UTAH SUPREME COURT ADVISORY COMMITTEE
ON RULES OF CIVIL PROCEDURE

Summary Minutes – January 24, 2024
via Webex

THIS MEETING WAS CONDUCTED ELECTRONICALLY VIA WEBEX

Committee members	Present	Excused	Guests/Staff Present
Rod N. Andreason, Vice-Chair	X		Stacy Haacke, Staff
Lauren DiFrancesco, Chair	X		Keri Sargent
Trevor Lee	X		Samatha Parmley
Ash McMurray	X		Crystal Powell, Recording Secretary
Michael Stahler	X		
Timothy Pack		X	
Loni Page	X		
Bryan Pattison	X		
Judge Clay Stucki	X		
Judge Andrew H. Stone	X		
Justin T. Toth	X		
Susan Vogel	X		
Tonya Wright	X		
Judge Rita Cornish	X		
Commissioner Catherine Conklin	X		
Giovanna Speiss		X	
Jonas Anderson	X		
Heather Lester	X		
Jensie Anderson	X		
Judge Blaine Rawson		X	
Judge Ronald Russell		X	
Rachel Sykes	X		
Judge Laura Scott, *Emeritus*	X		
James Hunnicutt, *Emeritus*	X		

(1) INTRODUCTIONS

The meeting began at 4:02 p.m. after forming a quorum. Ms. Lauren DiFrancesco welcomed the Committee members.

(2) APPROVAL OF MINUTES

Ms. DiFrancesco asked for approval of the minutes subject to amendments noted by the Minutes subcommittee and further revisions from Ms. Susan Vogel and Mr. Jim Hunnicutt. Mr. Ash McMurray moved to adopt the Minutes as amended. Mr. Justin Toth seconded. The Minutes were unanimously approved.

(3) RULE 56. REVISIONS FROM PUBLIC COMMENT AND SUPREME COURT FEEDBACK

Mr. Rod Andreason opened the discussion by briefly summarizing the history of amendments to the Rule and the current issue. He explained that the initial input was that we have a rule in Rule 56 as to when motions for summary judgment may be filed at the latest: which is 28 days after the close of all discovery. He explained that the issue then becomes a question of when does "all discovery" close? He explained that that date varies based on Rule 26 thereby creating ambiguity. He noted that the Subcommittee proposed amending Rule 26 to identify when the close of expert discovery occurs so that Rule 56 would align; but the Committee decided instead to modify Rule 56 to take away the 28-day deadline and to state that the court may set a deadline under Rule 16 to file motions for summary judgment.

He relayed that the comments from public feedback were split. Two commenters agreed and expressed the desire to be able to file motions for summary judgment at any point; while six commenters strongly disagreed because in general, they felt that it eliminated any timeline and allowed parties file a motion for summary judgment without any regulation creating a free- for-all. The Utah Supreme Court also provided feedback that they would like to see a deadline or any language that establishes a timeline to move the case forward. The Supreme Court also added that they would like a deadline for submission of certificates of readiness for trial.

Mr. Andreason reported that the Subcommittee does not yet have any language to satisfy the concerns of the Utah Supreme Court and is discussing going back to an amendment on Rule 26 rather than an amendment in Rule 56. He noted that that decision is one for the Committee to make and then they will draft the amendment.

Ms. DiFrancesco added that the Supreme Court wanted the Committee to look at Rule 16 and propose procedure on how to move cases forward and that her impression was not that

they are insisting upon seeing a deadline that could be calculated but have concerns about cases lingering at the end of expert discovery.

Mr. Micheal Stahler noted that the notice of events is automatically created with default dates from the date of the first answer and in practice they are routinely stipulated and extended which just kills that notice of expert discovery deadline. He raised that the issue is ultimately what happens when the opposing party does not make any expert disclosures. Ms. DiFrancesco expressed that that issue originates from Rule 16(b) and that is also what the Supreme Court wants to be addressed.

The Committee reviewed Rule 16(b). Ms. DiFrancesco noted that her surprise was that she thought the rules surrounding certification for trial were different and required that there were no pending motions whereas Rule 16(b) creates a gap where a party is certifying a case for trial when the summary judgment deadline is still 28 days away. Other Committee members expressed that they have filed the certificate of readiness with the calculation of the 28 days in mind and having an eye on the trial regardless of a motion for summary judgment might be wise. Judge Scott noted that she would not be inclined to set a trial date for a case that might be resolved by motion because it blocks the court calendar creating backlog. She noted however that motions for partial summary judgment are different. She also notes that she sets a pretrial conference whenever she gets a certificate of readiness for trial to discuss the status of the case with the parties.

Ms. DiFrancesco questioned whether it would be burdensome to have a Rule 16 conference in every case that gets past expert discovery. Judge Stone noted that he sets up pretrial conferences before trial as well and only forgoes them in license revocation challenges where all parties are aware of the case progression. He questioned whether the Rule should be changed to require parties to identify if there are any pending dispositive motions at the pretrial conference and if the party does not then that party is past the deadline. Judge Scott expressed that the pretrial conference serves a useful purpose in anticipating the progress towards trial or disposition and setting deadlines accordingly. Ms. DiFrancesco questioned whether it should be a request for a certificate of readiness or a request for a pretrial conference. Judge Stone noted that a party can ask for a pretrial conference at any point, but the certificate of readiness tells the court that at least one party thinks that they are done and that does changes how he prepares for the hearing.

Ms. Susan Vogel questioned whether judges have observed self-represented parties appreciating the difference that Judge Stone pointed out. Judge Stone noted that he has never had a self- represented party ask for a Rule 16(b) conference other than to set the trial and have done the certificate of readiness. Mr. Rod Andreason joined in Judge Scott's views and expressed that there should be no scheduling of trial until the parties are aware of partial motions for summary judgment or after the resolution of summary judgment motions because even though it is slower it is ultimately more efficient. Ms. Vogel noted that that procedure also saves money for the parties. Ms. Rachel Sykes noted that she agrees that trial dates

should not be set until the close of all discovery because trial dates are difficult to secure and should not be easily lost because of nebulous summary judgement deadlines. Ms. DiFrancesco asked if the Committee was ready to take a vote on an approach. Hearing no input, Mr. Andreason suggested that the Subcommittee take back all the thoughts and present a solution at the next meeting.

The Committee discussed other approaches such as requiring scheduling conferences at regular intervals or looking at the federal practices. Commissioner Conklin suggested there may be lessons to learn from Rule 101 procedure in having cases pushed along where that Rule was not impactful. Judge Stone related his experience in the pilot project on Rule 101 surrounding the enormous scope of resources that were needed to effectuate the Rule. Commissioner Conklin also questioned whether there is value in having a conference after the close of fact discovery and the Committee briefly discussed that issue. Judge Stone also wondered what the institutional interest is in pushing parties to move a case forward. Mr. Andreason opined that the sentiment might have come from legislative criticism of divorce cases taking too long and that sentiment trickling over into other areas of civil practice. The Subcommittee took the feedback and discussion and will present a new proposal at a future meeting.

(4) RULE 6. LANGUAGE ON HOLIDAYS

Ms. DiFrancesco noted that the Rule went out for public comment, and none were given. Ms. Susan Vogel moved to adopt the Rule without further amendment. Judge Stone seconded. The motion passed unanimously.

(5) RULE 12. ANSWERS FILED AND SERVED

Ms. DiFrancesco recapped that this amendment fixes the confusion in Rule 12 whether filing a Rule 12 motion in domestic relations actions negated the obligation to file an answer. One public Comment was received. Commissioner Conklin moved to adopt the rule change. Mr. Trevor Lee seconded. The motion passed unanimously.

(6) RULE 83. VEXATIOUS LITIGANTS

Ms. DiFrancesco recapped that this rule change clarifies the right to appeal for vexatious litigants and reported that no public comments were received. Mr. Michael Stahler moved to adopt the change. Judge Cornish seconded. The motion passed unanimously.

(7) RULE 101. MOTIONS TO ENFORCE ORDER AND FOR SANCTIONS

Ms. DiFrancesco explained that this rule changes the language to match amendments made to Rule 7A and 7B and there are no public comments. Ms. Vogel suggested changing the word "application" to "request" on lines 88 and 91. The Committee reviewed the language in Rules 7A and 7B to see what words were used. Ms. DiFrancesco suggested that the current changes be approved, and the suggestion be reserved until the other amendments to Rule 101 are made. Mr. Toth moved to approve the amendment as is. Judge Stucki seconded. The motion passed unanimously.

(8) RULES 64, 66, 69, 69B, 69C.

Ms. DiFrancesco reported that they were no public comments on changing the language to "file" instead of "record." Mr. Toth moved for final approval of the amendment. Judge Stucki seconded the motion. The motion was approved unanimously.

(9) RULE 74. CONTACT INFORMATION WHEN ATTORNEY WITHDRAWS

Mr. Stahler summarized the issue of what to do when one attorney withdraws when the party is still being represented by another attorney. He explained that there isn't a substitution of counsel where the party isn't being represented by a newly hired counsel but the way that Rule 74 reads, the problem that comes up is that an opposing party can object and hold up that process. The proposal that Mr. Stahler received was to amend Rule 74 to allow for withdrawal when the party continues to be represented by counsel that has already filed a notice of appearance. Mr. Stahler suggested that federal rule 83 be looked to as guidance and to draft a similar Rule. Ms. DiFrancesco noted that it sounds like a good idea and would like to see a redline.

The Committee discussed service of that information under Rule 76 where addresses are protected, or one party has a protective order restricting the notification of certain information concerning a party. Ms. Loni Page noted that the court has been filling the gap but may not have the bandwidth to review every certificate of service to see that something was not served because there is a safeguarded party. Commissioner Conklin also referred to the change in law that allowed the state entity to accept the service of documents for participants in the safe at home program and wondered how that law might be utilized in this situation. After a lengthy discussion, the Committee formed a Subcommittee to address the issues on how attorneys move around on cases. The Subcommittee will be led by Mr. Stahler and other members include Ms. Rachel Sykes, Ms. Crystal Powell, Ms. Susan Vogel, Ms. Heather Lester, Keri Sargent, and Ms. Loni Page.

(10) RULE 101. PLAIN LANGUAGE FOR APPLICATION TO THE COURT.

Ms. Vogel suggested removing the words "an application to the court" and "for" in lines 88, 90, and 91 of Rule 101 in keeping with the mandate to use plain language in the Rules. Commissioner Conklin agreed with the proposed change. No motion to adopt the change was made as this rule will be addressed on the agenda again with Ms. Samantha Parmley.

(11) RULE 18. VOIDABLE TRANSACTIONS LANGUAGE

Judge Scott noted that this issue came up in a case where the parties were referring to the Rule and realized it did not match up with the statute. Ms. Stacy Haacke prepared the proposed amendment to change "voidable transactions" to "fraudulent conveyance" in line with the statutory language change in 2017. Judge Cornish moved to approve the draft changes. Commissioner Conklin seconded. The motion passed unanimously.

(12) RULE 7(k), (l), (m), AND 37. APPLYING IN FAMILY CASES

Ms. Parmley summarized the issue surrounding statements of discovery issues when it is a domestic case in front of a commissioner. Ms. Parmley noted that some commissioners are treating it as the judges do where the party has seven days to respond, and both sides may submit a proposed order and then the commissioner either grants the order or sets it for a hearing. Ms. Parmley noted however that in some districts, a hearing is set for every statement of discovery issue whether or not a hearing is appropriate, causing cases to drag on for months extra. They realized when discussing the issue that technically in Rule 101, every motion for relief except for the exceptions must go to a commissioner and must follow Rule 101. They are looking for clarity on whether it is the intent of the Rules Committee that in family law cases nothing is ever decided on the papers or if things can be moved along under Rule 37. Ms. Parmley highlighted that ex parte and stipulated motions cannot be ruled on under Rule 7 without a hearing. Ms. Parmley presented the redline of amendments that would allow for such motions to be ruled by a commissioner without a hearing.

Ms. Rachel Sykes noted that she agrees with the changes, especially given that Rule 101 state that commissioners shall hold hearings. She noted that the purpose of the statement of discovery issues is to quickly resolve discovery disputes but in family law cases, hearings are usually set two months out. She noted that commissioners need to have the authority to just make a ruling. Ms. Susan Vogel also agreed that the Rule should be clearer and facilitate speedy disposition and suggested that "application" should be changed to "request." Mr. Ash McMurray also suggested to change the language to "a request must be made by motion…"

Ms. Keri Sargent highlighted that paragraph three may impact the default language on those motions so that language needs to be changed as well. Mr. Jim Hunnicut suggested putting subsection (a) (5) (written options required) under sub part (m) which is an exception to Rule 101 where this amendment will also carve out another type of exception. Ms. Parmley noted that the thought process in putting the exception close to the beginning of the Rule would decrease confusion. Ms. DiFrancesco opinion that Justice Pohlman also likes when the subject matter is kept together in the Rules so things relating to commissioners should be placed where the Rule refers specifically to commissioners.

Commissioner Conklin also suggested making it clear that all requests are made by motion but not all motions will have a hearing according to their respective rules. Commissioner Conklin noted that she always sets a hearing for statement of discovery issues and that while ruling on the paper may be beneficial for some issues and in many circumstances, a hearing is advantageous for two reasons. First, many self-represented parties do not understand initial disclosures and second, the technological aspect of the court's signing system does not allow for docket notes for changes made to a proposed order thereby making it difficult to notify of changes in the final order.

After more general discussion on the intent of the amendment and the intent of the Rules, the Committee recommended that Ms. Parmley, Mr. Hunnicut, and Commissioner Conklin get together and think about the best way to make the Rules work together. Mr. Hunnicut noted that he would be happy to put together a Subcommittee. Ms. Keri Sargent also offered to help the Subcommittee to look more closely at Rule 101 in relation to Rules 7(k), (l), and (m). The Subcommittee will include Mr. Hunnicutt, Ms. Vogel, Ms. Tonya Wright, Ms. Parmley, and Commissioner Conklin.

(13) RULE 5. SERVICE

Ms. Loni Page summarized that they want to make sure the timing of Rule 5 becomes effective when MyCase is implemented. She noted that one project deliverable in MyCase that allows parties to acknowledge that notification in MyCase is effective service is tied up until April 2024 and another point is that the other party needs to know that they can serve within MyCase, and the programming is not completed. The Subcommittee is tracking the MyCase implementation and in the meantime has tackled some of the plain language in the Rule to coincide with the processes of MyCase. The Subcommittee would like feedback and direction from the Committee on those issues. She also noted that there is not a huge rush to amend Rule 5 but described what some of the changes would be. Ms. DiFrancesco questioned whether the Rule contemplates what happens before a party signs up for MyCase. Ms. Page explained that if a party is not on MyCase then that method of service cannot be used. She added that the system also needs to set up a notification that that MyCase can be used for service in appropriate circumstances.

Ms. Page questioned if the Subcommittee should make it clearer who exactly serves orders and noted that they added a paragraph to say that every paper signed by the court but not prepared by the court will be served by the party who prepared it. Ms. Page noted that she would like to know the timing for amending the Rules if they should be addressed now or addressed to coincide with MyCase rollout. Ms. DiFrancesco suggested that the Committee move forward with anything that can be changed now and to the extent necessary the Rules should precede MyCase.

Ms. DiFrancesco asked if MyCase will still notify persons years into the future or changes to a case assuming that the party's email address is active. Ms. Vogel responded that it would.

(14) ADJOURNMENT

Ms. DiFrancesco noted that there was no time left for any other agenda issues but reminded the Committee that the legislative session has commenced and reminded the Committee to keep their eyes out for rapid response issues that would need the attention of the Committee. The meeting was adjourned at 5:57 p.m. The next meeting will be February 28, at 4:00 p.m.