UTAH SUPREME COURT ADVISORY COMMITTEE ON RULES OF CIVIL PROCEDURE

Meeting Minutes – January 24, 2018

PRESENT: Chair Jonathan Hafen, Judge Andrew Stone, Judge James Blanch, Judge Kent Holmberg, Judge Laura Scott, Judge Clay Stucki, James Hunnicutt, Rod Andreason, Lauren DiFrancesco, Susan Vogel, Barbara Townsend, Michael Petrogeorge, Leslie Slaugh, Justin Toth, Paul Stancil, Lincoln Davies, Dawn Hautamaki (remote), Judge Kate Toomey (remote), Timothy Pack, Trystan Smith, Judge Amber Mettler

EXCUSED: Heather Sneddon

STAFF: Nancy Sylvester

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(1) WELCOME, APPROVAL OF MINUTES

Jonathan Hafen introduced new recording secretary, Katy Strand, to the committee and had the members introduce themselves. Mr. Hafen then turned to the minutes and requested any edits to them. Ms. Sylvester noted Jim Hunnicutt's edits. Rod Andreason echoed the same edits. Mr. Hunnicutt moved to approved the minutes as amended and Mr. Andreason seconded the motion. The committee unanimously approved the minutes.

(2) LOGUE SUBCOMMITTEE

In *Logue v. Court of Appea*ls, 2016 UT 44, the Utah Supreme Court stated, "It appears that criminal defendants, like Mr. Logue, who discover new evidence more than ninety days after sentencing must await the conclusion of their appeal before attempting to seek relief based on this evidence, even if it would likely entitle them to a new trial." *Id.* ¶ 5. It then directed the appropriate advisory committee on the rules of procedure to consider revising the rules so that they do not act as a categorical bar to motions for new trials. The advisory committees for the rules of civil, criminal, and appellate procedure formed a joint subcommittee to consider revising the rules.

The subcommittee concluded that Rule of Criminal Procedure 24 was the rule at play but modifying it could have significant negative unintended consequences for post-conviction relief. The subcommittee recommended against amending any rules. Leslie Slaugh moved to approve the subcommittee's recommendation and Amber Mettler seconded. The motion passed unanimously.

(3) RULE 5(B)(5)(B). ORDERS PREPARED BY THE COURT

Ms. Sylvester introduced the topic and Susan Vogel reported that in her experience with the Self-Help Center, pro se litigants are not always receiving copies of orders from the court or opposing counsel. She said if an order is e-filed and then signed by the judge it will return to the attorney, but not to the pro se party. She said the clerks assume the attorneys are sending it on to the other party

but in many cases they are not. Ms. Vogel said even when orders are served by opposing counsel, pro se litigants have expressed concerns to the Self-Help Center about their authenticity. Mr. Leslie Slaugh and Judge Stone questioned why the court relies on an adversarial party to serve it. Mr. Slaugh argued that the court as a third party should serve it if possible. Rod Andreason observed that we may need a change. He said ideally, the court would serve any order they sign. However, that may be expensive due to mailing costs and time prohibitive. And perhaps some orders, like garnishments, should be served by the party requesting them. He proposed that if a party requests and is granted an order, that party should serve it on the other. But if no party requests the order, the court shall serve it. The committee discussed that his solution likely doesn't address Ms. Vogel's concerns about trust and confidence in the courts. Lauren DiFrancesco pointed out that we should put the onus back on the attorney because they have an ethical obligation *not* to fake orders. Even if parties don't trust it they will have to learn to.

Dawn Hautamaki reported that the clerks of the court are under the impression that the clerks should not be serving orders when a party submits a proposed order and the court then signs it. With respect to orders the judge changes, the clerks are not always aware if the judge has changed an order, so the clerks would not know that they should be sending it out since it was not originally prepared by the court. The clerks recognize that there is a problem, but are concerned that in civil cases they may not have the addresses for service purposes. Generally, the clerks believe the attorneys should be responsible for sending orders out to the other parties. As a group they did not like the plan of requiring the clerks to serve a proposed order after it is signed. The court also "issues" several other things that are not typically served, so by using the word "issues" it may unintentionally create additional, unnecessary requirements and burdens on the court, including financial. Mr. Slaugh opined that unless there is a major fiscal reason, the only fair option is to have the courts do it.

Judge Toomey proposed that all of these issues would be resolved if pro se litigants were given access to e-filing. Ms. Hautamaki said if orders went through e-filing, they would automatically show up in the person's inbox. Committee members also discussed how accepting papers by email could temporarily solve many of these problems, too. Ms. Strand pointed out that a number of people will still not be able to do this. Judge Stone said that we cannot require email at this point, but that it should be possible for the courts to serve all orders and technology will catch up. Mr. Slaugh pointed out that there is an advantage to the court serving an order because, like the federal courts—and unlike attorneys—the court does not go on vacation. Judge Stone reiterated that the burden of serving would no longer be problematic if email were required.

Susan Vogel pointed out the Rule 5 amendments would exclude anything that has to be served under Rule 4 (case initiating documents). Judge Blanch agreed that the court should be sending out the orders they sign excluding things that have to be served under Rule 4. Mr. Hunnicutt noted that Rule 58 requires that notice of judgment is to be served by the party preparing it, so it will not be consistent, but there is a good reason for this requirement: the burden to serve is on the person who wants to enforce the order later.

Judge Stone expressed concerned that the rule would require mailing minute entries, which would be impractical. Judge Blanch pointed out that he signs most minute entries. He added that an order is valid even if it is not served. The committee observed that it did not intend signed orders to

include every minute entry. Ms. Sylvester pointed out the following language in the committee note to Rule 7:

> The committee recognizes the many different forms a judge's decision might take, and discussed defining "order," but decided against the attempt. There are too many variations. If written, the document might be titled "order," "ruling," "opinion," "decision," "memorandum decision," etc. The decision might not be written; an oral directive is an order. A clerk's minute entry of an oral decision is, when signed by the judge, treated the same as a written order.

She observed that the language in Rule 5 should reflect that only dispositive orders or ones that implicate parties' rights should be served.

Judge Stucki said he didn't feel comfortable adopting the language yet because he said it still may not be clear what an order means as drafted. He and Judge Blanch echoed that the court should not be sending out 200 minute entries since not all orders are equally impactful.

Professor Paul Stancil proposed a study to see empirical data on the current rule prior to a proposal.

Nancy Sylvester proposed working with the Policy and Planning Committee to create a rule requiring email for all litigants.

Ms. Vogel moved to amend the rule to striking "every paper" in paragraph (b)(5)(B) and adding: "Every ruling, decision, or order of the court that is to be served under this rule shall be served by the court on the parties." She also moved to amend paragraph (a)(1)(B) to state "a signed order of the court other than a non-final oral directive memorialized in a minute entry" and striking "an order that states it must be served."

Mr. Slaugh seconded the motion.

Further discussion ensued so no further vote was taken. Mr. Slaugh then moved to table this amendment subject to further vetting by committee members and court staff. Ms. Vogel seconded the motion and it passed unanimously.

(4) OTHER BUSINESS

Mr. Hafen gave an update on the Rule 16 Case Management Pilot Program along with Mr. Stancil. Mr. Stancil observed that in a year to 18 months there will be enough data to evaluate and determine if the committee wants to make this statewide. No new cases are being initiated into this program for the purposes of study now that the two years of gathering cases have lapsed.

(5) ADJOURNMENT

The remaining matters were deferred, and the committee adjourned at 6:00 pm. The next meeting will be held on February 28, 2018 at 4:00 pm at the Administrative Office of the Courts, Level 3.