



Administrative Office of the Courts

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

MEMORANDUM

Daniel J. Becker
State Court Administrator
Raymond H. Wahl
Deputy Court Administrator

To: Policy and Planning Committee
From: Nancy Sylvester *Nancy D. Sylvester*
Date: June 24, 2016
Re: Remote Hearings Rules

On May 25, the Supreme Court took up three remote hearings rules: Juvenile Procedure Rules 29B and 37B, Criminal Procedure Rule 17.5, and Civil Procedure Rule 43. The rules were supposed to align with Code of Judicial Administration Rule 4-106 to allow for remote conferencing with appropriate safeguards. The impetus behind this was a 2014 Judicial Council study about the evolving technology that makes remote conferencing a more viable option when appropriate.¹

The Supreme Court expressed concerns, though, that the four procedure rules all had language variations and did not necessarily align with Rule 4-106 (effective May 1, 2016). It did not act on them and instead sent them back to be discussed among the staff members and the committees to see if the language could better match up unless there was good cause for the variations.

When Brent Johnson, Tim Shea, Katie Gregory, and I met to discuss the various rules, one idea that was kicked around was repealing Rule 4-106 and placing the constitutional safeguards it espouses in each rule of procedure instead. But the question then arose, does this create gaps? In my opinion, this would create gaps, but not necessarily for the reasons our group discussed. The due process protections apply whether they are specifically enumerated or not. But as Rule 4-106 is currently drafted,

¹ COMMITTEE ON REMOTE HEARINGS AND SERVICES, REPORT TO THE JUDICIAL COUNCIL (2014).

it may now foreclose the normal phone scheduling conferences that happen every day in our courthouses. It discusses the constitutional safeguards, but does not carve out those instances when they are not needed. So Rule 4-106 should stay, but it seems to need a simple fix to better allow for the normal out-of-court conferencing that happens regularly.

Another fix that may be needed is better matching up the language within the rule. For example, the title to the rule reads Remote Conferencing, but nowhere in the rule is that language repeated. It instead discusses remote appearances and conferencing from a different location. It is at least worth another look to determine if a change is appropriate.

Returning to the Supreme Court's concerns, it may be worthwhile to add references to the Supreme Court's rules of procedures. The juvenile procedure rule drafts contain references to Rule 4-106, but the Supreme Court will likely remove them since it does not typically refer to the Code of Judicial Administration. But just so it is clear that there is a connection, a reference to the four procedural rules may be appropriate.

I have attached the following to this memorandum: 1) the current drafts of the four rules of procedure, 2) an email from Katie Gregory regarding the edits the juvenile procedures committee made in response to the Supreme Court's feedback, and 3) the May 1 draft of Rule 4-106 in legislative format.

Rule 29B. Hearings with remote conferencing ~~contemporaneous transmission~~ from a different location.

Pursuant to Rule 4-106 of the Utah Code of Judicial Administration:

(a) In any delinquency proceeding or proceeding under Section 78A-6-702 or Section 78A-6-703 the court may conduct the following hearings with the minor or the minor's parent, guardian, or custodian attending by ~~contemporaneous transmission~~ remote conferencing from a different location:

- (a)(1) contempt;
- (a)(2) detention;
- (a)(3) motion;
- (a)(4) review; and
- (a)(5) warrant.

(b) Except as provided in Paragraph (a), upon motion of ~~a party~~ and for good cause shown, the court may permit a party or a minor's parent, guardian, or custodian to attend any delinquency hearing or hearing under Section 78A-6-702 or Section 78A-6-703 by ~~contemporaneous transmission~~ remote conferencing from a different location.

(c) ~~In compelling circumstances and with appropriate safeguards~~ For good cause, the court may permit testimony in open court by ~~contemporaneous transmission~~ remote conferencing from a different location if the party not calling the witness waives confrontation of the witness in person.

(d) If the court permits remote conferencing, the court may require a party to make the arrangements for the remote conferencing.

Rule 37B. Hearings with remote conferencing ~~contemporaneous transmission~~ from a different location.

Pursuant to Rule 4-106 of the Code of Judicial Administration:

(a) Except as provided in Rule 29B, upon motion of ~~a party~~ and for good cause shown, the court may permit a party or a minor's parent, guardian, or custodian to attend any proceeding by ~~contemporaneous transmission~~ remote conferencing from a different location unless otherwise prohibited by law or rule.

(b) ~~In compelling circumstances~~ For good cause and with appropriate safeguards, the court may permit testimony in open court by ~~contemporaneous transmission~~ remote conferencing from a different location.

(c) If the court permits remote conferencing, the court may require a party to make the arrangements for the remote conferencing.

Rule 17.5

for good cause
Rule 17.5 Hearings with contemporaneous transmission from a different location.

(a) The court, in its discretion, may conduct the arraignment, bail hearing, and/or initial appearance with a defendant attending by contemporaneous transmission from a different location without the agreement of the parties or waiver of the defendant's attendance in person.

(b) For any other type of hearing, the court may conduct the hearing with a defendant attending by contemporaneous transmission from a different location only if the parties agree and the defendant knowingly and voluntarily waives attendance in person.

(c) The court, in its discretion, may permit testimony in open court by contemporaneous transmission from a different location if the party not calling the witness waives the right to confront the witness in person.

(d) Nothing in this rule precludes or affects the procedures in rule 15.5.

for good cause

Rule 43. Evidence.

(a) Form. In all trials, the testimony of witnesses shall be taken orally in open court, unless otherwise provided by these rules, the Utah Rules of Evidence, or a statute of this state. ~~All evidence shall be admitted which is admissible under the Utah Rules of Evidence or other rules adopted by the Supreme Court.~~ 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 ~~appearing of in the record,~~ the court may hear the matter on affidavits, ~~presented by the respective parties, but the court may direct that the matter be heard wholly or partly on~~ 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.



Nancy Sylvester <nancyjs@utcourts.gov>

Remote Access Rules-URJP

1 message

Katie Gregory <katieg@utcourts.gov>

Thu, Jun 16, 2016 at 4:09 PM

To: Tim Shea <tims@utcourts.gov>

Cc: Nancy Sylvester <nancyjs@utcourts.gov>, Brent Johnson <brentj@utcourts.gov>, Carol Verdoia <cverdoia@utah.gov>

Tim,

At our meeting last week, you asked that I send you the latest copies of proposed URJP 29B and 37B, which I have attached. The attached versions contain the URJP's June 3 revision of the "compelling circumstances" standard to "good cause," as well as the small punctuation changes in Rule 29B. I included them on the marked up drafts that went to the Court on May 25th because the revisions contained in those drafts were reviewed but not formally approved by the Court. Please let me know if you would prefer clean copies, as I agree that it is getting a little confusing at this point.

For the time being I left in the qualifier at the top of each rule which reads "Pursuant to Rule 4-106 of the Code of Judicial Administration:" I understand your concern that the Court will likely not support a rule that permits testimony pursuant to a rule of the Judicial Council. I reviewed the auto tape of the December 2015 meeting in which the URJP Committee moved to include the reference. Assuming that the Court will ask that the reference be removed, the URJP Committee will need to revise its rules and attempt to harmonize the the provisions of 4-106 with the juvenile rules. For example, the juvenile rule permits a "party or a minor's parent, guardian or custodian" to attend a hearing from a remote location. Rule 4-106 also allows counsel to participate remotely and provides that the judge may conduct the hearing remotely. The committee read the later to mean that a judge could be at the judicial conference and appear by telephone (ie shelter or arraignment) with the hearing participants present in his or her courtroom. The URJP Committee also wished to incorporate into the juvenile rules by reference the standards for the remote appearance contained in 4-106(3)(A) through (D). Depending on the future of Rule 4-106 with Policy & Planning, the URJP may need to incorporate some of the language of 4-106 directly into the juvenile rules. The Committee was concerned that if the juvenile rules and 4-106 are promulgated in their current forms without cross reference that a conflict is created that may set up a debate in the courtroom about which individuals are entitled to request remote participation.

The other point made at the committee level was a preference for the phrase "remote conferencing" over "contemporaneous transmission from a different location." First because they felt that any transmission contemplated would be "contemporaneous." Secondly, they preferred the term remote conferencing because it focuses on the ability of the participants to be physically in a different location while contemporaneous transmission is focuses on the vehicle through which the person participates.

So..I'm afraid this is getting worse and not better. Please let me know what is decided about 4-106 and any direction I may take back to the URJP on August 19.

Katie

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2 attachments

Rule 4-106. ~~Electronic~~ Remote conferencing.

Intent:

To authorize the use of ~~electronic 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) In the judge's discretion, any hearing may be conducted using telephone or video conferencing.~~

~~(2) Any proceeding in which a person appears by telephone or video conferencing shall proceed as required in any other hearing including keeping a verbatim record.~~

(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.