Agenda

Advisory Committee on Rules of Civil Procedure

June 24, 2020

4:00 to 6:00 p.m.

Via Webex

Welcome and approval of minutes.	Tab 1	Jonathan Hafen, Chair
Legislative standing agenda item Rule 68 Informal Comment Period • Update from meeting with Supreme Court		Jonathan Hafen and Nancy Sylvester
Rules 4, 7, 36, 55, 101: • Continuing discussion from May meeting regarding resolving issues relating to caution and consequence language in the family law context.	Tab 2	Jim Hunnicut and Susan Vogel
URCP 24, URCrP 12, and URAP 25A - comment period closed April 12, 2020 • Review 2 comments	Tab 3	Nancy Sylvester
Rule 83 • Application to appellate and other courts	Tab 4	Larissa Lee
Rules 43 and 4-106 • Discuss moving provisions of 4-106 (proposal to repeal) to Rule 43	Tab 5	Nancy Sylvester
Other business • Volunteers for Litigation Section CLE • Project for Technology Committee: Word limits vs. page limits in Rule 7		Jonathan Hafen, Chair Judge Clay Stucki Trevor Lee

Committee Webpage: http://www.utcourts.gov/committees/civproc/

2020 Meeting Schedule: May 27, 2020, June 24, 2020, September 23, 2020, October 28, 2020, November 18, 2020

Tab 1

May Minutes

Review and approve draft minutes of May 2020 meeting.

UTAH SUPREME COURT ADVISORY COMMITTEE
ON RULES OF CIVIL PROCEDURE

Summary Minutes – May 27, 2020

DUE TO THE COVID-19 PANDEMIC AND STATE OF EMERGENCY
THIS MEETING WAS CONDUCTED ELECTRONICALLY VIA WEBEX

Committee members, staff & guests	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. 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		
Brooke McKnight	X		
Ash McMurray, Recording Secretary	X		
Nancy Sylvester, Staff	X		

(1) WELCOME AND APPROVAL OF MINUTES

Jonathan Hafen welcomed the committee and asked for approval of the minutes. Judge Amber Mettler moved to adopt the minutes. The minutes were approved unanimously.

(2) RULE 68

Judge Clay Stucki led the continued discussion of the proposed amendments to Rule 68 to create new settlement and fee-shifting rules, and introduced Doug Cannon of the Utah Association for Justice (UAJ) and Representative Brady Brammer of the Utah House of Representatives.

Mr. Cannon reported on his communications with Nevada attorneys, including the Nevada Trial Lawyers Association President, regarding Nevada's settlement and fee-shifting rules. Mr. Cannon stated that most of the attorneys with whom he spoke did not have strong feelings regarding Nevada's rules but that a few had negative feelings. Mr. Cannon explained that judges in Nevada have discretion under their rules to award fees but rarely do so and that Utah judges would have less discretion under the committee's proposed amendments. Mr. Cannon further commented that current data are insufficient to show that Nevada's settlement and fee-shifting rules have made a difference and that the UAJ still opposes the proposed amendments. Leslie Slaugh commented that the intended purpose of the proposed amendments is to move cases through the judicial system more expeditiously, and that there may be other and more effective ways to do so than adopting the proposed settlement and fee-shifting rules. Representative Brammer commented that the proposed amendments provide judicial discretion and reminded the committee that he previously provided to the committee a memorandum identifying several states, including Nevada and New Jersey, that have rules similar to the proposed amendments.

Representative Brammer presented briefly on his forthcoming bill related to the proposed amendments to Rule 68, stating that accompanying legislation would be necessary for the settlement and fee-shifting rules to be consistent in federal and state courts. Representative Brammer expressed his desire to coordinate with the judiciary on the bill. Mr. Hafen suggested that the committee could seek permission from the Utah Supreme Court to reach out to the state bar for input on the proposed rule and legislation prior to the 2021 general legislative session. The committee discussed the process and timeline for soliciting comments from the state bar. Representative Brammer expressed willingness to include information regarding the proposed bill.

Judge Kent Holmberg expressed support for soliciting comments from the state bar, but asked the committee if it would be better for the legislature to lead on the issue, noting that the proposed amendments and legislation would implement a major policy shift from the traditional American Rule that could significantly impact litigation. Judge Stucki acknowledged Judge

Holmberg's concerns but suggested that the significance of the policy shift may be a reason for the committee to act sooner to have time to craft the rule carefully.

Susan Vogel commented that the proposed amendments to Rule 68 and Representative Brammer's proposed legislation were brought to the committee as a solution to the problem of overworked judges but that the committee could not make an informed decision because it did not have data before it regarding which cases have caused the problem. Representative Brammer commented that the issue raised by Ms. Vogel had been addressed in some legislative subcommittee meetings and that the data indicate that debt-collection cases contribute significantly to judicial caseloads. Representative Brammer noted that the proposed amendments and legislation may impact debt-collection cases, but that the effect may be limited by contracts, which often have attorney fees clauses. Representative Brammer also commented that insurance defense cases also become burdensome when parties are unwilling to negotiate until late in the litigation process. Representative Brammer acknowledged that the data are imperfect and that the impact of the proposed amendment and legislation cannot be accurately predicted. Mr. Cannon commented that access-to-justice reforms are data driven and agreed with Ms. Vogel that the committee should identify the causes of burdensome judicial caseloads before crafting a solution.

Ms. Vogel expressed concern for self-represented parties, noting that a significant majority of cases involving self-represented parties are resolved on default and that no evidence has been provided to the committee showing that the proposed amendments to Rule 68 would help self-represented parties. Representative Brammer commented that the proposed amendments would uniquely benefit and give leverage to self-represented parties by allowing them to collect equivalent attorney fees. Ms. Vogel recommended that, if the proposed legislation passes, individuals should be educated and provided a calculator to help them calculate equivalent attorney fees.

The committee continued to discuss how to solicit feedback from the state bar on the proposed amendments to Rule 68 and Representative Brammer's forthcoming bill. The committee agreed to continue discussion on these issues at the committee's June meeting.

(3) RULES 4, 7, 8, 36

Mr. Hafen and Nancy Sylvester reported on their communications with the Utah Supreme Court regarding the bilingual notice and caution language proposed for Rules 4, 7, 8, and 36. Mr. Hafen commented that the Supreme Court approved of the proposed notice and caution language and expressed a desire for them to be required uniformly to reduce potential confusion. Ms. Sylvester reported that the Supreme Court agreed that the rules should provide consequences for failure to include the notice and caution language but took issue with the proposed language providing for "equitable relief" as a potential remedy. Mr. Hafen noted that the Supreme Court is comfortable with judicial discretion but wants judges to have clearer guidance on what consequences are available.

The committee discussed what forms of relief should be available when the required notice and caution language are not given. Judge Andrew Stone suggested that failure to include the notice and caution language may be grounds for establishing excusable neglect or issuing a stay but warned against creating a means to circumvent Rule 60(b). Mr. Slaugh suggested providing additional time to respond if the court has not yet ruled on the motion. Judge Amber Mettler suggested adding language providing that a judge may provide other relief not listed. The committee discussed potential language in response to Judge Mettler's suggestion, including "other relief" and "just and appropriate relief"; however, Judge Stone cautioned that the suggestions would be similar to "equitable relief," which the Supreme Court advised against, and could allow a party to circumvent Rule 60(b). Judge Mettler suggested adding language explicitly limiting the ability of any relief granted to circumvent Rule 60(b). Mr. Slaugh commented that relief may be appropriate under rules other than Rule 60(b).

The committee discussed whether the bilingual notice and cautionary language should be included uniformly on every motion. Trystan Smith commented in support of including the notice and caution language on every motion and noted that the committee may need to amend Rule 56. Jim Hunnicutt commented that dispositive motions are rare in family law cases, but that some language related to notice and caution language may be needed in Rules 7 and 101. Mr. Hunnicutt and Ms. Vogel volunteered to review how best to include caution language on motions in the family law context.

(4) RULE 64

Ms. Sylvester reported on her communications with the Board of District Court Judges regarding the committee's proposed amendments to Rule 64. After a brief committee discussion, Judge Stucki moved to send the proposed amendment to the Utah Supreme Court for comment. Justin Toth and Susan Vogel seconded the motion. The motion passed unanimously.

(5) RULES 5, 109

Ms. Sylvester introduced to the committee proposed amendments to Rules 5 and 109 to address an issue raised by some clerks of court concerning Rule 109 injunctions. Ms. Sylvester explained that the proposed amendments address a problem under the current rules and CORIS system where a respondent may receive a Rule 109 injunction prior to receiving a petition and, therefore, before the respondent knows that a case has been filed against the respondent. The committee briefly discussed the proposed amendments and the history of Rule 109. Mr. Hunnicutt moved to send the proposed amendments to the Utah Supreme Court for comment. Judge Stucki seconded the motion. The motion passed unanimously.

(6) RULE 42

Judge Holmberg introduced to the committee Judge Richard Mrazik and proposed amendments to Rule 42 relating to consolidation of cases across district lines and transfer of venue. Judge Holmberg explained that the proposed amendments to transfer of venue were drafted in response to the Utah Supreme Court, which in a recent opinion invited the committee to address change of venue in addition to consolidation. Judge Mrazik commented that the proposed amendment explicitly addresses a judge's authority to transfer. The committee discussed the effect of the proposed amendments and made technical revisions to the language. Rod Andreason moved to send the proposed amendments, as revised by the committee, to the Utah Supreme Court for comment. Mr. Hunnicutt seconded the motion. The motion passed unanimously.

The committee revised the proposed amendments to Rule 42 as follows:

Rule 42. Consolidation; separate trials; venue transfer.

(a) Consolidation. When actions involving a common question of law or fact or arising from the same transaction or occurrence are pending before the court~~, it~~ in one or more judicial districts, the court may, on motion of any party or on the court's own initiative: order that the actions are consolidated in whole or in part, including for discovery, other pretrial matters, a joint hearing or trial ~~of any~~, or for all ~~the matters in issue in the actions; it may order~~purposes; stay any or all of the proceedings in any action subject to the order; transfer any or all further proceedings in the actions ~~consolidated~~to a location in which any of the actions is pending after consulting with the presiding judge of the transferee court; and ~~it may~~ make other such orders concerning proceedings therein as may tend to avoid unnecessary costs or delay.

(a)(1) In determining whether to order consolidation and the appropriate location for the consolidated proceedings, the court may consider, among other matters: the complexity of the actions; the importance of any common question of fact or law to the determination of the actions; the risk of duplicative or inconsistent rulings, orders, or judgments; the relative procedural postures of the actions; the risk that consolidation may unreasonably delay the progress, increase the expense, or complicate the processing of any action; prejudice to any party that far outweighs the overall benefits of consolidation; the convenience of the parties, witnesses, and counsel; and the efficient utilization of judicial resources and the facilities and personnel of the court.

(a)(2) A motion to consolidate ~~cases shall be~~actions may be filed and opposed by any party to any action that is the subject of the motion. The motion shall be filed in and heard by the judge assigned to the first ~~case filed. Notice of a motion to consolidate cases shall be given to~~action filed and served on all parties in each ~~case. The~~ action pursuant to Rule 5. A notice of the motion shall be filed in each action. The movant shall and any party may file in each action notice of the order denying or granting the motion ~~shall be filed in each case.~~.

(a)(~~2~~3) If ~~a motion to consolidate is granted, the~~the court orders consolidation, a new case number ~~of the first case filed shall~~will be used for all subsequent filings ~~{pleadings and papers} and the case shall be heard by the judge assigned to the first case.~~in the consolidated case. The court may direct that specified parties pay the expenses, if any, of consolidation. The presiding judge of the transferee court may assign the consolidated case to another judge for good cause.

(b) Separate trials. The court in furtherance of convenience or to avoid prejudice may order a separate trial of any claim, cross claim, counterclaim, or third party claim, or of any separate issue or of any number of claims, cross claims, counterclaims, third party claims, or issues.

(c) Venue Transfer.

(c)(1) On timely motion of any party, where transfer to a proper venue is available, the court must transfer any action filed in an improper venue.

(c)(2) The court must give substantial deference to a plaintiff's choice of a proper venue. On timely motion of any party, a court may: transfer venue of any action, in whole or in part, to any other venue, including for discovery, other pretrial matters, a joint hearing or trial, or for all purposes; stay any or all of the proceedings in the action; and make other such orders concerning proceedings therein to pursue the interests of justice and avoid unnecessary costs or delay. In determining whether to transfer venue and the appropriate venue for the transferred proceedings, the court may consider, among other factors, whether transfer will: increase the likelihood of a fair and impartial determination in the action; minimize expense or inconvenience to parties, witnesses, or the court; decrease delay; avoid hardship or injustice otherwise caused by venue requirements; and pursue the interests of justice.

(c)(3) The court may direct that specified parties pay the expenses, if any, of transfer.

Note: These changes arise in part due to the Supreme Court's decision in *Davis County v. Purdue Pharma, L.P*, 2020 UT 17.

(7) ADJOURNMENT

The remaining items were deferred until June 24, 2020. The meeting adjourned at 5:47 p.m.

Tab 2

Rules 4, 7, 36, 55, 101

Continue discussion from May meeting regarding resolving issues relating to caution and consequence language in the family law context.

Tab 3

Comment Period Expired

The comment period for amendments to Civil Rule 24, Criminal Rule 12, and Appellate Rule 25A expired April 12. The amendments are intended to better coordinate the provisions addressing constitutional challenges. Two comments were received for the rules.

The comments are well-taken and offer helpful feedback. I have added comment bubbles to the rules.

UTAH COURT RULES – PUBLISHED FOR COMMENT

The Supreme Court and Judicial Council invite comments about amending these rules. To view the proposed amendment, click on the rule number.

To submit a comment or view the comments of others, click on "Continue Reading." To submit a comment, scroll down to the "Leave a Reply" section, and type your comment in the "Comment" field. Type your name and email address in the designated fields and click "Post Comment."

Comments cannot be acknowledged, but all will be considered. Comments are saved to a buffer for review before publication.

Posted: February 27, 2020

Utah Courts

Rules Governing Constitutional Challenges – Comment Period Closed April 12, 2020

The following amendments to **Civil Rule 24, Criminal Rule 12, and Appellate Rule 25A** are intended to better coordinate the provisions addressing constitutional challenges. The amendments do the following:

- Address service on the Attorney General and other governmental entities;
- Broaden the kinds of challenges that may arise;
- Clarify that it is the governmental entity that responds, not the county or municipal attorney (which can be a contracted position in certain jurisdictions);
- Eliminate outdated language in Civil Rule 24 in favor of the updated federal language;
- Clarify in each rule the process and timing for the Attorney General or other governmental entity to respond to a constitutional challenge; and
- Eliminate the requirement in Appellate Rule 25A that the Attorney General state the reasons for declining to file an amicus brief.

To view all comments submitted during a particular comment period, click on the comment deadline date. To view all comments to an amendment, click on the rule number.

CATEGORIES

- -Alternate Dispute Resolution
- -Code of Judicial Administration
- -Code of Judicial Conduct
- -Fourth District Court Local Rules
- -Licensed Paralegal Practitioners Rules of Professional Conduct
- -Rules Governing Licensed Paralegal Practitioner
- -Rules Governing the State Bar

URCP024 – Redline and URCP024 – Clean

URCrP012 – Redline

URAP025A – Redline

EDIT PAGE

This entry was posted in URAP024A, URCP024, URCrP012.

« Rules of Criminal Procedure – Comment Period Closed April 19, 2020

Rule of Appellate Procedure – Comment Period Closed April 12, 2020 »

UTAH COURTS

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2 thoughts on "Rules Governing Constitutional Challenges – Comment Period Closed April 12, 2020"

Bart Kunz
March 2, 2020 at 11:47 am Edit

UCRP024:
(1) I can't tell whether 24(b)(2) is also intended to permit intervention by other governmental entities (i.e., those not considered the state or an agency, like political subdivisions). If so (and I assume that's the intent, given the other changes), I suggest adding language to (b)(2) to make that clear–perhaps something like "state or local government entity" or adding political subdivisions.
(2) I think there's a typo in (d)(3)(A)–it refers to URCrP, but I think it's supposed to be URCP.
(3) In (d)(3)(A) & (d)(3)(B), it seems like "ordinance, or other

- -Rules of Appellate Procedure
- -Rules of Civil Procedure
- -Rules of Criminal Procedure
- -Rules of Evidence
- -Rules of Juvenile Procedure
- -Rules of Professional Conduct
- -Rules of Professional Practice
- -Rules of Small Claims Procedure
- ADR101
- ADR103
- Appendix B
- Appendix F
- CJA Appendix F
- CJA01-0201
- CJA01-0204
- CJA01-0205
- CJA01-0205
- CJA01-0303
- CJA01-0304
- CJA01-0305
- CJA010-1-020
- CJA02-0103
- CJA02-0104
- CJA02-0106.01
- CJA02-0106.02
- CJA02-0106.03
- CJA02-0106.04
- CJA02-0106.05
- CJA02-0204
- CJA02-0206
- CJA02-0208
- CJA02-0208
- CJA02-0212
- CJA03-0101
- CJA03-0102
- CJA03-0103
- CJA03-0103
- CJA03-0104
- CJA03-0106
- CJA03-0106
- CJA03-0107
- CJA03-0109
- CJA03-0111
- CJA03-0111.01
- CJA03-0111.02
- CJA03-0111.03
- CJA03-0111.04
- CJA03-0111.05
- CJA03-0111.06
- CJA03-0112

governmental enactment" should be added to the end of each, otherwise they just address statutes.

URAP025A:
It seems like there should there be an (a)(4.5) regarding service on other governmental entities besides the state, as in the revised URCP024(d)(2). Otherwise, it seems that parties are own their own about how to serve other governmental entities and whether they need to file a proof of service.

William Hains
March 19, 2020 at 10:38 am Edit

URCrP012:
(1) Mr. Kunz's third recommendation in his comments about URCP024 applies equally to Lines 88 and 91 of URCrP012. Consider adding ", ordinance, or other governmental enactment" to the end of each of those lines.
(2) For the sake of consistency, consider adding a bolded subheading with the words "Record of proceedings." or "Record." between "(g)" and "A verbatim record" on Line 54.

Nancy's comments: Both commenters gave helpful suggestions that should be implemented.

- CJA03-0114
- CJA03-0115
- CJA03-0116
- CJA03-0117
- CJA03-0201
- CJA03-0201.02
- CJA03-0202
- CJA03-0301
- CJA03-0302
- CJA03-0304
- CJA03-0304.01
- CJA03-0305
- CJA03-0306
- CJA03-0306.01
- CJA03-0306.02
- CJA03-0306.03
- CJA03-0306.04
- CJA03-0306.05
- CJA03-0401
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- CJA03-0414
- CJA03-0418
- CJA03-0501
- CJA04-0103
- CJA04-0106
- CJA04-0110
- CJA04-0201
- CJA04-0202
- CJA04-0202.01
- CJA04-0202.02
- CJA04-0202.03
- CJA04-0202.04
- CJA04-0202.05
- CJA04-0202.06
- CJA04-0202.07
- CJA04-0202.08
- CJA04-0202.09
- CJA04-0202.10
- CJA04-0202.12
- CJA04-0203
- CJA04-0205
- CJA04-0206
- CJA04-0302
- CJA04-0401
- CJA04-0401.01
- CJA04-0401.02
- CJA04-0401.03
- CJA04-0402

Rule 24. Intervention.

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

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

(a)(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.**

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

(b)(1)(A) is given a conditional right to intervene by a statute; or

(b)(1)(B) has a claim or defense that shares with the main action a common question of law or fact.

(b)(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:

(b)(2)(A) a statute or executive order administered by the officer or agency; or

(b)(2)(B) any regulation, order, requirement, or agreement issued or made under the statute or executive order.

(b)(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 motion 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, ordinances, rules, and other administrative or legislative enactments.**

(d)(1) **Challenges to a statute.** If a party challenges the constitutionality of a statute in an action in which the Attorney General has not appeared, the party raising the question of constitutionality shall notify the Attorney General of such fact by serving the notice on the Attorney General by email or, if circumstances prevent service by email, by mail at the address below. The party shall then 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)(2) **Challenges to an ordinance or other governmental enactment.** If a party challenges the constitutionality of a governmental entity’s ordinance, rule, or other administrative or legislative

enactment in an action in which the governmental entity has not appeared, the party raising the question of constitutionality shall notify the governmental entity of such fact by serving the person identified in Rule 4(d)(1) of the Utah Rules of Civil Procedure. The party shall then file proof of service with the court.

(d)(3) **Notification procedures.**

(d)(3)(A) **Form and content**. The notice shall (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)(3)(B) **Timing**. The party shall serve the notice on the Attorney General or other governmental entity on or before the date the party files the paper challenging the constitutionality of the statute.

(d)(4) **Attorney General's or other governmental entity's response to notice.**

(d)(4)(A) Within 14 days after the deadline for the parties to file all papers in response to the constitutional challenge, the Attorney General or other governmental entity ("responding entity") shall file a notice of intent to respond unless the responding entity determines that a response is unnecessary. The responding entity may seek up to an additional 7 days' extension of time to file a notice of intent to respond.

(d)(4)(B) If the responding entity files a notice of intent to respond within the time permitted by this rule, the court will allow the responding entity to file a response to the constitutional challenge and participate at oral argument when it is heard.

(d)(4)(C) Unless the parties stipulate to or the court grants additional time, the responding entity's response to the constitutional challenge shall be filed within 14 days after filing the notice of intent to respond.

(d)(4)(D) The responding entity's right to respond to a constitutional challenge under Rule 25A of the Utah Rules of Appellate Procedure is unaffected by the responding entity's decision not to respond under this rule.

(d)(5) **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 by this rule, the court may postpone the hearing until the party serves the notice.

Rule 25A. Challenging the constitutionality of a statute, ~~or~~ ordinance, rule, or other administrative or legislative enactment.

(a) **Notice to the Attorney General or ~~the county or municipal attorney~~other governmental entity; penalty for failure to give notice.**

(a)(1) When a party challenges the constitutionality of a statute in an appeal or petition for review in which the Attorney General has not appeared, every party must serve its principal brief and any subsequent brief on the Attorney General on or before the date the brief is filed.

(a)(2) When a party challenges the constitutionality of a governmental entity's ordinance, rule, or other administrative or legislative enactment ~~a county or municipal ordinance~~ in an appeal or petition for review in which the responsible ~~county or municipal~~governmental entity ~~attorney~~ has not appeared, every party must serve its principal brief and any subsequent brief on the governmental entity~~county or municipal attorney~~ on or before the date the brief is filed, and file proof of service with the court.

(a)(3) If an appellee or cross-appellant is the first party to challenge the constitutionality of a statute, ~~or~~ ordinance, rule, or other administrative or legislative enactment, the appellant must serve its principal brief on the Attorney General or ~~the county or municipal~~ other governmental entity no more than 7 days after receiving the appellee's or the cross-appellant's brief and must serve its reply brief on or before the date it is filed.

(a)(4) When service on the Attorney General is necessary under these rules, ~~E~~every party must serve its brief on the Attorney General by email or, if circumstances prevent service by email, by mail at the addresses below, ~~or mail at the following address~~ and ~~must~~ 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

~~320 Utah State Capitol~~

P.O. Box 142320

Salt Lake City, Utah 84114-2320

(a)(5) If a party does not serve a brief as required by this rule and supplemental briefing is ordered as a result of that failure, a court may order that party to pay the costs, expenses, and attorney fees of any other party resulting from that failure.

(b) **Notice by the Attorney General or other governmental entity ~~county or municipal attorney~~; amicus brief.**

(b)(1) ~~Within 14 days after service of the~~ a brief that presents a constitutional challenge~~, and all responsive briefs,~~ When a party raises a constitutional challenge in an appeal in which the Attorney General or responsible governmental entity has not appeared, the Attorney General or other governmental ~~attorney~~ entity ~~will~~ must ~~notify~~ inform the appellate court whether ~~it intends to~~ it will file an amicus brief. When the appellant's principal brief raises the constitutional challenge, the Attorney General or other governmental entity must file its notice within 14 days after service of the appellee's principal brief. When the appellee's or cross-appellant's principal brief raises the constitutional challenge, the Attorney General or other governmental entity must file its notice within 14 days after service of the appellant's or cross-appellant's reply brief. The Attorney General or other governmental ~~attorney~~ entity may seek up to an additional 7 days' extension of time ~~from the court~~to file its notice. ~~Should the Attorney General or other government attorney decline to file an amicus brief, that entity should plainly state the reasons therefor.~~

(b)(2) If the Attorney General or other governmental ~~attorney~~entity declines to file an amicus brief, the briefing schedule is not affected.

(b)(3) If the Attorney General or other governmental ~~attorney~~entity intends to file an amicus brief, that brief ~~will come~~is due 30 days after the notice of intent is filed. ~~Each~~ The Attorney General or other governmental entity may ~~file a motion~~ move to extend that time as provided under Rule 22. ~~On a governmental entity~~The filing of a notice of intent to file an amicus brief~~,~~ vacates the briefing schedule established under Rule 13 ~~is vacated,~~ and the next brief of a party, if the rules allow for a next brief, ~~will come~~is due 30 days after the amicus brief is ~~filed~~served. If the rules do not allow the party that raised the constitutional challenge to file an additional brief without leave of the court after that party receives the amicus brief, that party may move for permission to file a supplemental brief. If leave is granted, the court will state the length of, and due date for, the supplemental brief. The supplemental brief must be limited to

responding to the arguments raised in the amicus brief and comply with all other requirements of rule 24(b). On its own motion, the court may order additional supplemental briefing.

(c) **Call for the views of the Attorney General or other governmental entity ~~county or municipal attorney~~.** Any time a party challenges the constitutionality of a statute, ~~or~~ ordinance, rule, or other administrative or legislative enactment, the appellate court may call for the views of the Attorney General or ~~of the county or municipal attorney~~other governmental entity and set a schedule for filing an amicus brief and supplemental briefs by the parties, if any.

(d) **Participation in oral argument.** If the Attorney General or other governmental entity~~county or municipal attorney~~ files an amicus brief, the Attorney General or other governmental entity~~county or municipal attorney~~ will be permitted to participate at oral argument by timely declaring an intent to participate on the court's oral argument acknowledgment form. ~~.~~

Rule 12. Motions.

(a) **Motions**. An application to the court for an order shall be by motion, which, unless made during a trial or hearing, shall be in writing and in accordance with this rule. A motion shall state succinctly and with particularity the grounds upon which it is made and the relief sought. A motion need not be accompanied by a memorandum unless required by the court.

(b) **Request to Submit for Decision**. If neither party has advised the court of the filing nor requested a hearing, when the time for filing a response to a motion and the reply has passed, either party may file a request to submit the motion for decision. If a written Request to Submit is filed it shall be a separate pleading so captioned. The Request to Submit for Decision shall state the date on which the motion was served, the date the opposing memorandum, if any, was served, the date the reply memorandum, if any, was served, and whether a hearing has been requested. The notification shall contain a certificate of mailing to all parties. If no party files a written Request to Submit, or the motion has not otherwise been brought to the attention of the court, the motion will not be considered submitted for decision.

(c) **Time for filing specified motions**. Any defense, objection or request, including request for rulings on the admissibility of evidence, which is capable of determination without the trial of the general issue may be raised prior to trial by written motion.

(c)(1) The following shall be raised at least 7 days prior to the trial:

(c)(1)(A) defenses and objections based on defects in the indictment or information ;

(c)(1)(B) motions to suppress evidence;

(c)(1)(C) requests for discovery where allowed;

(c)(1)(D) requests for severance of charges or defendants;

(c)(1)(E) motions to dismiss on the ground of double jeopardy ; or

(c)(1)(F) motions challenging jurisdiction, unless good cause is shown why the issue could not have been raised at least 7 days prior to trial.

(c)(2) Motions for a reduction of criminal offense at sentencing pursuant to Utah Code Section 76-3-402(1) shall be in writing and filed at least 14 days prior to the date of sentencing unless the court sets the date for sentencing within ten days of the entry of conviction. Motions for a reduction of criminal offense pursuant to Utah Code Section 76-3-402(2) may be raised at any time after sentencing upon proper service of the motion on the appropriate prosecuting entity.

(d) **Motions to Suppress**. A motion to suppress evidence shall:

(d)(1) describe the evidence sought to be suppressed;

(d)(2) set forth the standing of the movant to make the application; and

(d)(3) specify sufficient legal and factual grounds for the motion to give the opposing party reasonable notice of the issues and to enable the court to determine what proceedings are appropriate to address them.

If an evidentiary hearing is requested, no written response to the motion by the non-moving party is required, unless the court orders otherwise. At the conclusion of the evidentiary hearing, the court may provide a reasonable time for all parties to respond to the issues of fact and law raised in the motion and at the hearing.

(e) **Motions made before trial.** A motion made before trial shall be determined before trial unless the court for good cause orders that the ruling be deferred for later determination. Where factual issues are involved in determining a motion, the court shall state its findings on the record.

(f) **Failure to timely raise defenses or objections.** Failure of the defendant to timely raise defenses or objections or to make requests which must be made prior to trial or at the time set by the court shall constitute waiver thereof, but the court for cause shown may grant relief from such waiver.

(g) A verbatim record shall be made of all proceedings at the hearing on motions, including such findings of fact and conclusions of law as are made orally.

(h) **Defects in the institution of the prosecution or indictment or information.** If the court grants a motion based on a defect in the institution of the prosecution or in the indictment or information, it may also order that bail be continued for a reasonable and specified time pending the filing of a new indictment or information. Nothing in this rule shall be deemed to affect provisions of law relating to a statute of limitations.

(i) **Motions challenging the constitutionality of Utah statutes, ordinances, and other governmental enactments**.

(i)(1) **Challenges to a statute.** If a party in a court of record challenges the constitutionality of a statute in an action in which the Attorney General has not appeared, the party raising the question of constitutionality shall notify the Attorney General of such fact by serving the notice on the Attorney General by email or, if circumstances prevent service by email, by mail at the address below. The party shall then 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

(i)(2) **Challenges to an ordinance or other governmental enactment.** If a party challenges the constitutionality of a governmental entity's ordinance, rule, or other administrative or legislative enactment in an action in which the governmental entity has not appeared, the party raising the question of constitutionality shall notify the governmental entity of such fact by serving the person identified in Rule 4(d)(1) of the Utah Rules of Civil Procedure. The party shall then file proof of service with the court.

(i)(3) **Notification procedures.**

(i)(3)(A) **Form and content**. The notice shall (i) be in writing, (ii) be titled "Notice of Constitutional Challenge Under URCrP 12(i)," (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 statut

(i)(3)(B) **Timing**. The party shall serve the notice on the Attorney General or other governmental entity on or before the date the party files the paper challenging the constitutionality of the statu

(i)(4) **Attorney General's or other governmental entity's response to notice.**

(i)(4)(A)Within 14 days after the deadline for the parties to file all papers in response to the constitutional challenge, the Attorney General or other governmental entity ("responding entity") shall file a notice of intent to respond unless the responding entity determines that a response is unnecessary. The responding entity may seek up to an additional 7 days' extension of time to file a notice of intent to respond.

(i)(4)(B) If the responding entity files a notice of intent to respond within the time permitted by this rule, the court will allow the responding entity to file a response to the constitutional challenge and participate at oral argument when it is heard.

(i)(4)(C) Unless the parties stipulate to or the court grants additional time, the responding entity's response to the constitutional challenge shall be filed within 14 days after filing the notice of intent to respond.

(i)(4)(D) The responding entity's right to respond to a constitutional challenge under Rule 25A of the Utah Rules of Appellate Procedure is unaffected by the responding entity's decision not to respond under this rule.

(i)(5) **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 by this rule, the court may postpone the hearing until the party serves the notice.

Tab 4

Rule 83

Appellate court staff met as a group to consider how best to handle vexatious litigants. In doing so, they looked at how the district courts are currently handling them. Rule 83 allows a court to enter an order limiting the vexatious litigant in some ways. But it is unclear whether another district or appellate court may rely on another court s order.

The proposal is to amend Rule 83 to include language to the effect of: "Upon a court issuing a vexatious litigant order, any other court may rely upon that court's finding and order its own restrictions against the litigant as provided in paragraph (b)."

Rule 83. Vexatious litigants.

(a) Definitions.

(a)(1) The court may find a person to be a "vexatious litigant" if the person, including an attorney acting pro se, without legal representation, does any of the following:

(a)(1)(A) In the immediately preceding seven years, the person has filed at least five claims for relief, other than small claims actions, that have been finally determined against the person, and the person does not have within that time at least two claims, other than small claims actions, that have been finally determined in that person's favor.

(a)(1)(B) After a claim for relief or an issue of fact or law in the claim has been finally determined, the person two or more additional times re-litigates or attempts to re-litigate the claim, the issue of fact or law, or the validity of the determination against the same party in whose favor the claim or issue was determined.

(a)(1)(C) In any action, the person three or more times does any one or any combination of the following:

(a)(1)(C)(i) files unmeritorious pleadings or other papers,

(a)(1)(C)(ii) files pleadings or other papers that contain redundant, immaterial, impertinent or scandalous matter,

(a)(1)(C)(iii) conducts unnecessary discovery or discovery that is not proportional to what is at stake in the litigation, or

(a)(1)(C)(iv) engages in tactics that are frivolous or solely for the purpose of harassment or delay.

(a)(1)(D) The person purports to represent or to use the procedures of a court other than a court of the United States, a court created by the Constitution of the United States or by Congress under the authority of the Constitution of the United States, a tribal court recognized by the United States, a court created by a state or territory of the United States, or a court created by a foreign nation recognized by the United States.

(a)(2) "Claim" and "claim for relief" mean a petition, complaint, counterclaim, cross claim or third-party complaint.

(b) Vexatious litigant orders. The court may, on its own motion or on the motion of any party, enter an order requiring a vexatious litigant to:

(b)(1) furnish security to assure payment of the moving party's reasonable expenses, costs and, if authorized, attorney fees incurred in a pending action;

(b)(2) obtain legal counsel before proceeding in a pending action;

(b)(3) obtain legal counsel before filing any future claim for relief;

(b)(4) abide by a prefiling order requiring the vexatious litigant to obtain leave of the court before filing any paper, pleading, or motion in a pending action;

(b)(5) abide by a prefiling order requiring the vexatious litigant to obtain leave of the court before filing any future claim for relief; or

(b)(6) take any other action reasonably necessary to curb the vexatious litigant's abusive conduct.

(c) Necessary findings and security.

(c)(1) Before entering an order under subparagraph (b), the court must find by clear and convincing evidence that:

(c)(1)(A) the party subject to the order is a vexatious litigant; and

(c)(1)(B) there is no reasonable probability that the vexatious litigant will prevail on the claim.

(c)(2) A preliminary finding that there is no reasonable probability that the vexatious litigant will prevail is not a decision on the ultimate merits of the vexatious litigant's claim.

(c)(3) The court shall identify the amount of the security and the time within which it is to be furnished. If the security is not furnished as ordered, the court shall dismiss the vexatious litigant's claim with prejudice.

(d) Prefiling orders in a pending action.

(d)(1) If a vexatious litigant is subject to a prefiling order in a pending action requiring leave of the court to file any paper, pleading, or motion, the vexatious litigant shall submit any proposed paper, pleading, or motion to the judge assigned to the case and must:

(d)(1)(A) demonstrate that the paper, pleading, or motion is based on a good faith dispute of the facts;

(d)(1)(B) demonstrate that the paper, pleading, or motion is warranted under existing law or a good faith argument for the extension, modification, or reversal of existing law;

(d)(1)(C) include an oath, affirmation or declaration under criminal penalty that the proposed paper, pleading or motion is not filed for the purpose of harassment or delay and contains no redundant, immaterial, impertinent or scandalous matter;

(d)(2) A prefiling order in a pending action shall be effective until a final determination of the action on appeal, unless otherwise ordered by the court.

(d)(3) After a prefiling order has been effective in a pending action for one year, the person subject to the prefiling order may move to have the order vacated. The motion shall be decided by the judge to whom the pending action is assigned. In granting the motion, the judge may impose any other vexatious litigant orders permitted in paragraph (b).

(d)(4) All papers, pleadings, and motions filed by a vexatious litigant subject to a prefiling order under this paragraph (d) shall include a judicial order authorizing the filing and any required security. If the order or security is not included, the clerk or court shall reject the paper, pleading, or motion.

(e) Prefiling orders as to future claims.

(e)(1) A vexatious litigant subject to a prefiling order restricting the filing of future claims shall, before filing, obtain an order authorizing the vexatious litigant to file the claim. The presiding judge of

the judicial district in which the claim is to be filed shall decide the application. In granting an application, the presiding judge may impose in the pending action any of the vexatious litigant orders permitted under paragraph (b).

(e)(2) To obtain an order under paragraph (e)(1), the vexatious litigant's application must:

(e)(2)(A) demonstrate that the claim is based on a good faith dispute of the facts;

(e)(2)(B) demonstrate that the claim is warranted under existing law or a good faith argument for the extension, modification, or reversal of existing law;

(e)(2)(C) include an oath, affirmation, or declaration under criminal penalty that the proposed claim is not filed for the purpose of harassment or delay and contains no redundant, immaterial, impertinent or scandalous matter;

(e)(2)(D) include a copy of the proposed petition, complaint, counterclaim, cross-claim, or third party complaint; and

(e)(2)(E) include the court name and case number of all claims that the applicant has filed against each party within the preceding seven years and the disposition of each claim.

(e)(3) A prefiling order limiting the filing of future claims is effective indefinitely unless the court orders a shorter period.

(e)(4) After five years a person subject to a pre-filing order limiting the filing of future claims may file a motion to vacate the order. The motion shall be filed in the same judicial district from which the order entered and be decided by the presiding judge of that district.

(e)(5) A claim filed by a vexatious litigant subject to a prefiling order under this paragraph (e) shall include an order authorizing the filing and any required security. If the order or security is not included, the clerk of court shall reject the filing.

(f) Notice of vexatious litigant orders.

(f)(1) The clerks of court shall notify the Administrative Office of the Courts that a pre-filing order has been entered or vacated.

(f)(2) The Administrative Office of the Courts shall disseminate to the clerks of court a list of vexatious litigants subject to a prefiling order.

(g) Statute of limitations or time for filing tolled. Any applicable statute of limitations or time in which the person is required to take any action is tolled until 7 days after notice of the decision on the motion or application for authorization to file.

(h) Contempt sanctions. Disobedience by a vexatious litigant of a pre-filing order may be punished as contempt of court.

(i) Other authority. This rule does not affect the authority of the court under other statutes and rules or the inherent authority of the court.

(j) Applicability of vexatious litigant order to other courts. Upon a court issuing a vexatious litigant order, any other court may rely upon that court's finding and order its own restrictions against the litigant as provided in paragraph (b).

Tab 5

Rules 43 and 4-106

Discuss moving the provisions of CJA 4-106 (there is a current proposal to repeal the rule) to URCP Rule 43.

Administrative Office of the Courts

Chief Justice Matthew B. Durrant
Utah Supreme Court
Chair, Utah Judicial Council

Mary T. Noonan
State Court Administrator
Catherine J. Dupont
Deputy Court Administrator

MEMORANDUM

To: Civil Rules Committee
From: Nancy Sylvester
Date: April 22, 2020
Re: Rule 43 and CJA Rule 4-106

About 5 or 6 years ago, the courts enacted several remote hearing rules. Rule 43 contained some provisions addressing hearings in civil cases and CJA Rule 4-106 further elaborated on the requirements. Now that the pandemic has brought remote access to the fore, the consensus has become that rule 4-106 needs to be repealed. Its provisions are clearly procedural. They are thus in the bailiwick of the Supreme Court and not the Judicial Council. The question for this committee is whether we should amend Rule 43 or create a new civil rule addressing remote conferencing.

Rule 4-106. Remote conferencing.

Intent:

To authorize the use of conferencing from a different location in lieu of personal appearances in appropriate cases.

To establish the minimum requirements for remote appearance from a different location.

Applicability:

This rule shall apply to all courts of record and not of record.

Statement of the Rule:

(1) If the requirements of paragraph (3) are satisfied, the judge may conduct the hearing remotely.

(2) If the requirements of paragraph (3) are met, the court may, for good cause, permit a witness, a party, or counsel to participate in a hearing remotely.

(3) The remote appearance must enable:

(3)(A) a party and the party's counsel to communicate confidentially;

(3)(B) documents, photos and other things that are delivered in the courtroom to be delivered previously or simultaneously to the remote participants;

(3)(C) interpretation for a person of limited English proficiency; and

(3)(D) a verbatim record of the hearing.

450 South State Street / P.O. Box 140241 / Salt Lake City, Utah 84114-0241 / Tel: 801-578-3808 / Fax: 801-578-3843 / email: nancyjs@utcourts.gov

Rule 43. Evidence.

(a) Form. In all trials, the testimony of witnesses shall be taken in open court, unless otherwise provided by these rules, the Utah Rules of Evidence, or a statute of this state. For good cause and with appropriate safeguards, the court may permit testimony in open court by contemporaneous transmission from a different location.

(b) Evidence on motions. When a motion is based on facts not in the record, the court may hear the matter on affidavits, declarations, oral testimony or depositions.

Advisory Committee Note

Federal Rule of Civil Procedure 43 has permitted testimony by contemporaneous transmission since 1996. State court judges have been conducting telephone conferences for many decades. These range from simple scheduling conferences to resolution of discovery disputes to status conferences to pretrial conferences. These conferences tend not to involve testimony, although judges sometimes permit testimony by telephone or more recently by video conference with the consent of the parties. The 2016 amendments are part of a coordinated effort by the Supreme Court and the Judicial Council to authorize a convenient practice that is more frequently needed in an increasingly connected society and to bring a level of quality to that practice suitable for a court record. As technology evolves the methods of contemporaneous transmission will change.