

**UTAH SUPREME COURT ADVISORY COMMITTEE
ON RULES OF CIVIL PROCEDURE**

Summary Minutes – August 26, 2020

**DUE TO THE COVID-19 PANDEMIC AND STATE OF EMERGENCY
THIS MEETING WAS CONDUCTED ELECTRONICALLY VIA WEBEX**

Committee members, staff & guests	Present	Excused	Appeared by Phone
Jonathan Hafen, Chair	X		
Rod N. Andreason	X		
Judge James T. Blanch	X		
Lauren DiFrancesco	X		
Judge Kent Holmberg	X		
James Hunnicutt	X		
Larissa Lee		X	
Trevor Lee	X	X	
Judge Amber M. Mettler	X		
Timothy Pack	X		
Bryan Pattison		X	
Michael Petrogeorge		X	
Judge Clay Stucki	X		
Judge Laura Scott		X	
Leslie W. Slaugh	X		
Trystan B. Smith	X		
Heather M. Sneddon		X	
Paul Stancil	X		
Judge Andrew H. Stone	X		
Justin T. Toth	X		
Susan Vogel	X		
Brooke McKnight	X		
Ash McMurray	X		
Robert Alder	X		
Kimberly Neville	X		
Nancy Sylvester, Staff	X		

(1) WELCOME AND APPROVAL OF MINUTES

Jonathan Hafen welcomed the committee and called for introductions. James Hunnicutt and Rod Andreason previously proposed changes to the minutes, which were incorporated. Mr. Hafen asked for approval of the minutes: Judge Stucki moved to approve the minutes; Justin Toth seconded. The minutes were approved unanimously.

(2) RULES 7, 43, AND 45.

This item was in response to the Judicial Council's decision to repeal CJA 4-106. Susan Vogel introduced proposed changes to Rules 43 and 45, which are being updated with the goal of improving the efficiency of remote hearings. Ms. Vogel indicated that the proposed rule changes were vetted for sign language, interpreter, and connectivity / technological issues, as well as issues affecting pro se litigants. An additional goal is to provide clarification regarding notices, as there have been some delays in notices transmitted by traditional mail.

Ms. Vogel presented the proposed changes to Rule 43 (Evidence). Mr. Hunnicutt inquired whether the Court would be responsible for maintaining the confidentiality of attorney-client communications. The committee discussed the Court's current capabilities to accommodate attorney-client communications during remote proceedings and appropriate technological safeguards to protect these confidential communications.

The Committee also discussed the delivery of documents to the courtroom and proper notice of exhibits to adverse parties and the Court for use during remote evidentiary proceedings. Judge Stucki proposed that the draft language be amended to include "a means for sharing documents, photos, and other things among remote participants" in order to address the Committee's concerns.

Leslie Slaugh expressed concern that there is potential for witness coaching in a remote environment, and whether language should be included to protect the integrity of the proceedings. Ms. Vogel expressed concerns that pro se litigants often appear from a semi-public environment, and consequently, may have difficulty announcing others in the vicinity. Judge Holmberg expressed similar concerns raised by litigants about potential witness coaching during remote hearings, as well as concerns associated with verifying the identity of witnesses or the circumstances surrounding their testimony for those who appear by phone. Judge Stone proposed a provision to authorize the Court to take any other action the court deems necessary to maintain the integrity of the proceedings. Subsection (a)(7) was added to including "any other measures the court deems necessary to maintain the integrity of the proceedings."

Trystan Smith inquired whether there is an equivalent rule in the criminal context. Several members of the Committee expressed concerns about potential confrontation clause issues. Judge Mettler commented that Criminal Rule of Procedure 17.5 is specific to criminal proceedings, and as

such, the proposed changes to Rule 43 would not apply in the criminal context. Judge Blanch concurred with Judge Mettler's assessment that the change would not be viewed as applying in criminal proceedings and that any such change would be more appropriately referred to the Criminal Rules Committee.

Judge Mettler also expressed concern about the notice provisions and the burdens imposed on Courtroom clerks by the proposed changes. Ms. McKnight indicated that the Court's IT department is working on building language into notices regarding courtroom etiquette and other instructions. The court is also sending out duplicative notices to represented parties in order to provide as much notice of possible to participants.

As a measure to address the earlier discussion regarding witness coaching, Mr. Slaugh proposed that the language be amended to include a provision allowing the court to take additional measures to ensure "that no person is able to improperly influence the testimony of a witness."

Ms. Vogel reported a proposed change suggested by Lauren DiFrancesco to subsection (a)(4) to include access to interpreters. Judge Stone and Ms. Sylvester raised additional concerns regarding access to technology by low-income individuals or those who are disabled. Ms. McKnight reported that the courts are currently exploring ways to offer impacted individuals access to computers at the courthouse.

Mr. Hunnicutt expressed concerns about having the ability to see all parties in order to assess reactions to incoming evidence. Several committee members remarked that they have been asked to turn off cameras during remote proceedings. The proposed concern would potentially be addressed through subsection (a)(8).

Mr. Hafen also proposed that the opening paragraph of the rule be amended to clarify that the rule applies "in civil proceedings."

Judge Stone expressed concern regarding the language of section (a) which indicates a preference for videoconference "whenever possible," indicating that this could be a high standard in application that could hinder courtroom efficiency. Judge Stone also expressed that the rule should not be read to create a preference for video conference, as the audio record serves as the official record. He proposed that section (a) be amended from "the court shall permit testimony via videoconference" to "may." Mr. Andreason expressed a preference for video in order to view witness body language. Judge Holmberg proposed that section (a) be amended to state "[c]ontemporaneous transmission may be conducted via videoconference if reasonable practical." Ms. Vogel also proposed that subject (a) be amended to replace "from a different location" to remote, using the more modern terminology. Additional deletions were proposed to subsection (a) to remove superfluous language.

Additional revisions were proposed to section (a)(4) to include “telephone and assisted device” as additional technologies that may need to be accommodated.

No changes were proposed to the Advisory Committee Notes.

Mr. Hafen proposed that Rule 7(h)(1) be revised to include a reference to Rule 43.

With regard to Rule 45: Ms. Vogel conveyed that the proposed change is to require subpoenaed parties to contact the attorney issuing the subpoena if they experience technical difficulties. Some committee members expressed concerns that this proposal would not work well for an adverse witness. After discussion, the original proposed language was retained.

After discussion concluded, Mr. Hafen called for a motion. Ms. Vogel moved to send the proposed amendments to Rules 43, 45, and 7 to the Supreme Court; Judge Holmberg second. The motion unanimously passed.

The Committee approved the following proposed amendments to send to the Court:

Rule 43. Evidence.

(a) Form. In all trials and evidentiary hearings, the testimony of witnesses shall be taken in open court, unless otherwise provided by these rules, the Utah Rules of Evidence, or a statute of this state. In civil proceedings, the court may, upon request or on its own order, and for good cause and with appropriate safeguards, permit remote testimony in open court. Remote testimony will be conducted via videoconference if reasonably practical, or if not, via telephone or assistive device. Safeguards must include:

- (1) notice of the date, time, and method of transmission, including instructions for participation, whom to contact if there are technical difficulties, and the means by which a party and the party’s counsel may communicate confidentially;
- (2) a means for a party and the party’s counsel to communicate confidentially;
- (3) a means for sharing documents, photos, and other things among the remote participants;
- (4) access to the necessary technology to participate, including telephone or assistive device;
- (5) an interpreter or assistive device, if needed;
- (6) a verbatim record of the testimony;
- (7) assurances that no person is able to improperly influence the testimony of a witness; and
- (8) any other measures the court deems necessary to maintain the integrity of the proceedings.

(b) Evidence on motions. When a motion is based on facts not in the record, the court may hear the matter on affidavits, declarations, oral testimony or depositions.

Rule 7. Pleadings allowed; motions, memoranda, hearings, orders.

(h) Hearings.

The court may hold a hearing on any motion. A party may request a hearing in the motion, in a memorandum or in the request to submit for decision. A request for hearing must be separately identified in the caption of the document containing the request. The court must grant a request for a hearing on a motion under Rule 56 or a motion that would dispose of the action or any claim or defense in the action unless the court finds that the motion or opposition to the motion is frivolous or the issue has been authoritatively decided. Such hearing may be held remotely consistent with Rule 43.

Rule 45. Subpoena.

(a) Form; issuance.

(a)(1) Every subpoena shall:

(a)(1)(A) issue from the court in which the action is pending;

(a)(1)(B) state the title and case number of the action, the name of the court from which it is issued, and the name and address of the party or attorney responsible for issuing the subpoena;

(a)(1)(C) command each person to whom it is directed

(a)(1)(C)(i) to appear and give testimony at a trial, hearing or deposition, or

(a)(1)(C)(ii) to appear and produce for inspection, copying, testing or sampling documents, electronically stored information or tangible things in the possession, custody or control of that person, or

(a)(1)(C)(iii) to copy documents or electronically stored information in the possession, custody or control of that person and mail or deliver the copies to the party or attorney responsible for issuing the subpoena before a date certain, or

(a)(1)(C)(iv) to appear and to permit inspection of premises;

(a)(1)(D) if an appearance is required, notice of the date, time and place for the appearance and, if remote transmission is requested, instructions for participation and who to contact if there are technical difficulties; and

(a)(1)(E) include a notice to persons served with a subpoena in a form substantially similar to the approved subpoena form. A subpoena may specify the form or forms in which electronically stored information is to be produced.

(a)(2) The clerk shall issue a subpoena, signed but otherwise in blank, to a party requesting it, who shall complete it before service. An attorney admitted to practice in Utah may issue and sign a subpoena as an officer of the court.

(3) RULE 47

Judge Stone conveyed a request from the Board of District Court Judges regarding empanelment of jurors. A proposal has been made to reduce the number of preemptory challenges in cases with a smaller number of jurors. The Board made the request in anticipation of the difficulty securing an adequate number of jurors during the pandemic, along with the anticipated backlog of cases that will follow. The Committee was asked for input regarding potential Constitutional or practical implications.

Judge Mettler inquired as to whether a corresponding criminal rule has been proposed. Judge Stone was unaware of any such rule but indicated that criminal cases would be most likely be heard first following the pandemic. Mr. Smith inquired about the possibility of allowing the proposed change by stipulation. Several Committee Members expressed concerns that the proposed change would be viewed negatively by practitioners and that the change could substantively affect litigation strategy.

Judge Stone suggested that the proposal be presented to the Supreme Court as a proposal from the Board of District Court Judges. Mr. Andreason proposed that the rule be amended to include language requiring exigent circumstances and as much advance notice as possible. Judge Holmberg suggested that the presiding judge should make the determination.

After discussion, Mr. Hafen called for a motion. Judge Stucki moved that the proposed amendment be sent to the Supreme Court for consideration without a recommendation; Judge Stone seconded. Mr. Andreason proposed a friendly amendment to the language of the proposed revision, consistent with Committee's prior discussion. The motion passed as amended.

The Committee approved the following amendments to send to the Court, without recommendation:

Rule 47. Jurors.

(e) **Challenges to individual jurors; number of peremptory challenges.** The challenges to individual jurors are either peremptory or for cause. Each party shall be entitled to three peremptory challenges. Several defendants or several plaintiffs shall be considered as a single party for the purposes of making peremptory challenges unless there is a substantial controversy between them, in which case the court shall allow as many additional peremptory challenges as is just. If one or two alternate jurors are called, each party is entitled to one peremptory challenge in addition to those otherwise allowed. In exigent circumstances, and with as much advance notice to the parties as possible, when the jury panel is of a number where a jury cannot be seated if some or all peremptory challenges are exercised, the court may, prior to any side exercising peremptory challenges, equally reduce the number of peremptory challenges to which each side is entitled, to allow a jury to be seated.

(4) ADJOURNMENT

The remaining items were deferred until September 23, 2020. The meeting adjourned at 5:50 p.m.