UTAH SUPREME COURT ADVISORY COMMITTEE ON RULES OF CIVIL PROCEDURE

Meeting Minutes – March 27, 2019

Committee members & staff	Present	Excused	Appeared by Phone
Jonathan Hafen		**X**	
Rod N. Andreason	**X**		
Judge James T. Blanch	**X**		
Lincoln Davies		**X**	
Lauren DiFrancesco	**X**		
Dawn Hautamaki			**X**
Judge Kent Holmberg	**X**		
James Hunnicutt		**X**	
Larissa Lee			**X**
Trevor Lee	**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**		
Katy Strand, Recording Secretary	**X**		
Nancy Sylvester, Staff	**X**		

GUESTS: Allison Barger, Shane Bahr

(1) WELCOME AND APPROVAL OF MINUTES

Rod Andreason, acting as Chair Pro Tem, welcomed the committee and asked for approval of the minutes. Heather Sneddon moved to approve the corrected minutes. Paul Stancil seconded. The motion passed.

(2) PROBATE RULES: NEW URCP 26.4 (CJA 6-506, CJA 4-1001, FORM MEDIATION ORDER)

Allison Barger introduced the work of the Probate Rules Subcommittee and proposed a solution to the existing friction between the Rules of Civil Procedure and the Probate Code in the form of a new Rule 26.4. She also proposed a statewide mediation requirement and additional rules to close the gap between the Rules of Civil Procedure and the Probate Code. The ADR committee recommended the mediation requirement, and the Board of District Court Judges approved the effort. The rule being considered today outlines specifics for the objection process and initial disclosures in probate cases. She reported that after a petition is initiated, there is a period for interested parties to object. However, this is done without service or the formality of answers. This rule would provide a framework for these objections. She reported that clerks often take objections orally, which is problematic for attorneys. Rule 26.4 would further create disclosure requirements that fit the type of case involved. The expected effect of all of this is to limit the costs of probate litigation.

The proposed rule is an entirely new rule. Susan Vogel mentioned that the self-help area of the court website does have an available form proposed objection. Ms. Barger reported that the form is not being used often. Michael Petrogeorge questioned whether this rule would apply to ongoing probate cases. Ms. Barger answered that this would apply to new cases. However, there are often several petitions within a probate case. Mr. Petrogeorge reported that he worked on cases with additional complaints within the probate case. Ms. Barger answered that a new complaint would be a new matter under the rules of civil procedure. Trystan Smith questioned whether a minor settlement would be included under this rule. Ms. Barger stated it would, and that the mediation would be required if it was contested. Mr. Smith pointed out that if it was contested, this would often happen only at the final approval stage, at which point these provisions would apply. Ms. Vogel questioned whether the requirements would begin if there was a motion or an objection to the motion. Judge Blanch pointed out that there can be unique issues, such as a termination of a minor guardianship, but that these are not always ruled upon the same way, nor are they always required to go to mediation. Ms. Barger pointed out that the longer rotation for judges in the 3rd District probate calendar may help some of these issues, as the judges will have more time to adjust to probate standards. Mr. Smith pointed out that the court could waive the mediation requirement under this rule. Ms. Barger acknowledged that point and observed that the ADR rules under the Code of Judicial Administration would still apply. She also pointed out that there would be a pre-mediation conference, which would allow the judge to determine the issues for mediation and would allow parties to choose not to become involved as the case may be. The form order is an outline of the issues to discuss in pre-mediation.

Ms. Vogel proposed that the rule use either petitioner or plaintiff. Ms. Barger replied that this was to clarify that the plaintiff was the earliest petitioner, as the two types of proceedings use different words. Ms. Vogel also questioned in paragraph (C) whether the phrase of "or otherwise" could be clarified to say or pro se. Mr. Andreason proposed removing everything after "appeared."

Ms. Vogel proposed in paragraph (c)(2)(C) adding the word "then" before "reduced to writing." Mr. Andreason questioned what the differences between paragraphs (b) and (c) were. Ms. Barger and Judge Scott answered that this was to clarify that the oral objections must be in court, not over the phone. Judge Stucki questioned whether the word "also" would clarify that the objection must also be in writing. Judge Scott responded that "then" was more logical, as there was a time element to this question. Ms. Vogel proposed clarifying further that it must be filed within "7 days of the hearing at which the oral objection was made." Ms. Sylvester pointed out that this created an extremely long sentence. Mr. Lee proposed making the last clause a separate sentence. Ms. Sneddon said she did not think the long sentence was problematic. Mr. Andreason said he believed that subsections (a) and (b) should be combined with a "first" and then "second." Ms. DiFrancesco mentioned that "mailed" was an odd word, but Judge Scott pointed out that this was normal in probate. Ms. Vogel proposed that subsection (a) include that the oral objection be made in open court at a hearing, then in subsection (b) the hearing would already have been defined. Ms. Barger proposed adding "on the petition," as there may be multiple hearings. Timothy Pack questioned if it mattered which hearing. Ms. Sneddon said she believed that if the hearing could be multiple hearings, it still required that it be the hearing at which the oral objection was made. Judge Stucki questioned whether the requirement of reducing to writing could be placed in (c)(2)(A). Others agreed. Ms. Barger proposed clarifying that the written objection must set forth grounds for the objection.

Judge Holmberg proposed changing "the written objection" to "a written objection." Ms. Vogel agreed. Ms. Sneddon questioned if the term "open court" was sufficiently clear to people who were calling. Ms. Barger proposed changing it to "at a scheduled hearing on the matter." She agreed that "open court" may be ambiguous. Mr. Pack pointed out that it may not matter what hearing it is, as the written objection must occur too. Judge Scott pointed out that subsequent hearings would not be appropriate, even if a written objection still followed.

Mr. Petrogeorge questioned whether the first petitioner on a matter was a plaintiff. If a subsequent petition is filed, does the plaintiff remain the same? Judge Scott pointed out that this tied into the fact that the probate action was started by a petition, and the person who filed that ends up being the plaintiff. In other disputes, there may be cross-claims and additional confusion as to who the plaintiff is at any particular point. Ms. Barger responded that objections are defined in the probate code, but that general litigators may need clarification. Mr. Andreason clarified that objections under subsection (c)(2) were to the petition. Mr. Pack questioned if "the plaintiff" is required, as they could just be a petitioner. Ms. Barger answered that under Rule 17, petitioner is not defined. Deadlines are based upon the definition of "plaintiff"; therefore, it is important to have that term defined. Mr. Pack pointed out that "plaintiff" includes the term "petitioner." Ms. Barger pointed out that a respondent is typically the person being protected in a guardianship, not the person objecting.

Ms. Vogel questioned under subsection (c)(2)(C) whether the word "stipulated" could be replaced with "agreed upon" for clarity. Further, in subsection (c)(3) she proposed replacing the word "redundant." Mr. Andreason proposed "contained in." Judge Holmberg proposed "included in the petition or disclosures." This issue was also found on line 49.

Mr. Andreason questioned if subsection (c)(3)(A) created a confusing sentence. Ms. Barger clarified that this was supposed to allow for particular case types to not produce all the same documents (as they all fall under probate, but are not all the same). The rule has been broken up into different types of probate issues, and so this may not be needed. Ms. Sneddon pointed out that if the documents referenced were not relevant, they would probably not be in the parties' petition anyway. Mr. Andreason proposed adding a colon, the list of documents, then state that this supersedes Rule 26(a)(2). Ms. Sneddon agreed with this language.

Judge Mettler mentioned that the numbering in the rule was not correct and Ms. Sylvester corrected it.

Judge Mettler moved to submit the rule below for comment. Judge Stucki seconded. The motion passed.

Rule 26.4. Provisions governing disclosure and discovery in contested proceedings under Title 75 of the Utah Code.

(a) **Scope.** This rule applies to all contested actions arising under Title 75 of the Utah Code.

(b) **Definition.** A probate dispute is a contested action arising under Title 75 of the Utah Code.

(c) **Designation of parties, objections, initial disclosures, and discovery.**

(c)(1) **Designation of Parties**. For purposes of Rule 26, the plaintiff in probate proceedings is presumed to be the petitioner in the matter, and the defendant is presumed to be any party filing an objection. Once a probate dispute arises, and based on the facts and circumstances of the case, the court may designate an interested person as plaintiff, defendant, or non-party for purposes of discovery. Only an interested person who has appeared will be treated as a party for purposes of discovery.

(c)(2) **Objection to the petition**.

(c)(2)(A) Any oral objection must be made at a scheduled hearing on the petition and then reduced to writing within 7 days, unless the written objection has been previously filed with the court..

(c)(2)(B) A written objection must set forth the grounds for the objection and any supporting authority, must be filed with the court, and must be mailed to the parties named in the petition and any interested persons as provided in Utah Code § 75-1-201(24).

unless the written objection has been previously filed with the court.(c)(2)(C) If the petitioner and objecting party agree to an extension of time to file the written objection, notice of the agreed upon date must be filed with the court.

(c)(2)(D) In the event no written objection is timely filed, the court will act on the original petition upon the petitioner's filing of a request to submit pursuant to Rule 7 of the Utah Rules of Civil Procedure.

(c)(3) **Initial disclosures in guardianship and conservatorship matters.**

(c)(3)(A) In addition to the disclosures required by Rule 26(a), and unless included in the petition, the following documents must be served by the party in possession or control of the documents within 14 days after a written objection has been filed.

(c)(3)(A)(i) any document purporting to nominate a guardian or conservator, including a will, trust, power of attorney, or advance healthcare directive, copies of which must be served upon all interested persons; and

(c)(3)(A)(ii) a list of less restrictive alternatives to guardianship or conservatorship that the petitioner has explored and ways in which a guardianship or conservatorship of the respondent may be limited.

This paragraph supersedes Rule 26(a)(2).

(c)(3)(B) The initial disclosure documents must be served on the parties named in the probate petition and the objection and anyone who has requested notice under Title 75 of the Utah Code:

(c)(3)(C) If there is a dispute regarding the validity of an original document, the proponent of the original document must make it available for inspection by the contesting party within 14 days of the date of referral to mediation unless the parties agree to a different date.

(c)(3)(D) The court may modify the content and timing of the disclosures required in this rule or in Rule 26(a) for any reason justifying departure from these rules.

(c)(4) **Initial disclosures in all other probate matters.**

(c)(4)(A) In addition to the disclosures required by Rule 26(a), and unless included in the petition, the following documents must be served by the party in possession or control of the documents within 14 days after a written objection has been filed: any other document purporting to nominate a representative after death, including wills, trusts, and any amendments to those documents, copies of which must be served upon all interested persons. This paragraph supersedes Rule 26(a)(2).

(c)(4)(B) The initial disclosure documents must be served on the parties named in the probate petition and the objection and anyone who has requested notice under Title 75 of the Utah Code.

(c)(4)(C) If there is a dispute regarding the validity of an original document, the proponent of the original document must make it available for inspection by the contesting party within 14 days of the date of referral to mediation unless the parties agree to a different date.

(c)(4)(D) The court may modify the content and timing of the disclosures required in this rule or in Rule 26(a) for any reason justifying departure from these rules.

(c)(5) **Discovery once a probate dispute arises**. Except as provided in this rule or as otherwise ordered by the court, once a probate dispute arises, discovery will proceed pursuant to the Rules of Civil Procedure, including the other provisions of Rule 26.

(d) **Pretrial disclosures, objections.** No later than 14 days prior to an evidentiary hearing or trial, the parties must serve the disclosures required by Rule 26(a)(5)(A).

(3) RULE 73. REVIEW OF COMMENTS

Ms. Sylvester introduced a comment received during the comment period regarding augmenting judgments. Ms. Sylvester pointed out that this portion of the rule was not the purpose of the amendments, and that this was a rather substantive change. Judge Clay Stucki stated this was a logical comment. The comment was questioning whether the service was necessary for small augmentations (as the service fee will always be more than the $25 augmentation). He proposed adding for scheduled flat fee augmentation amounts that the judgment debtor does not need to be served under rule 54(d), which would also need to be amended. He believed it would make sense to make such amendments. Judge Amber Mettler proposed making it clear that this process does not apply to post-judgment collection under Rule 73(f)(3). This would require sending Rule 54 out for comment, which may be sent out for the LPP amendments.

Judge James Blanch agreed that a defendant in default should not have to be served, but for others, using service under Rule 5 should be sufficient. This would eliminate the costs and allow for objections. He pointed out that sometimes, augmentations are not automatic. Judge Homberg believed that this was a good point. Ms. Vogel agreed, and believed that this may encourage debtors to pay. Ms. Sneddon agreed that it was best to serve an augmented judgment, as people should know what is owed. Judge Blanch believed it was only necessary to clarify that persons in default need not be served. Timothy Pack pointed out that Rule 5 may already take care of this question. The committee agreed that this comment was based upon an incorrect assumption as to what service was required.

Judge Holmberg stated that the comment was about the cost of creating the service notice, not the cost of service. Judge Mettler pointed out that if the cost of doing this was too much, then it wouldn't be worth the money, and the attorney should not take that action. Judge Blanch agreed. Ms. Sneddon pointed out that the application for the writ was already filed, so the service was not much additional work. Judge Blanch pointed out that the committee could look into whether $25 was enough of a fee, but should not look into the service question since Rule 5 controlled service.

Judge Kent Holmberg asked where the word "augment" appeared in the rules. He believed this was just a term of art used by attorneys. Trevor Lee pointed out that the term is used in paragraph (f).

Judge Stucki moved to send the rule as written to the court. Judge Holmberg seconded. The motion passed.

(4) LICENSED PARALEGAL PRACTITIONERS AND THE CIVIL RULES: RULES 4, 5, 10, 11, 26 (RESERVED FOR SUBCOMMITTEE), 53, 56, 58B (COORDINATE WITH OTHER AMENDMENTS), 65A, 73, 74, 75, AND 76. LOOK AT OTHER RULES WHERE "COUNSEL" APPEARS AND DETERMINE IF THERE IS A NEED FOR CHANGE.

Mr. Andreason and Ms. Sylvester introduced this issue. In light of the new licensed paralegal profession, some of the civil rules may need to be updated to accommodate their practice. Ms. Sylvester pointed out that not every required rule may be included in the packet. She asked if additional definitions are required for these rules. Mr. Andreason questioned whether this would be odd, as "attorney" is not defined within the Rules. Ms. Sneddon believed that defining "legal professional" would be valuable, as it would make it clear that licensed paralegal practitioners ("LLPs") and attorneys are both included. Judge Stucki proposed adding the definition to Rule 1 to avoid amending the rules in multiple places. Professor Stancil proposed including that LPPs must be "acting in an approved capacity," but that if they used the terms "counsel," "attorney," or "lawyer," those would apply to the LPP. This would avoid the risk of expanding the permissible behaviors for LPPs. Judge Holmberg pointed out that where LPPs are not approved to practice, the terms "attorney" or "lawyer" should be used. Ms. Sylvester questioned how the term "counsel" should be replaced, as it is a nuanced term.

Mr. Andreason pointed out that there is no place where all of the Rules have a definition section. Judge Holmberg pointed out that sometimes it is nuanced, and perhaps a universal definition would

not be appropriate. However, this issue is so unique that it may be appropriate. Ms. Sylvester proposed reviewing this and making changes before next month.

Ms. Sylvester also pointed out that there were Rule 26 disclosure questions from the Court and proposed assigning Mr. Andreason to evaluate this problem. Judge Blanch questioned what the Court thought should be disclosed that was not already required. Judge Scott asked if the Court was proposing that the disclosures be included with the complaint. Mr. Pack questioned what would happen if the required disclosures were not given. Judge Scott answered that she would not allow the documents to be used in court. Judge Blanch questioned whether an LPP should be allowed to file a statement of discovery issues. The Court does not appear to be proposing this, only that the disclosures be required, but they may already be required under the rule. He proposed delineating the consequences for non-disclosure so that no motions would be required. He questioned whether these documents should be required with the complaint. Judge Stucki believed that the court was asking for something like that found in Rule 26.5 for debt collection. Judge Blanch does not believe that items being served with the complaint would make sense, but after the answer, it would be useful; however, this disclosure is already required. He asked that Ms. Sylvester ask for additional guidance from the court. Ms. DiFrancesco proposed creating a form for that particular situation which could be filed to put the court on notice that documents were missing. Judge Mettler believes the bigger problem is with the LPP rule, as it is not clear that an LPP can file motions. Judge Holmberg requested that someone from the LPP committee explain the limitations of LPPs.

The committee noticed an issue with USB Rule 14-802. Although the Rule defines what the practice of law is, it more specifically enumerates it in a comment. The Court's letter mentioned that LPPs are unable to conduct discovery, but that comes from the comment to the Rule, not the Rule itself. The Rule should probably be amended to more specifically enumerate what attorneys can—and LPPs and other can't—do.

This rule was tabled until next month, based upon the questions for Ms. Sylvester to review.

(5) ADJOURNMENT

The remaining matters were deferred, and the committee adjourned at 5:59 pm. The next meeting will be held April 24, 2019 at 4:00 pm.