

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

**Summary Minutes – May 24, 2023
In-Person and 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		Eric Weeks
Trevor Lee	X		Chad Rasmussen
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 4:0 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 April Minutes subject to amendments noted by the Minutes subcommittee. Mr. Jim Hunnicut moved to adopt the Minutes as amended. Judge Rita Cornish seconded. The Minutes were unanimously approved.

(3) REMOTE HEARINGS

Mr. Tim Pack summarized the feedback from the Remote Hearings Working Paper. He noted that judges are currently having remote hearings based on their preference and what works in their courtroom. Some judges are holding hearings fully in-person while others are almost fully remote. Some judges prefer WebEx unless evidence is taken, then the default is in-person. Ultimately, there has been very broad discretion amongst judges. Some judges would be hesitant to firmly commit that specific hearings should always be kept a certain way. It doesn't appear that attorneys are having a difficult time scheduling hearings remotely or in-person. The fact that the Committee is looking at the working paper is not necessarily an indication that the supreme court presumes that the Committee will make specific rules. The ultimate decision on how to handle hearings may best be left to each judge as part of their case management. Mr. Pack asked for the judges on the Committee to relay their experiences. The judges on the Committee relayed some of their experiences, thoughts, and concerns.

Judge Cornish noted that some judges have gone fully in-person and require a motion to appear remotely. She noted that she sets all evidentiary hearings in-person unless the parties stipulate otherwise and reviews witness requests for remote appearance on a case-by-case basis. She noted that has denied requests for persons to appear by WebEx, particularly where a warrant has been issued to a party. Judge Cornish also noted that she would refrain from saying what types of hearings must be in-person as remote hearings can increase access to justice, particularly in rural parts of the state. She expressed the need for a simple procedure to request a different type of hearing than the one set by the judge.

Judge Scott reported that many of her hearings are being conducted remotely by request from the parties, though she noted that she does prefer to have dispositive motions held in-person. She requires parties to deliver a physical copy of their exhibits to the court before evidentiary hearings to better facilitate remote hearings. She noted that she sets evidentiary hearings in-person by default unless the parties request otherwise. Judge Scott

expressed that she would like to see judges involving parties in deciding how the hearing will be held.

Judge Stone related his early involvement in discussions regarding remote vs. in-person hearings and noted that the judge's discretion weighs quite heavily in any potential rule. He expressed that there are dispositive motions that he believes are better held remotely, and some discovery motions that need to be handled in-person. He however also expressed his concern with a judge's preference defaulting to purely in-person hearings where access to justice issues may arise, such as in rural areas where there are no local attorneys, or an appropriate attorney lives very far away. He noted that he is in favor of a rule that is not based solely on the judge's preference. He would like to see a rule that states that the court must consider the needs and resources of the parties and allow an easy procedure for motions of this type to be heard though is not in favor of the court ruling *ex parte* on such a motion. He also noted that if a rule is to be made, that he would like the Committee to make that rule.

Judge Stucki explained that there is a high volume of cases in justice courts and because of that he believes it is difficult to fashion a rule that would be fair to every party. He relayed that he tries to accommodate what the parties want or need. He also expressed that there are also access to justice issues that require the hearing to be held in-person, such as for persons who do not have technological means to appear remotely. He agreed with Judge Stone that a potential rule would need to accommodate the needs of the parties and fashion a rule that allows for greater access to justice. Judge Stucki wondered if the rule could generally preserve the judge's discretion but give some guidelines as to factors the judge should consider when deciding the type of hearing.

Commissioner Conklin added that while she does most of her hearings in person, there are certain types of hearings that she does remotely by WebEx or telephone. She also relayed that she accommodates various types of hearings to help persons have access to justice, for example for homeless persons, those without emails and telephones, or those who do not know how to use WebEx. She added that there is difficulty for mixed hearings in her district, where multiple people are in-person and only one would like to be remote. She noted that the difficulty is technological where the courthouse technology is not set up to handle hybrid hearings. Ms. Keri Sargent noted that eventually the technology in all the courthouses will be able to handle hybrid meetings.

Judge Holmberg noted that in the 7th district, most hearings are done remotely because of the long distances that parties must travel and now it is improving access to justice and the administration of justice; for example, in Kane County where there are no local attorneys.

Ms. DiFrancesco noted that if there is a good cause standard for the rule, it must have a stated preference for a default. She also expressed that the default/preference may change based on the type of hearing. Judge Cornish questioned whether the default should be what

each judge initially sets the hearing as and allow the parties to give good cause for deviation from the type of hearing set by the judge. Ms. DiFrancesco wondered if it would not be fairer to all interests if certain hearings were defaulted to in-persons, such as dispositive or evidentiary; while others are defaulted to remotely, such as scheduling and status hearings. Judge Stone advised that some dispositive hearings have been better held remotely, while some discovery hearings he has insisted be held in-person. He noted that sometimes the time needed to conduct the hearing may be a better indicator as to what type of hearing is needed rather than the type of hearing.

Ms. Susan Vogel noted some of the issues that self-represented parties face in wanting to have hearings remotely vs. in-person including petitioners for protective orders and stalking injunctions not being comfortable being in the same room at the other party or witness. She relayed one case whether the respondent in a stalking case insisted that the hearing be held in person. Ms. Powell added that with some protective order hearings and stalking injunctions the petitioner may have deep safety concerns in coming to court and particularly in stalking injunctions, the hearing itself gives the stalker an opportunity to see the person being stalked. Ms. Vogel also noted child-care issues as a compelling reason to appear remotely where some people cannot afford or cannot find someone to provide childcare for the half a day that it usually takes to attend court. She also noted sometimes people get stuck in transit or because of weather conditions or other events.

(4) SUGGESTED AMENDMENTS TO RULES 69A, 69B, AND 69C

Mr. Chad Rasmussen introduced himself and summarized the issue relating to his proposed amendment To Rules 69A, 69B, and 69C. He expressed that he has personally been involved in executions on real estate where after the Sheriff sold the property, the Sheriff's office refused or failed to file a certificate of sale and knows of another case that is currently being litigated because of that same reason. He requested that the Rules clarify that there must be a recording of the certificate of sale.

Ms. DiFrancesco questioned what the difference is between "recording" and "filing the certificate for record." Judge Stucki also questioned what other than a recording would be filed at the county recording office. Ms. DiFrancesco also asked if there is a process by which the county office is reimbursed for the filing fee. Judge Stone questioned whether the Rule should require the Sheriff's office to file the certificate and allow them to take the filing fee out of the proceeds of the sale. The Committee generally discussed the process and semantics of Rule. Mr. Jim Hunnicut noted that in the law, it is the county recorder that "records" and other persons "submit for recording" therefore the amendment could reflect that. Ms. DiFrancesco noted that she would like all the interested parties to be heard on the issue but perhaps the Committee could take a preliminary vote and have a follow up meeting/consultation on the process and the fees. Rasmussen will either reach out to various Sherriff's offices or get their contact information for Ms. DiFrancesco to make contact for

further information/consultation on a proposed amendment. The Committee took a preliminary vote on changing the word “file” to “submit for recording.” The vote was unanimous.

(5) OMNIBUS RULES

Mr. Justin Toth reported on the omnibus amendments to Rules 7, 30, 37, and 45. He expressed that their first question was solidifying the problem to be cured by the amendment. He noted that the issue is that the current Rules 37 and 45 are not clear about whether Rule 37 statement of discovery issues process applies to persons seeking relief from subpoena or whether Rule 45(e) objection process should control that—which path controls and who are required to take each path. He advised that the best process is amend the rules to clarify that Rule 45 is one process for subpoenas specifically and Rule 37 exists for parties to resolve discovery issues including potentially asking a court for an order to enforce a subpoena but is not a method for objecting to a subpoena under Rule 45. Ultimately, Rule 37 would be used to resolve discovery issues including enforcing a subpoena; but Rule 45 (e)(3) would be the controlling Rule to object to a subpoena.

The Committee discussed the proposed amendments. The subcommittee suggested adding “party” under Rule 45(e)(3) and once a party objects under Rule 45 that ends the obligation to comply with the subpoena. The subcommittee also suggested to delete “or the person from whom discovery is sought” from Rule 37(a)(1) to make it clear Rule 37 process applies to parties; and add “seeking to compel compliance with.” Under Rule 7 (b), add an additional amendment to Rule 7(b)(4) to make it clear that the party seeking an order to compel compliance must follow Rule 37 such as “a request for an order to compel compliance under Rule 45(e) must follow Rule 37(a).

Ms. DiFrancesco highlighted that the primary difference between the suggested amendments and prior discussions of the Committee is that Rule 45 objection process was for non-parties while the Rule 37 process was for parties because of the difference in time required for compliance between parties and non-parties. Mr. Hunnicut likes the recommendation and believes it comports with how subpoenas work. Judge Stucki also favors the amendment. Ms. Vogel also favors the amendment because it makes it easy for non-parties to object, especially when a non-party does not have a big stake in the case. Mr. Michael Stahler pointed out that 45(e) (4)(A) needs to also have an addition of “party.” Judge Holmberg asked whether a party can make an objection and then a subpoena has no effect after unless a motion to compel is filed. Ms. DiFrancesco noted that that will be the exact effect of the Rule change. Judge Holmberg pointed out that under Rule 37, the first step of the party was to request a protective order, but the Rule change would allow for simply objecting. Mr. Toth noted that the language that a party requests a protective order under is slightly different than the objection process under Rule 45(e) and that the distinction is that Rule 37 could contemplate seeking a protective order based on the discovery standards under Rule 26 that are not contemplated within the objection process within Rule 45. Mr. Toth questioned what the import of requesting a protective order in limiting the scope of a subpoena in a way

that is different from objecting and noted that that is something the subcommittee may need to address.

Ms. DiFrancesco questioned whether the rule should make it that easy for a party to invalidate a subpoena, especially if the subpoena is directed to a non-party. She also wondered if the Rule change will increase the burden on the judiciary where once an objection is made, the subpoena becomes invalid and the party must go the court for an order, rather than resolve issues at a meet-and-confer. Mr. Toth noted that all the points are well taken, but suggested the Committee refocus on the issues that they are trying to solve. Ms. DiFrancesco noted that the initial problem was solved by deleting “under Rule 37” in Rule 45 so that a written objection from non-parties would be a sufficient method of objecting. However, the supreme court added to the mission. Justice Cornish pointed out that Rule 45 (e) (5) does not stop the other party from complying, it only ends an obligation to comply. Ms. DiFrancesco and Mr. Toth suggested that another meeting with the supreme court is needed to solidify the objectives the Committee should be seeking to accomplish. Ms. DiFrancesco noted that she wanted to have some consensus before that meeting on whether a party should have to file a statement of discovery issues or whether the written objection alone should be enough. The Committee took a vote to either leave the status quo or to amend the Rule to serve written objections. Six voted in favor of leaving the status quo. Eight voted in favor to serve written objections. Ms. DiFrancesco will report to Justice Pohlman and seek further instructions.

(6) RULE 7B TITLE CHANGE

The Committee noted to change the title of Rule 7B from domestic law matters” to “Motion to enforce order and for sanctions in domestic relations actions” to make it more consistent with Rule 53A. Judge Stone moved to approve the title change. Judge Stucki seconded. The Motions passed unanimously.

ADJOURNMENT.

The meeting was adjourned at 5:59 p.m. The next meeting will be held on September 27 at 4:00 p.m.