UTAH SUPREME COURT ADVISORY COMMITTEE ON RULES OF CIVIL PROCEDURE

Meeting Minutes – May 24, 2017

PRESENT: Chair Jonathan Hafen, Judge Andrew Stone, Judge James Blanch, Judge Kent Holmberg, Judge John Baxter, Paul Stancil, Terri McIntosh, Barbara Townsend, James Hunnicutt, Lincoln Davies, Leslie Slaugh, Heather Sneddon, Rod Andreason, Trystan Smith

ABSENT: Judge Laura Scott, Judge Kate Toomey, Justin Toth, Sammi Anderson, Amber Mettler, Dawn Hautamaki

STAFF: Nancy Sylvester, Lauren Hosler

GUESTS: Russ Pearson (for Dawn Hautamaki)

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(1) WELCOME, APPROVAL OF MINUTES

Chair Jonathan Hafen welcomed the committee. Heather Sneddon suggested one change to the April, 2017 meeting minutes. Ms. Sneddon then moved to approve the minutes as amended; Rod Andreason seconded. The motion was approved unanimously.

(2) PRISONER MAILBOX RULE: CIVIL RULE 6 AND APPELLATE RULE 21, AND CIVIL RULE 45

Nancy Sylvester and Judge James Blanch provided an update based on their meeting with the Advisory Committee on the Utah Rules of Appellate Procedure. The Committee on Rules of Appellate Procedure is in favor of adopting the proposed changes to Rule 6 with their suggested language regarding more precisely defining what an "inmate" is, contemporaneously filed declarations, and changing "and" to "or" on the legal mail requirement.

With respect to the proposed changes to Rule 6, the committee discussed removing the proposed language on line 69 that reads "plus any time added under paragraph (b)." The committee also corrected line 70 of proposed (e)(3) to refer to paragraph (e)(2) instead of (d)(1). The committee then changed the following language of proposed (e)(2) from "… contemporaneously filed notarized statement or written declaration setting forth …" to "… contemporaneously filed written declaration or notarized statement setting forth …" The committee discussed the definition of inmate in proposed Rule 6(e)(1) and the meaning of legal confinement and agreed with the proposed language. The committee agreed with the remaining proposed changes to Rule 6. The committee also agreed to the language in the proposed draft form for the declaration of inmate filing.

With respect to the proposed changes to Rule 45, the committee proposed changing "as that term is defined in Rule 6(e)(1)" to "as defined in Rule 6(e)(1)."

Leslie Slaugh moved to send the proposed amendments to Rules 6 and 45, with the foregoing changes, back to the Utah Supreme Court for consideration and then out for additional public comment; James Hunnicutt seconded. The motion was approved unanimously.

(3) HB 376: POTENTIAL AMENDMENTS TO RULE 26.3 AND RULE 6.

Mr. Slaugh provided a summary of recent legislative changes to Utah Code section 78B-6-810, and the potential need for changes to Rule 26.3 as a result.

The committee proposed changing the language in paragraphs (b)(2) and (c) from "occupancy hearing" to "evidentiary hearing" and removing the language "to determine occupancy" in those paragraphs. The committee also proposed removing the reference to commercial tenants in paragraph (a). Ms. Sneddon moved to send the foregoing proposed change to the Utah Supreme Court for consideration; Mr. Andreason seconded the motion. The committee approved the motion unanimously.

(4) RULE 37 AND ESI: DISCUSSION PERIOD REVIEW

Paul Stancil presented a summary of the public comments submitted on the prior proposed changes. The committee discussed the proposed changes again at length. Ultimately the committee decided to send the following three options to the Utah Supreme Court with a message indicating that Option 3 yielded a majority, but not unanimous, vote from the committee:

Option 1: No amendments at all to Rule 37 (i.e., not adopting Federal Rule 37(e)).

Option 2: Adopt the federal amendments to Rule 37(e) with the following changes:

1. Remove "may or" from proposed (e)(1)(B)(2) (Federal Rule 37(e)(2)(B)) for it to read "instruct the jury that it must presume the information was unfavorable to the party;"
2. Add "including, in appropriate circumstances, permitting the factfinder to infer that the lost information was unfavorable to the party" after "to cure the prejudice" to proposed (e)(1)(A); and
3. Remove (e)(1)(B)(1) (Federal Rule 37(e)(2)(A)) and renumber (e)(1)(B)(2) and (3) to (e)(1)(B)(1) and (2), respectively.
4. Remove what had become (e)(1)(C), but was a holdover from current Utah Rule 37 ("Absent exceptional circumstances, a court may not impose sanctions under these rules on a party for failing to provide electronically stored information lost as a result of the routine, good-faith operation of an electronic information system.").

Option 3: Adopt the proposed amendments to Rule 37 with the following change: remove what had become (e)(1)(C), but was a holdover from current Rule 37 ("Absent exceptional circumstances, a court may not impose sanctions under these rules on a party for failing to provide electronically stored information lost as a result of the routine, good-faith operation

of an electronic information system."). This option is the same as the current version of the corresponding federal rule.

Both Options 2 and 3 would include the following note:

> The 2017 amendments to paragraph (e) merged the 2015 amendments to Federal Rule of Civil Procedure 37(e). The federal amendments "addressed the serious problems resulting from the continued exponential growth in the volume of [electronically stored] information" by providing "measures a court may employ if information that should have been preserved is lost." Fed. R. Civ. P. 37, Advisory Committee Notes, 2015 Amendment. Unlike the federal rule, Utah's Rule 37(e) also addressed non-electronically stored evidence; the committee preserved the language addressing that subject.
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> It is the advisory committee's view that subsection (e) concerns sanctions available for the destruction of electronically stored information and is limited to such sanctions. It does not limit the court's ability to sanction in other circumstances (see e.g., 37(b)(7)), and does not bar (1) the parties from litigating the issue of the loss or destruction of electronically stored information before the finder of fact, (2) the finder of fact from making whatever inferences it deems appropriate from the totality of the evidence, or (3) the court from giving general instructions regarding permissible inferences from a failure to produce evidence formerly in a party's possession.
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> Regarding missing evidence instructions, this note represents a departure from the approach articulated in the federal committee's note.

Judge Blanch moved to send the three options, along with the suggested note, to the Utah Supreme Court for consideration. Judge John Baxter seconded the motion; the motion was approved by the committee unanimously.

(5) ADJOURNMENT

The remaining matters were deferred, and the committee adjourned at 5:55 pm. The next meeting will be held on September 27, 2017 at 4:00 pm at the Administrative Office of the Courts, Level 3.