UTAH SUPREME COURT ADVISORY COMMITTEE ON RULES OF CIVIL PROCEDURE

Meeting Minutes – March 23, 2016

Present:	Lincoln Davies, Judge Baxter, Terri McIntosh, Leslie Slaugh, Judge Blanch, Rod Andreason, Jon Hafen, Kent Holmberg, Paul Stancil, Amber Mettler, Sammi Anderson, Judge Furse
Telephone:	Lori Woffinden, Judge Pullan
Staff:	Nancy Sylvester, Heather Sneddon, Tim Shea
Guest:	Lane Gleave

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

Jonathan Hafen welcomed the committee and invited a motion to approve the meeting minutes from February. Rod Andreason moved to approve the minutes, which Judge Baxter seconded. The minutes were approved unanimously.

II. Review comments to Rules 54, 58A, 58C, 73. [Tab 2] – Nancy Sylvester

Nancy Sylvester reported that one comment on Rule 54 was received from Nathan Whittaker. Mr. Whittaker wants to change (d)(2) to state, "not later than 14 days," to mirror the language in Rule 59. Ms. Sylvester made that change. He expressed concern that since the language in (d)(2) and (d)(3) suggests a memorandum of costs cannot be ruled upon until after a judgment is entered, there will be an amended judgment in nearly every case under paragraph (e). He suggested deleting (d)(3), but Ms. Sylvester has not made that change. Finally, Mr. Whittaker suggests deleting "to include the award in the judgment" from lines 28-29 because it is unnecessary and confusing. Ms. Sylvester made that change. As to Rule 58A, no comments were received.

Discussion:

- Mr. Andreason said that he saw no reason to delete (d)(3). Instead, with Ms. Sylvester's edits to (d)(2) and lines 28-29, the rule looks good.

Ms. Sylvester reported that the committee received a comment from Graeme Abraham concerning Rule 58C seeking guidance on the statutory interest rates. She believes this is a new issue, so she placed it on the priority list. If the committee believes the comment to be a continuation of existing issues with the rule, however, we can consider it.

Discussion:

- Kent Holmberg noted that the issue seemed statutory rather than rules related. Mr. Hafen read Mr. Abraham's comment, which is that some judges allow contractual rates to carry over for renewed judgments while others require imposition of the statutory rate. If a judgment is being renewed, he wondered why it wouldn't always be the post-judgment rate. Mr. Holmberg said that under Rule 15, the contractual interest rate should apply unless no rate is provided in the

contract. He thinks Mr. Abraham's comment is getting at the issue of inconsistent rulings from courts. When you are renewing a judgment, you are not adopting the contractual interest rate, but you aren't creating a new judgment. Thus, he questioned whether the old interest rate should apply going forward. Judge Blanch said that judges feel differently about the issue, but that doesn't make it a procedural issue for the committee to resolve. Sammi Anderson commented that she believes this is a new issue and that the committee should not address it right now. Judge Blanch further commented that it is an issue of statutory construction. There are different schools of thought, but he does not believe it should be addressed through a procedural rule. Ms. Sylvester will take the issue off of the priority list.

As to Rule 73, Ms. Sylvester reported that the comments primarily concerned raising presumptive attorney fee limits. At the last meeting, the committee decided to put issues on the priority list if they were new, but nonetheless, she suggested that perhaps the committee should consider taking up this issue now.

Discussion:

- Leslie Slaugh suggested that one of the comments is easy to implement---eliminating the first two lines of the attorney fee schedule. That is easy to do, and accomplishes most of what has been suggested by commenters. Mr. Hafen asked whether we would need to put the rule out again for comment if we did that; Ms. Sylvester said she believes we would as it is a drastic change. Mr. Andreason said that he believes we need to put the rule back out for comment because this is a big issue for the collection bar. We would not want to take up new issues and finalize the rule without an opportunity for comment.

- Mr. Hafen said that he would like to get this group of rules done and out the door before the next deadline. The question is whether we hold what has been done with Rule 73 so far to address this new issue, or take the changes we've made, get them out the door, and take this issue up relatively quickly. Judge Blanch asked if there was a way to telegraph to people that this is a priority and that the committee will take it up soon. Mr. Hafen said we can. Judge Blanch further commented that the committee should consider more carefully information regarding the inflation in the cost of legal services, and what more is required to get default judgments entered, including military service affidavits, etc., to make a more intelligent decision on where the fees should be. Mr. Andreason agreed. Ms. Sylvester will send an email to that effect.

- With respect to other comments, Ms. Sylvester reported that Mr. Whittaker has suggested that the rule or a committee note distinguish between a motion and a request for fees under the various rules. She believes some clarifying language in subparagraph (a) could be added. Mr. Slaugh asked whether it is an issue that comes up often. Ms. Sylvester responded that she didn't know, but the rule seems to suggest that an additional motion must be filed if fees are sought under Rule 11(c). Mr. Slaugh commented that he has had judges simply pick a sanction amount, although most want an affidavit on fees. Judge Furse said that once an affidavit is received, the other side wants an opportunity to oppose it. It would be nice to streamline the issue somehow. Mr. Andreason agreed, but wondered how it could be done. Mr. Hafen invited a motion proposing a change. No motion was made.

- Tim Shea said that the Appellate Rules Committee wants to be sure that regardless of whether a motion or claim for fees under Rule 73 is a full blown motion for attorney fees, or simply a

determination of the amount of fees and liability has already been determined, that the time for filing a notice of appeal begins to run from the date of the dispositive order on the amount of fees. Mr. Slaugh commented that under Rule 58A, a separate order is not required, but his recollection is that we did not adopt the federal rule that says attorney fees are separate. Mr. Shea said that the Appellate Rules Committee wants to adopt a modification of the federal approach by making the appeal period automatically run from the dispositive order on fees. Mr. Shea believes it is clear from existing rules that the appeal period does not run until a determination of the amount of fees, even if a prior determination on liability for fees was made, but the Appellate Rules Committee wants to be sure. Mr. Hafen asked whether the advisory committee note on Rule 58A, starting at line 120, needs to be modified. Mr. Shea said the rules at issue are Rule 73(a) (that attorney fees must be claimed by filing a motion within 14 days of the judgment), and Appellate Rule 4 (that a timely motion or claim for attorney fees under Rule 73 has the effect of making the time to appeal run from the entry of the dispositive order on fees). Mr. Hafen asked how we can make the rules more clear on that issue. Mr. Slaugh said that "disposition" means the final disposition of all issues under Utah authority, i.e., not just liability. Mr. Shea asked whether anyone saw a reasonable basis to argue the other side of the issue. Judge Furse suggested that a comment could be added to Rule 73 that refers to Rule 58A for appealability. Judge Blanch suggested that the phrase, "including amount of attorney fees, if any," could be added. Judge Pullan said that he thinks the rules are clear. Until an amount is determined, the case is not finished. Mr. Shea thanked the committee for their comments.

- Mr. Hafen invited a motion that this group of rules could be submitted to the Supreme Court for approval. Mr. Andreason so moved, and the motion was seconded. The motion carried.

III. Review comments to Rules 13, 15, 26.03. [Tab 3] – Nancy Sylvester

Ms. Sylvester reported that no comments were received on Rules 13 and 15. With respect to Rule 26.03, only one comment was received: Axel Trumbo does not believe mobile home park cases should be captured under the rules because expedited procedures already apply to those cases by statute. Also, expedited procedures under the unlawful detainer apply only when the tenant remains in possession. He suggested amending the scope of the rule to mirror the possession language in Utah Code section 78B-6-810. Ms. Sylvester amended subparagraph (a) accordingly, taking out the reference to the Mobile Home Park Residency Act.

Discussion:

- With respect to the language on line 4 of Rule 26.03, Mr. Andreason said that he thought all cases under the unlawful detainer act were against tenants who remained in possession. Judge Blanch mentioned that there is no reason to show up for the immediate occupancy hearing if the tenant has moved out. Mr. Slaugh said that, in some cases, you can have a lot of litigation after that stage. Mr. Hafen asked whether it hurts to have the reference to "remains in possession" in line 4. Mr. Slaugh said he didn't think so. Mr. Andreason said we should make sure it is not redundant. Judge Blanch commented that expedited proceedings apply to the narrow issue of who is going to have the property. Usually, later proceedings concern how much rent is owed, damages, etc. If the tenant has vacated, it doesn't make sense to have the occupancy hearing and require the disclosures in 26.03. Mr. Hafen reminded the committee that it had received substantial input from landlord/tenant attorneys on the changes to Rule

26.03, and noted that the committee did not receive any comments from that group after the proposed rule was sent out.

- Mr. Shea questioned why "remains in possession" was included in the first place. The statutes allow for expedited proceedings under both acts in particular circumstances, as he recalls. Perhaps, however, the mobile home act does not provide for expedited proceedings. Ms. Sylvester said that the Mobile Home Park Residency Act has many procedures within it, including the option to sue under that act or under the unlawful detainer statute.

- Mr. Shea agreed that the occupancy hearing occurs only if a tenant remains in possession, but he thinks the "remains in possession" phrase should modify only the occupancy hearing. The disclosures in the rule include other things that would be relevant even if the tenant doesn't remain in possession. Therefore, he suggests using the phrase to modify subparagraphs (b)(2) and (c). Mr. Hafen and Ms. Sylvester questioned whether the phrase is needed at all. Ms. Mettler likewise commented that, by definition, it would seem that the tenant is remaining in possession. Ms. Anderson agreed, and believes the phrase is redundant. Judge Blanch said that he could envision a circumstance where the tenant gave up possession but wants it back. In that case, the disclosure would be needed. Mr. Shea commented that if the tenant is not in possession, then the request won't be made. Based on the committee's comment, Mr. Hafen suggested that the phrase "and remains in possession" be removed. Judge Blanch agreed.

- Mr. Hafen asked if anyone was concerned about removing the reference to the mobile home act. Mr. Holmberg commented that no one had raised that as an issue when the landlord/tenant attorneys attended the committee meetings about the rule. Ms. Sylvester noted that Axel Trumbo is from Utah Legal Services. Judge Furse asked whether we would be creating an ambiguity as to whether the rule applies to the mobile home setting if it is taken out of the rule, or whether the rule does not apply in that setting. Ms. Sylvester said that in the mobile home setting, a landlord may proceed under that act or under the unlawful detainer statute. Mr. Holmberg said that mobile home folks would probably want the expedited initial disclosures under Rule 26.03. Ms. Sylvester said that the mobile home act was quite specific. Ms. Anderson commented that expedited procedures are also available under the mobile home act. Mr. Hafen said that providing expedited disclosures should help the mobile home folks if those aren't provided for in the act. Judge Blanch commented that if mobile home folks want the expedited disclosures, they can use the unlawful detainer statute to trigger them. Lincoln Davies confirmed that the mobile home act is clear that the plaintiff can pick whether to use the mobile home act procedures or the unlawful detainer statute. Mr. Hafen questioned whether it creates confusion to keep the reference to the mobile home act in the rule. Mr. Davies said that he thinks it does.

- Mr. Hafen asked whether anyone wanted to remove the reference to the mobile home act. Judge Blanch asked why a landlord wouldn't choose to use the mobile home statute. Would it be to avoid the disclosure requirements? Mr. Shea said that there is no occupancy hearing in the mobile home act—only in the unlawful detainer statute. The disclosures in Rule 26.03 are supposed to apply to things other than just the occupancy hearing. Therefore, if an occupancy hearing is held under the unlawful detainer act for a regular apartment, or if it is held as a result of a mobile home landlord proceeding under the unlawful detainer statute, the disclosures will apply. Judge Blanch said that presumably regular discovery would be fine if there is no occupancy hearing; it doesn't make sense to require expedited disclosures in that case because there isn't the urgent question of possession that needs to be addressed. Judge Furse said that

is also true under the unlawful detainer statute if a tenant is no longer in possession. Judge Blanch suggested that perhaps the "remains in possession" phrase should go back in.

- Mr. Hafen asked the committee whether it wanted to reconsider the "remains in possession" issue. Mr. Slaugh said that the nature of an unlawful detainer is that the landlord wants the tenant to have the info. Why not have it apply to any unlawful detainer action, even if possession is no longer issue? Judge Blanch said that perhaps it should apply, but there is no need to expedite the procedure. Mr. Slaugh responded that the disclosures also served the purpose of making sure the landlord had a factual basis for the claims. The committee debated whether to put the requirements in Rule 8 or in a separate disclosure rule, and in his experience, sometimes the complaint itself prompts the tenant to move out. Judge Blanch commented that we aren't going to save people much trouble in most cases because sometimes the tenant leaves when the complaint is filed. The landlord will have already made the disclosures in that event because the tenant was in possession at the time of filing. Paul Stancil commented that he isn't very familiar with these types of cases, but questioned whether it is really true that the urgency of the matter is tied entirely to possession. Mr. Hafen commented that there could be an urgency associated with re-letting the premises to someone else. Prof. Stancil said that possession is important, but perhaps not determinative of the urgency of the disclosures. Judge Furse said that, in practice, she thinks that possession is fairly determinative because the big deal is treble damages from continuing occupancy. Judge Blanch said that's why tenants leave. Judge Furse said she doesn't think anyone is waiting to re-let the property once the tenant moves out. Many times, the landlord just drops the case if the tenant leaves. Judge Blanch said that absolving the landlords of the responsibility of these disclosures when the tenant is not in possession is almost never going to give much comfort because tenants remaining in possession is why landlords file these cases. Mr. Slaugh said that in the rare case where the tenant has moved out and the landlord still filed the action, it won't hurt to require the disclosures because the tenant really ought to have it.

- Mr. Slaugh made a motion that "remains in possession" not be inserted, and that the reference to the Mobile Home Park Residency Act be removed. Prof. Stancil seconded. All approved and the motion carried. With those changes, Mr. Slaugh moved to send this package of rules to the Supreme Court for approval. Mr. Andreason seconded. The motion carried.

IV. Rule 4. Process. [Tab 4] – Lane Gleave, Tim Shea

Mr. Shea reminded the committee that the issue that began the discussion on Rule 4 was subparagraph (d)(3), starting on line 103. Mr. Slaugh prepared a proposed draft, which is a simplified description of what the committee has been discussing. Mr. Shea is not sure whether subparagraph (c)—regarding the acceptance of service by a party—is needed because you can serve an agent, but it does no harm.

Discussion:

- Mr. Slaugh said that the reason for an acceptance by an attorney is to clarify that an attorney can accept service on behalf of a minor or an incompetent person, etc. Also, with respect to subparagraph (d), the committee may want to consider whether lines 104-105 should be moved elsewhere or removed, as he does not believe they have any legal impact. Mr. Shea noted that they maintain the principles we've been discussing, namely, that the method of delivery does not matter. The Gleaves' online delivery of the complaint and summons, as long as it produces

a receipt to be filed with court, is adequate and meets the due process requirements of service. Mr. Slaugh said that he opted not to put a default response time in, and just included the requirement that acceptance state the time for response. As an alternative, the rule could provide that the default response time is 21 days unless the response states otherwise. Mr. Shea suggested that, in that event, the rule should say "no less than 21 days." Mr. Hafen suggested adding that to the end of lines 110 and 113—the acceptance shall state the time for response, but the response shall not be less than 21 days from acceptance of service. Mr. Slaugh said that was fine, although he was trying to provide more flexibility by not including a default time. Mr. Hafen said that if the acceptance does not specify the response time, it would not be effective under the rule. Mr. Slaugh agreed, but said that he does not want to mandate 21 days because there are situations where a person will agree to accept service but only if a longer time is given. Mr. Hafen suggested putting a period after lines 109 and 113, and saying that the response shall be due in 21 days unless a longer time is stated. Mr. Slaugh said that would work. Judge Pullan commented that with unlawful detainer actions, the summons can require a response time of much less than 21 days—usually, 3 days. We don't want to cause confusion on that. Ms. Anderson suggested that it simply say unless a different time is stated.

- Mr. Slaugh also suggested that a period be inserted after line 109, that 110 be eliminated, that the same thing be done on the next paragraph, and that the time for a response shall be 21 days unless a different time is stated. Judge Blanch asked whether that simply invites people to put whatever they want. Mr. Andreason responded that it does, by agreement. Mr. Holmberg asked whether shorter response timeframes exist in criminal cases. Judge Blanch said not really. Judge Pullan said in criminal cases, no answer is filed. The defendant just shows up. Mr. Shea asked why the receipt needs to state a response time. Why say anything? Mr. Slaugh said that he did not include a time for response because often times, the responding party will accept service only if additional time is granted. If a default time is included, however, the parties can still agree otherwise. Mr. Shea commented that those agreements are already occurring on a regular basis among represented parties. Judge Blanch responded that the agreement isn't based on the number of days in the summons; it is a separate acceptance.

- Mr. Hafen asked whether the committee should simply put a period after "complaint" on lines 109 and 113, and leave out the response time. Mr. Slaugh said that he thought it would be better to put a response time in line 115, making the response time run from the date of acceptance. Prof. Stancil agreed. Mr. Shea said that is an expression of existing law in other circumstances. Judge Pullan commented that, whatever rule is adopted, it ought to encourage those types of agreements. It promotes efficiency, and it sounds like that is the practice of the bar in any event. Mr. Shea said that he thinks that principle would apply regardless of the method of service. Mr. Slaugh commented that service should be deemed effective on the date of acceptance. We would just be clarifying that, although it may be unnecessary. Judge Blanch said that we don't want to discourage agreements, but he doesn't believe people will misinterpret the rule as discouraging or disallowing those arrangements. Amber Mettler said that she thinks it is necessary; if a plaintiff sends an acceptance form and it is not signed immediately, there could be a question regarding when service was accomplished. Mr. Hafen suggested that, after objections in subparagraph (d)(3)(D), the committee add that service is effective on the date of acceptance.

- Mr. Hafen asked whether Lane Gleave had any comments. Mr. Gleave said his concern is simply that he would like to save the extra trip of attempting to serve a defendant by hand again by allowing that defendant to download the complaint from his website. Mr. Shea said that,

provided the receipt from Mr. Gleave's system meets the minimum qualifications in the rule, service in that manner would be effective. The plaintiff just needs to have something filed with the court that meets the qualifications for proof of service. Mr. Hafen said that is covered by lines 108 and 110, and questioned whether those are sufficient or whether a committee note is needed. Mr. Shea said the rule is platform neutral, so the method of delivery should not matter. The concern, however, is that one judge has already rejected it. Mr. Slaugh commented that if we are trying to draft the rule to reflect current practice, he has never seen a summons in a case of acceptance. Under the new rule, the defendant will receive something that says the response is due in 21 days; the new rule requires a summons.

- Mr. Hafen then restated Mr. Slaugh's prior motion: To send the rule out for comment as drafted, with a period after the word "complaint" on line 109, with the removal of line 110, with a period after "complaint" on line 113, with the deletion of the rest, and then before "filing" on line 115, add that service is effective on the day of the acceptance. Mr. Andreason seconded the motion. Judge Furse requested further discussion. Lines 114-115 provide that a person who accepts service retains all defenses, but at the same time, we are saying that the person is waiving service. Ms. Anderson suggested saying that the acceptance is with respect to service of process. Judge Blanch said that the defendant accepts service but retains the right to argue the summons was defective. Mr. Shea said that nothing is waived, and that the retention of all defenses is the better policy. Ms. Anderson said that lack of personal jurisdiction absolutely is not waived. Judge Furse said that she believes a defendant is waiving service of process defenses by accepting service, but not other defenses. Ms. Anderson commented that it would be difficult to accept service and then argue that service was defective. Mr. Shea said the argument is not waived, but the defendant would lose. Judge Furse responded that that's a waste; by accepting service, the defendant waives a Rule 12(b)(4) motion. Why shouldn't that be in the rule? She suggested adding "except for adequacy of service" on line 115. Judge Pullan questioned whether a Rule 12(b)(4) motion would never be legally supportable following acceptance of service. What if the person accepting service was not authorized by the client? Mr. Andreason asked whether, in that situation, service was effective. Ms. Anderson commented that it could raise agency questions in the context of organizational clients. Mr. Slaugh said there could be a contract question with respect to whether there was a valid signature on the acceptance. Judge Blanch said that, if the language Judge Furse suggested is not added, the concern is really about someone accepting service and then filing a motion to dismiss on that basis. The motion would most likely be denied, and fees probably awarded. He doesn't believe it is a practical concern. His inclination is not to go down a road of carving anything out. Judge Baxter noted that he has only seen that kind of argument from constitutionalists. Mr. Holmberg commented that the federal rule provides that you do not waive any objection to personal jurisdiction or venue. Mr. Andreason said that he believes it is internally inconsistent for the rule to say that you can accept service but that you don't waive any defenses.

- Mr. Hafen asked whether line 150 should say "summons and complaint." Mr. Slaugh said that it probably makes sense to put "complaint" back in to facilitate electronic service. Mr. Hafen said he would make that part of Mr. Slaugh's motion, with Judge Furse's motion to amend Mr. Slaugh's motion to add "except for adequacy of service" to line 115. Prof. Stancil and Mr. Andreason seconded the motion. Judge Pullan opposed the motion, but all others voted in favor. The motion passed.

- Mr. Shea suggested that, in line 112, the phrase "on behalf of a party" be changed to "on behalf of a client." Mr. Hafen asked if anyone had a problem with making that change. Mr. Andreason suggested that perhaps it be changed to "attorney's client."

- Judge Furse asked whether a comment should be added to make clear that various forms of electronic service, accomplished either through third party providers or by agreement, fall under the acceptance of service subparagraph. Mr. Andreason agreed that a comment is a good idea. Mr. Hafen asked if the committee could come up with language for the comment during the meeting, and various committee members offered suggestions. With the committee's comments, Mr. Shea suggested that Ms. Sylvester prepare a proposal for the comment and then email it to the committee for consideration. Mr. Hafen confirmed that Rule 4 has been approved to send out for comment, subject to the comment that Ms. Sylvester will prepare.

V. Rule 35. Physical and mental examination of persons. [Tab 5]

Mr. Hafen tabled discussion on Rule 35 until next month.

VI. Review of changes to federal rules of civil procedure. [Tab 6] – Paul Stancil

Mr. Stancil identified the four categories his subcommittee on the federal rule changes had discussed: Things we don't want, things we don't need, things we might want to look at, and things to put on the agenda for consideration.

First, they didn't want to change Rule 4. The change to the time for service makes more sense at the federal level than the state level. We don't have a Rule 16 conference. And the state is implementing a pilot project with respect to bigger, complex cases, so we should see how that goes. There was less general consensus with respect to early requests for production. The new federal rule 26(b)(2) permits Rule 34 requests to be served within 21 days after complaint is filed, and considered served on the day of the Rule 26(f) conference. Under the old rule, they could not be served at all until the Rule 26(f) conference. Prof. Stancil is not a big fan of these early production requests. It might make life easier for a judge, but it makes life more challenging for defendants. Regardless of how long you get to respond to the requests, in a big document case, a defendant is going to feel the pressure of responding as soon as the requests are served. He would like to see how the federal rule plays out before it is adopted by the state court.

Discussion:

- Judge Furse commented that she believes the early requests are useful because people are more informed about what the other side is seeking when they have their Rule 26(a)(1) conference. The defendants have had an opportunity by then to talk with their IT people and other issue-specific people to get a handle on document-related issues.

- Judge Blanch noted that there is no Rule 26(f) conference in state court anymore, so the service date would have to be triggered another way. Judge Pullan asked if you can address the issue of the clock running at the Rule 26 conference. In document intensive cases, he thinks the purpose of the conference is to manage discovery in reasonable ways, and perhaps the judge could be involved. In ESI cases, knowing what the parties are really after is very helpful for the initial conference. Mr. Hafen commented that the state court doesn't have either a Rule 16 or a Rule 26 conference, but perhaps it could be worked in to Tier 3 cases through the pilot program.

Judge Pullan noted that he is in the pilot program, and he would really like to have the parties have a good sense for what documents they need before they come in to talk to him. Mr. Hafen said it is worth putting on the list of things to address in the future, and potentially inserting it into the pilot program. Ms. Mettler said that under our state rules, Rule 26 disclosures are quite serious. She questioned why we would want to get out ahead of those with an initial set of document requests. Prof. Stancil asked about initial disclosures under the federal rules, and Judge Blanch responded that they are rather cursory, as the state initial disclosures used to be. Mr. Hafen suggested that early Rule 34 requests for production be put on the list for consideration.

With respect to Rule 34, Prof. Stancil reported that the subcommittee agreed the federal changes were worth exploring. The amendment will require particularity when stating objections to document requests, including whether responsive documents are being withheld based on the objections.

Discussion:

- Mr. Hafen commented that that is a good practice, and suggested that Ms. Sylvester add it to the list for consideration. Mr. Andreason and Ms. Anderson commented that they liked the amendment as well.

As to Rule 37, Prof. Stancil indicated that the subcommittee would like to follow it and see how the federal courts address it. In a nutshell, the amendment limits what judges can impose as sanctions for failure to preserve ESI, rejecting part of the *Zubulake* opinion from the SDNY. The sanctions can be imposed only after a finding of some level of culpability well above negligence. Prof. Stancil said it is worth looking at.

Discussion:

- Mr. Hafen said that it sounds like a lower priority. Judge Furse commented that her recollection is Utah case law is not clear on the standards for spoliation. Knowing what the risks are when determining how much to spend on preservation would be a good thing. If it is appropriate for our committee to clarify that, we should.

- Judge Pullan said that if he were to pick one change in the federal rule that we should look at substantively, it would be Rule 37(e). There was a lot of careful discussion on that in the federal rules committee, he was impressed with the scholarship behind it, and he believes it would be helpful in Utah. We are retaining so much information and its loss through negligence is almost inevitable. We should definitely look at it and it should be a high priority. Ms. Sylvester said she would make it a high priority.

Prof. Stancil reported that the rest of the changes to the federal rules were things like proportionality; we don't need to make those changes because the state rules have already adopted something like it. Mr. Hafen thanked the subcommittee for their work. Ms. Sylvester confirmed that Rules 34 and 37 would be added to the list for future consideration.

VII. Rule 7A. Motion for order to show cause. [Tab 7] – Nancy Sylvester

Mr. Shea has proposed that motions for order to show cause be covered by a new civil procedure rule, Rule 7A, rather than the Judicial Code of Administration. Judge Blanch reported that 80% of his calendar is criminal. He issues orders to show cause regarding probation violations all the time, and many criminal lawyers don't know that the civil rules apply. There is already a statutory procedure in place for probation violations—pretty much the same stuff that is in the rule. He said we need to think about whether Rule 7A should apply only to domestic cases on the civil side, or if we are trying to supplement/replicate stuff for criminal matters. If we leave the criminal matters to statute, perhaps we should specifically note that in Rule 7A to avoid confusion. Ms. Sylvester will put something together.

VIII. Continuation of discussion on Rule 4.

Judge Furse raised the question that had been raised at the last meeting regarding the time for service under Rule 4. Mr. Holmberg pointed to lines 86-92, and reported that he had sent Ms. Sylvester some proposed language, which she improved upon, and the new lines are what they ended up with. The amendments bring the state of Utah and its agencies under one rule, and then all other public entities under another rule. It is now consistent with the notice of claim statute.

Discussion:

- Mr. Hafen said that if we are going to further change Rule 4, we should do it now. Mr. Holmberg said he believes Judge Furse's concern to be that the second of the two subsections in lines 86-92 should also include "and any other person or agency required by statute to be served." In Judge Furse's experience working for Salt Lake City, the city was governed by statute and didn't fall under (J); it fell under (K) as a public body. Trying to serve a member of the governing board would not actually effect service.

- Mr. Slaugh commented that the statute identifies who must be served, and wondered why the rule doesn't simply refer to the statute. Judge Furse said the rule is also addressing other entities. Mr. Slaugh asked what entities would not have a listing with the Department of Commerce. Mr. Hafen asked if the rule should refer people to the website. Mr. Slaugh suggested that would give more clarity on who needs to be served. He asked if the city actually falls under (K). Ms. Sylvester responded that it does. Ms. Anderson asked if all of the agencies, etc., in the rule are listed with the Department of Commerce. Judge Furse responded that she knows they are required to be by statute; the governmental immunity statute requires each entity to provide its name, address, etc., to the Department of Commerce. Ms. Anderson asked whether the "required by statute" language should be added to the rule. That was Judge Furse's suggestion as well. She commented that the rule should highlight that there is a governing statute. Mr. Slaugh suggested that the rule adopt the language from line 88 that you serve the person required by statute, or if no method is specified, you may serve a member of the governing board.

- Prof. Stancil noted that the way subsection (d)(1)(K) is written, it doesn't have to be a Utah public body. It probably needs to be tied to the state, as he assumes it is talking about political subdivisions of the state of Utah. Judge Furse said that it might make sense not to tie it to the state; she thinks it is supposed to be a more general category.

- Ms. Mettler questioned why Salt Lake City wouldn't fall under (d)(1)(F). It doesn't say anything about a statute. Judge Furse said the same was true of (G) and (H)—no statute is mentioned. Mr. Holmberg commented that the notice of claim statute includes (A) through (G), and specifies under each one. He agrees, however, with Judge Furse's position.

- Mr. Hafen asked whether anything needs to be added to lines 90-92. Mr. Holmberg said he thinks we should. Have it read that by delivering the summons and complaint to: "any person or agency required by statute to be served, or in the absence of controlling statute," and then continue on. Judge Furse asked whether it made sense to add "or by statute" to the other ones? Mr. Slaugh said that the database just gives you who the person is. Mr. Hafen responded that we are not referring people to that, we are simply specifying it in the rule. Judge Furse sees a risk: We don't change the rules that often, but the legislature changes the governmental immunity statute quite often. With subsections (F), (G), (H), (I), and (K), she thinks we should have "or by statute" because all of them are governed by statute. Mr. Holmberg asked whether they should take another stab at the language. Judge Furse said that she thought we could send the rule out with the changes she just mentioned. Ms. Anderson so moved, Mr. Holmberg seconded, and all voted in favor. The motion carried.

IX. Adjournment.

The meeting adjourned at 6:02 pm. The next meeting will be held on April 27, 2016 at 4:00pm at the Administrative Office of the Courts, Level 3.