

**UTAH SUPREME COURT ADVISORY COMMITTEE
ON RULES OF CIVIL PROCEDURE**

Meeting Minutes – October 16, 2019

Committee members & staff	Present	Excused	Appeared by Phone
Jonathan Hafen, Chair		X	
Rod N. Andreason	X		
Judge James T. Blanch		X	
Lauren DiFrancesco	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. Slauch	X		
Trystan B. Smith		X	
Heather M. Sneddon		X	
Paul Stancil	X		
Judge Andrew H. Stone	X		
Justin T. Toth	X		
Susan Vogel	X		
Brooke McKnight	X		
Ash McMurray, Recording Secretary	X		
Nancy Sylvester, Staff	X		

(1) WELCOME AND APPROVAL OF MINUTES

Rod Andreason, acting as chair pro tem, welcomed the committee and asked for approval of the minutes. The minutes were approved unanimously.

(2) PROBATE RULE 26.4

Nancy Sylvester introduced new amendments made to Rule 26.4, which the committee discussed and approved to go on to the Supreme Court. During the discussion, several committee members raised concerns regarding how a respondent's objection made using their preferred means of communication would be memorialized and how other parties would receive a copy of the objection. Noting that specific concerns would become clearer over time and use, the committee determined that notice to the other parties of the objection was sufficient and that the language of the rule should be approved without further amendment. Judge Andrew Stone moved to recommend that the Supreme Court take final action on the rule as drafted below. The motion passed unanimously.

Rule 26.4. Provisions governing disclosure and discovery in contested proceedings under Title 75 of the Utah Code.

- (a) **Scope.** This rule applies to all contested actions arising under Title 75 of the Utah Code.
- (b) **Definition.** A probate dispute is a contested action arising under Title 75 of the Utah Code.
- (c) **Designation of parties, objections, initial disclosures, and discovery.**

(c)(1) **Designation of Parties.** For purposes of Rule 26, the plaintiff in probate proceedings is presumed to be the petitioner in the matter, and the defendant is presumed to be any party ~~filling who has~~ made an objection. Once a probate dispute arises, and based on the facts and circumstances of the case, the court may designate an interested person as plaintiff, defendant, or non-party for purposes of discovery. Only an interested person who has appeared on the record will be treated as a party for purposes of discovery.

(c)(2) **Objection to the petition.**

(c)(2)(A) Any oral objection ~~must be made at a scheduled hearing on the petition and must~~ then be put into writing and filed with the court within 7 days, unless the written objection has been previously filed with the court. The court may for good cause in a guardianship or conservatorship case accept an objection made using the person's preferred means of communication and document the objection in the court record.

(c)(2)(B) A written objection must set forth the grounds for the objection and any supporting authority, must be filed with the court, and must be mailed to the parties named in the petition and

any interested persons, as ~~that term is defined provided~~ in Utah Code § 75-1-201(24), unless the written objection has been previously filed with the court.

(c)(2)(C) An objection made using the person's preferred means of communication under paragraph (c)(2)(A) must also set forth the grounds for the objection and any supporting authority to the extent possible. The court will provide notice of the objection to the parties named in the petition and any interested persons, as that term is defined in Utah Code § 75-1-201.

(c)(2)(D) If the petitioner and objecting party agree to an extension of time to file the written objection, notice of the agreed upon date must be filed with the court.

(c)(2)(E) The court may modify the timing for making an objection in accordance with Rule 6(b).

(c)(2)(F) In the event no written or other objection under paragraph (c)(2)(A) is timely filed, the court will act on the original petition upon the petitioner's filing of a request to submit pursuant to Rule 7 of the Utah Rules of Civil Procedure.

(c)(3) Initial disclosures in guardianship and conservatorship matters.

(c)(3)(A) In addition to the disclosures required by Rule 26(a), and unless included in the petition, the following documents must be served by the party in possession or control of the documents within 14 days after a written objection has been filed:

(c)(3)(A)(i) any document purporting to nominate a guardian or conservator, including a will, trust, power of attorney, or advance healthcare directive, copies of which must be served upon all interested persons; and

(c)(3)(A)(ii) a list of less restrictive alternatives to guardianship or conservatorship that the petitioner has explored and ways in which a guardianship or conservatorship of the respondent may be limited.

This paragraph supersedes Rule 26(a)(2).

(c)(3)(B) The initial disclosure documents must be served on the parties named in the probate petition and the objection and anyone who has requested notice under Title 75 of the Utah Code:

(c)(3)(C) If there is a dispute regarding the validity of an original document, the proponent of the original document must make it available for inspection by any other the contesting party within 14 days of the date of referral to mediation unless the parties agree to a different date.

(c)(3)(D) The court may for good cause modify the content and timing of the disclosures required in this rule or in Rule 26(a) in accordance with Rule 6(b). ~~for any reason justifying departure from these rules.~~

(c)(4) Initial disclosures in all other probate matters.

(c)(4)(A) In addition to the disclosures required by Rule 26(a), and unless included in the petition, the following documents must be served by the party in possession or control of the documents within 14 days after a written objection has been filed: any other document purporting to nominate a

personal representative or trustee after death, including wills, trusts, and any amendments to those documents, copies of which must be served upon all interested persons. This paragraph supersedes Rule 26(a)(2).

(c)(4)(B) The initial disclosure documents must be served on the parties named in the probate petition and the objection and anyone who has requested notice under Title 75 of the Utah Code.

(c)(4)(C) If there is a dispute regarding the validity of an original document, the proponent of the original document must make it available for inspection by the contesting party within 14 days of the date of referral to mediation unless the parties agree to a different date.

(c)(4)(D) The court may for good cause modify the content and timing of the disclosures required in this rule or in Rule 26(a) in accordance with Rule 6(b). ~~for any reason justifying departure from these rules.~~

(c)(5) **Discovery once a probate dispute arises.** Except as provided in this rule or as otherwise ordered by the court, once a probate dispute arises, discovery will proceed pursuant to the Rules of Civil Procedure, including the other provisions of Rule 26.

(d) **Pretrial disclosures under Rule 26(a)(5), objections.** The term "trial" in Rule 26(a)(5)(B) also refers to evidentiary hearings for purposes of this rule. ~~No later than 14 days prior to an evidentiary hearing or trial, the parties must serve the disclosures required by Rule 26(a)(5)(A).~~

(3) RULE 100 APPROVAL

The committee briefly discussed Rule 100, which received no comments during the comment period. Judge Clay Stucki moved to recommend that the Supreme Court take final action on the rule as drafted below. Judge Stone seconded the motion. The motion passed unanimously.

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 custody, child support, or parent time,~~ 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 number₁, 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 custody, child support, or parent time,~~ 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).

(4) RULE 68 DISCUSSION

Judge Stucki introduced Representative Brady Brammer, Charles Stormont, and Doug Cannon and Chuck Conrad from the Utah Association for Justice to discuss the proposed draft Rule 68, which creates new settlement and fee-shifting rules.

Representative Brammer explained that the purpose of the proposed rule is to preserve judicial resources by reducing rising caseloads burdening state district court judges. Accordingly, the proposed rule purports to alleviate caseloads by incentivizing parties to enter settlement agreements earlier in the litigation process. Representative Brammer also explained the rule is not a defense-bar or plaintiffs-bar issue, noting that Nevada has a similar rule and that Nevada's relatively weak plaintiffs' bar supports the rule. Timothy Pack and Justin Toth asked if states with similar rules have seen caseload reductions. Representative Brammer responded that the answer is unclear but that the subcommittee built into the proposed rule a mechanism to track Rule 68 settlement agreements via return of service filings. Judge Stone asked what effect the proposed rule would have on contract enforcement. Representative Brammer responded that if a specific ancillary rule should be codified in statute, he would be happy to hear it. Judge Kent Holmberg and Judge Stucki noted a concern regarding the committee's authority to act without legislative action.

Mr. Stormont, in his capacity as an access-to-justice advocate, recommended that the committee revisit the rule within six months of its implementation to evaluate any unintended consequences and the need to revert to a previous version of the rule. Mr. Stormont also

recommended that the rule be amended to provide parties more time to respond to an offer, which would be especially valuable to unsophisticated and unrepresented parties. Mr. Stormont noted that, if the proposed rule works as intended, access to justice could be increased by enabling more people to access the courts because cases are resolved more quickly.

Mr. Cannon and Mr. Conrad from the Utah Association for Justice raised additional access-to-justice concerns. Specifically, Mr. Cannon expressed concerns that, because plaintiffs are often individuals with minimal assets, the proposed rule would create an imbalance of power in favor of large defendant companies. Mr. Cannon raised further concerns that the rule would disincentivize contingency attorneys from helping clients and thereby reduce access to justice. Judge Stucki noted that wealthy parties who can outspend their adversaries are already favored and that plaintiffs' attorneys in Nevada reported that their version of the proposed rule helped correct the imbalance. Mr. Conrad raised the issue of whether it is good policy to favor judicial economy over the law's traditional balance of relationships that gives "underdogs" the opportunity to win at jury trial. The committee discussed the proposed rule's potential disparate impact depending on the type of case at issue and whether the rule could be crafted to account for any disparate impact. Mr. Cannon and Mr. Conrad expressed that they would like to return with more specific concerns and possible amendments to the proposed draft.

(5) RULE 4 AND ELECTRONIC ACCEPTANCE OF SERVICE

Mr. Toth introduced new proposed amendments to Rule 4, which the committee discussed and approved to go up to the Supreme Court. Mr. Toth explained that the Rule 4 subcommittee simplified the amendments to focus on the original charge of addressing concerns regarding electronic acceptance of service and the potential for deception through misrepresentation. Judge Stucki moved to recommend that the Supreme Court circulate the rule for public comment. Judge Stone and Lauren DiFrancesco seconded the motion. The motion passed unanimously.

Rule 4. Process.

(a) Signing of summons. The summons must be signed and issued by the plaintiff or the plaintiff's attorney. Separate summonses may be signed and issued.

(b) Time of service. Unless the summons and complaint are accepted, a copy of the summons and complaint in an action commenced under Rule 3(a)(1) must be served no later than 120 days after the complaint is filed, unless the court orders a different period under Rule 6. If the summons and complaint are not timely served, the action against the unserved defendant may be dismissed without prejudice on motion of any party or on the court's own initiative.

(c) Contents of summons.

(c)(1) The summons must:

(c)(1)(A) contain the name and address of the court, the names of the parties to the action, and the county in which it is brought;

(c)(1)(B) be directed to the defendant;

(c)(1)(C) state the name, address and telephone number of the plaintiff's attorney, if any, and otherwise the plaintiff's address and telephone number;

(c)(1)(D) state the time within which the defendant is required to answer the complaint in writing;

(c)(1)(E) notify the defendant that in case of failure to answer in writing, judgment by default will be entered against the defendant; and

(c)(1)(F) state either that the complaint is on file with the court or that the complaint will be filed with the court within 10 days after service.

(c)(2) If the action is commenced under Rule 3(a)(2), the summons must also:

(c)(2)(A) state that the defendant need not answer if the complaint is not filed within 10 days after service; and

(c)(2)(B) state the telephone number of the clerk of the court where the defendant may call at least 14 days after service to determine if the complaint has been filed.

(c)(3) If service is by publication, the summons must also briefly state the subject matter and the sum of money or other relief demanded, and that the complaint is on file with the court.

(d) Methods of service. The summons and complaint may be served in any state or judicial district of the United States. Unless service is accepted, service of the summons and complaint must be by one of the following methods:

(d)(1) Personal service. The summons and complaint may be served by any person 18 years of age or older at the time of service and not a party to the action or a party's attorney. If the person to be served refuses to accept a copy of the summons and complaint, service is sufficient if the person serving them states the name of the process and offers to deliver them. Personal service must be made as follows:

(d)(1)(A) Upon any individual other than one covered by paragraphs (d)(1)(B), (d)(1)(C) or (d)(1)(D), by delivering a copy of the summons and complaint to the individual personally, or by leaving them at the individual's dwelling house or usual place of abode with a person of suitable age and discretion who resides there, or by delivering them to an agent authorized by appointment or by law to receive process;

(d)(1)(B) Upon a minor under 14 years old by delivering a copy of the summons and complaint to the minor and also to the minor's father, mother, or guardian or, if none can be found within the state, then to any person having the care and control of the minor, or with whom the minor resides, or by whom the minor is employed;

(d)(1)(C) Upon an individual judicially declared to be incapacitated, of unsound mind, or incapable of conducting the individual's own affairs, by delivering a copy of the summons and complaint to the individual and to the guardian or conservator of the individual if one has been appointed; the individual's legal representative if one has been appointed, and, in the absence of a guardian, conservator, or legal representative, to the person, if any, who has care, custody, or control of the individual;

(d)(1)(D) Upon an individual incarcerated or committed at a facility operated by the state or any of its political subdivisions, by delivering a copy of the summons and complaint to the person who has the care, custody, or control of the individual, or to that person's designee or to the guardian or conservator of the individual if one has been appointed. The person to whom the summons and complaint are delivered must promptly deliver them to the individual;

(d)(1)(E) Upon a corporation not otherwise provided for in this rule, a limited liability company, a partnership, or an unincorporated association subject to suit under a common name, by delivering a copy of the summons and complaint to an officer, a managing or general agent, or other agent authorized by appointment or law to receive process and by also mailing a copy of the summons and complaint to the defendant, if the agent is one authorized by statute to receive process and the statute so requires. If no officer or agent can be found within the state, and the defendant has, or advertises or holds itself out as having, a place of business within the state or elsewhere, or does business within this state or elsewhere, then upon the person in charge of the place of business;

(d)(1)(F) Upon an incorporated city or town, by delivering a copy of the summons and complaint as required by statute, or in the absence of a controlling statute, to the recorder;

(d)(1)(G) Upon a county, by delivering a copy of the summons and complaint as required by statute, or in the absence of a controlling statute, to the county clerk;

(d)(1)(H) Upon a school district or board of education, by delivering a copy of the summons and complaint as required by statute, or in the absence of a controlling statute, to the superintendent or administrator of the board;

(d)(1)(I) Upon an irrigation or drainage district, by delivering a copy of the summons and complaint as required by statute, or in the absence of a controlling statute, to the president or secretary of its board;

(d)(1)(J) Upon the state of Utah or its department or agency by delivering a copy of the summons and complaint to the attorney general and any other person or agency required by statute to be served; and

(d)(1)(K) Upon a public board, commission or body by delivering a copy of the summons and complaint as required by statute, or in the absence of a controlling statute, to any member of its governing board, or to its executive employee or secretary.

(d)(2) Service by mail or commercial courier service.

(d)(2)(A) The summons and complaint may be served upon an individual other than one covered by paragraphs (d)(1)(B) or (d)(1)(C) by mail or commercial courier service in any state or judicial district of the United States provided the defendant signs a document indicating receipt.

(d)(2)(B) The summons and complaint may be served upon an entity covered by paragraphs (d)(1)(E) through (d)(1)(I) by mail or commercial courier service in any state or judicial district of the United States provided defendant's agent authorized by appointment or by law to receive service of process signs a document indicating receipt.

(d)(2)(C) Service by mail or commercial courier service shall be complete on the date the receipt is signed as provided by this rule.

(d)(3) Acceptance of service.

(d)(3)(A) Duty to avoid expenses. All parties have a duty to avoid unnecessary expenses of serving the summons and complaint.

(d)(3)(B) Acceptance of service by party. Unless the person to be served is a minor under 14 years old or an individual judicially declared to be incapacitated, of unsound mind, or incapable of conducting the individual's own affairs, a party may accept service of a summons and complaint by signing a document that acknowledges receipt of the summons and complaint.

(d)(3)(B)(i) Content of proof of electronic acceptance. If acceptance is obtained electronically, the proof of acceptance must demonstrate on its face that the electronic signature is attributable to the party accepting service and was voluntarily executed by the party. The proof of acceptance must demonstrate that the party received readable copies of the summons and complaint prior to signing the acceptance of service.

(d)(3)(B)(ii) Duty to avoid deception. A request to accept service must not be deceptive, including stating or implying that the request to accept service originates with a judicial officer or court.

(d)(3)(C) Acceptance of service by attorney for party. An attorney may accept service of a summons and complaint on behalf of the attorney's client by signing a document that acknowledges receipt of the summons and complaint.

(d)(3)(D) Effect of acceptance, proof of acceptance. A person who accepts service of the summons and complaint retains all defenses and objections, except for adequacy of service. Service is effective on the date of the acceptance. Filing the acceptance of service with the court constitutes proof of service under Rule 4(e).

(d)(4) Service in a foreign country. Service in a foreign country must be made as follows:

(d)(4)(A) by any internationally agreed means reasonably calculated to give notice, such as those means authorized by the Hague Convention on the Service Abroad of Judicial and Extrajudicial Documents;

(d)(4)(B) if there is no internationally agreed means of service or the applicable international agreement allows other means of service, provided that service is reasonably calculated to give notice:

(d)(4)(B)(i) in the manner prescribed by the law of the foreign country for service in that country in an action in any of its courts of general jurisdiction;

(d)(4)(B)(ii) as directed by the foreign authority in response to a letter of request issued by the court; or

(d)(4)(B)(iii) unless prohibited by the law of the foreign country, by delivering a copy of the summons and complaint to the individual personally or by any form of mail requiring a signed receipt, addressed and dispatched by the clerk of the court to the party to be served; or

(d)(4)(C) by other means not prohibited by international agreement as may be directed by the court.

(d)(5) Other service.

(d)(5)(A) If the identity or whereabouts of the person to be served are unknown and cannot be ascertained through reasonable diligence, if service upon all of the individual parties is impracticable under the circumstances, or if there is good cause to believe that the person to be served is avoiding service, the party seeking service may file a motion to allow service by some other means. An affidavit or declaration supporting the motion must set forth the efforts made to identify, locate, and serve the party, or the circumstances that make it impracticable to serve all of the individual parties.

(d)(5)(B) If the motion is granted, the court will order service of the complaint and summons by means reasonably calculated, under all the circumstances, to apprise the named parties of the action. The court's order must specify the content of the process to be served and the event upon which service is complete. Unless service is by publication, a copy of the court's order must be served with the process specified by the court.

(d)(5)(C) If the summons is required to be published, the court, upon the request of the party applying for service by other means, must designate a newspaper of general circulation in the county in which publication is required.

(e) Proof of service.

(e)(1) The person effecting service must file proof of service stating the date, place, and manner of service, including a copy of the summons. If service is made by a person other than by an attorney, sheriff, constable, United States Marshal, or by the sheriff's, constable's or marshal's deputy, the proof of service must be by affidavit or unsworn declaration as described in Title 78B, Chapter 18a, Uniform Unsworn Declarations Act.

(e)(2) Proof of service in a foreign country must be made as prescribed in these rules for service within this state, or by the law of the foreign country, or by order of the court.

(e)(3) When service is made pursuant to paragraph(d)(4)(C), proof of service must include a receipt signed by the addressee or other evidence of delivery to the addressee satisfactory to the court.

(e)(4) Failure to file proof of service does not affect the validity of the service. The court may allow proof of service to be amended.

Advisory Committee Notes

(6) ADJOURNMENT

The remaining items were deferred until the next meeting. The meeting adjourned at 5:58 p.m. The next meeting will be held November 20, 2019.