UTAH SUPREME COURT ADVISORY COMMITTEE
ON RULES OF CIVIL PROCEDURE

Summary Minutes – October 28, 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			
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		
Chris Williams			
Kimberly Neville	X		
Nancy Sylvester, Staff	X		

(1) WELCOME AND APPROVAL OF MINUTES

Jonathan Hafen welcomed the committee and asked for approval of the minutes (as amended with comments from the subcommittee). Rod Andreason moved to approve the minutes; Jim Hunnicutt seconded. The minutes were approved unanimously.

(2) RULE 5

Susan Vogel reported on efforts of the Rule 5 subcommittee to revise Rule 5 to improve the expungement procedures to make the process more uniform throughout the state. The subcommittee will be coordinating with a working group from the Criminal Rules Committee (which is meeting on November 17) to suggest a revision. Ms. Vogel reported that the subcommittee will report back in January with a proposed revision.

Ms. Vogel suggested that certain changes could be advanced prior to the working group meeting and that the proposed revision to Paragraph 3, section (c) (pertaining to service via email when the person who is required to serve notice does not have access to email) could be prioritized. Ms. Vogel encouraged the committee to take action on this provision as a large number of individuals lack access to email right now because of public library closures and other pandemic-related stresses.

Trevor Lee noted that lines 58-59 should be revised to reference a last-known mailing address. Mr. Lee also expressed concern with allowing service by leaving papers "in a conspicuous place," as currently provided in lines 61-62. Mr. Lee proposed removing the provision. Judge Stone commented that the proposed rule provides for email as the default form of service, and as such, the "leaving papers" provision is not invoked frequently. Lauren DiFrancesco also noted that the language mirrors the language of the Federal Rule. After discussion, the consensus of the committee was that the current language serves a purpose and was not creating any significant practical problems that would justify a change. Leslie Slaugh proposed that the language be revised to include "a party or person," noting that other rules require corporate parties to be represented by counsel under certain circumstances.

At the conclusion of discussion, Mr. Hafen called for a motion. Ms. Vogel moved to send the proposed amendment to the Supreme Court; Mr. Hunnicutt seconded. The motion passed unanimously.

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

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

(a) When service is required.

(1) ~~Papers~~Documents that must be served. Except as otherwise provided in these rules or as otherwise directed by the court, the following ~~papers~~documents must be served on every party:

(A) a judgment;

(B) an order that states it must be served;

(C) a pleading after the original complaint;

(D) a ~~paper~~document relating to disclosure or discovery;

(E) a ~~paper~~document filed with the court other than a motion that may be heard ex parte; and

(F) a written notice, appearance, demand, offer of judgment, or similar ~~paper~~document.

(2) Serving parties in default. No service is required on a party who is in default except that:

(A) a party in default must be served as ordered by the court;

(B) a party in default for any reason other than for failure to appear must be served as provided in paragraph (a)(1);

(C) a party in default for any reason must be served with notice of any hearing to determine the amount of damages to be entered against the defaulting party;

(D) a party in default for any reason must be served with notice of entry of judgment under Rule 58A(d); and

(E) a party in default for any reason must be served under Rule 4 with pleadings asserting new or additional claims for relief against the party.

(3) Service in actions begun by seizing property. If an action is begun by seizing property and no person is or need be named as defendant, any service required before the filing of an answer, claim or appearance must be made upon the person who had custody or possession of the property when it was seized.

(b) How service is made.

(1) Whom to serve. If a party is represented by an attorney, a ~~paper~~document served under this rule must be served upon the attorney unless the court orders service upon the party. Service must be made upon the attorney and the party if:

(A) an attorney has filed a Notice of Limited Appearance under Rule 75 and the ~~papers~~ documents being served relate to a matter within the scope of the Notice; or

(B) a final judgment has been entered in the action and more than 90 days has elapsed from the date a ~~paper~~document was last served on the attorney.

(2) When to serve. If a hearing is scheduled 7 days or less from the date of service, a party must serve a ~~paper~~document related to the hearing by the method most likely to be promptly received. Otherwise, a ~~paper~~document that is filed with the court must be served before or on the same day that it is filed.

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

(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) for papers not electronically served under paragraph (b)(3)(A), emailing it to

~~(i)~~ the most recent email address provided by the person to the court and other parties under Rule 10(a)(3) or Rule 76, or by other notice, or

~~(ii)~~ to the email address on file with the Utah State Bar;

(C) if a person's email address is not valid or has not been provided to the court and other parties, or if the person required to serve the document does not have the ability to email, a document may be served under this rule by:

(i) mailing it to the person's last known mailing address provided by the person to the court and other parties under Rule 10(a)(3) or Rule 76,

~~(D)~~(ii) handing it to the person;

~~(E)~~(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;

~~(F)~~(iv) 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

~~(G)~~(v) any other method agreed to in writing by the parties.

(4) When service is effective. Service by mail or electronic means is complete upon sending.

(5) Who serves. Unless otherwise directed by the court:

(A) every ~~paper~~document required to be served must be served by the party preparing it; and

(B) every ~~paper~~document prepared by the court will be served by the court.

(c) Serving numerous defendants. If an action involves an unusually large number of defendants, the court, upon motion or its own initiative, may order that:

(1) a defendant's pleadings and replies to them do not need to be served on the other defendants;

(2) any cross-claim, counterclaim avoidance or affirmative defense in a defendant's pleadings and replies to them are deemed denied or avoided by all other parties;

(3) filing a defendant's pleadings and serving them on the plaintiff constitutes notice of them to all other parties; and

(4) a copy of the order must be served upon the parties.

(d) Certificate of service. A ~~paper~~document required by this rule to be served, including electronically filed ~~papers~~documents, must include a signed certificate of service showing the name of the document served, the date and manner of service and on whom it was served. Except in the juvenile court, this paragraph does not apply to ~~paper~~documents required to be served under paragraph (b)(5)(B**)** when service to all parties is made under paragraph (b)(3)(A).

(e) Filing. Except as provided in Rule 7(j) and Rule 26(f), all ~~papers~~ documents after the complaint that are required to be served must be filed with the court. Parties with an electronic filing account must file a ~~paper~~document electronically. A party without an electronic filing account may file a ~~paper~~document by delivering it to the clerk of the court or to a judge of the court. Filing is complete upon the earliest of acceptance by the electronic filing system, the clerk of court or the judge.

(f) Filing an affidavit or declaration. If a person files an affidavit or declaration, the filer may:

(1) electronically file the original affidavit with a notary acknowledgment as provided by Utah Code Section 46-1-16(7);

(2) electronically file a scanned image of the affidavit or declaration;

(3) electronically file the affidavit or declaration with a conformed signature; or

(4) if the filer does not have an electronic filing account, present the original affidavit or declaration to the clerk of the court, and the clerk will electronically file a scanned image and return the original to the filer.

The filer must keep an original affidavit or declaration of anyone other than the filer safe and available for inspection upon request until the action is concluded, including any appeal or until the time in which to appeal has expired.

Advisory Committee Notes

~~Rule 5(d) is amended to give the trial court the option, either on an ad hoc basis or by local rule, of ordering that discovery papers, depositions, written interrogatories, document requests, requests for admission, and answers and responses need not be filed unless required for specific use in the case. The committee is of the view that a local rule of the district courts on the subject should be encouraged.~~

~~The 1999 amendment to subdivision (b)(1)(B) does not authorize the court to conduct a hearing with less than 5 days notice, but rather specifies the manner of service of the notice when the court otherwise has that authority.~~

~~2001 amendments~~

~~Paragraph (b)(1)(A) has been changed to allow service by means other than U.S. Mail and hand delivery if consented to in writing by the person to be served, i.e. the attorney of the party. Electronic means include facsimile transmission, e-mail and other possible electronic means.~~

~~While it is not necessary to file the written consent with the court, it would be advisable to have the consent in the form of a stipulation suitable for filing and to file it with the court.~~

~~Paragraph (b)(1)(B) establishes when service by electronic means, if consented to in writing, is complete. The term "normal business hours" is intended to mean 8:00 a.m. to 5:00 p.m. Monday through Friday, excluding legal holidays. If a fax or e-mail is received after 5:00 p.m., the service is deemed complete on the next business day.~~

2015 amendments

~~Since the Rules of Juvenile Procedure do not have a rule on serving papers, this rule applies in juvenile court proceedings under Rule 1, Rule 81(a) and Rule of Juvenile Procedure 2.~~

Under paragraph (b)(3)(A), electronically filing a document has the effect of serving the document on lawyers who have an e filing account. (Lawyers representing parties in the district court are required to have an account and electronically file documents. Code of Judicial Administration Rule 4 503.) The 2015 amendment excepts from this provision documents electronically filed in juvenile court.

Although electronic filing in the juvenile court presents to the parties the documents that have been filed, the juvenile court e filing application (CARE), unlike that in the district court, does not deliver an email alerting the party to that fact. The Board of Juvenile Court Judges and the Advisory Committee on the Rules of Juvenile Procedure believe this difference renders electronic filing alone insufficient notice of a document having been filed. So in the juvenile court, a party electronically filing a document must serve that document by one of the other permitted methods.

[*Comment regarding advisory committee note: The Civil Rules Committee thought this procedure should go into a juvenile rule. The Juvenile Rules Committee respectfully requested that the Civil Rules Committee retain all of the 2015 amendments with the exception of the first sentence, which is no longer accurate. This is the sentence that reads "Since the Rules of Juvenile Procedure do not*

have a rule on serving papers, this rule applies in juvenile court proceedings under Rule 1, Rule 81(a) and Rule of Juvenile Procedure 2."

The Juvenile Rules Committee stressed the importance of leaving the remainder of the 2015 amendments in Rule 5 to instruct practitioners and pro se parties on the differences between practice in juvenile and district court. While these distinctions are included in the body of Juvenile Rule 18, the committee expressed the desire to have the differences spelled out in both rules, since those new to juvenile court practice may not realize the necessity of reviewing service requirements in both the juvenile and civil rules.]

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(3) RULE 43

Mr. Hafen reported on the presentation of the proposed amendment to Rule 43 to the Supreme Court. The Court requested that the Committee consider an amendment to the oath to address concerns advanced by the district court judges, which the Supreme Court shared.

A proposed remote hearing oath was presented for discussion (subsection c). Judge Stone commented that the language could potentially be applicable to live testimony as well and stated a preference that it apply to all testimony. Judge Holmberg proposed that the language be broadened to change "third-parties" to any communications with any persons other than as authorized by the Court. Judge Stucki commented that the rule should apply to both communications with and received by the witness. Committee members also expressed concern that witnesses could communicate via chat box, text, or note, which could improperly influence their testimony. Several committee members also suggested that the word "evidence" be changed to "testimony" since not all testimony is admitted as evidence. Additional stylistic revisions were proposed to make the language more concise and understandable to those testifying.

The Committee also compared the language to the relevant statute to conform to any legislative directives. Ms. Sylvester confirmed that the language of Utah Code Ann. § 78B-1-143 is permissive, stating that an oath or affirmation "may be administered in the following form…." Judge Holmberg proposed that the language of the proposed rule be revised to reflect that the oath should be used in "substantially the following form." Discussion was also held as to whether the revisions to the oath should be proposed for just remote hearings or all hearings.

Mr. Hafen also raised an issue with regard to subsection 7(b), as to whether the Court should require an attestation that the exclusionary rule had been followed. Judge Stone and Judge Stucki

expressed concern about additional burdens placed on the clerks to monitor the provision via Webex.

Judge Stone proposed that the "remote hearing" language be omitted to reflect that the oath applies in all proceedings. Judge Mettler questioned whether the proposal would be applicable to criminal proceedings, given its interplay with Rule 17.5 of the Rules of Criminal Procedure. Judge Stucki advocated for a more concise oath, to make it simpler for the witness. After additional discussion, Mr. Hafen suggested that the Committee provide a proposed amendment to the Supreme Court for consideration, along with the statutory language as a possible alternative.

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

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 ~~F~~for good cause and with appropriate safeguards, ~~the court may~~ permit remote testimony in open court. Remote testimony will be presented 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; and

(7) any other measures the court deems necessary to maintain the integrity of the proceedings.

Tracking the statute:

(c) **Remote hearing oath**. An oath in substantially the following form must be given prior to any remote hearing testimony: "You do solemnly swear (or affirm) that the evidence you shall give in this issue (or matter) pending between ____ and ____ shall be the truth, the whole truth and nothing but the truth, and that you will neither communicate with, nor receive any communications from, another person during your testimony unless authorized by the court, so help you God (or, under the pains and penalties of perjury)."

Alternative:

(c) **Oath.** An oath in substantially the following form must be given prior to any testimony: "You do solemnly swear or affirm under penalties of perjury that the testimony you give in this matter shall be true and that you will neither communicate with, nor receive any communications from, another person during your testimony unless authorized by the court."

(~~b~~d) 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.~~

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(4) RULE 26

Rod Andreason presented the proposed changes to Rule 26 that were carried over from prior meetings, noting that most changes reflected on the redline had been discussed and debated previously.

Ms. Sylvester raised an issue regarding lines 98-99 concerning payment of an opposing expert's fees, which was included in response to a legislator's proposal. Mr. Slaugh referenced a recent Court of Appeals case that would potentially conflict with the proposal. Judge Stone raised concern about fees charged by treating physicians, which can vary depending upon which party has requested the testimony and places the trial court in a difficult position of setting a reasonable fee. Ms. Sylvester suggested that we invite the representative to raise this issue in a later meeting.

Ms. Vogel commented that there are certain aspects of the rule that are confusing to pro se litigants. Specifically: (i) the Court's notice of event due dates can be confusing to pro se litigants, particularly with regard to initial disclosure obligations; and (ii) self-represented parties would benefit from direction on how to file exhibits through email. Judge Stone commented that the notice of event due dates is issued as a service to the parties, reflecting the default deadlines, and a preference that the notice be recognized as an order of the court unless otherwise stipulated or amended by the court. Judge Holmberg commented that he does not consider the notice of event due dates to be an order, because the parties can stipulate regarding certain dates without court approval.

Judge Stone expressed support for submission of a witness list, which would assist trial judges in efficiently managing pretrial matters. Judge Stone also suggested that the rule be revised to require the party who objects to an exhibit to file a courtesy copy to give the judge context regarding the nature of the objection. Mr. Pack commented that in practice, most attorneys will raise comprehensive objections in conjunction with pretrial disclosures. Mr. Slaugh suggested that

the Committee adopt a procedure similar to the Rule 7 procedure for objecting to proposed orders. Mr. Andreason proposed that the language state that copies of trial exhibits be provided to the court, but not filed.

Judge Holmberg suggested that the language of the rule be revised to address objections to authenticity or lack of disclosure, without waiving other categories. Mr. Pack expressed support for the proposal to allow for certain objections to be reserved at the time of the trial. Mr. Andreason suggested that objections be addressed in conjunction with subjection (a)(5)(b). Judge Stone commented regarding the purpose of the rule, which was to minimize the need to call custodians or other witnesses to authenticate exhibits. Mr. Hunnicutt commented that in most family law trials, the practitioners do not object to every single exhibit as is seen in some civil litigation. The existing rule provides that untimely objections are waived unless excused for good cause, and in his experience, judges are adept at finding good cause when an offered exhibit should be rejected. s. Professor Adler commented regarding the possibility of revising the rule to allow for additional objections to raised based upon the context in which the document is offered at trial. The working group will prepare language to address this issue and make a proposal to the Committee.

(5) *ARREQUIN-LEON v. HARDCO CONSTRUCTION*, 2020 UT 59

Judge Blanch reported on a recent Utah Supreme Court decision that addressed a preservation issue pertaining to a party's failure to renew a motion for judgment as a matter of law at the close of trial. Judge Blanch indicated that the 2016 Advisory Committee Notes removed the language requiring a party to renew its motion, as this was a potential trap for litigants. The prior amendment also conforms to the corresponding federal rule. Judge Blanch commented that the rule permits, but does not require, a party to renew the motion at the close of trial. However, a party adequately preserves the issue by raising the issue in its initial motion. The Committee was invited by the Supreme Court to look at the issue in light of an appellate court ruling.

Judge Blanch recommended that the Committee report that the current rule is sufficient, particularly in light of the prior advisory committee note, and therefore, no additional amendment is recommended. Mr. Hunnicutt supported Judge Blanch's recommendation and noted that the decision at issue went to the Court of Appeals shortly after the prior amendment and does not appear to have surfaced again with the passage of time. Several committee members expressed support of Judge Blanch's recommendation, with no alternative views expressed.

(6) ADJOURNMENT

The remaining items were deferred until November 18, 2020. The meeting adjourned at 5:57 p.m.