UTAH SUPREME COURT ADVISORY COMMITTEE ON RULES OF CIVIL PROCEDURE

Meeting Minutes – November 16, 2016

PRESENT: Jonathan Hafen, Judge John Baxter, Paul Stancil, Amber Mettler, Judge Kate Toomey, Judge Andrew Stone, James Hunnicutt, Rod Andreason, Dawn Hautamaki, Leslie Slaugh, Terri McIntosh, Kent Holmberg, Trystan Smith, Judge James Blanch

TELEPHONE: Judge Derek Pullan

ABSENT: Lincoln Davies, Romaine Marshall, Barbara Townsend, Heather Sneddon

STAFF: Nancy Sylvester, Lauren Hosler

GUESTS: Linda Jones

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(1) WELCOME, APPROVAL OF MINUTES, REPORT FROM MEETING WITH UTAH SUPREME COURT

Chair Jonathan Hafen welcomed the committee and guests, and presented a summary of his last meeting with the Utah Supreme Court.

Judge Toomey moved to approve the minutes from the October 16, 2016 meeting, as amended; James Hunnicutt seconded. The motion was approved unanimously.

(2) RULE 5. INMATE MAILBOX RULE

Linda Jones presented on the proposed inmate mailbox rule. Ms. Jones explained the history and origin of the proposed amendment's Utah Rule of Appellate Procedure ("URAP") corollary—URAP 21(f). The proposed amendment and URAP 21(f) are premised on the fact that inmates do not have control over the time period between when a document is placed in the prison mail system and when the document is actually mailed. Mailing can be lengthy due to necessary screening procedures and inmates also do not have regular access to phone or internet to check the filing status of documents. Ms. Jones explained that URAP 21(f) was adopted in approximately 1997 in response to *State v. Parker*, 936 P.2d 1118 (Utah Ct. App. 1997). Ms. Jones noted that the United States Supreme Court has interpreted FRAP 4(a)(1) in a manner that is consistent with URAP 21(f) and the proposed amendment. *See Houston v. Lack*, 487 U.S. 266 (1988). Ms. Jones further noted that because URAP requires parties to also follow the Utah Rules of Civil Procedure, the proposed amendment furthers the goal of consistency between the appellate and district court rules of procedure.

Judge Blanch spoke about his recommendation that the proposed amendment be adopted within URCP 5 (Service and filing of pleadings and other papers), and that he sees no reason why the proposed amendment should not be adopted.

The committee discussed the proposed amendment, including whether the proposed amendment necessitated additional time to respond to any filings made subject to the proposed rule and whether the proposed amendment should be moved to any existing paragraphs within Rule 5. Ultimately, the committee reached a consensus that the proposed amendment be modified as follows and be added to the end of Rule 5 as a new subparagraph (g):

> **(g) Filing by inmate.** Pleadings and papers filed by an inmate confined in an institution are timely if they are deposited in the institution's internal mail system on or before the last day for filing. Timely deposit may be shown by a notarized statement or written declaration setting forth the date of deposit and stating that first-class postage has been prepaid. Response time will be calculated from the date the papers are received by the court.

Judge Toomey moved to approve the amendment as proposed above and send the proposed amendment out for public comment; Kent Holmberg seconded the motion. The committee approved the motion unanimously.

(3) RULE 84. FORMS. (REPEAL)

Nancy Sylvester presented on the Utah Supreme Court's recommendation that the committee consider repealing Rule 84 in light of the Management Committee of the Utah Judicial Council's recent decision to create a standing committee on court forms. Additionally, Ms. Sylvester noted that the current language of Rule 84 is problematic because the forms were never reviewed by the Utah Supreme Court for sufficiency.

The committee discussed timing issues surrounding the proposed repeal of Rule 84. Leslie Slaugh noted that Rule 45 also refers to "court approved" forms, and added that repeal of Rule 84 without explanation about the new standing committee could create confusion among practitioners. Ms. Sylvester said she anticipated that both the new forms standing committee rule and Rule 84 would circulate for comment simultaneously.

The committee reached a consensus to repeal Rules 84. Mr. Slaugh moved to adopt the proposal and send it out for public comment; Judge Toomey seconded. The motion passed unanimously.

Mr. Slaugh also moved to amend Rule 45 to replace "court approved subpoena form" with "approved subpoena form;" Judge Stone seconded the motion. The committee unanimously approved the motion.

(4) FRCP Rule 37(e). Failure to Preserve ESI.

Paul Stancil and Judge Pullan presented on the proposed amendment to Rule 37(e), which was prompted by the recent changes to FRCP 37(e). The federal rule changes limit the sanctions available to the court in connection with a party's failure to preserve Electronically Stored Information ("ESI"). "Death penalty" sanctions (adverse inference instructions/presumptions or dismissal or default judgment) are no longer permitted for failure to preserve ESI absent a finding of "intent to deprive another party of the information's use in the litigation." Judge Pullan explained the issue is one of inherent authority of the courts. The committee then discussed the interplay between judges' inherent authority, automated destruction of ESI and document retention policies, the steps required to destroy paper documents.

Judge Blanch reminded the committee of the guiding principal of consistency, which includes that the state rules be consistent with the federal rules. Judge Pullan read from the committee note on the recent amendment to FRCP 37:

> Adverse-inference instructions were developed on the premise that a party's intentional loss or destruction of evidence to prevent its use in litigation gives rise to a reasonable inference that the evidence was unfavorable to the party responsible for loss or destruction of the evidence. Negligent or even grossly negligent behavior does not logically support that inference. Information lost through negligence may have been favorable to either party, including the party that lost it, and inferring that it was unfavorable to that party may tip the balance at trial in ways the lost information never would have. The better rule for the negligent or grossly negligent loss of electronically stored information is to preserve a broad range of measures to cure prejudice caused by its loss, but to limit the most severe measures to instances of intentional loss or destruction.

The committee further discussed issues of lawyers arguing to a jury about missing documents and whether/how the proposed rule would impact a judge's ability to give curative jury instructions under those circumstances. Judge Stone reiterated his belief that judges should not be restricted from instructing the factfinder that it "may" consider certain missing evidence. The committee discussed a variety of jury instructions that could be given under these circumstances. Judge Stone also raised the issue of difficulty proving intentional destruction. The committee discussed whether you can infer intent from a preponderance of the evidence or whether it requires clear and convincing evidence.

Judge Pullan reiterated the importance of keeping the state rules close to the federal rules. He noted that case law develops very quickly in the federal courts on discovery issues, in stark contrast to Utah appellate authority on discovery issues, citing proportionality decisions as an example.

Mr. Hafen noted that the committee has always been reluctant to remove or limit judicial discretion in the rules, and suggested that Mr. Stancil further revise the proposal to better preserve judicial discretion and that the committee revisit the proposal at a later date.

(5) Rule 60. *Logue v. Court of Appeals*, 2016 UT 44; discussion only.

Ms. Sylvester presented the issue, which is one of the interplay among the criminal, civil, and appellate rules of civil procedure that results in litigants being precluded from raising potentially meritorious claims. Mr. Hafen and Ms. Sylvester have a meeting scheduled with the Utah Supreme Court to discuss this issue, and anticipate that the Court will form a subcommittee to further explore it. Mr. Hafen solicited the committee for volunteers for the subcommittee, and Mr. Holmberg volunteered.

Mr. Hafen also noted that the committee has been asked to remove language to the effect of "the committee has determined" from the advisory committee notes, and replace it with language similar to "the committee believes."

(6) ADJOURNMENT.

The remaining matters were deferred, and the committee adjourned at 5:50pm. The next meeting will be held on January 25, 2017 at 4:00pm at the Administrative Office of the Courts, Level 3.