

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

Meeting Minutes – May 22, 2019

Committee members & staff	Present	Excused	Appeared by Phone
Jonathan Hafen, Chair		X	
Rod N. Andreason	X		
Judge James T. Blanch	X		
Lincoln Davies		X	
Lauren DiFrancesco	X		
Dawn Hautamaki		X	
Judge Kent Holmberg	X		
James Hunnicutt	X		
Larissa Lee		X	
Trevor Lee	X		
Judge Amber M. Mettler	X		
Timothy Pack		X	
Bryan Pattison		X	
Michael Petrogeorge		X	
Judge Clay Stucki	X		
Judge Laura Scott			X
Leslie W. Slaugh	X		
Trystan B. Smith		X	
Heather M. Sneddon		X	
Paul Stancil	X		
Judge Andrew H. Stone	X		
Justin T. Toth			X
Susan Vogel	X		
Katy Strand, Recording Secretary		X	
Nancy Sylvester, Staff	X		

GUESTS: Rep. Brady Brammer, Michael Drechsel, Jacqueline Carlton, Joseph Wade.

(1) WELCOME AND APPROVAL OF MINUTES

Rod Andreason, acting committee chairperson, welcomed the committee and asked for approval of the minutes. Jim Hunnicutt moved to approve the minutes, as amended. Lauren DiFrancesco seconded. The motion passed.

(2) COORDINATION OF INTERVENTION RULES: URCP 24, URAP 25A, URCrP 12.

Nancy Sylvester introduced this issue. The committee reviewed the proposed changes and discussed subsection (d)(2) to appropriately encompass the intended breadth of the rule. The committee further discussed the advisability of the breadth of the rule. The committee reached a consensus on amending the rule to read:

Rule 24. Intervention.

(a) Intervention of right. On timely motion, the court must permit anyone to intervene who:

(1) is given an unconditional right to intervene by a statute; or

(2) claims an interest relating to the property or transaction that is the subject of the action, and is so situated that disposing of the action may as a practical matter impair or impede the movant's ability to protect its interest, unless existing parties adequately represent that interest.

(b) Permissive intervention.

(1) In General. On timely motion, the court may permit anyone to intervene who:

(A) is given a conditional right to intervene by a statute; or

(B) has a claim or defense that shares with the main action a common question of law or fact.

(2) By a Government Officer or Agency. On timely motion, the court may permit a federal or state governmental officer or agency to intervene if a party's claim or defense is based on:

(A) a statute or executive order administered by the officer or agency; or

(B) any regulation, order, requirement, or agreement issued or made under the statute or executive order.

(3) Delay or Prejudice. In exercising its discretion, the court must consider whether the intervention will unduly delay or prejudice the adjudication of the original parties' rights.

(c) Notice and motion ~~p~~ required. A motion to intervene must be served on the parties as provided in [Rule 5](#). The motion must state the grounds for intervention and set out the claim or defense for which intervention is sought.

(d) Constitutionality of Utah statutes, ordinances, and regulations.

(d)(1) **Challenges to a statute.** If a party challenges the constitutionality of a Utah statute in an action in which the Attorney General has not appeared, the party raising the question of constitutionality must notify the Attorney General of such fact as described in paragraphs (d)(1)(A), (d)(1)(B), and (d)(1)(C).

(d)(1)(A) **Form and Content.** The notice must (i) be in writing, (ii) be titled “Notice of Constitutional Challenge Under URCP 24(d),” (iii) concisely describe the nature of the challenge, and (iv) include, as an attachment, the pleading, motion, or other paper challenging the constitutionality of the statute.

(d)(1)(B) **Timing.** The party must serve the notice on the Attorney General on or before the date the party files the paper challenging the constitutionality of the statute.

(d)(1)(C) **Service.** The party must serve the notice on the Attorney General by email or, if circumstances prevent service by email, by mail at the address below, and file proof of service with the court.

Email: notices@agutah.gov

Mail:

Office of the Utah Attorney General

Attn: Utah Solicitor General

350 North State Street, Suite 230

P.O. Box 142320

Salt Lake City, Utah 84114-2320

(d)(1)(D) **Attorney General’s response to notice.**

(d)(1)(D)(i) Within 14 days after the deadline for the parties to file all papers in response to the constitutional challenge, the Attorney General must file a notice of intent to respond unless the Attorney General determines that a response is unnecessary. The Attorney General may seek up to an additional 7 days’ extension of time to file a notice of intent to respond.

(d)(1)(D)(ii) If the Attorney General files a notice of intent to respond within the time permitted by this rule, the court will allow the Attorney General to file a response to the constitutional challenge and participate at oral argument when it is heard.

(d)(1)(D)(iii) Unless the parties stipulate to or the court grants additional time, the Attorney General’s response to the constitutional challenge must be filed within 14 days after filing the notice of intent to respond.

(d)(1)(D)(iv) The Attorney General’s right to respond to a constitutional challenge under Rule 25A of the Utah Rules of Appellate Procedure is unaffected by the Attorney General’s decision not to respond under this rule.

(d)(2) **Challenges to a governmental entity’s administrative or legislative enactment.** If a party challenges the constitutionality of a governmental entity’s ordinance, rule, or other administrative or legislative enactment in an action in which the governmental entity has not appeared, the party raising the question of constitutionality must notify the governmental entity by serving notice on the person identified in Rule 4(d)(1). The procedures for the party challenging the constitutionality of the enactment will be consistent with paragraphs (d)(1)(A), (d)(1)(B), and (d)(1)(C), except that service must be on the individual

governmental entity. The procedures for the response by the governmental entity must be consistent with paragraph (d)(1)(D).

(d)(3) **Failure to provide notice.** Failure of a party to provide notice as required by this rule is not a waiver of any constitutional challenge otherwise timely asserted. If a party does not serve a notice as required under paragraphs (d)(1) or (d)(2), the court may postpone the hearing until the party serves the notice.

Judge Andrew Stone moved to the send the rule out for comment, as amended. Judge Clay Stucki seconded. The motion passed.

(3) INFORMAL TRIALS: REFERRAL FROM THE JUDICIAL COUNCIL’S POLICY AND PLANNING COMMITTEE.

Judge Laura Scott introduced this issue; Ms. Sylvester provided additional background. Leslie Slaugh suggested having loose application of the rules of evidence—similar to Rule of Small Claims Procedure 7(d), in lieu of having the rules of evidence not apply at all. The committee discussed whether such modification would significantly alter the current practice of informal trials in domestic cases, as well as the general pros and cons of application of the Rules of Evidence in informal settings. The committee was generally in favor of applying this rule in domestic and probate matters in the short term, and leaving open the possibility of expanding the rule in the future to apply to other types of cases. The committee also was in favor of numbering the proposed rule as rule 39.1. Ms. Sylvester will run the proposed rule by commissioners for their input before further consideration by the committee.

(4) RULE 65C: SERVICE OF PETITIONS.

Ms. Sylvester introduced this issue. The committee discussed the distinction between e-filing documents and the court uploading documents to the docket. The committee had no changes to the proposal. Mr. Hunnicut moved to adopt the proposed changes. Judge Holmberg seconded. The motion passed.

(5) LICENSED PARALEGAL PRACTITIONERS AND THE CIVIL RULES.

Mr. Hunnicutt introduced this issue. The committee considered the proposed Rule 81(f) and debated the language of each sentence. The committee tabled Rule 81(f) for the next meeting to accommodate the arrival of guests to discuss Rule 68.

(6) DISCUSSION OF RULE 68 AND FORMATION OF A SUBCOMMITTEE.

Mr. Andreason introduced Rep. Brady Brammer, who introduced the issue to the committee. The committee discussed the issues at length with Rep. Brammer, centering on the following four areas of proposed improvement for Rule 68: (i) greater clarity as to recoverable costs in connection with a Rule 68 offer; (ii) more clear framework for shifting of attorney fees (where otherwise recoverable)

in connection with Rule 68 offers; (iii) more clarity on language as to whether an offer includes attorney fees (i.e., “adjusted award” language); and (iv) the advisability of whole or partial attorney fee shifting under Rule 68 where attorney fees would not otherwise be recoverable. Judge James Blanch raised the issue of gamesmanship in Rule 68 offers if attorney fees (not otherwise recoverable) are added to Rule 68 and the possibility that such a change would convert our legal system into a “loser-pays-attorney-fees” system. The committee discussed ways to evaluate whether a Rule 68 offer was made in good faith to combat such gamesmanship, including judicial oversight of the reasonableness of the offer. Rep. Brammer suggested implementing any new proposal involving fee-shifting of not otherwise recoverable attorney fees as a pilot program using Tier 1 cases with a sliding scale of or cap on attorney fees. Judge Kent Holmberg suggested a fifth possible change—a cost-shifting mechanism that would include all costs (not only those currently recoverable) in lieu of an attorney fee shifting scheme. Mr. Andreason appointed the following subcommittee to further evaluate the issue: Trevor Lee, Judge Clay Stucki, Leslie Slaugh, Susan Vogel, Rep. Ivory, and Rep. Brammer. The committee tabled the issue for further consideration by the subcommittee.

(7) ADJOURNMENT.

The remaining issues were deferred until the next meeting. The meeting adjourned at 6:10. The next meeting will be held June 26, 2019 at 4:00 pm.