

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

Summary Minutes – September 30, 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		
Robert Adler		X	
Rod N. Andreason		X	
Paul Barron	X		
Judge James T. Blanch	X		
Lauren DiFrancesco	X		
Judge Kent Holmberg	X		
James Hunnicutt	X		
Larissa Lee		X	
Trevor Lee	X		
Judge Amber M. Mettler	X		
Brooke McKnight	X		
Ash McMurray	X		
Timothy Pack		X	
Bryan Pattison		X	
Michael Petrogeorge		X	
Judge Clay Stucki	X		
Judge Laura Scott	X		
Leslie W. Slauch	X		
Trystan B. Smith	X		
Heather M. Sneddon		X	
Paul Stancil		X	
Judge Andrew H. Stone	X		
Justin T. Toth	X		
Susan Vogel	X		
Chris Williams	X		
Kimberly Neville	X		
Nancy Sylvester, Staff	X		
Jojo Liu, Guest	X		
Jake Smith, Guest	X		

(1) WELCOME AND APPROVAL OF MINUTES

Jonathan Hafen welcomed the committee and announced that a group of family law attorneys have reached out to the Committee expressing interest in certain improvements to the rules affecting their area of practice. These representatives will be joining an upcoming meeting to present their proposals. Mr. Hafen asked for approval of the minutes: Susan Vogel moved to approve; Jim Hunnicutt seconded. The minutes were approved unanimously.

(2) LEGISLATIVE STANDING AGENDA ITEM: EXPUNGEMENT

Jojo Liu and Jake Smith of Salt Lake County addressed the Committee and provided an update regarding recent expungement clinics and legislative developments in expungement law. Ms. Liu stated that the program has helped more than 2000 people, and has legislative plans for further improvements to the process. Mr. Smith gave a brief overview of the expungement process and the challenges faced by individuals during the process. The County has a federal grant that supports some funding; however, the costs to petitioning individuals can still run from \$150 to \$1000, making it difficult for many individuals to apply for expungement.

The County believes there is a disconnect between petitioners, the prosecutor's office, and the courts regarding service and acceptance of the petition, which has presented a problem for many petitioners. Specifically, there have been inconsistencies among the courts and prosecutors as to which documents need to be filed, whether documents should be filed before / after service, and whether an acceptance of service is required. The expungement statute is silent on these issues. There are also issues with finding old case numbers on Xchange. Although expungement relates to criminal matters, the proceeding itself is considered a civil proceeding and would be governed by the Rules of Civil Procedure. Accordingly, the County is looking for guidance regarding whether they should pursue a statutory change or if this can be addressed through an amendment to the Rules.

Susan Vogel spoke in support of the County's position, stating that this issue is affecting large numbers of people who are proceeding pro se. The self-help center would be interested in any improvements that would streamline the process for pro se petitioners. Nancy Sylvester also spoke in favor of a rule-based change in order to provide guidance for the Justice Courts.

Susan Vogel, Brooke McKnight, and Judge Holmberg volunteered to serve on a subcommittee to propose a rule change. Jake Smith will also serve on the subcommittee as a representative of the County. They will coordinate with the criminal rules committee and make a recommendation.

(3) RULE 43

Nancy Sylvester presented the Supreme Court's changes to the Committee's proposed amendment to Rule 43. The Court has added a subsection entitled "post-testimony remote hearing safeguards," which will require both the witness and counsel for the witness to attest that the witness did not improperly communicate with any third parties, including legal professionals, during the witness' testimony.

Leslie Slaugh suggested that additional language be added to reference the exclusionary rule, and to require attestation that the exclusionary rule has been followed. Judge Blanch commented that the exclusionary rule does not apply automatically; it must be invoked and has several exceptions. Judge Stone suggested that the subsection be revised to apply only if the exclusionary rule is invoked. Judge Stone also expressed concern about requiring the court to make an inquiry of every witness, as well as requiring counsel to attest to matters when they are not in the same location as the witness, as these are essentially changes to the oath. Judge Blanch also indicated that the Courts have been in contact with their IT vendors to address the issue through technology, which may render the proposed change unnecessary.

Lauren DiFrancesco suggested that the language of the proposed section include a prohibition barring "improper influenc[ing]" of a witness.

Further discussion was also held regarding subsections (b)(1) and (2) regarding confidential communications. Trevor Lee suggested that the phrase "a means" be changed to "the ability" to reflect that the court is not providing the technology.

At the conclusion of discussion, Mr. Hafen called for a motion. Ms. DiFrancesco moved to send the proposed amendment to the Supreme Court; Mr. Lee seconded. The motion passed, with Judge Stone, Judge Holmberg, and Judge Blanch voting against the amendment, citing their prior concerns regarding attestation.

The following proposed amendments were sent to the Supreme Court for consideration:

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, the court may permit remote testimony in open court. Remote testimony will be conducted via videoconference if reasonably practical, or if not, via telephone or assistive device.

(b) Remote testimony safeguards. Remote testimony safeguards must include:

- (1) notice of the date, time, and method of transmission, including instructions for participation, and whom to contact if there are technical difficulties;
- (2) the ability 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) if the court orders exclusion of witness under Rule 615 of the Utah Rules of Evidence, attestation that the exclusionary rule has been followed;
- (8) any other measures the court deems necessary to maintain the integrity of the proceedings.

(c) **Post-testimony remote hearing safeguards.** Following remote testimony, a witness and any counsel for the witness must attest that the witness did not improperly communicate with a third party, including a legal professional, and was not improperly influenced, during the witness's testimony.

(bd) 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.

Advisory Committee Note

~~Federal Rule of Civil Procedure 43 has permitted testimony by contemporaneous transmission since 1996. State court judges have been conducting telephone conferences for many decades. These range from simple scheduling conferences to resolution of discovery disputes to status conferences to pretrial conferences. These conferences tend not to involve testimony, although judges sometimes permit testimony by telephone or more recently by video conference with the consent of the parties. The 2016 amendments are part of a coordinated effort by the Supreme Court and the Judicial Council to authorize a convenient practice that is more frequently needed in an increasingly connected society and to bring a level of quality to that practice suitable for a court record. As technology evolves the methods of contemporaneous transmission will change.~~

(4) RULE 37

Lauren DiFrancesco presented a proposed change to Rule 37 to remove the preference for telephonic hearings for discovery disputes. Judge Stone moved to send the proposed amendment to the Supreme Court; Justin Toth seconded. The motion passed unanimously.

The following proposed amendments will be sent to the Supreme Court for consideration:

Rule 37. Statement of discovery issues; Sanctions; Failure to admit, to attend deposition or to preserve evidence.

(a) Statement of discovery issues.

(a)(1) A party or the person from whom discovery is sought may request that the judge enter an order regarding any discovery issue, including:

- (a)(1)(A) failure to disclose under Rule [26](#);
- (a)(1)(B) extraordinary discovery under Rule [26](#);
- (a)(1)(C) a subpoena under Rule [45](#);
- (a)(1)(D) protection from discovery; or
- (a)(1)(E) compelling discovery from a party who fails to make full and complete discovery.

(a)(2) Statement of discovery issues length and content. The statement of discovery issues must be no more than 4 pages, not including permitted attachments, and must include in the following order:

- (a)(2)(A) the relief sought and the grounds for the relief sought stated succinctly and with particularity;
- (a)(2)(B) a certification that the requesting party has in good faith conferred or attempted to confer with the other affected parties in person or by telephone in an effort to resolve the dispute without court action;
- (a)(2)(C) a statement regarding proportionality under Rule [26\(b\)\(2\)](#); and
- (a)(2)(D) if the statement requests extraordinary discovery, a statement certifying that the party has reviewed and approved a discovery budget.

(a)(3) Objection length and content. No more than 7 days after the statement is filed, any other party may file an objection to the statement of discovery issues. The objection must be no more than 4 pages, not including permitted attachments, and must address the issues raised in the statement.

(a)(4) Permitted attachments. The party filing the statement must attach to the statement only a copy of the disclosure, request for discovery or the response at issue.

(a)(5) Proposed order. Each party must file a proposed order concurrently with its statement or objection.

(a)(6) Decision. Upon filing of the objection or expiration of the time to do so, either party may and the party filing the statement must file a Request to Submit for Decision under Rule [7\(g\)](#). The court will promptly:

- (a)(6)(A) decide the issues on the pleadings and papers;
- (a)(6)(B) conduct a hearing, preferably remotely and if remotely, then consistent with the safeguards in Rule 43(b); or
- (a)(6)(C) order additional briefing and establish a briefing schedule.

(5) RULES 5 AND 6

Ms. DiFrancesco also presented the proposed change to Rules 5 and 6 to address service issues brought about by the pandemic. The proposed changes would require email service if available and change the time added for mailing days from 3 days to 5 days to allow for delays in mailing.

Susan Vogel spoke in support of the rule change, indicating that pro se litigants are experiencing significant delays in receiving mail and have missed hearings or had other rights affected by delays in mailing. Ms. Vogel also indicated that the number of people needing help and technological assistance has increased substantially during the pandemic. She suggested that the proposed rule be revised to allow 7 days for service by mail.

Judge Holmberg suggested that rule be amended to use email as a default form of service if the email address is used on the first responsive pleading or identified as the preferred method of service. The language of proposed 5(b)(3)(C) was revised to clarify that email is the preferred form of service for papers that are not served via electronic filing. Other methods were identified in the subsection that follows in the event an email address is not valid or was not provided to the court.

Judge Scott suggested that Rule 5 clearly state that the email address must be provided “to the court,” as opposed to having been provided in other documents exchanged between parties (such as in debt collection or landlord-tenant matters).

Judge Mettler inquired as to whether the proposed amendment applied to individuals who do not have the ability to serve via email. The proposed rule would appear to apply in that manner. However, the benefits of email service would be expected to outweigh any adverse impact.

Ash McMurray also suggested that the word “papers” be changed to “documents” to conform to the Style Guide.

After discussion, Mr. Hafen called for a motion. Judge Stone moved to send the proposed amendments to the Supreme Court; Ms. Vogel seconded. The motion passed unanimously.

The following proposed amendments will be sent to the Supreme Court for consideration:

Rule 5. Service and filing of pleadings and other ~~papers~~documents.

...

(b)(3) Methods of service. A paper is served under this rule by:

(b)(3)(A) except in the juvenile court, submitting it for electronic filing, or the court submitting it to the electronic filing service provider, if the person being served has an electronic filing account;

(b)(3)(B) for papers not electronically served under paragraph (b)(3)(A), emailing it to the most recent email address provided by the person to the court and other parties under Rule 10(a)(3), Rule 76, or by other notice, or to the email address on file with the Utah State Bar.

(b)(3)(C) If a person's email address is not valid or has not been provided to the court and other parties, a paper may be served under this rule by:

(b)(3)(C)(i) mailing it to the person's last known address;

(b)(3)(C)(ii) handing it to the person;

(b)(3)(C)(iii) leaving it at the person's office with a person in charge or, if no one is in charge, leaving it in a receptacle intended for receiving deliveries or in a conspicuous place;

(b)(3)(F) leaving it at the person's dwelling house or usual place of abode with a person of suitable age and discretion who resides there; or

(b)(3)(G) any other method agreed to in writing by the parties.

Rule 6. Time.

...

(c) Additional time after service by mail. When a party may or must act within a specified time after service and service is made by mail under Rule 5(b)(3)(C)(i), 7 days are added after the period would otherwise expire under paragraph (a).

(6) ADJOURNMENT

The remaining items were deferred until October 28, 2020. The meeting adjourned at 5:45p.m.