UTAH SUPREME COURT ADVISORY COMMITTEE ON RULES OF CIVIL PROCEDURE

Meeting Minutes – September 28, 2016

PRESENT: Jonathan Hafen, Trystan Smith, James Hunnicutt, Judge James Blanch, Judge Kate Toomey, Terri McIntosh, Lincoln Davies, Kent Holmberg, Judge Andrew Stone, Leslie Slaugh, Sammi Anderson, Heather Sneddon, Judge John Baxter, Rod Andreason, Paul Stancil

TELEPHONE: Dawn Hautamaki

STAFF: Nancy Sylvester, James Ishida, Lauren Hosler

GUESTS: Zachary Myers, Judy Finch, Rick Schwermer, Mary Jane Ciccarello

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(1) WELCOME AND APPROVAL OF MINUTES.

Chair Jonathan Hafen welcomed the committee, in particular the new members. Mr. Hafen invited all members of the committee to introduce themselves and reviewed the committee's Principles of Rulemaking, noting that they are available on the committee website (http://www.utcourts.gov/utc/civproc/). The minutes from the June 22, 2016 meeting were unanimously approved, with a few minor amendments.

(2) RULE 4. PROCESS (SERVICE UPON ROOMMATES).

Zachary Myers presented to the committee. Mr. Myers proposed a revision to Rule 4(d)(1)(A) that would disallow service on a dwelling-mate in unlawful detainer actions, without first obtaining leave of court. Mr. Myers explained that the basis for his proposed revision is that, in conjunction with the three-day period to respond, notice to a dwelling-mate is leaving many tenants without actual notice of the hearing date, resulting in many unfair defaults.

Mr. Slaugh raised concerns about difficulties in effecting service under the current rule, including issues of successful avoidance of service, and queried to Mr. Myers his response to an argument that this is another hurdle making eviction more difficult. Mr. Myers responded that many tenants have legitimate defenses that aren't getting heard because they don't have actual notice.

Judge Stone expressed concern that during the pendency of service treble damages are accruing against tenants. Judge Stone explained that the service of an unlawful detainer action isn't the tenant's first notice, as a notice to quit is required prior to filing the action.

Mr. Slaugh explained there are situations where service is technically legal, but ineffective for providing actual notice. He suggested the rule be amended to provide additional reassurances for actual notice in instances of short response times.

Mr. Holmberg asked about the interplay between this rule and the legislative framework. Mr. Schwermer explained the interplay between the Supreme Court's and the Legislature's rulemaking authority over procedural matters and explained the legislative process for amending a Rule of Civil Procedure. Mr. Schwermer noted that the Supreme Court recommended the committee review the proposed amendment because the issue had been previously raised to the Legislature. Mr. Schwermer suggested that even if the committee ultimately decided not to act in response to the proposed amendment, the Legislature would appreciate the committee's input on the language of the proposed amendment as the Legislature may act in the event the committee does not.

Judge Blanch questioned the prudence of substance-specific rules of service and the possibility of opening the door to modifying service rules for other specific types of actions. As an alternative, Judge Blanch proposed linking the three-day response time to a method of actual service, rather than deeming service ineffective. Mr. Slaugh proposed alternate language to allow service upon dwelling-mates "except in an action where the time for response is less than 21 days, unless leave of court is granted." Mr. Myers noted that the "unless leave of the court is granted" may be redundant.

Mr. Hunnicutt asked what other types of lawsuits the proposed rule might impact, i.e. have a response time of less than 21 days. The committee considered the applicability of the proposal to temporary restraining orders.

Mr. Hafen suggested we invite members on both sides of the issue to discuss the matter further at a future meeting; the committee concurred.

(3) RULE 65C. POST-CONVICTION RELIEF (RECORDS IN A CRIMINAL CASE).

Mr. Ishida presented on behalf of the Appellate Rules Committee, requesting a change to Rule 65C to expressly make the criminal record part of the post-conviction relief ("PCRA") civil record, enabling the appellate court to review the criminal record in conjunction with a PCRA appeal. Mr. Ishida explained that sometimes in PCRA appeals the criminal record is not included. And although, as a practical matter, it is typically available upon request, the proposed amendment would obviate the need to make a specific request.

Judge Stone noted that a clarification would also be useful at the trial court level because there is some discussion about whether the criminal matter is extra-judicial in the separate, civil PCRA action. Mr. Hafen questioned whether there was any reason not to adopt this proposal, noting he didn't see any.

Judge Toomey moved to send the proposed amendment out for comment, and Mr. Andreason seconded. The motion passed unanimously.

(4) RULES 4 AND 15. FURTHER AMENDMENTS REQUESTED BY THE UTAH SUPREME COURT.

Mr. Hafen began by explaining the process of submitting the committee's proposed amendments to the Utah Supreme Court for consideration. Ms. Sylvester explained the committee's proposed amendments to Rules 4 and 15 were presented to the Utah Supreme Court, and that the Court recommended the proposed amendments undergo further consideration by the committee. Ms. Sylvester detailed the Court's concerns about the interplay among proposed Rule 15(c), proposed Rule 4(b), and existing Rule 6(b).

The committee discussed the potential inconsistency between the "good cause" standard set forth in proposed Rule 4(b) on line 7 and the standards set forth in Rule 6(b)(1)(A)-(B). Mr. Hafen proposed removing "The court may allow a longer period of time for good cause shown." in proposed Rule 4(b), and adding an advisory committee note that "Nothing in the amendment is intended to modify the applicability of Rule 6."

Mr. Andreason questioned why the "good cause" standard was a problem. The committee discussed the issue at length. In particular, there was concern that the proposed Rule 4(b) permitted the court to order a different period of time "for good cause shown" regardless of whether the request was made before or after the expiration of the 120 days, and Rule 6 would require "excusable neglect" if the request was made after the expiration of the 120 days. The prudence of such a change was discussed by the committee. The committee also discussed the relationship between proposed Rule 4(b) and proposed Rule 15(c), as well as the relationship between proposed Rule 15(c) and Rule 15(c) of the Federal Rules of Civil Procedure ("FRCP"). The committee proposed alternate language for Rule 4(b) of "unless the court orders a different period under Rule 6" with no advisory committee note. The committee further discussed whether an additional comment period was necessary as a result of this proposed change. Mr. Smith moved to adopt the language "unless the court orders a different period of time under Rule 6" and present the proposed amendment to the Supreme Court. Ms. Sneddon seconded. The motion passed unanimously.

Mr. Hafen moved back to Rule 15 and suggested the committee delay a decision on Rule 15 in order to obtain further clarification from the Supreme Court. Mr. Davies sought clarification regarding the history of Rule 15, in particular its deviation from FRCP 15. The committee also discussed the impetus for amending Rule 15—a concurring opinion by Judge Voros in the case of *Wright v. PK Transport*, 2014 UT App 93, ¶¶ 18-22. The committee questioned and discussed whether the proposed Rule 15(c) language contemplated adding a party, or just substituting or changing a party, ultimately determining that it did contemplate adding a party. The committee again noted that the proposed Rule 15(c) was identical to FRCP 15(c). Mr. Davies discussed the operation of FRCP 15(c).

Mr. Hafen recommended the committee defer any further modifications to proposed Rule 15(c) in order to discuss the proposed Rule 15(c) further with the Utah Supreme Court. The committee agreed.

(5) RULE 7. FILED VS. SERVED AND LIMIT ON ORDERS TO SHOW CAUSE.

Mary Jane Ciccarello, director of the Self-Help Center of the Utah State Courts, presented to the committee on her proposed changes to Rule 7. Ms. Ciccarello discussed the large number of pro se parties utilizing our court system, in particular in eviction, divorce, and debt collection actions where there is an abundance of motion practice, and shared her concerns about the language of "filed" versus "served" in Rule 7. Ms. Ciccarello noted that because pro se plaintiffs cannot e-file, they rarely receive simultaneous notice of filings the same way that attorneys do (inasmuch as all actively licensed attorneys are required to be registered for e-filing). As a result, she explained there is confusion among pro se parties about what it means to file, when service is accomplished, and the applicability of Rule 6(c) in light of its "service" language, and also there are delays in receiving actual notice of filings resulting in shorter response times for pro se parties as compared to represented parties. Ms. Ciccarello also noted the inconsistency with the language of Rule 101, which states "filed and served."

Judge Blanch noted that the committee previously considered a similar proposal, but declined to recommend it to maintain predictability for the automatically generated scheduling orders. Judge Blanch stated that, notwithstanding the prior decision, since the proposal is only to change the wording of Rule 7, and for the majority of filings service occurs simultaneously with filing, he supports the proposal to protect the interests of self-represented parties.

Mr. Slaugh expressed concern about the possibility of the proposal undermining the "days are days" simplicity of the current rules by reintroducing the three-day mailing rule for filed documents and questioned whether pro se parties are really hurt by the decreased response time created by service via mail and the "filing" language.

Ms. Ciccarello responded that pro se parties are most hurt by the uncertainty of how service is accomplished under the rules, and stated that many pro se parties are not getting served with documents, don't know what date to state on a certificate of service, and don't know and can't ascertain when their responses are due (because it's not apparent from the face of the document when filing is accomplished).

The committee discussed the proposals and compared the existing and proposed rules to the federal rules. The committee further discussed whether the proposal would add or remove uncertainty for pro se parties, and whether a more appropriate solution may be to allow pro se parties to e-file.

Ms. Sylvester asked Ms. Ciccarello about her proposal for Rule 101. Ms. Ciccarello responded that she proposed that Rule 101 use only "filed" or "served," and not both as it currently does, and that the same term used in Rule 7 be used in Rule 101.

The committee also considered a proposal to amend Rule 6 to create an exception specifically for self-represented parties. Ms. Ciccarello noted that knowledge of the filing date is an additional hurdle for self-represented parties because they don't have access to the docket. The committee discussed the ongoing applicability of Rule 6(c) in light of the shift in language in the rules from

"served" to "filed." The committee deferred a decision on the proposal and opted to reconsider the proposal again, along with Rules 6(c) and 101. The committee invited Ms. Ciccarello to return to a future meeting.

Judge Blanch presented on the proposed change to Rule 7(q) on orders to show cause. He explained that, as a result of the prior change, attorneys are now filing orders to show cause on matters other than to enforce existing orders or for contempt for violation of an existing order. The committee was unanimously in support of the proposal. Judge Toomey moved to restore the proposed language to Rule 7(q) without an advisory committee note referencing the change; Mr. Davies seconded. The motion passed unanimously.

(6) ADJOURNMENT.

The remaining matters were deferred, and the committee adjourned at 6:00pm. The next meeting will be held on October 25, 2016 at 4:00pm at the Administrative Office of the Courts, Level 3.