

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

**Summary Minutes – April 26, 2023
via Webex**

**DUE TO THE COVID-19 PANDEMIC AND PUBLIC HEALTH EMERGENCY
THIS MEETING WAS CONDUCTED ELECTRONICALLY VIA WEBEX**

Committee members	Present	Excused	Guests/Staff Present
Rod N. Andreason, Vice-Chair	X		Stacy Haacke, Staff
Lauren DiFrancesco, Chair	X		Keri Sargent
Judge Kent Holmberg	X		Crystal Powell
James Hunnicutt	X		Shannon Treseder
Trevor Lee		X	
Ash McMurray		X	
Michael Stahler	X		
Timothy Pack	X		
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		
Commissioner Catherine Conklin	X		
Giovanna Speiss	X		
Jonas Anderson	X		
Heather Lester	X		
Jensie Anderson	X		
<i>Emeritus Seats Vacant</i>			

(1) INTRODUCTIONS

The meeting started at 4:04 p.m. after forming a quorum. Ms. Lauren DiFrancesco welcomed the Committee and guests.

(2) APPROVAL OF MINUTES

Ms. DiFrancesco asked for approval of the March Minutes subject to amendments noted by the Minutes subcommittee. Rod Andreason moved to adopt the Minutes as amended. Judge Stucki seconded. The Minutes were unanimously approved.

(3) RULE 26(G). STANDARD CIVIL DOCUMENTS PROTECTION ORDER

Ms. Lauren DiFrancesco met with the Forms Committee. They were not able to completely finalize the Standard Civil Protective Order in time. Two issues were raised in that meeting. First, there is no opportunity for a signed order in the standard protective order if the only thing a party has to do to have the protective order be in effect is to give notice. Second, The Forms Committee questioned the necessity for standard Findings of Fact that are a part of the order, when the judge would not have an opportunity to review the order before. They noted that the Findings of Fact is required under the Rules of Judicial Administration but queried whether the Rules of Judicial Administration needed to be amended. The draft standard order will be sent to the Standard Protective Order Subcommittee to review the concerns of the Forms Committee. Ms. DiFrancesco will follow up with the subcommittee directly.

(4) RULES RETURNING FROM PUBLIC COMMENT

Ms. DiFrancesco reported on the Rules coming back to the Committee from public comments. She noted that Rules 4, 7, and 100A need no further discussion or amendments.

For Rule 83, one commenter expressed that it was not yet clear how petitions for interlocutory appeals are to be treated regarding vexatious litigants where the implication is that vexatious litigants need to get pre-approval from the trial court. Ms. DiFrancesco reminded the Committee that in prior discussions on vexatious litigants, this issue was raised, and the Committee felt that a change to the interlocutory process would not be necessary because interlocutory appeals go directly to the Court of Appeals anyway.

Ms. Sargent questioned whether the appellate courts have the ability to declare someone a vexatious litigant and whether an interlocutory appeal would feature the same roadblock as a motion filed in trial court or if the appellate courts have the same obligations under Rule 83. Ms. DiFrancesco noted that in the appellate courts the party must ask for permission to appeal but it is unclear how the appellate court handles vexatious litigants under the appellate rules.

Commissioner Conklin referred to the definitions section at Rule 83(a)(2) and noted that it does not seem to include filings in the appellate courts. Ms. DiFrancesco reminded the Committee of the original issue the rule change was meant to address. The idea was to not truncate the right to appeal under Rule 83 based on how courts were handling notices of appeal. Judge Stone and Judge Stucki agreed with Commissioner Conklin in that what would be needed is a rule change in the appellate courts since Rule 83 does not involve the appellate courts. After further discussion, Ms. DiFrancesco questioned whether a vote was needed since there was no action taken but suggested referring the comment to the appellate rules committee. Ms. Haacke informed the Committee that there would only need to be a motion to send the rules to the supreme court for final approval, not if there was no action.

Rule 10(d). One person opposed the change in margin to preserve the ease of paper files. After discussion, the Committee decided they would not make any further amendments to the proposed Rule.

Judge Stone moved to submit the Rules to the Supreme Court for final approval. Mr. Justin Thoth seconded. The motion passed unanimously.

(5) RULE 42. CONSOLIDATION; SEPARATE TRIALS; VENUE TRANSFERS

Ms. DiFrancesco reminded the Committee that this Rule was addressed some time ago and they have now received feedback from the supreme court. The amendments to this rule started with a change from “new” to “single” in (a)(3). After further discussions there was also an addition made to (a)(2) that would allow any party “to either action to be consolidated” could file or oppose a motion to consolidate. These changes to (a)(2) and (a)(3) were presented to the Supreme Court and were acceptable. The Supreme Court recommended language that clarified that there was no need to file a motion intervene in the first action if a party to a second action wanted to oppose the motion to consolidate.

The Committee discussed how to incorporate that language. Judge Stone questioned what happens in the situation where the first action is private; then the party in the second action would not be able gain access to the first action which some parties would want to see before crafting an opposition to the motion to consolidate. The Committee further discussed draft language and whether the Code of Judicial Administration would need amendment to facilitate the rule change. Mr. Andreason motioned to include draft language “without seeking permission to intervene” under section (a)(2). Mr. Hunnicutt seconded. The amendment was approved unanimously.

(6) RULE 65. JOINT RESOLUTION ON RULES OF CIVIL PROCEDURE ON INJUNCTIONS

Ms. DiFrancesco informed the Committee that changes to Rule 65 were approved by the Legislature and went into effect immediately.

(7) RULE 26

Mr. Andreason reported on the discussions and proposal of the Motion for Summary Judgment Deadline Subcommittee. The issue was to research whether the Rules can/should set clearer deadlines for parties to file motions for summary judgment and take other actions dependent on the close of all discovery.

The Subcommittee proposed to include new subsection 26(a)(4)(C)(iv): “Unless otherwise stipulated by the parties or ordered by the court, to calculate any remaining deadlines in the case that are based on the close of discovery, expert discovery is complete on the first date that either (1) the last rebuttal expert report is served or rebuttal expert deposition is taken; or (2) any party fails to meet any of the prior expert discovery deadlines listed above.”

Mr. Andreason solicited feedback from the Committee. Ms. DiFrancesco had a concern where the party that bears the burden of proof does not disclose an expert there is still the opportunity for the party not bearing the burden of proof to disclose an expert, but under the proposed (4)(2), the close of expert discovery is when the party bearing the burden of proof did not serve an expert disclosure. In that situation the deadline for summary judgment begins to run even though the parties are still engaged in expert discovery on the defense side. Mr. Bryan Pattison mentioned the notice of events due dates that fixes the expert discovery cutoff which he had always calculated as the date the summary judgment deadline starts. Ms. DiFrancesco questioned whether that would delay cases. After discussing alternate deadlines, Ms. DiFrancesco suggested a two-option scenario in the notice of event deadlines. For example, in a case where any party designates an expert then the close of all discovery is [specific date] and in a case where no party designates an expert then close of all discovery is [specific date]. Mr. Andreason questioned whether the problem is solved by designating a day in the notice of event due dates. Judge Stone noted that a notice of event due dates is an order of the courts, and any conflict is resolved by the newest order or to let the parties establish the deadlines in the notice of event due dates and otherwise address it at a pretrial conference under Rule 16 and set deadlines in order to avoid any unnecessary delays.

Mr. Andreason wondered if anything else in the case is affected by the official close of discovery. Ms. DiFrancesco wondered if anything needed to be added to Rule 26. Mr. Pattison said that he believes it’s covered under Rule 16. Judge Stone suggested also adding an amendment under 56(b) to allow the judge to set a deadline as follows: “The court may set a deadline under Rule 16 to file motions for summary judgment.” Judge Stone moved to add that amendment. Judge Cornish seconded. The motion unanimously passed.

(8) RULE 30 (B)(6). NOTICE OR SUBPOENA DIRECTED TO AN ORGANIZATION.

Mr. Toth summarized the key guiding principles to amend the Rule. 1) The amendment encourages more exchange of information to lessen disputes; 2) facilitates collaborative efforts to achieve proportionality goals expressed in Rules 1 and 26(b)(1); and 3) is consistent with previous discussions of the Committee where the amendments would not add deadlines to service of the notice, objections, meet and confer requirements, or provide additional limitations on the number of topics that may be set forth in the motion. Mr. Toth presented the proposed new Rule 30(b)(6) with the incorporation of the federal rule. Judge Holmberg questioned whether the understanding is correct every time Rule 30(b)(6) comes up, there needs to be a meet and confer. Mr. Toth confirmed that that is the understanding in the Rule, but it does not need to be particularly sophisticated. The Committee expressed hesitation on always requiring a meet and confer and discussed issues surrounding that. Ms. DiFrancesco expressed that there are no consequences if the parties do not meet and confer. Mr. Toth proposed adding "...if any objections are raised" into the amendment.

Ms. DiFrancesco raised that Rule 30(b)(6) also applies to Rule 45 which might include non-parties and so the Rule is a little imprecise in using parties. Ms. DiFrancesco also raised that under Rule 45 if the non-party files an opposition to the deposition, the deposition does not go forward which creates a conflict between Rule 30(b)(6) involving parties and Rule 45 involving non-parties.

Mr. Toth suggested to hold off on further discussions to allow his subcommittee to reanalyze the Rule with Rule 45 in mind.

(9) RULE 45. SUBPOENA.

Ms. DiFrancesco explained that the proposed change is to 45(e)(3). The Committee expressed that looking at three different rules to understand the subpoena obligations is confusing. For example, under Rule 7 (b) a request under Rule 45 must follow Rule 37, however Rule 37 is about discovery issues and not about motions. Commissioner Conklin noted that she would like clarification under Rule 37 for the procedure if the person subject to the subpoena is the party. Ms. DiFrancesco noted that if it's a party objecting to the subpoena, they must file a statement of discovery issues and not merely file an objection. The Supreme Court requests that the Committee make sure the language in Rules 7, 37, and 45 are clear as to parties, non-parties, objection and motions to quash. The Committee will continue to work on this issue. Mr. Toth's subcommittee was renamed the Omnibus Subcommittee and will propose something tentative. Ms. DiFrancesco mentioned that she will also ask feedback from Justice Pohlman before going forward.

(10) RULE 47. ATTORNEY VOIR DIRE- UPDATE.

Ms. DiFrancesco noted that the proposal is a large packet and will be sent to the Committee and stakeholders. The proposal is to take the voir dire away from the judge and give it to the attorneys. Judge Holmberg reported on the survey sent to district court judges. The feeling is that the judges are already permitting attorney conducted voir dire once it has been narrowed down to a certain point in the process. They are against the proposal for a number of reasons but overall the process has developed in wisdom over time. The Committee will continue to research the issue and pick it up back discussions in the Fall. The Board of District Court Judges currently supports the conclusion of the district court judges survey on the issue.

(11) ADJOURNMENT.

The meeting was adjourned at 6:00 p.m.