UTAH SUPREME COURT ADVISORY COMMITTEE ON RULES OF CIVIL PROCEDURE

Meeting Minutes – May 27, 2015

Present:	Hon. Lyle Anderson, Rod Andreason, Hon. James Blanch, Lincoln Davies, Hon. Evelyn Furse, Jonathan Hafen, Terrie McIntosh, Amber Mettler, David Scofield, Hon. Todd Shaughnessy, Leslie Slaugh, Trystan Smith, Barbara Townsend
Telephone:	Lori Woffinden
Staff:	Timothy M. Shea, Heather M. Sneddon
Guests:	Frank J. Carney, Rep. Curtis Oda, Lane Gleave, Tyler Gleave, Comm. Michelle Blomquist
Not Present:	Hon. Kate Toomey, Scott S. Bell, Sammi Anderson, Steve Marsden, Hon. John Baxter, Hon. Derek Pullan, Paul Stancil

I. Welcome and approval of minutes. [Tab 1] – Jonathan Hafen.

Jonathan Hafen welcomed the committee and invited a discussion of the minutes. Ms. Mettler moved to approve the minutes. Ms. McIntosh seconded. The minutes were approved.

II. Recognition of David Scofield and Judge Shaughnessy – Jonathan Hafen.

Mr. Hafen expressed the committee's and the Supreme Court's thanks to Judge Shaughnessy and David Scofield for their service to the committee.

III. Rule 4. Electronic service for personal jurisdiction. [Tab 2] – Lane Gleave.

Mr. Hafen invited further discussion of recommendations regarding electronic service for personal jurisdiction. Lane Gleave said that he and his team had been asked to propose changes to Rule 4 to incorporate electronic service consistent with their program. They did quite a bit of research and believe their proposed language should be adequate, but he invites comments from the committee.

Discussion:

- Mr. Slaugh reiterated his concern regarding the kind of information needed to be given to people before they consented to electronic service to ensure that consent was educated and voluntary. What protections are in place to make sure no one's rights are violated? Mr. Gleave responded that two boxes must be checked before proceeding with the download. By checking the box, you agree to be served electronically. Another check box requires that the user agree to the terms of use of the website. There had been a question about what constitutes an electronic signature. Mr. Gleave indicated that the statute requires some form of action indicating consent; they have adopted the check box as that action. Mr. Shea believes that is correct, although the representation may be a little more revealing if it said that by checking the box, it constitutes an electronic signature. That said, under the statute, any act you intend to be a signature that is associated with an electronic transaction is in fact an electronic signature.
- Mr. Hafen mentioned two issues: What is coming from Mr. Gleave's program looks like it is coming from the court as opposed to elsewhere, and we need to address how the system is

ensuring the person who is acknowledging receipt is in fact the right person. Tyler Gleave responded that to achieve positive identification, the defendant is required to input the last four digits of his/her SS number. Lane Gleave commented that as part of that process, the SS number is loaded into the system before people log into the computer, so the computer tries to match what they already have. No download is permitted if the SS numbers do not match. Mr. Slaugh said that wouldn't preclude a husband accepting service for his wife if he knew her SS number. Lane Gleave said that was possible, but that is already permitted by regular personal service. Mr. Slaugh said the difference is that in that situation, we know who was actually served. There is room for fraud, but perhaps we cannot protect against all fraud. He recommended that we include something in the rule that permits the court to authorize electronic service even if consent is not received.

- Judge Blanch raised the issue of the timing of consent—must consent be obtained when process is ready to be served? The current language may allow, for example, credit card companies to include boilerplate in their agreements regarding consent, and then use that consent to achieve service by using an old email address. Tyler Gleave said the language could be adjusted to require consent at the time of service.

- Mr. Andreason commented that "electronically" at lines 40 and 89-90 is very general. A defendant should agree to a particular method of electronic service and be served by that method.

- Mr. Slaugh asked whether the system automatically emails a copy of the summons and complaint. Lane Gleave responded that they are automatically downloaded to the user's computer as soon as they hit download. The summons becomes time stamped with that date and time. The IP address is tracked. Mr. Slaugh asked what happens if there is a problem during transmission. Tyler Gleave said they can attempt download later by going back to the website and filling out the forms again. Mr. Slaugh asked whether that results in two different service times. Lane Gleave said no; if there is a problem with download, there is no time-stamped service. And if there is a problem, attempted downloads are reported to Lane and Tyler's phones. If they see 2 or 3 attempts of trying to download, he will call and find out the problem. Sometimes they will just email the summons and complaint to the defendant.

- Mr. Slaugh asked whether there are size limitations on the file. Tyler Gleave responded that none are in place, but theoretically, a couple of GB per document. Mr. Scofield commented that color documents could be a problem. If they take a long time to download, will people wait to receive them? And if they are too big, they can't be emailed. Tyler Gleave said that by not requiring an email address, they permit a download. Mr. Scofield said that the speed of the download is affected by the speed of the defendant's ISP—it is not immediate. If an issue arose with the download and the documents couldn't be emailed, Lane Gleave said he would call the defendant, discuss the issue and default to another procedure under the rule to accomplish service if it couldn't be resolved. Mr. Shea mentioned that we are focused on ways in which electronic service would not be successful—the Gleaves want to know when it is not working and then they will fix it. But so long as there is no representation to the court that service was successful, that's okay. Tyler Gleave said that no return of service is given, and nothing is flagged as served, unless they know it worked.

- Mr. Shea asked whether our process is sufficient if we serve someone in another state. Mr. Slaugh responded that the long arm jurisdiction statute would permit it if the court has jurisdiction. Mr. Shea questioned whether service is accomplished in those situations under

that state's rules. Mr. Scofield said no, they serve it under Utah rules. The only problem is with international service and the Hague Convention.

- Mr. Shea raised the issue of permitting electronic service in situations when it is not allowed due to security regulations at the prison, for example. Judge Blanch commented that we don't have to prohibit such service just because it is impossible.
- Mr. Shea also pointed to lines 90-91 regarding "electronic service being complete upon initiation of service by the receiving party," and not writing the rule so specifically to the Gleaves' system. Mr. Scofield raised the issue of a glitch in the download—the process was initiated so service is complete despite the problem. Ms. Mettler said this language could also mean just email. Lane Gleave responded that the language was intended to capture the same type of service as certified letters, etc., which are considered served when the person signs for the letter even if the letter is not opened. If you hit the download button, that constitutes service. Mr. Slaugh said the way it is worded is confusing. Why "initiation of service" instead of "completion of service" or "download"? Judge Blanch noted that there are competing concerns at issue. We need to tailor the language to make it clear we are describing this kind of system, but not prohibiting anyone else from coming along afterward. The language, as it stands, is too broad.
- Mr. Slaugh asked why we don't allow service by email if someone consents to service in that manner. Judge Blanch said that if someone explicitly agrees to be served that way, that's fine. But we need to address the situation in which a 15-page contract has a buried provision that the person consents to being serviced via email. Mr. Slaugh said we should disallow that.
- Mr. Scofield said the benefit of this system is that the Gleaves won't give a return of service if they see a glitch. Just "electronic service" is concerning. Here we know what is happening because people are overseeing it. Judge Blanch raised his concern that allowing email service leads to common issues of inputting the wrong email address, the email landing in the person's junk mail, etc. Typically you know that email will work if you're agreeing to it, but if we're going to allow a plaintiff to get a default on email service, we must have evidence that it went through.
- Mr. Scofield suggested that we describe electronic service through a licensed process server so that the affidavit of service is at least somewhat reliable. Judge Blanch commented that the concepts that would give him comfort are an affirmative agreement at the time of service, and electronic service that doesn't record as successful until actually downloaded. Mr. Slaugh asked about email service if the person sending it checks the option for a delivery/read receipt. Judge Blanch responded that we allow people to opt into and agree to that after service of process, but that the Rule 4 service standard should be higher. Magistrate Judge Furse commented that you are already prohibited from serving your own complaint.
- Lane Gleave proposed changing the language to "electronic download" instead. Mr. Andreason, Judge Blanch and Mr. Slaugh prefer that language, and suggested making service complete when the download is complete. Mr. Shea said that there needs to be enough rigor in the Rule 4 service to meet minimum due process requirements. Given the committee's discussion, Mr. Shea will work with the Gleaves and invite others from the committee to help with further drafting and editing.
- Mr. Shea raised a concern regarding the confidentiality of the information that the process server receives. Lane Gleave said that they receive this information from the serving party, except perhaps for the IP address and phone number. Tyler Gleave confirmed that they

request a phone number, which is mandatory so that they can send a text message. If there is an issue about who received or initiated the download, someone can go to the cellular carrier and see who had the phone. The person enters a 4-digit code via text to download the paper. It's a safeguard. Ms. Townsend asked whether there is a disclaimer saying what the phone number will be used for, since it is required. Tyler Gleave said that on the same field with the two check boxes, they agree to electronic service, and below agree to the terms and conditions, which includes a short block of text that says the process server doesn't give information to anyone but that it is retained indefinitely. The primary reason for the phone number is that if something goes wrong, they have a current number to get in touch with whoever attempted to initiate the download.

- Mr. Shea noted that the Commissioner had asked for a copy of the summons and proposed folding that in. Mr. Hafen agreed. The subcommittee will address these issues and the rule will be discussed at the next meeting.

IV. Rule 101. Motion practice before court commissioners. [Tab 3] – Commissioner Michelle Blomquist.

With respect to Rule 101, Comm. Blomquist reported that the committee has looked at the issue of practice in the domestic realm. After a very long process, the committee's proposal reflects general agreement. The proposed rule was sent out for public comment, and those comments have been reviewed by the committee. One comment was very specific regarding the language, and others concerned the timelines. The committee had come to consensus on the timelines after input from hundreds of domestic attorneys; thus, the subcommittee voted to leave the rule as it is. It has gone through the comment period. The rule is limited to practice before the commissioners and is expressly excluded from Rule 7.

Discussion:

- Mr. Hafen asked whether someone with an immediate issue, like a protective order, can get in front of a judge. Comm. Blomquist responded that they can. That is not part of Rule 101. Because so many domestic attorneys wanted the deadline pushed to 28 days for regular motions, the committee took that input.

- Mr. Slaugh asked why the dates are tied to the hearing date rather than the motion filing date. Comm. Blomquist said that was before her time, but unlike Rule 7, there are no rulings without hearings. Mr. Slaugh also raised the "necessary evidence" phrase referenced in line 5, and asked whether it should include certified copies of deeds, deposition transcripts, etc. Comm. Blomquist commented that the rule mentions some of those, including voluminous exhibits. Mr. Hafen asked what the threshold is for "voluminous." Comm. Blomquist responded that "voluminous" is over ten pages and requires a summary. If you have 100 pages, you include a summary and bring the documents to the hearing to share with counsel. The issue is that commissioners have 8-10 hearings every morning and cannot look at voluminous exhibits. However, the "voluminous exhibits" exception does not apply to documents with particular legal significance, such as tax returns. Ms. Mettler asked whether the expectation is that the party would file for overlength, and Comm. Blomquist said yes.

- Magistrate Judge Furse asked whether there would be any value in saying "not including relief under Rule 65" to make line 99 more clear. Comm. Blomquist said that the existing language is pretty much what the rule says right now, and there have been no issues. "Motion for temporary relief" is a term of art in the domestic arena. Mr. Slaugh noted that line 35 says

motion for temporary "orders" rather than "relief," and suggested they be consistent. Comm. Blomquist suggested going with "temporary orders" so there is no cross-over with Rule 65.

- Mr. Andreason suggested that at line 13, the language be changed to "any other party." He also suggested changing "opposing party" to "responding party," and removing "overly" before "voluminous" on lines 71 and 74. Mr. Shea commented that even "voluminous" could be stricken—if it exceeds ten pages, it must be submitted in summary form.
- Mr. Smith asked about the contexts for summary relief and the distinctions between TROs and protective orders versus temporary orders/relief. Comm. Blomquist said that for TROs and protective orders, there is an urgent nature to them that permits parties to get into court immediately. But other issues come up that must be dealt with before the end of the case, such as preservation of the marital estate and custody issues. Temporary orders address issues, and have lower evidentiary standards and separate rules.
- Mr. Slaugh suggested adding "or other admissible evidence" to line 6, and changing "opposition" to "response" throughout. At line 39, "must" should be inputted. At line 71, "are deemed to be overly voluminous and" should be deleted. At line 75, "are deemed not to be overly voluminous, regardless of length, and" should be deleted. Comm. Blomquist is fine with these changes.
- Mr. Andreason said that at lines 26-28, you get lost on the different forms of reply to a counter motion. Comm. Blomquist agreed. At the end of the sentence, he recommends just putting "to the motion," then "any response" and "any reply," and "the reply" for the following sentence. He also recommended adding all serial commas. Comm. Blomquist confirmed that the last reply needs "the." Mr. Andreason also proposed a comma after "hearing" on line 10.
- Mr. Smith commented that three days doesn't seem like much for a significant counter motion. Mr. Shea said that the policy served by the short turnaround is to get all issues to the commissioner at the same time for a decision, rather than having separate hearings on the motion and countermotion. It is important that that policy be served, as these cases frequently involve children, custody, support and visitation. Comm. Blomquist commented that by the time of the last reply, both parties have briefed their issues so much that there isn't much left to address.
- Mr. Slaugh moved to send the rule to the Supreme Court with the proposed revisions. Magistrate Judge Furse seconded, and the motion carried.

V. Post-trial motions. Rules 50, 52, 59 and 60. Technical amendment of Rule 6. [Tab 4] – Frank Carney.

Mr. Carney reviewed Mr. Shea's changes and they look good. Mr. Shea believes the rules are ready to go out for comment. Judge Blanch moved to send them out for comment. Mr. Smith seconded, and the motion carried.

VI. Rule 35. Physical and mental examination of persons. [Tab 5] – Frank Carney

Mr. Carney discussed an issue that has arisen with the last sentence of the existing advisory committee note on Rule 35 regarding the treatment of medical examiners as other expert witnesses, with the required disclosure and the option of a report or deposition. People have taken the sentence to mean that you don't have to disclose the report from an IME—you only have to disclose it if the expert is going to testify at trial under Rule 26 and the other side gets either a report or deposition. That was not the intent; the intent was that Rule 35 reports should be required to be disclosed, and the defendant may not withhold the report by not designating the examiner as an expert for trial. Mr. Carney suggests taking that sentence out of the note and replacing it with his proposed language.

Discussion:

- Mr. Smith remembers the committee's prior discussion, but recalled a vote that Rule 35 examiners were not required to produce a report unless they were to serve as experts and a report was elected. The whole idea behind the new rules was to reduce the cost of discovery, and that is the meaning of the comment. You get to elect a report or a deposition, and you don't get the report unless you elect it. Mr. Scofield expressed the same recollection. Mr. Carney said the rule says you must have a report.
- Judge Shaughnessy said there is a historical reason for this. The old Rule 35 required them to produce a report of the examination. This was important for policy reasons—the results of any diagnostic test performed were to be produced. The Rule 35 examiner is not acting as the doctor for that patient, but under the old rule, the idea was that they should have to do a report and disclose to the patient the results of the test. Mr. Carney said that last time, the committee was just talking about taking away the requirement that all prior reports be produced. They still have to do reports under the current rule. Judge Shaughnessy noted that this comes up all the time; he has required a Rule 35 report and a deposition, but not a Rule 26 report. He doesn't think they are the same. The plaintiff can then elect to get a full Rule 26 report that requires all opinions and factual bases to be identified and be limited to the opinions offered in the report, or to elect a deposition and be responsible for cleaning out the witness and eliciting all opinions. The committee should address the issue. Mr. Smith said the issue should be explicitly addressed in the rule. Lines 11-14 are unclear.
- Magistrate Judge Furse suggested that a separate report under Rule 35(b) seems inconsistent with cutting discovery costs. She also asked whether there is danger in requiring the other side to produce a Rule 35 report when there is no doctor-patient relationship. Mr. Slaugh said that if you submit to an involuntary examination, you should get to receive the results of that exam.
- Mr. Scofield noted that the Rule 35 report is not a Rule 26 report unless someone calls the examiner as an expert. If a report is elected, does the Rule 35(b) report become the expert report or is there a separate Rule 26 report? Mr. Slaugh said the rule requires clear disclosure of the expert after examination. The examination findings are not necessarily coextensive with what a Rule 26 report would be later. The findings could be much more abbreviated. Mr. Smith noted that the other side gets to make an election. If they elect a deposition, they are not limited to what is in the Rule 35 report. There is a question as to whether we want the expense of both a Rule 35 report and a deposition; the rule needs to address this. Magistrate Judge Furse commented that doctors are the most expensive experts, so we undercut our efforts to save costs with this rule.

- Judge Blanch said that with this proposal, we're saying that there is no such thing as a consulting expert on physical examinations under Rule 35. If the patient submits to a Rule 35 examiner, you are stuck with that report. Are there policy reasons for this? Magistrate Judge Furse said there is value in having consulting experts in this realm, but to get another examination, you have to go to court. Judge Shaughnessy commented that there are consulting experts, but they are records consultants. Mr. Slaugh said that once you have the physical examination, he doesn't see how you don't disclose those findings to the patient given the invasion of privacy. Mr. Smith said the difference is that the plaintiff's bar is able to send their clients to many doctors for opinions, and the results of those examinations do not have to be disclosed. Judge Shaughnessy commented that the defense bar also has its roster of experts.

VII. Rule 63. Disability or disqualification of a judge. [Tab 6] – Tim Shea

Mr. Shea has made further amendments to Rule 63 after the last meeting. The critical language is lines 22-27 regarding the standard of "did not know of and could not have known of." If the timeliness of the motion is being decided, the party must describe in an affidavit how and when it came to know of the reasons.

Discussion:

- Magistrate Judge Furse said "their" is used on line 3 when talking about a single judge. Mr. Shea and Judge Shaughnessy suggested changing the language to "judge's duties." Mr. Andreason proposed dropping the first preposition in line 16 to become: "knew or should have known of."
- Judge Shaughnessy asked how subsection (b)(6) operates in practice. Mr. Slaugh said that if the motion is filed within 21 days of the date when you knew or should have known, then you have to have a timeliness affidavit. If there are other grounds, then you do not.
- With the foregoing changes, Mr. Andreason moved to send the rule out for comment. Ms. McIntosh seconded, and the motion carried.

VIII. Rule 5. E-filing and service in the juvenile court. [Tab 9] – Tim Shea

Mr. Shea reported that an amendment has been requested on p. 54, line 37. Because the juvenile court does not have its own rules for service, it relies on Rule 5. In juvenile court, however, practitioners don't receive notification when something has been filed. Therefore, they have asked for this exception to be approved on an expedited basis so that electronic filing is not recognized as effective service in juvenile court when electronic filing goes live for them on November 1st. Both the committee and the board have asked for this change, and Mr. Shea has received no opposition.

Discussion:

- Mr. Andreason asked whether the juvenile rules are separate from the Rules of Civil Procedure. Messrs. Shea and Hafen responded that they are, but they do not cover everything. Mr. Hafen explained that they rely on the civil and criminal rules as well, and that they have a rule that incorporates all of the civil rules that have no juvenile counterpart. Mr. Andreason questioned why this provision is not put into the juvenile rules instead. Mr. Shea suggested that, but the board and committee would both prefer to have the change in the civil rules.
- Some members noted that the language is a bit awkward. Messrs. Scofield and Hafen suggested moving "except in the juvenile court" to the end of the sentence. Mr. Shea will make the change.

- Ms. Townsend moved to approve the rule as amended, with the above change. Judge Blanch seconded, and the motion carried.

IX. Adjournment.

The meeting adjourned at 5:56 pm. The next meeting will be held on September 23, 2015 at 4:00 pm at the Administrative Office of the Courts.