UTAH SUPREME COURT ADVISORY COMMITTEE ON RULES OF CIVIL PROCEDURE

Meeting Minutes – April 24, 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: Rep. Ken Ivory, Steve Johnson, Cathy Dupont, Michael Drechsel

(1) WELCOME AND APPROVAL OF MINUTES.

Johnathan Hafen welcomed the committee and asked for approval of the minutes. Jim Hunnicutt moved to approve the corrected minutes. Rod Andreason seconded. The motion passed.

(2) DISCUSSION OF RULE 68.

Mr. Hafen introduced Rep. Ken Ivory, as well as the issues surrounding Rule 68. Rep. Ivory described the practice in Nevada, which requires the parties to have a discussion of the merits of their cases early on. In Utah, he found that Offers of Judgment didn't work the same way, particularly for plaintiffs. He spoke with Rep. Brady Brammer, who agreed that there were no practical teeth in Rule 68. He recognized the concern of plaintiffs being pushed into accepting unreasonable offers and that some types of cases would not apply. However, he believes that the Nevada rule could compel the parties to get serious about the merits of their claims, and thus increase efficiency in cases.

Leslie Slaugh opined that the test of this rule is not related to reasonableness; it relates to guessing what a jury will do. He questioned how to protect those parties. He worried the rule rewarded deep pockets, as others could not afford the risk. Rep. Ivory responded that in Nevada the option is for the court to order some of the costs, while others would be a shall. Mr. Slaugh responded that there was discretion but no standards. Rep. Ivory said he found that it did work both ways. Mr. Slaugh asked if there were any rules that were based upon reasonable offers, rather than successful offers. Mr. Slaugh questioned the Nevada approach and has concerns about this rule, as he has seen it used as a strong-arm tactic. He pointed out that even when a judge can decline to award a penalty, generally they do award them. Judge Holmberg pointed out that this changes the economics, as parties do not know the other party's attorney fees. He asked whether the Idaho statute was reviewed before this meeting, which allows for a pre-suit demand, which locks in attorney fees, and can serve as a trap for defendants. Judge Blanch worried that there could be an incentive for low ball offers that are not in good faith. Ms. Vogel asked if this would happen where one party was pro se. Rep. Ivory stated that he hadn't seen it.

Mr. Hunnicutt asked if there was data on whether this policy placed a larger burden on the Court of Appeals. Mr. Hafen asked if this would generally come up early or later in cases in Nevada. Rep. Ivory responded it would happen at both times. Judge Blanch stated that they are not seen often in Utah. He wasn't sure if it was because of the lack of fee shifting, or a cultural question. Rep. Ivory believes culture can be developed with a rule. Mr. Hafen asked how many states have a fee provision. Rep. Ivory stated that Florida may, and he doesn't really know other than Nevada. Susan Vogel questioned why it wasn't used. Bryan Pattison opined that it would be difficult to get clients to move forward with this, as they might think it showed weakness. Judge Blanch opined that it would not be used when attorney fees were included under a statute or contract. Judge Scott agreed that she had not seen it.

Judge Blanch asked whether this was really a policy call for the Legislature: should Utah follow the English rule (the litigation loser pays attorney fees and costs)? Rep. Ivory said he believed that the Nevada rule would allow parties to choose which rule (American or English) to work with. He said that during his time practicing in Nevada, he found that the Nevada rule was best when the other party was not willing to move at all. Judge Blanch asked if there were any statistics on how often the rule is used in Nevada. Rep. Ivory said he did not know, but in his experience it was 30-40% of cases. Mr. Hafen wondered what additional data could be found.

Rep. Ivory noted that another important difference between the Utah and Nevada rules is that under the Nevada rule, the Defendant could move for a dismissal based upon the offer of judgment. Mr. Hafen questioned if there would be legislative pushback for such a large change. Rep. Ivory thought push back would be coming from the Bar, but pointed out that costs are continuing to rise, both for parties and the state.

Rep. Ivory proposed contacting experts for additional information and then bringing this topic back up. Mr. Hafen proposed creating a preliminary report including data on how it could work, which the committee would then bring to the Court. The committee will continue to look into this issue with Rep. Ivory.

(3) LICENSED PARALEGAL PRACTITIONERS AND THE CIVIL RULES.

Steve Johnson and Mr. Hafen introduced the issue of how to bring the rules up to date with respect to Licensed Paralegal Practitioners. Mr. Johnson opined that the committee should be bold in solving this problem. He reported that LPPs could not go to court, but could help people fill out forms in three areas. They would also be able to negotiate with opposing counsel and provide the financial documents as required by Rule 26.1. He believed the committee would need to make changes to that rule. He agreed there were other rules that would need to be changed, particularly with regards to lawyers talking with other lawyers, since lawyers would also now be talking with LPPs as well. He proposed changing the wording to legal professional. Mr. Hafen pointed out that we do not have a definition section of the Rules of Civil Procedure.

Mr. Johnson reported that there were 15 potential LPPs taking the ethics course, with 12 in the family law course. He believes that there could be almost 40 within the first year, particularly as the only other state with this kind of licensing has higher standards. The swearing in will be in October. Mr. Hafen pointed out that this would require around four months to amend the rules.

Ms. Vogel questioned the demographics of the potential LPPs. Mr. Johnson responded that the LPPs were mostly from firms. Judge Holmberg asked if there would be a mentorship program. Mr. Johnson said currently they have some requirements for a number of hours of supervised practice before they can sit for the exam. Mr. Hunnicutt thought it was 500 hours for landlord-tenant or collections work and 1000 hours for family law. He also predicted that the LPPs will sit in the back of court and the client will then need to discuss the question with the LPP, who is not allowed to speak. Mr. Johnson was concerned that lawyers would do things that would require attorneys, as LPPs are limited. Mr. Hafen stated that this would likely result in half unrepresented parties.

Lauren DiFrancesco questioned the scope of what an LPP could do to draft a motion, as there is a form labeled "Motion." Mr. Johnson answered that so long as there was a form, they could fill it out.

Mr. Hafen proposed a subcommittee to go through the rules and evaluate it. James Hunnicutt volunteered to be on the subcommittee. Nancy Sylvester volunteered him to be the chair. Larissa Lee agreed to be on this subcommittee. Mr. Hunnicutt requested that Michael Petrogeorge be

assigned as well, which was agreed to, in addition to a paralegal from his firm who has been involved with the LPP Committee.

(4) COORDINATION OF INTERVENTION RULES: URCP 24, URAP 25A, URCRP 12.

Ms. Sylvester introduced this issue. The Appellate Rules Committee preferred having the term "attorney representing the governmental entity," as it was a more general rule. This appears in Rule 24 at line 65. There may not be an appointed attorney, it could be a contract attorney, so the Committee proposed this change. Mr. Hafen asked how the parties would know who that was. Ms. Sylvester said the parties would be required to find that out. Ms. Lee asked if this would include school boards. Judge Holmberg questioned whether this now made it less clear that one attorney would receive notice, as opposed to potentially many. Mr. Pattison argued that a contract attorney is still considered the city attorney, but would serving them be sufficient?

Mr. Hunnicutt proposed using the language from Rule 4(d)(1)(F)-(K) and referencing back to the rule. Judge Mettler stated that she did not take the view that in criminal cases, the state was informed just because it was a party. Ms. Lee pointed out that the criminal rules were being amended, too. Mr. Slaugh reported that the AG's office was concerned that administrative personnel might not know where to take the notice. However, he believed that contract attorneys would have a similar problem, as they are not really city attorneys, but attorneys who are often hired by a governmental entity. Judge Holmberg approved of referencing Rule 4. Ms. Sylvester expressed concerned that the AG references should remain. Mr. Slaugh proposed leaving the AG references in, but referencing Rule 4 for the rest. Mr. Pattison proposed serving the clerk or recorder. Mr. Slaugh recalled that the state was opposed to incorporating Rule 4, however, Judge Holmberg recalled this was the state, but they are currently not included in the proposed incorporation. He pointed out that we have not received any notice of problems on the municipal level. Mr. Slaugh proposed using the governmental immunity site, as every entity must have a person who can receive notice. Mr. Hafen responded that the Court does not like referring to websites in the rules. He then asked if this language was really a problem that really exists, or if it could be just sent out for comment. Mr. Pattison does not believe that this is a practical problem, as he has never seen this. Mr. Slaugh asked if the rule could state "the person designated to receive a claim." Mr. Hunnicutt proposed that it must provide notice to "the person designated under Rule 4(d)(1)." Mr. Hafen and Judge Holmberg supported this proposal.

Mr. Slaugh proposed changing the "wills" to "must." Ms. Sylvester responded that for references to what the court does, "will" is generally used. Mr. Hafen questioned if the last two sentences should stay. Mr. Slaugh wanted to keep the first in, but cut the second as it was now addressed earlier in the rule. Mr. Hunnicutt and Judge Holmberg proposed changing "municipal attorney" in the second to last sentence to "municipality."

Judge Holmberg moved to send the rule, as it appears below, to the Court, and then out for comment. Mr. Hunnicutt seconded. Motion passed.

Rule 24. Intervention.

(a) Intervention of right. On timely motion, the court must permit anyone to intervene who:

(1) is given an unconditional right to intervene by a statute; or

(2) claims an interest relating to the property or transaction that is the subject of the action, and is so situated that disposing of the action may as a practical matter impair or impede the movant's ability to protect its interest, unless existing parties adequately represent that interest.

(b) Permissive intervention.

(1) In General. On timely motion, the court may permit anyone to intervene who:

(A) is given a conditional right to intervene by a statute; or

(B) has a claim or defense that shares with the main action a common question of law or fact.

(2) By a Government Officer or Agency. On timely motion, the court may permit a federal or state governmental officer or agency to intervene if a party's claim or defense is based on:

(A) a statute or executive order administered by the officer or agency; or

(B) any regulation, order, requirement, or agreement issued or made under the statute or executive order.

(3) Delay or Prejudice. In exercising its discretion, the court must consider whether the intervention will unduly delay or prejudice the adjudication of the original parties' rights.

(c) Notice and Pleading Required. A motion to intervene must be served on the parties as provided in Rule 5. The motion must state the grounds for intervention and set out the claim or defense for which intervention is sought.

(d) Constitutionality of Utah statutes and ordinances.

(d)(1) **Challenges to a statute.** If a party challenges the constitutionality of a Utah statute in an action in which the Attorney General has not appeared, the party raising the question of constitutionality must notify the Attorney General of such fact as described in paragraphs (d)(1)(A), (d)(1)(B), and (d)(1)(C).

(d)(1)(A) **Form and Content**. The notice must (i) be in writing, (ii) be titled "Notice of Constitutional Challenge Under URCP 24(d)," (iii) concisely describe the nature of the challenge, and (iv) include, as an attachment, the pleading, motion, or other paper challenging the constitutionality of the statute.

(d)(1)(B) **Timing**. The party must serve the notice on the Attorney General on or before the date the party files the paper challenging the constitutionality of the statute.

(d)(1)(C) **Service**. The party must serve the notice on the Attorney General by email or, if circumstances prevent service by email, by mail at the address below, and file proof of service with the court.

Email: notices@agutah.gov

Mail:

Office of the Utah Attorney General

Attn: Utah Solicitor General

350 North State Street, Suite 230

P.O. Box 142320

Salt Lake City, Utah 84114-2320

(d)(1)(D) **Attorney General's response to notice.**

(d)(1)(D)(i) Within 14 days after the deadline for the parties to file all papers in response to the constitutional challenge, the Attorney General must file a notice of intent to respond unless the Attorney General determines that a response is unnecessary. The Attorney General may seek up to an additional 7 days' extension of time to file a notice of intent to respond.

(d)(1)(D)(ii) If the Attorney General files a notice of intent to respond within the time permitted by this rule, the court will allow the Attorney General to file a response to the constitutional challenge and participate at oral argument when it is heard.

(d)(1)(D)(iii) Unless the parties stipulate to or the court grants additional time, the Attorney General's response to the constitutional challenge must be filed within 14 days after filing the notice of intent to respond.

(d)(1)(D)(iv) The Attorney General's right to respond to a constitutional challenge under Rule 25A of the Utah Rules of Appellate Procedure is unaffected by the Attorney General's decision not to respond under this rule.

(d)(2) **Challenges to an ordinance**. If a party challenges the constitutionality of a county or municipal ordinance in an action in which the county or municipality has not appeared, the party raising the question of constitutionality must notify the county or municipality by providing notice

to the person identified in Rule 4(d)(1). The procedures for the party challenging the constitutionality of a county or municipal ordinance will be consistent with paragraphs (d)(1)(A), (d)(1)(B), and (d)(1)(C), except that service must be on the individual governmental entity. The procedures for the response by the county or municipality must be consistent with paragraph (d)(1)(D).

(d)(3) **Failure to provide notice.** Failure of a party to provide notice as required by this rule is not a waiver of any constitutional challenge otherwise timely asserted. If a party does not serve a notice as required under paragraphs (d)(1) or (d)(2), the court may postpone the hearing until the party serves the notice.

(5) NEW RULE 7A. MOTION FOR ORDER TO SHOW CAUSE.

Ms. DiFrancesco introduced this issue. The subcommittee tried to move orders to show cause to a one-step process, but opted not to take the order out of the process based on statutory language. The proposed rule would allow for, but not require, a phone conference before the hearing. There is still the process of creating the order, as you could not have contempt without the order coming from the Court, with service, before the hearing. She also stated that on line 11, "party" would be too restrictive, so "person" should be used. Ms. Vogel suggested that lines 16 and 17 should be in the present tense, so it would state "is requesting" the non-moving person be held in contempt. Judge Holmberg pointed out that line 19 should also say "person." Mr. Pattison questioned if the non-party would be a party to the motion, and therefore the word "party" could be used. Mr. Hafen proposed that the term "party" remain.

Judge Mettler questioned how this would interact with Rule 37 with respect to sanctions. Judge Holmberg pointed out there would have to be an order in place, and Ms. DiFrancesco stated that Rule 37 would only apply to parties. Judge Mettler pointed out that the party could proceed under either of these rules, so long as an order was in place. Judge Holmberg stated you would be getting a different order under Rule 37. This made Judge Mettler concerned that discovery disputes could now involve jail. Ms. DiFrancesco stated discovery disputes could not be exempted entirely. She also stated that the timing constraints would mean litigants would not use rule 7a. Mr. Slaugh pointed out that Rule 37 already allowed for contempt for discovery disputes. Ms. Sylvester proposed adding that "this rule does not apply to discovery disputes between the parties under Rule 37." Mr. Slaugh proposed stating that it did not apply to discovery disputes "within the scope of Rule 37." Mr. Hafen questioned what Rule 7A was intended to cover. Mr. Slaugh said that injunctions would be covered. Ms. Vogel said that it would also cover family law.

Mr. Hunnicutt pointed out that the schedule under this rule was consistent with rule 101. This was done because that will be the most likely use. Ms. Vogel pointed out that the rule was also flexible. Judge Mettler asked how the hearing would get on the calendar, as it would not happen without a request for hearing. Judge Holmberg thought that the language following Rule 7 would cover that

requirement. Judge Blanch questioned if it would ever be discussed without a hearing, as without a hearing the briefing schedule would not work. Mr. Slaugh said he did not believe you could hold someone in contempt without a hearing. Ms. DiFrancesco agreed that you could reduce something to a judgment without a hearing, which would also fall under this rule. Mr. Slaugh proposed a rule like in bankruptcy where a hearing would be scheduled, but if the response is not received, the court can strike the hearing and grant the relief.

Mr. Hafen questioned if we would need an advisory committee note, as this was rather new. Mr. Slaugh proposed waiting for comments before adding any notes.

Mr. Slaugh moved to send the rule as below to the Court and for comment. Ms. Lee seconded. The motion passed.

Rule 7A. Motion to enforce order and for sanctions.

(a) Motion. To enforce a court order or to obtain a sanctions order for violation of an order, a party must file a motion to enforce order and for sanctions (if requested), pursuant to the procedures of this rule and Rule 7. The timeframes set forth in this rule rather than those set forth in Rule 7 govern motions to enforce orders and for sanctions. If the motion is to be heard by a commissioner, the motion must also follow the procedures of Rule 101. For purpose of this rule, an order includes a judgment.

(b) Affidavit. The motion must state the title and date of entry of the order that the moving party seeks to enforce. The motion must be verified, or must be accompanied by at least one supporting affidavit that is based on personal knowledge and shows that the affiant is competent to testify on the matters set forth. The verified motion or affidavit must set forth facts that would be admissible in evidence and that would support a finding that the party has violated the order.

(c) Proposed order. The motion must be accompanied by a proposed order to attend hearing, which must:

(c)(1) state the title and date of entry of the order that the moving party seeks to enforce;

(c)(2) state the relief sought by the moving party;

(c)(3) state whether the moving party is requesting that the nonmoving party be held in contempt and, if so, state that the penalties for contempt may include, but are not limited to, a fine of up to $1000 and confinement in jail for up to 30 days;

(c)(4) order the nonmoving party to appear personally or through counsel at a specific date, time and place to explain whether the nonmoving party has violated the order; and

(c)(5) state that no written response is required but is permitted if filed at least 14 days before the hearing, unless the court sets a different time, and that any written response must follow the requirements of Rule 7, and Rule 101 if the hearing will be before a commissioner.

(d) Service of the order. If the court grants the motion and issues an order to attend hearing, the moving party must have the order, the motion, and all supporting affidavits personally served on the nonmoving party in a manner provided in Rule 4 at least 28 days before the hearing. For good cause the court may order that service be made on the nonmoving party's counsel of record in a manner provided in Rule 5. The court may order less than 28 days' notice of the hearing if:

(d)(1) the motion requests an earlier date; and

(d)(2) it clearly appears from specific facts shown by affidavit that immediate and irreparable injury, loss, or damage will result to the moving party if the hearing is not held sooner.

(e) Reply. A reply is not required, but if filed, must be filed at least 7 days before the hearing, unless the court sets a different time.

(f) Hearing. At the hearing the court may receive evidence, hear argument, and rule upon the motion, or may request additional briefing or hearings. The moving party bears the burden of proof on all claims made in the motion. At the court's discretion, the court may convene a telephone conference before the hearing to preliminarily address any issues related to the motion, including whether the court would like to order a briefing schedule other than as set forth in this rule.

(g) Limitations. This rule does not apply to an order to show cause that is issued by the court on its own initiative. A motion to enforce order and for sanctions presented to a court commissioner must also follow Rule 101, including all time limits set forth in Rule 101. This rule applies only in civil actions, and does not apply in criminal cases. This rule does not apply to discovery disputes within the scope of Rule 37.

(h) Orders to show cause. The process set forth in this rule replaces and supersedes the prior order to show cause procedure. An order to attend hearing serves as an order to show cause as that term is used in statute.

(6) RULE 100: COORDINATION BETWEEN THE DISTRICT AND JUVENILE COURTS IN MINOR GUARDIANSHIP CASES.

Ms. Sylvester introduced this issue. The court visitor program found that there were many "whereabout cases" on guardianship cases, but the different courts were not informing one another

when custody decisions were being made in the context of a district court minor guardianship. Mr. Hafen asked if there were any reasons not to accept the proposed rule change. Mr. Slaugh questioned if minor guardianship was a type of custody. However, he still believed this rule accomplished the result. Mr. Hunnicutt believed that minor guardianship was part of child custody, but that if we separated it out adoption would have to be added, and perhaps additional ones such as international parental abduction. He proposed adding adoption and any other similar child custody case.

Ms. Lee questioned the absence of oxford commas.

Mr. Slaugh moved to send the rule as below to the Court and for comment. Mr. Hunnicutt seconded. Motion passed.

Rule 100. Coordination of cases pending in district court and juvenile court.

(a) **Notice to the court.** In a case in which child custody, child support, or parent time is an issue, all parties have a continuing duty to notify the court:

(a)(1) of a case in which a party or the party's child is a party to or the subject of a petition or order involving child support, parent time, or child custody, including minor guardianship, adoption, or any similar child custody case;

(a)(2) of a criminal or delinquency case in which a party or the party's child is a defendant or respondent;

(a)(3) of a protective order case involving a party regardless whether a child of the party is involved.

The notice shall be filed with a party's initial pleading or as soon as practicable after the party becomes aware of the other case. The notice shall include the case caption, file number, and name of the judge or commissioner in the other case.

(b) **Communication among judges and commissioners.** The judge or commissioner assigned to a case in which child support, parent time, or child custody is an issue shall communicate and consult with any other judge or commissioner assigned to any other pending case involving the same issues and the same parties or their children. The objective of the communication is to consider the feasibility of consolidating the cases before one judge or commissioner or of coordinating hearings and orders.

(c) Participation of parties. The judges and commissioners may allow the parties to participate in the communication. If the parties have not participated in the communication, the parties shall be given notice and the opportunity to present facts and arguments before a decision to consolidate the cases.

(d) **Consolidation of cases.**

(d)(1) The court may consolidate cases within a county under Rule 42.

(d)(2) The court may transfer a case to the court of another county with venue or to the court of any county in accordance with Utah Code Section 78B-3-309.

(d)(3) If the district court and juvenile court have concurrent jurisdiction over cases, either court may transfer a case to the other court upon the agreement of the judges or commissioners assigned to the cases.

(e) Judicial reassignment. A judge may hear and determine a case in another court or district upon assignment in accordance with CJA Rule 3-108(3).

(7) ADJOURNMENT.

The committee was reminded that committee notes were due in May, and would be discussed in June, and the committee adjourned at 5:59 pm. The next meeting will be held May 22, 2019 at 4:00 pm.