

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

Summary Minutes – April 28, 2021

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

Committee members, staff, and 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		
Jacqueline Carlton	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. Slaugh		X	
Trystan B. Smith	X		
Heather M. Sneddon		X	
Paul Stancil		X	
Nick Stiles		X	
Judge Andrew H. Stone	X		
Justin T. Toth	X		
Susan Vogel	X		
Nancy Sylvester, Staff	X		
Kim Neville, Recording Secretary	X		

Bridget Koza, Guest	X		
Nicole Salazar-Hall, Guest	X		
Brent Salazar-Hall, Guest	X		

(1) APPROVAL OF MINUTES

Jonathan Hafen asked for approval of the minutes as amended with comments from the minutes sub-committee. Rod Andreason moved to adopt the minutes as amended; Judge Stone seconded. The minutes were approved unanimously.

(2) ICWA AND RULE 24

Bridget Koza, Court Improvement Program Director, briefly explained the history of the rules governing juvenile court proceedings involving the Indian Child Welfare Act, and presented a proposed amendment to Rule 24 to allow for intervention by the child’s Tribe in certain welfare proceedings. Ms. Koza clarified that the proposed rule would most likely apply in adoption or guardianship proceedings in the district court.

Judge Stone suggested that the title be simplified to “Intervention” as the concepts fall within the scope of the intervention rule. Judge Holmberg expressed support for the amendment, indicating that the district courts have worked diligently to coordinate with the appropriate Tribes to establish heritage in these proceedings. Judge Holmberg also noted that a statewide committee includes representatives from the Tribes, which have considered comparable language. Ms. Sylvester also noted that a comparable juvenile rule was previously amended to include similar language, with approval by the Supreme Court.

Dean Adler suggested that subsections (2)(d), (2)(e), and (3) be revised to include notice to other parties in addition to the Court. Ms. Koza noted that the forms committee has approved a form that includes notice to the parties. Judge Stone suggested that, alternatively, “to the Court” could be deleted. Judge Stone also recommended that the issue be flagged in presentation to the Supreme Court, so there is consistency with the juvenile rule. Mr. Andreason proposed additional linguistic revisions for clarity.

At the conclusion of discussion, Mr. Hafen called for the motion. Dean Alder moved to send the proposed amendment to the Supreme Court; Judge Stucki seconded. The motion passed unanimously. The proposed amendment, which is attached as Exhibit A, will be sent to the Supreme Court for consideration.

(3) FAMILY LAW AMENDMENTS

Brent Salazar-Hall and Nicole Salazar-Hall presented the comments to the proposed changes to the family law amendments. Mr. Hall indicated that the committee received fewer comments

than expected, and that it has incorporated a few changes to address those comments. The following public comments were discussed:

The Subcommittee received favorable comments from a number of experienced family law practitioners who supported the amendments.

The Subcommittee received a comment on the 14-day period to produce initial disclosures. The Subcommittee indicated that the intent of the rule change is to improve the efficiency of the process for the majority of family law cases, which typically are not document intensive. No change was recommended in response to the comment.

The Subcommittee also received one comment regarding the 90-day discovery period in a domestic relations action. The Subcommittee indicated that a large majority of cases do not require extensive discovery, and that expanded discovery is available in more complex cases. The 90-day baseline is intended to prevent parties from delaying matters, which can occur when the rules allow for a lengthy mandatory discovery period.

The Subcommittee received a comment regarding the 4-hour deposition limit in the proposed rule change, questioning whether expert discovery depositions would be included within the limit. The Subcommittee's position was that expert discovery is separate, and therefore, they recommended no change.

With regard to Rule 100A, the Subcommittee received feedback regarding the mediation requirement. The Subcommittee had proposed minor revisions to clarify that a delay in mediating will not be a basis to delay setting a trial date. Judge Scott expressed support for the change, indicating that parties are often more likely to pursue meaningful mediation when a trial date has been set. Judge Stone indicated that he prefers that the parties complete mediation before setting the trial date so that trial dates are not unnecessarily blocked off on the docket. Judge Blanch indicated that he views the language as leaving the trial setting to the discretion of the trial judge. Judge Blanch suggested that the language be revised to indicate that a failure to mediate should not be a basis to "request a delay" in setting a trial date. Several Committee members expressed support for that change.

The Subcommittee received multiple comments, including from a domestic commissioner, raising concerns about a requirement that anyone wanting temporary orders must raise the issue early in the case. The Subcommittee agreed that the comment was well-taken and struck the language in response to this comment.

The Subcommittee received additional comments from the public and a commissioner regarding the use of a tiered discovery process, with the commentators stating that attorneys should have the ability establish the case management deadlines on a case-by-case basis. The Subcommittee considered the comments but viewed that as a philosophical dispute that would be

beyond the scope of the proposed rule changes. The Subcommittee further expressed that the proposed amendments are consistent with recent audit findings and legislative guidance, which support a faster disposition of cases. Accordingly, the Subcommittee did not recommend any changes in response to these comments. Ms. Salazar-Hall also noted that parties always have an option to delay filing their petition for divorce if they are intimidated by the deadlines, as litigants can do much of their investigative work prior to filing. Susan Vogel commented that unrepresented litigants frequently express frustration by the notice of event due dates, as they feel that cases take a long time and do not understand disclosure requirements. Mr. Hall also noted that children are also affected by the length of the proceedings, as many guardian ad litem attorneys have noted.

With respect to Rule 10, the Subcommittee received comments regarding use of children's initials in pleadings from a commissioner and an attorney in the Office of Recovery Services, which viewed that use as potentially confusing and problematic. The Subcommittee revised that portion of the proposed rule to address these comments. Jim Hunnicutt suggested that the language be revised to use the term "Track" instead of Tier, to avoid confusion with the broader discovery rules.

At the conclusion of discussion, Mr. Hafen called for a motion. Judge Stucki moved to send the proposed amendments to the Supreme Court; Ms. Vogel seconded. The motion passed unanimously. The proposed amendments, which are attached as Exhibit B, will be sent to the Supreme Court for consideration.

(4) RULE 26 COMMENTS

Mr. Andreason presented the public comments to the proposed changes to Rule 26, noting that most comments were supportive of the amendments.

The Committee received a comment regarding the pre-trial disclosure of deposition transcripts and concerns about privacy issues. The working group expressed that this concern can be addressed by the existing rules, which allow for classification of records as private. Additional discussion was held as to what information can be reasonably obtained through the public docket, with Ms. Vogel raising concerns as to the information available through MyCase. Paul Barron noted that parties do have the right to ask the Court to classify records as private under the existing rules. Brooke McKnight indicated that most citations would already be classified as private. Lauren DiFrancesco suggested that the Committee may want to consider a standing protective order similar to that used in federal practice in order to reduce confidentiality disputes.

Judge Stone suggested that the language be revised to require parties to file their witness lists, but only serve deposition designations. Judge Holmberg expressed support for this approach, as deposition testimony typically only becomes an issue when the parties dispute the admissibility of certain deposition excerpts. Judge Holmberg also expressed concern regarding the need to balance the use of protective orders against the public's right to access under the Open Courts Clause, and the need to ensure that protective orders are used thoughtfully by litigants.

In order to address the confidentiality issue, the proposed language was revised to provide that the names of trial witnesses (whether presented live or by deposition) will be filed, while designations of deposition testimony will be served.

The Committee also received a series of comments from a practitioner regarding the use of rebuttal experts in a party's case-in-chief. The working group proposed that the language be modified to allow the judge to consider precluding a rebuttal expert from testifying in a party's case-in-chief, affording the trial judge the discretion to control order of proof and curb discovery misconduct.

The Committee also received a comment regarding a potential ambiguity in the language pertaining to filing and service of disclosures 28 days before trial. Mr. Andreason recommended minor stylistic changes to address this comment.

Finally, the Committee received a comment regarding the production of expert materials and models at the time of designation, instead of at the time of report or deposition. The Comment appeared to be a request for an additional rule change, as the most recent proposed changes did not address this issue. Judge Holmberg raised a question as to how the rule is being used in practice, with practitioners on the Committee noting some variations as to how the rule is being implemented by practitioners.

At the conclusion of discussion, Mr. Hafen called for a motion. Mr. Hunnicutt moved to send the proposed amendments to the Supreme Court; Mr. Andreason seconded. The motion passed unanimously. The proposed amendments, which are attached as Exhibit C, will be sent to the Supreme Court for consideration.

(5) RULE 37

Judge Holmberg presented the feedback received from judges regarding the use of proposed orders on discovery motions. The working group received a number of responses, with most judges favoring the submission of a proposed order. Those criticizing the use of proposed orders indicated that such unnecessarily clogs the docket.

Ms. Vogel commented that the use of proposed orders is inconsistent with what the courts customarily tell unrepresented litigants, which is to file a proposed order after the briefing period has concluded. Judge Stone suggested that a proposed order be filed as an attachment to the statement of discovery issues, as it assists the Court in ascertaining what the parties are asking for in their motion. Judge Blanch commented that the Rule 37 process is unique as it was intended to encourage the parties to be more reasonable in preparing a draft order, with the understanding that the judge would select one of the parties' competing submissions. Judge Blanch also noted that the process is often confusing to the clerks, as this is the only type of motion addressed in this manner.

Further discussion on the issue was deferred until the next meeting.

(6) ADJOURNMENT

The remaining agenda items were postponed until next month. The meeting adjourned at 6:02 p.m.