

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

**Summary Minutes – September 25, 2024  
via Webex**

**THIS MEETING WAS CONDUCTED ELECTRONICALLY VIA WEBEX**

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<b>Committee members</b>	<b>Present</b>	<b>Excused</b>	<b>Guests/Staff Present</b>
Rod N. Andreason, Chair	X		Stacy Haacke, Staff
Justin T. Toth, Vice Chair	X		Keri Sargent
Ash McMurray	X		Daniel L. Day
Michael Stahler		X	Mark Olson
Timothy Pack		X	Leslie Slaugh
Loni Page	X		Mark Field
Bryan Pattison	X		Erin Riley
Trevor Lee	X		Jacqueline Carlton
Laurel Hanks	X		
Tonya Wright	X		
Judge Rita Cornish		X	
Commissioner Catherine Conklin	X		
Giovanna Speiss		X	
Jonas Anderson		X	
Heather Lester	X		
Brett Chambers	X		
Judge Blaine Rawson		X	
Judge Ronald Russell		X	
Rachel Sykes	X		
Michael Young		X	
Laurel Hanks	X		
Judge Laura Scott, <i>Emeritus</i>	X		
James Hunnicutt, <i>Emeritus</i>	X		

**(1) INTRODUCTIONS**

The meeting began at 4:03 p.m. after forming a quorum. Mr. Rod Andreason welcomed the Committee Members and guests.

**(2) APPROVAL OF MINUTES**

Mr. Rod Andreason asked for approval of the August 2024 Minutes subject to amendments noted by the Minutes subcommittee. Ms. Tonya Wright moved. Mr. Justin T. Toth seconded. The Minutes were unanimously approved.

**(3) RULE 5. SERVICE AND FILING OF PLEADINGS AND OTHER PAPERS.**

Mr. Rod Andreason thanked Mr. Leslie Slauch for his thoughtful comments on the proposed amendments to Rule 5. Mr. Slauch suggested inserting the word “otherwise” to the first line of (a)(1). To section (b)(3)(B)(ii), Mr. Slauch suggested changing the word “pleading” to “most recent filing” for consistency throughout the rules. Commissioner Conklin noted that “pleading” is otherwise defined in the rules as only certain documents.

Ms. Loni Page discussed Mr. Slauch’s proposed changes to (b)(5)(C). She notes that this issue was discussed at length because “prepared” has different meanings and is interpreted in different ways. The courts provide electronic notification and everyone with an electronic filing account receives notice including self-represented parties through MyCase. By clarifying who has the service burden we don’t miss any of those parties. Mr. Jim Hunnicutt agreed that the Committee had a robust discussion at the March 27<sup>th</sup> meeting and the language was hammered out extensively by the Committee.

After further discussion, Commissioner Conklin moved that the Committee adopt the proposed changes and send the proposed rule to the Supreme Court. Ms. Tonya Wright seconded. All approve. Mr. Andreason noted that because the proposed amendments are not substantive changes, he will recommend to the Justices that the rule does not need to go back out for public comment.

**(4) RULES BACK FROM PUBLIC COMMENT**

Mr. Andreason reported that there were no public comments for Rule 1 General provisions, Rule 7A Motion to enforce order and for sanctions, Rule 60 Relief from judgment or order, and Rule 81 Applicability of rules in general. Commissioner Conklin moved to send the proposed amendments to the Supreme Court. Mr. Justin Toth seconded. All approve.

**(5) RULE 65C. POST-CONVICTION RELIEF.**

Mr. Mark Field from the Utah Attorney General's Office introduced the proposed amendments to the Committee along with other guests, Ms. Erin Riley and Mr. Daniel Day. Mr. Field briefly explained post-conviction relief proceedings which are governed by Rule 65C. After trial where a defendant is convicted, they ordinarily pursue a direct appeal, and if they do not prevail on direct appeal, then the defendant has a year to file a post-conviction petition. The defendant can raise any claim that they think is a constitutional violation that occurred during the criminal trial. Rule 65C is the civil rule that governs post-conviction and is unique in that there is an underlying criminal record.

Mr. Field introduces seven changes or amendments the AG's office would like to see to Rule 65C.

- The proposed amendments to 65C(d)(6) adds three words, "a posttrial motion" to clarify that a petitioner who claims newly discovered evidence must explain why it couldn't be discovered at the time of trial.
- The second change, to 65C(f), is the one that is most important for the Attorney General's Office. The proposed amendments address that word limits in URCP Rule 7(q) apply to a memorandum of points and authorities that is filed separately from the post-conviction petition. Mr. Field wants to emphasize that the word limit would not apply to the actual petition only to the memorandum. Over the last couple of years petitions have been getting larger, ranging from 150 pages to over 250 pages. Ms. Riley adds a party can avail themselves of the same provision that a party can in other civil proceedings to request an overlength memorandum for good cause.
- The third proposed amendment is to 65C(h)(1). The rule as it reads now allows claims that were previously adjudicated on appeal can be summarily dismissed by the district court. In 2018, the Court of Appeals held in *Bevan v. State*, 2018 UT App 237, that you have to give the petitioner notice. The AG's office is asking that the words "any claim has been adjudicated in a prior proceeding, or if" and "either that the claim has been adjudicated or" be removed because it is inconsistent with the Postconviction Remedies Act.
- For service of petitions, 65C(i), the proposed amendments adds "consistent with Utah Rule of Appellate Procedure 11". It is the AG's view that the record should be consistent with the record taken on direct appeal and it should comply with Rule 11 of the URAP.
- The fifth proposed change to 65C(j) adds a second paragraph that states that the court should be required to serve appointed counsel with all the documents in the case as a matter of course instead of appointed counsel having to request it. Mr. Field notes that when counsel is appointed, they are not a party to the proceeding yet because they haven't been ordered to respond.
- The sixth proposed change to 65C(k) adds language "The respondent may file a reply in support of the motion." Mr. Field noted that this amendment is consistent with the

general practice in postconviction cases since *Gordon v. State*, 2016 UT 11, was issued in 2016 and it will make clear that the state may file a reply.

- The final proposed change to 65C(n) clarifies that discovery is allowed only after the district court orders an evidentiary hearing. It is the state's view that discovery should only be permitted once the court schedules an evidentiary hearing. If the state is going to prevail on a summary judgment motion, there is no need to go through discovery. Ms. Riley notes that adding the language clarifies the intent of allowing discovery. Mr. Day clarified that there is nothing that prevents parties from subpoenaing parties on their own outside of the rules of discovery. Ms. Riley noted that most information should already be part of the record because there has been a trial and the case is in a different posture once it gets to post-conviction proceedings.

Ms. Loni Page asked a question about whether this change causes extra steps for clerical staff. Ms. Riley noted that the petitioner is not entitled to counsel and has to file a motion requesting counsel, the petitioner can do that anywhere along the line. Once the state is ordered to respond, the clerk is required to provide all of that information to the AG's office anyway. The rule change would not add extra work to the clerk but clarify when the record is provided. Mr. Andreason thanks Mr. Field, Ms. Riley and Mr. Day for coming and explaining the proposed changes to the Committee.

Mr. Andreason questioned whether anyone from the defense bar would be able to speak on the proposed changes. The state notes that the Indigent Appellate Defense Commission (IADC) are often the ones appointed to represent the petition. Ms. Haacke will send the proposal to the IADC for review and feedback. A subcommittee was formed including Loni Page, Keri Sargent and Trevor Lee.

#### **(6) RULES 73. ATTORNEY FEES.**

Mr. Mark Olson introduces himself to the Committee. Mr. Olson has had a debt collection practice for over 30 years, has served as chair of the Collection Law section of the Utah State Bar, and is on the Access to Justice Commission. Mr. Olson gives a history of Rule 73. This rule originated in the circuit courts and judges were spending a lot of time reviewing fee requests in default cases, so they implemented a schedule of attorney's fees to allow clerks to enter defaults without the judge's involvement. This process worked well for many years but eventually inflation caused the schedule to become out of date and attorneys were filing affidavits in support of fee requests. The schedule has been adjusted over the years with the most recent adjustment in 2018. Mr. Olson and Charles Stormont, now a district court judge, worked out a compromise that resulted in the current schedule. Mr. Olson has provided the Committee with a detailed proposal that outlines his recommendations for an increase due to inflation over the past few years. Mr. Olson recognizes that the time period from the last adjustment is shorter, but inflation has been increasing more rapidly.

Mr. Olson consulted with Judge Stormont, who volunteered to appear at the Committee meeting to give his perspective on the history of the change in schedules. Mr. Jim Hunnicutt was on the Committee during the last adjustment and remembers Judge Stormont was the counterpoint and there was a robust back and forth. Mr. Andreason notes that some kind of increase is overdue. The Committee discussed a counterpoint representative that would be willing to appear and give perspective.

Ms. Tonya Wright is a LPP in debt collection who has questions regarding the contested fee, which she notes is a substantial increase. Mr. Olson noted that the contested fee requires a hearing which increases an attorney's cost and one that he hardly ever uses because it was not enough to cover his costs for the hearing. Ms. Heather Lester notes that it seems to be a high increase from even the standards. Mr. Olson stated that it only applies on entry of judgment and most of the work is done at that point along with a thirty point checklist. Judge Laura Scott commented that \$1200 is higher than attorneys usually ask for in an affidavit and notes that since the pandemic there is no travel time that needs to be included.

Mr. Andreason stated that the Committee needs to have a little more analysis of the issue including a view from a counterpoint. A subcommittee was formed including Ms. Tonya Wright, Mr. Bryan Pattison and Ms. Heather Lester. Ms. Haacke will contact Judge Stormont.

#### **(7) RULE 62. STAY OF PROCEEDINGS TO ENFORCE A JUDGEMENT OR ORDER**

Mr. Leslie Slaugh, a former member of the Committee, presented on proposed amendments to Rule 62. Utah Rule 62(b) of the Federal Rules of Civil Procedure allows a stay of judgment at any time and no similar right exists under the Utah rule. Mr. Slaugh suggests the Committee follow the lead. Mr. Slaugh notes that between 62(b) and 62(c) there is no permissible way to get a stay on a non-monetary judgment unless a party has an appeal pending. It is unclear from the rules as written whether the court has authority to grant a stay and Mr. Slaugh thinks the rule ought to clearly give the court authority.

Mr. Slaugh states that there seems to be two problems with 62(c). The rule seems to require that an appeal already be pending and by that time it is often too late. He notes that 62(a) applies if you have an injunction but it needs to be more broadly worded so that it applies anytime. It appears the more difficult question is what the grounds for a stay on a nonmonetary judgment are. Mr. Hunnicutt questions whether the wording might be authorizing a stay as a matter of right and is not sure that is what the federal rules committee intended. Mr. Pattison thought the Committee had changed the wording at the request of someone from the appellate rules committee and questioned whether the Committee would

be backsliding on why the Committee changed it. Mr. Andreason stated that it would be beneficial to look at history of changes to the rule to see where we have been.

Mr. Hunnicutt wasn't here at the Committee meeting last month so he briefly introduces himself. Mr. Hunnicutt reviews *Rothwell v. Rothwell*, 2023 UT App 51, where the Utah Court of Appeals invited this Committee to review Rule 62. Mr. Hunnicutt reviews the opinion and noted that in the majority of divorces, the rule as written is not going to be a problem, but there are a few where it could be an injustice, and that it seemed the *Rothwell* court felt confined by Rule 62. The husband was able to keep assets for several years that had been awarded to the wife. The proposed amendments give judges more leeway during an appeal of a divorce.

A subcommittee was formed including Commissioner Conklin, Mr. Hunnicutt and Ms. Hanks. Commissioner Conklin will serve as Chair of the subcommittee.

## **(8) SUBCOMMITTEE ASSIGNMENTS**

The Committee reviews the subcommittee assignments to make adjustments because of old members leaving and new members joining the Committee. For the records classification subcommittee, Ms. Haacke notes that Judge Stone drove this one. The Supreme Court had questions and the Committee questions whether we continue to pursue it. Mr. Toth and Mr. Hunnicutt will look into it and Ms. Haacke will send them historical information.

For the plain language subcommittee, Ms. Susan Vogel has finished her term on the Committee so a new chair is needed. Mr. McMurray will be willing to chair and notes that there is no urgency to that subcommittee because it is more of an ongoing review of rules. Susan was a good advocate for plain language.

For the standard discovery PO subcommittee. Mr. Pattison thinks it died off but remembers meeting with Judge Oliver and creating a with a draft PO. After that it went to the Supreme Court and then the forms committee. Mr. Pattison and Ms. Haacke will work together to track down emails. Mr. McMurray remembered that the plain language committee looked at the PO.

For the eviction expungements, Judge Stucki was Chair, but they never met. The subcommittee thought that there was going to be a legislative change. Ms. Lester is currenting the chair and is happy to keep it that way. Ms. Haacke and Ms. Lester will correspond to check on the status. Ms. Sargent is happy to help.

The Rule 42 subcommittee requested more members. Ms. Page would love to have additional help. Ms. Sargent notes that with the Business and Chancery Court coming online Oct. 1<sup>st</sup> there is going to be a lot more transfer of cases. Mr. Chambers is happy to help with that one.

**(9) ADJOURNMENT**

Mr. Andreason thanked everyone for their hard work for the Committee. With no more agenda items, the meeting was adjourned at 5:57 p.m. The next meeting will be October 23, 2024, at 4:00 p.m.