

UTAH SUPREME COURT ADVISORY COMMITTEE  
ON RULES OF CIVIL PROCEDURE

Summary Minutes – February 23, 2022

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

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<b>Committee members</b>	<b>Present</b>	<b>Excused</b>	<b>Guests/Staff Present</b>
Robert Adler		X	Stacy Haacke, Staff
Rod N. Andreason	X		Crystal Powell, Recording Secretary
Judge James T. Blanch		X	Keri Sargent
Lauren DiFrancesco, Chair	X		Nick Stiles
Judge Kent Holmberg	X		
James Hunnicutt	X		
Judge Linda Jones		X	
Trevor Lee		X	
Ash McMurray	X		
Judge Amber M. Mettler	X		
Kim Neville	X		
Timothy Pack	X		
Loni Page	X		
Bryan Pattison	X		
James Peterson		X	
Judge Laura Scott	X		
Leslie W. Slaugh	X		
Paul Stancil		X	
Judge Clay Stucki		X	
Judge Andrew H. Stone	X		
Justin T. Toth			
Susan Vogel	X		
Tonya Wright	X		

**(1) MEMBER INTRODUCTIONS**

The meeting started at 4:01 p.m. after forming a quorum. Ms. Lauren DiFrancesco welcomed the Committee and guests to the meeting. Ms. DiFrancesco informed the Committee that Mr. Leslie Slaugh will be resigning from the Committee.

**(2) APPROVAL OF MINUTES**

Ms. Lauren DiFrancesco asked for approval of the Minutes subject to minor amendments noted by the Minutes subcommittee. Jim Hunnicutt moved to adopt the minutes as amended. Ms. Tonya Wright seconded. The minutes were unanimously approved.

**(3) RULE 26 RESTROSPECTIVE STUDY**

Mr. Nick Stiles presented on a proposal for a 10 year retrospective study of Rule 26 to be done by the State Justice Institute in collaboration with the National Center for State Courts. He noted that the State Justice Institute reached out to the Budget Committee with a grant request to help fund the study. The goal of the study would be towards making the discovery process easier. Judge Holmberg noted that the National Center for State Courts organization is reputable and he would support their effort. Ms. Susan Vogel would support it as well on behalf of self-represented parties who would really benefit from the project if it leads to the discovery process being easier.

**(4) RULES 5 AND 76**

Rules 5 and 76 have come back from public comment. The committee discussed the comments for each.

*Rule 5*

Ms. DiFrancesco related Judge McCullagh's comments to the Committee noting that he would like for it to be explicit in the rule that eliminating certificates would only refer to when both parties have accounts with e-filing. Ms. DiFrancesco questioned whether the change is necessary given the rollout of public access to XChange and questioned whether the rollout included general access to e-filing. Ms. Vogel noted that the new system is being rolled out but it is impossible to assume that individuals can receive Rule 5 service through XChange or through MyCase. Mr. Slaugh noted the rule in line 42-43 states that a person may only use e-filing to serve where the person being served has an e-filing account. He questioned whether there would ever be a situation in which service through e-filing is effectuated when only one party has an e-filing account. Mr. Trevor Lee wondered if it would arise in a situation in which one party is pro se and does not have an electronic filing account. Mr. Slaugh noted that that is the exact situation that the rule covers.

The question was raised whether there was any confusion between the reference to electronic filing and the pro se avenues for filing documents. Ms. Vogel explained that she wanted to clarify

that the court electronic filing system does not include the two new resources self-represented parties now have access to - the court's XChange and MyCase resources. Ms. DiFrancesco clarified that XChange can't be used to file; but is used only to access public documents that have been filed. Ms. Vogel noted that with some of the positive changes made by the court during the pandemic such as being able to email documents to the court for filing, self-represented parties are confused with what "electronic filing" with the court entails. Ms. Vogel added also that there are also new companies now that are selling court forms similar to those available on OCAP and stating they are "filed online;" and wondered if a clarification is necessary that e-filing does not include self-represented parties' use of XChange and MyCase nor emailing documents to the court for filing.

Ms. DiFrancesco questioned whether a pro se party filing by email would need to do a certificate of service and asked for suggestions on how to make that clear. Mr. Slauch suggest the reference be to an electronic filing account rather than electronic filing system. Ms. DiFrancesco questioned what a typical motion service certificate looks like right now. Ms. Vogel explained that it is the basic certificate of service like in the olden days. Ms. Difrancesco suggested the Committee takes another look at rule 5 to see how the various filing systems can be made consistent against Rule 5.

Mr. Slauch questioned whether a document emailed to the court and placed on the court's electronic filing service provider counts as service. Ms. DiFrancesco asked whether a certificate of service is needed in that scenario as the party being served receives the notice from the court. Ms. Page explained that anytime the clerk docket something into CORIS (the courts filing system) or change a hearing, the system sends out an email notice to all the parties at the end of the day but it does not include a PDF of the document. Judge Stone noted that the docket notice is not the same as service or the same as what an e-filing participant gets when something is filed in the case. Ms. DiFrancesco suggested it is best to look at the rule again as the Committee is having different interpretations of it. Ms. Vogel, Ms. Page, and Ms. Wright volunteered to work on a subcommittee to take a closer look at Rule 5.

### *Rule 76*

Judge McCullagh offered that the qualifier "civil" could be deleted as there are also criminal civil stalking injunctions. Ms. Vogel suggested that there are other laws/rules that protect information that the rule could reflect such as in UJA 4-202; and suggested changing the rule to say "unless other court order, rule, or law provides otherwise." Mr. Slauch noted he thinks the rule just regulates what is publicly available and doesn't address whether you have to notify the other party of a change of address. Judge Stone explained that protected information is in some instances still provided to the court, but it is protected from the other party. Ms. Vogel questioned whether there was any law that specifically provides protection from sharing the information with the other party. Ms. Stacey Haacke noted that the only law that comes to her mind is the protective order law for child protective orders where the address of the protected party is not provided to the respondent. Ms. DiFrancesco asked whether a rule of judicial procedure incorporates this law. Ms. Vogel expressed her concern that in OCAP it asks the individual if they are in danger if their address/contact information is provided and

allows the party to omit the information but this new rule could create unrest that they have to provide that information. After an in depth discussion on the wording, civil protection orders, and criminal protective orders, the Committee agreed to add “unless a protective order, stalking injunction, or other order provides otherwise.” Judge Stone moved to adopt the amendment. Mr. Rod Andreason seconded it. The amendment unanimously passed.

**(5) RULE 45**

*Rule 45(a) Forms, Issuance.*

Ms. Wright began the discussion explaining that rule 45 has caused some confusion among the Licensed Paralegal Practitioners (LPPs) where it explicitly provides who may sign subpoenas. She noted that Rule 86 is helpful because it states that anytime the word attorney or counsel appears for permission to sign documents, LPPs may also do so. However Rule 45 provides explicitly who may sign a subpoena. Some LPPs opt to submit the court form subpoena to the judge instead of signing it. Ms. Wright proposes to add permissive language to Rule 45.

Mr. Slaugh questioned whether LPPs are still disallowed from sending out discovery requests. Ms. Wright answered that there is no rule that the LPP cannot conduct the discovery if a form is available and relates to the practice area; but they cannot create documents for or about discovery. Mr. Slaugh expressed a concern about having to amend even more rules that deal with the functions that LPPs may undertake but have not explicitly stated so, especially when Rule 86 covers the situation. Mr. Hunnicutt questioned whether the change needed to be made in Rule 86(b) to include signing subpoenas. Ms. Wright noted that there is comfort in Rule 86(b) but it has not helped with the confusion among the LPPs especially those who have been called out on it by counsel. Judge Holmberg suggested that a committee note might also clarify the confusion. Mr. Slaugh and Mr. Andreason also agreed that a change in the rule may not fix the issue, but a committee note might.

Ms. Vogel suggested an amendment to other language such as changing “issue” to “sign,” “command” to “order,” and “tender” to “give,” to make the language more understandable. The committee discussed the legal and plain meaning of the words “issue” vs “sign,” “command,” and “order.” Mr. Hunnicutt expressed that something can be signed but not issued. Mr. Slaugh noted that signing the subpoena is issuing it, but service of the subpoena effectuates it. Judge Stone explained that the subpoena is a command of court once served as they are issued by attorneys as officers of the court exercising a court function which is enforceable as an order and that the word “issue” relates to the court function being performed.

The Committee decided that Ms. Wright will examine the rule more closely and present a committee note for consideration at the next meeting.

*Rule 45(e)(3). Objection*

Mr. Tim Pack guided the discussion on Rule 45(e)(3). He made the suggestion to delete “under Rule 37” to make it clear that all someone has to do to object to a subpoena is to serve the objection and not for example have to file a statement of discovery issues as an objection. He explained that, as the rule stands, it suggests that a person has to do something affirmatively such as file something with the court where as other places in the rule just requires an objection to be served. Mr. Slaugh noted that it seems to him that the rule was aimed at lessening the burden on the person being subpoenaed where they only need to object instead of seeking the services of an attorney. Mr. Pack suggested that the rule be changed then to say serve a written objection. Ms. DiFrancesco suggested a change to Rule 45(e)(4)(A) add “in writing and made before the date of compliance.” Ms. Powell added that Rule 45 governs subpoenas made pursuant to Rule of Criminal Procedure 14 and mandating a written objection may limit all the available avenues for a victim to object to subpoenas to their records. Mr. Pack expressed the concern of having an individual simply calling up a party to object. He also noted that Rule 45(e)(4)(B) implies that the objection is in writing. Judge Stone agreed with the suggestion given by Ms. DiFrancesco. Judge Stone moved for the amendment. Mr. Andreason seconded. The amendment unanimously passed.

*Rule 45(k). Foreign Subpoenas.*

Mr. Tim Pack suggested to add procedures for foreign subpoenas. He suggested a draft rule and noted the language was influenced by the Oregon Rule of Civil Procedure. Ms. DiFrancesco questioned whether a motion to the Utah court needs to accompany the foreign subpoena. Mr. Pack explained that a new case must be opened and then the subpoena is filed with the Clerk who then issues it. Ms. DiFrancesco questioned whether there was a way to not include a reference to the statute in 45(k)(2). Members of the committee suggested various ways such as naming the statute that the code refers to or citing the act in its full name. The Committee further discussed the specific language of the rule, specifically as it refers to foreign territories, states and territories of the United States. Mr. Pack expressed that he appreciated the comments and discussion to help guide a second draft. Ms. Haacke will send the draft language discussed to Mr. Pack for further revision.

**(6) ADJOURNMENT.**

The next meeting will be on March 23, 2022. The Chair thanked everyone for their time and effort and wished everyone a great month. The meeting adjourned at 6:00 p.m.