UTAH SUPREME COURT ADVISORY COMMITTEE
ON RULES OF CIVIL PROCEDURE

Summary Minutes – January 26, 2022

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

Committee members	Present	Excused	Guests/Staff Present
Robert Adler	X		Stacy Haacke, Staff
Rod N. Andreason	X		Crystal Powell, Recording Secretary
Judge James T. Blanch	X		Brent Salazar
Lauren DiFrancesco, Chair	X		Nicole Salazar-Hall
Judge Kent Holmberg	X		Judge Amy Oliver
James Hunnicutt	X		
Judge Linda Jones		X	
Trevor Lee	X		
Ash McMurray	X		
Judge Amber M. Mettler	X		
Kim Neville	X		
Timothy Pack		X	
Loni Page	X		
Bryan Pattison	X		
James Peterson	X		
Judge Laura Scott		X	
Leslie W. Slaugh	X		
Paul Stancil		X	
Judge Clay Stucki	X		
Judge Andrew H. Stone	X		
Justin T. Toth		X	
Susan Vogel	X		
Tonya Wright	X		

(1) MEMBER INTRODUCTIONS

The meeting started at 4:12 p.m. after forming a quorum. Ms. Di Francesco welcomed the Committee and guests to the meeting.

(2) APPROVAL OF MINUTES

Ms. Lauren DiFrancesco asked for approval of the Minutes subject to minor amendments noted by the Minutes subcommittee. Mr. Leslie Slaugh moved to adopt the minutes as amended. Judge Stucki seconded. The minutes were unanimously approved.

(3) RULE 42. CONSOLIDATION OF CASE NUMBERS

The Committee agreed to a minor change to Rule 42 (a) (3) after a brief discussion. The amendment changes "new case number" to "single case number." Judge Stucki moved for adoption of the amendment. Judge Andrew Stone seconded. The amendment was unanimously approved.

(4) RULE 43 (C). REMOTE HEARING OATH

Ms. Loni Page proposed changing Rule 43 on the advice and suggestion of the Juvenile Clerks of Court to ensure that the Oath is correct also for Remote Hearings. The amendment of Rule 43 (c) deletes "issue (or matter pending between____ and ____" and adds "in this matter." After a brief discussion, Judge Amber Mettler moved for adoption of the amendment. Judge Stone seconded. The amendment was unanimously approved.

(5) RULE 7. PAGE LIMITS VS. WORD LIMITS IN LENGTH OF MOTIONS

Mr. Trevor Lee presented the issue giving a brief historical overview of the work the Committee has done on the issue over the past year and proposed a move to word counts in addition to page limits as a compromise to factor in hand-written motions. He explained that many jurisdictions including federal courts have switched to word count instead of page count. He expressed that page limits are not a good proxy for fairness given how easily pages can be manipulated in word processors; and that there is wisdom in using word counts instead. He proposed a word limit of about 400 per page to result in:10,000 words or a 25-page motion; 6000 words o a 15-page opposing memorandum; 4000 words or 10-page reply memorandum; 1,200 words or 3-page objection to evidence in reply memorandum; 800 words or 2-page notice of supplemental authority. He further proposed for motion practice before commissioners: 4000 words or 10-page motion and response memoranda; 2000 words or 5-page reply.

As part of the discussion, Judge Stone questioned how the court would enforce the limit as briefs are sent in by PDF. Mr. Lee explained that attorneys would be required to certify the word count. Ms. Susan Vogel questioned how it would affect self-represented persons that are using court forms that are already in PDF and wondered if it would add a burden on self-represented persons

having to count the words in the court forms. She also noted that there are also different page limits in Rule 7 and Rule 101 and different words for the types of documents involved. Ms. Vogel asked if Jim Hunnicutt's subcommittee could create a chart to clarify what types of documents would be included in the word limit based in the Rules.

The Committee agreed to table to discussion until later in the meeting.

(6) STANDARD PROTECTIVE ORDERS FOR STATE COURTS.

Judge Amy Oliver presented on standard protective orders related to civil discovery issues. She recounted her frequent experience of discovery disputes in cases where parties are refusing to respond to discovery requests on the basis that a protective order is needed to do so, when in some cases it is not as well as attending difficulty and delay in agreeing on the contents of the protective order. Judge Oliver noted that federal courts have a standard protective order and wants to pursue a similar type of protective order in the state courts to mitigate the issues she outlined. Judge Oliver further noted that in federal court it is available as a standing order; but she is not sure that approach works because of the varying nature of cases in state court but it would be very beneficial for larger and more complicated cases.

One concern expressed was that the federal standing protective was too complex for many cases being litigated and that while the idea is great, it is geared towards very technical cases with a lot of experts. Another concern was that the order should be called "discovery protective order" instead of "protective order" to avoid the literary confusion where "protective order" most commonly relates to orders of protection against physical harm such as cohabitant abuse, sexual violence etc. A further concern was that only about one percent of cases would probably need an 'attorneys' eyes only' provision in the protective order and that a standard protective order that holds that provision is unfavorable as it would impede the open courts principle and the state's goals under GRAMA. Judge Mettler noted that there might be the idea to pilot it in the Third District to gain some understanding of how it would operate.

Judge Stone noted that an automatic protective order, ignores the rights of the public interest, and noted that judges are officers of the public and have a duty of transparency to the public as much as possible and a standing order would impede upon that duty. Mr. Slaugh noted that anything filed with the court should be public, but the order would apply only to discover materials that are not automatically public. Judge Stone clarified that his concern is the policy of the judge making it a default order rather than having parties make the decision to request it. Judge Holmberg noted that the obligation would be on the attorneys to certify that the order is being requested in good faith.

Judge Holmberg wondered whether the Forms Committee could create a form order that can be easily used and referred but not be implemented automatically. Ms. Tonya Wright questioned how available the form would be for situations where pro se parties have a need for a protective order limiting use of discovery beyond the case in domestic issues or when an individual is being assisted by a licensed paralegal practitioner. Mr. Hunnicutt noted that parties in divorce cases tend to avoid

requesting discovering protective orders as it is not usually in the interest of either party. Mr. Hunnicutt further noted that in the Third District there is short and simple stock order that is used to limit the use of custody evaluations.

Ms. DiFrancesco wondered when the pilot program might roll out, and Judge Mettler noted that discussions are very preliminary. Judge Holmberg moved to designate a few committee members to assist Judge Oliver in her work on the issue. Judge Stucki noted that he is not comfortable voting on a rule change at this point but agreed to moving for more work on the idea and producing a draft order in keeping with the concerns discussed. Judge Holmberg moved to designate Judge Stucki and Mr. Bryan Pattison to work with Judge Oliver. Judge Stucki seconded. The vote was unanimously approved.

(7) CLASSIFICATION OF DOCUMENTS

Judge Stone presented a draft Rule on records classification. He explained that the draft is taken liberally from the local federal rule. He summarized that the basics of the rule is to allow an ex parte motion to classify a case, a document, or the motion itself; requires a redacted version of the document; and gives the court the options to deny the motion, order less restrictive classification than requested, or order a response from the opposing party and hold a hearing.

Mr. Slaugh wondered if there would be an effort to retire the corresponding rule of judicial administration 4-202. Judge Stone noted that the rules would work in tandem and would provide a procedure to litigate issues under that rule but would not change the classifications in rule 4-202.

The concern was raised whether the language "Such motions are disfavored" should be included and whether it does enough to guide judges that these types of motions should not be granted without good reason. Mr. Slaugh noted that while the federal rule contains the discouraging language, he does not mind putting a standard in the rule; and prefers to not have discouraging language. Mr. Hunnicutt noted that he likes the discouraging language and doesn't have a problem saying that the public policy is not to have things sealed. A suggestion was made to include the standard that the privacy interest must outweigh the public interest in open records in the court. Judge Holmberg noted that rule of judicial administration 4-202.04 (6) also have a standard that would be mirrored and suggested a committee advisory note that envisions how the rule is intended to work. Judge Stone noted the subcommittee also discussed having an advisory note that references the expectations for the rule.

Ms. DiFrancesco asked about what the Committee was envisioning under Rule for the procedure of filing the redacted copy. Ms. Kim Neville asked how the open courts policy will be affected by this rule and wondered if there is a trend at the district court level of disputes for court to be more open and public. Judge noted that he doesn't see a lot of disputes but what he sees is that all the substantive issues that the public has an interest in are being protected. Judge Mettler agrees that all motions that are filed to protect documents should also have appropriate version for the public.

Ms. DiFrancesco wondered whether there would be an option or procedure for the requesting party to withdraw the document where the motion to classify is denied. Judge Stone explained that the subcommittee discussed that issue and concluded that a stay of 14 days to allow due process of appeal. He noted that the option to motion to withdraw is feasible but typically once a record is filed and the court determines that it is not subject to protection then it is rightly part of the record. The Committee suggested changing 14 days to 28 days in keeping with Rule 62 (a). It was proposed to give the party an absolute right to withdraw a document that won't be classified as requested. Judge Stone questioned whether that was possible in our system. Judge Stone would favor not having an absolute right to withdraw in favor of due process and the right to appeal and expressed that a unilateral right to withdraw a document in an adversarial process is unprecedented. After a full discussion, it was agreed that such a unilateral right to withdraw would not be supported by this Rule.

The Committee discussed whether to add another provision subsection (7) that "nothing in this rule limits the court's discretion, to review documents in camera." Ultimately, Judge Holmberg moved to remove subsection (7) and change the time of stay from 14 to 28 days. Judge Stone seconded. The motion passed with one opposing vote. Ms. Di Francesco asked the subcommittee to draft an advisory note. Judge Stone also asked for the highlighted sections to remain so that the Supreme court can have input on that discussion as well.

(7) SERVICE IN DOMESTIC CASES

Mr. Brent Salazar and Ms. Nicole Salazar-Hall presented on a proposed change to Rule 26.1 and suggested an amendment to clarify the time for service in domestic relations. Ms. Vogel asked for some discussion on hammering out some of the discrepancies on what cases require what levels of disclosure and asked to join their sub-committee. Lauren thanked guests for coming.

(9) RULE 7 (CONTINUED).

Mr. Slaugh questioned whether the suggested wording for page limits creates an either/or situation or requires both standards under subsection (c) (8) Length of motion. That is, does it both have to be no more than 25 pages and under 10,000 of words. Mr. Lee noted that option one makes more sense as then the certification language appear just once at the end of the document. Ms. Vogel said she would like it if people do not have to count words. The Committee suggested making the language clearer by saying for example: "10,000 words or in the alternative…." Mr. Ash McMurray agreed to look more closely on the correct punctuation. The Committee did not vote on the amendments and tabled the discussion due to time.

(9) ADJOURNMENT.

The next meeting will be on February 23, 2022. The Chair thanked everyone for their time and effort and wished everyone a great month. The meeting adjourned at 6:00 p.m.