

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

Summary Minutes – November 30, 2022

**DUE TO PARKING CONSTRUCTION AT THE MATHESON COURTHOUSE
THIS MEETING WAS CONDUCTED ELECTRONICALLY VIA WEBEX**

Committee members	Present	Excused	Guests/Staff Present
Rod N. Andreason		X	Jace Willard, Staff
Lauren DiFrancesco, Chair	X		Keri Sargent
Judge Kent Holmberg	X		Nick Stiles
James Hunnicutt	X		Jon Puente
Trevor Lee	X		Clark Sabey
Ash McMurray	X		Brandon Baxter
Kim Neville		X	John Bogart
Timothy Pack		X	Kara H. North
Loni Page	X		
Bryan Pattison	X		
Judge Laura Scott	X		
Judge Clay Stucki		X	
Judge Andrew H. Stone	X		
Justin T. Toth	X		
Susan Vogel	X		
Tonya Wright	X		
Judge Rita Cornish		X	
Vacant Commissioner Seat			
Vacant Academic Seat			
Vacant Academic Seat			
Vacant Self-Rep Perspective Seat			
Vacant Self-Rep Perspective Seat			
2 <i>Emeritus</i> Seats Vacant			

(1) INTRODUCTIONS

Ms. Lauren DiFrancesco welcomed the Committee and guests.

(2) APPROVAL OF MINUTES

Approval of minutes from October 26, 2022 Committee Meeting was deferred.

(3) RULES 7, 7A, AND 7B. REVIEW OF PUBLIC COMMENTS

The proposed amendments to these rules did not receive any public comments and are to be submitted to the Supreme Court for final approval.

(4) RULES 7, 7A, AND 83. MOTION TO STRIKE IMPROPER VEXATIOUS LITIGANT FILINGS

Mr. John Bogart presented as to the difficulty of enforcing a vexatious litigant order entered pursuant to Rule 83, and the lack of clarity as to whether a party must proceed under Rule 7A's procedures for enforcing an order, which involves full briefing and considerable delay. He said the rules are not clear as to how Rule 83 should interact with other rules. He proposed that a subparagraph be added to Rule 7(1)(1) for a motion to strike an improper vexatious litigant filing. This would allow a judge to decide the motion to strike without awaiting a response to such motion.

Judge Andrew H. Stone expressed doubt as to the need for the proposed amendment, saying that in his experience with vexatious litigants, a clerk would generally refuse an improper filing attempt by a vexatious litigant. Mr. Bogart responded that the proposed amendment is intended to address the exception, where a vexatious litigant manages to file a document that should not have been allowed.

Judge Stone also said that, even in such circumstances, the opposing party may simply ignore an improper filing, and that the court is highly unlikely to rule in favor of a vexatious litigant on anything of significance, even if no opposition is filed. Mr. Bogart responded that failing to respond is still risky, and that the other side shouldn't have to take that risk. Judge Stone agreed that the proposed amendment should be approved to receive public comments on the matter.

Judge Laura Scott moved to adopt the amendment as proposed. Judge Stone seconded the motion, which was unanimously approved.

(5) RULE 7. MOTION TO APPEAR REMOTELY

Ms. Susan Vogel proposed that Rule 7(1)(1) be further amended to allow a motion to appear remotely to be added to the list of motions that a judge may decide without awaiting a response. Ms. Vogel moved to so amend the rule. Mr. Justin Toth seconded the motion, which passed unanimously.

(6) RULE 83. NOTICE OF APPEAL

Mr. Nick Stiles presented as to an issue that has arisen where a trial court enters a filing restriction on a vexatious litigant, who then attempts to file a notice of appeal, but the clerk rejects the filing attempt based on the restriction. Trial court filing restrictions, if applied like that, would prevent a party from taking an appeal. He proposed amending Rule 83(b)(4) and (d)(1) to allow vexatious litigants to file a notice of appeal without first obtaining leave from the trial judge.

Judge Stone agreed that parties should be able to pursue appellate remedies, but he suggested that, in the case of vexatious litigants, such remedies may need to be pursued through the extraordinary writ process. Because a petition for an extraordinary writ may be filed directly with the appellate court, a trial court filing restriction would not interfere with a vexatious litigant's ability to obtain appellate relief that way.

Mr. Clark Sabey said the problem is that the notice of appeal filed with the trial court is the document used to determine whether a party has timely appealed. Under the appellate rules, the appellate court looks to the notice of appeal in determining whether it has jurisdiction. If the notice of appeal is not allowed, there is no documentation to support appellate jurisdiction.

Judge Stone moved to adopt the proposed amendment. Ms. Loni Page seconded the motion, which passed unanimously.

(7) RULE 83. PHRASE "OBTAIN LEAVE OF THE COURT"

Ms. Vogel proposed that Rule 83 be further amended to change the phrase "obtain leave of the court" in the rule to "obtain permission of the court" in order to make the rule more understandable to laypersons. Ms. Vogel moved to so amend the rule. Mr. Toth seconded the motion, which passed unanimously.

(8) RULE 100A. ORS EXEMPTION FROM CASE MANAGEMENT CONFERENCES

Mr. Jim Hunnicutt presented as to a request by the Office of Recovery Services (ORS) to be exempted from the Rule 100A case management conference requirement. ORS says that because its actions usually involves serving two parties, it often happens that one of them will be served and file an answer, prompting a case management conference to be set. The setting will often be premature because the other party has not yet been served or has not yet responded. In other cases a case management conference is unnecessary because the responding parties agree with ORS's pleading.

ORS has suggested different possible amendments to address the problem, the first being adding a new subparagraph (c) that would exempt ORS from case management conferences, and the second being to amend subparagraph (a) to provide that, where an action involves more than two parties, a case management conference would not be scheduled until proof of service has been filed for each responding party and at least one party has timely filed an answer.

Mr. Hunnicutt moved to adopt the first option proposed. Ms. Vogel seconded the motion, which passed unanimously.

(9) RULE 47. ATTORNEY VOIR DIRE

Ms. DiFrancesco reported that she received a list from Ms. Kara North identifying a number of attorneys consulted thus far with regard to Ms. North's proposed amendment to Rule 47.

Mr. Brandon Baxter presented in support of the proposal, urging the Committee to talk with judges from the First District regarding the proposal, who could provide a neutral perspective. He reported having had a discussion with First District Court Judge Spencer D. Walsh, who responded favorably to the proposal.

Mr. Jonathan Puente introduced himself as the director of the Office of Fairness and Accountability (OFA). He suggested presentation of the proposed rule to the OFA at a meeting in mid-December.

Judge Stone responded regarding Mr. Baxter's proposal to present the matter to judges as neutral parties. Judge Stone has informally presented the proposal to Third District Court judges, who try more than half of the cases in the state. He reported vigorous opposition to the proposal, saying the proposal is inconsistent with the voir dire process outlined in *State v. Williams*, 2018 UT App 96, 427 P.3d 434, which suggests use of a case-specific questionnaire, then general questions to all potential jurors, and then individual juror questions.

Mr. Baxter said he has never not been allowed to do attorney-directed voir dire. Ms. North inquired about the basis for Judge Stone's opposition.

Judge Stone expressed concern that mistrials would result from adopting the proposal due to the likelihood of improper questions. He says that in practice, most of the questions during voir dire are presented by attorneys, so Utah practice is not inconsistent with that of other states, as has been suggested.

Ms. DiFrancesco suggested that the merits of the proposal be postponed until further stakeholders have been consulted.

Judge Kent Holmberg asked whether the First District judges were given a copy of the proposed rule. Mr. Baxter responded that discussions have only treated the issue of attorney-directed voir dire generally. Judge Holmberg expressed concern that the proposed rule removes the trial judge's discretion to allow attorney-directed voir dire. He referenced a Task Force study of the issue concluding that judges need to take a more active role in voir dire and believes that reflects the national trend.

Ms. North expressed being open to suggestions for keeping trial judge discretion.

Ms. DiFrancesco said she would try to solicit more input on the issue, and accepted Mr. Puente's invitation to present the issue to the OFA. She said that the Rule 47 materials would be supplemented with *State v. Williams*, and that everyone would have one week to add other materials to go out.

Ms. North mentioned a Utah study done with Justice Durham's involvement and emphasized the Denver Study included in the Rule 47 materials. She offered to draft the letter to other stakeholders. Judge Stone encouraged all to read *State v. Williams*, and said the Denver Study incorrectly places Utah in the minority.

Ms. DiFrancesco summarized efforts to solicit input, saying that Judge Holmberg would reach out to the Board of District Court Judges, and that Ms. DiFrancesco would reach out to the Utah Defense Lawyers Association and the National Center for State Courts. Ms. DiFrancesco will also draft a letter regarding the materials provided, inviting supplemental materials from any other stakeholders, which letter will go out early the week of December 12 to give enough time prior to the next Committee meeting on January 25.

Ms. Vogel will obtain data as to the annual number of *pro se* civil jury trial cases in Utah district courts.

(10) RULE 10(d). 1" TOP MARGIN

Ms. DiFrancesco addressed a request to change the top margin for paper filings to 1" and asked whether a 1" margin would be sufficient for draft orders, which usually place the judge's signature on the top of the first page. Judge Stone asked whether it would really matter if the judge's signature was placed over someone else's name. Ms. Keri Sargent said that where judge and commissioner signatures are both needed, 1" might not be enough space for both and she will double-check this and report back in January.

Ms. Vogel said that because she is already working to collect all forms, and to make them more user-friendly and understandable to self-represented parties, she can work the margin issue into the same undertaking.

(11) RULE 4(d)(1)(D). PERSONAL SERVICE ON INMATES

Ms. DiFrancesco addressed Judge Orme's recent proposal (in *Jordan Credit Union v. Sullivan*, 2022 UT App 120, ¶18), expressing concern that his proposed wording could suggest that an attempt must be made to effect personal service on an incarcerated person. She said the solution is just to make the rule say that personal service is always sufficient service.

Ms. Vogel suggested alternative language for a proposed amendment of Rule 4(d)(1)(D) as follows: "by delivering a copy of the summons and complaint to the individual personally, to the

person” She moved to so amend Rule 4. Judge Stone seconded the motion, which passed unanimously. Mr. Stiles or Ms. Vogel will inform Judge Orme of the modification.

(12) RULE 53A. STATUS

Ms. DiFrancesco inquired as to the status of Rule 53A (special masters in family law cases). Judge Holmberg thinks this was approved in September to go to the Supreme Court for approval. Ms. DiFrancesco indicated she would check minutes regarding status; she doesn’t recall having presented it. She will give an update later in the week.

Update: On Friday, December 2, 2022, Ms. DiFrancesco sent an email to the Committee advising that she did present Rule 53A to the Supreme Court in September, and had received a redline draft back with comments from the Supreme Court. She shared the draft with the Committee and indicated that Rule 53A would be added to the agenda for January, but she suggested that the subcommittee would likely need to reconsider the matter and could do so either before the January meeting or have it pushed back to February.

(13) RULES 12(a)(1), 26.1(h), AND 104. STATUS

Ms. DiFrancesco reported on a discussion with Mr. Stiles as to the process to be followed when the Supreme Court suggests an amendment, as with Rules 26.1(h) and Rule 104. Proposals as to these rules, and others similarly made in the future, will be addressed by reaching out to the person requesting the change, requesting materials, and referring the matter to a subcommittee.

Ms. Vogel says Mr. Nathanael Player was the one who suggested the proposals mentioned in the September 2, 2022 memo from the Supreme Court, so the forms subcommittee can tackle all three of the proposed amendments: Rule 12(a)(1), Rule 26.1(h), and Rule 104. Ms. Vogel to present on all three in January.

(14) COMMITTEE VACANCIES

Ms. DiFrancesco and staff to review applications and make recommendations to the Supreme Court regarding filling the nonacademic vacancies later this month. She will also suggest appointments from University of Utah faculty for the open academic positions on the Committee.

(15) RULE 3(a)(2). STATUS

Mr. Trevor Lee provided an update regarding the proposed amendment to eliminate this subparagraph. The subcommittee has spoken with debt collectors, who like the existing rule, as it is often difficult to serve defendants in debt collection actions. There is no formal proposal at this point but the subcommittee will continue working on the issue and he will present a full report in January.

Judge Holmberg has included Judge Clay Stucki and will try to get input from Justice Court judges.

(16) ADJOURNMENT

The meeting adjourned at about 5:55.