UTAH SUPREME COURT ADVISORY COMMITTEE
ON RULES OF CIVIL PROCEDURE

Summary Minutes – June 28, 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		Heather White
Trevor Lee	X		Alex Dahl
Ash McMurray	X		Bryson King
Michael Stahler	X		Tripp Haston
Timothy Pack	X		Jacqueline Carlton
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		
Emeritus Seats Vacant			

(1) INTRODUCTIONS

The meeting started at 4:03 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 May 2023 Minutes subject to amendments noted by the Minutes subcommittee. Judge Stucki moved to adopt the Minutes as amended. Mr. Justin Toth seconded. The Minutes were unanimously approved.

(3) RULE 26. THIRD-PARTY LITIGATION FUNDING DISCLOSURES

Ms. Heather White introduced the proposed amendment to the Committee along with other guests, Alex Dahl, and Tripp Haston. They noted that their purpose for raising the issue with the Committee is to ensure transparency regarding third party litigation funding so that there is public disclosure about all the interests involved in a case. Ms. White noted that this will also help to assess conflict issues in cases. She noted that there is no mandatory disclosure of third-party litigation funding and much of the information is anecdotal. She further noted that a few states have implemented similar rules and so believes that Utah would be a promising place to implement this Rule as Utah has been a leader throughout the country in innovation in civil procedure development affecting access to justice.

Mr. Alex Dahl commented that third party funding is pervasive, yet very few parties and judges know that it is present. He explained that third party funding is non-recourse funding and not a loan, therefore it puts the undisclosed non-party funder in the case as one of the primary parties in interest who has the same interest in the outcome of the case as the named/known parties. He expressed that that is something that the judges need to know as it poses a problem for the management of cases and is inconsistent with the rights of persons who are called into court. He also expressed that it is in the interest of justice for adverse parties to know who really owns the claim. He also noted that is highly relevant to decisions regarding the ability to comply with discovery requests as well as sanctions.

Mr. Tripp Haston said that third party funding is a disruptive force in the litigation process. He noted that some funders of litigation are so substantial that they are publicly traded, and the court should know this information in determining resolutions in the case as well as cost allocations in the litigation. He added that there is a lack of data on how pervasive undisclosed third-party funding is, however, they know it is pervasive because of the public filings of some of the funders that report on the billions of dollars being invested into the U.S. legal system.

Ms. Di Francesco opened the discussion to questions. Mr. Timothy Pack asked the guests to provide any information they had on the experience of satellite litigation regarding communication privileges relating to communication between the parties and their third-party funders. Mr. Haston explained that is an issue that comes up a lot in discussions, with courts being split on whether all that communication is privileged. He noted that satellite litigation concerning privileged communication is something that is easily controlled through motion practice if necessary. He also noted that this type of satellite litigation is reminiscent of a lot of the discussion that took place when mandatory disclosure of insurance became part of the federal rules, but experience has now shown that it led to a more efficient civil justice system.

Mr. Dahl also noted that there is a decent analogy between the kinds of information that a party might want to discover in insurance agreements and third-party funders where those disclosures have usually been very straight forward, and the relevant information was knowing if there is another party in control or that owns a piece of the case. Ms. White also noted that the current Utah civil rules on proportionality would also guard against overburdensome or inappropriate requests for disclosures regarding litigation funding agreements.

Judge Stone queried whether there were any sample agreements that the Committee could look at where those samples might raise or satisfy concerns on how the information may be used. Mr. Dahl noted that there aren't many sample agreements, but the main provision would be understanding who is in control. He gave an example of one case involving a CISCO anti-trust settlement where the issues were whether the parties really had the authority to settle the case after a settle agreement had been signed and even whether they had the power to choose the attorney representing them. Judge Stone also questioned if there was any information on how common third-party funding is in Utah. Mr. Haston noted that while there are no statistics for Utah, there are companies that are publicly traded and in tracking their reports over the years—though they are not broken down by jurisdiction—there is a substantial list of litigations that are being invested as the U.S. has the most active litigation market in the world and the return on investment in litigation is more lucrative than tradition investments. He noted that mandatory disclosure rules would address the information deficit.

Ms. DiFrancesco expressed a need to understand who the other stakeholders are before any rule change could be made but that with an information deficit it would be difficult for the Committee to identify who the relevant stakeholders are where usually, other stakeholders expressing interest in the Rules are other attorneys.

Ms. Wright wondered how the rule would affect doctors working on lien and noted that the proposed rule isn't clear and may be misinterpreted. Mr. Rod Andreason wondered what the lessons from the guests' experience in the UK and Australia has been and if any of that could be applied to the U.S. Mr. Haston noted that he can put together a summary for the Committee but noted that Australia and the UK have greater regulatory oversight than in the

United States as well as a difference in rules for contingency fees that might make some of the lessons untransferable to the U.S. legal experience.

Mr. Michael Stahler noted that he has seen in his practice the existence of third-party funders, which complicates and makes litigation more difficult. He also questioned if there was a rationale behind why some of states listed in the proposal memo, passed legislation rather than going through judicial rulemaking.

Judge Holmberg asked the guests to comment on some of the major arguments against the implementation of the Rule. Mr. Haston noted some of the major opposition arguments include the lack of control from the third-party funders; trusting legal ethics of candor to the court; disclosure hurting the industry where regulation might stifle the industry. Mr. Dahl provided more details of the some of the issues that arose in the CISCO case. He also noted that some judges have asked for disclosure of third-party funders ex parte or in camera.

Ms. Susan Vogel expressed that as a staff attorney at the Self Help Center, she wanted to make sure that the Rule would not be affecting those who are funding litigation but have no monetary interest in the outcome of the case, such as where a parent or someone else is funding a divorce or eviction for a party that cannot afford the court or legal fees. Mr. Dahl noted that the Rule would be targeted only to third parties having a financial interest in the outcome of the case, however he did highlight a situation where third parties funding a litigation abused the process by encouraging the party to get unnecessary services and surgeries because it would increase the monetary value of the claim. Mr. White also noted that the Rule would benefit petitioners as well as respondents.

Mr. Pack questioned what the difference in is having a Rule that applies only to those who have a financial interest in the outcome of the case vs. those who do not have a financial interest in the outcome. Mr. Dahl noted that he believes that one of the reasons economic interest is important is because of the societal affect that some cases have such as cases that deal with issues having an important political effect.

After a further lengthy discussion of the questions raised by the Committee members, the Committee discussed who the stakeholders would be that should be reached out to for input on the proposed Rule. The Committee did not take a vote on the proposed Rule but took a preliminary vote on the interest of the Committee in moving the issue forward to invite stakeholders to comment. The vote passed by majority.

(4) RULE 83. VEXATIOUS LITIGANTS

Mr. Bryson King summarized the issue regarding due process and the court ruling on its own motion for vexatious litigants without notice and opportunity to be heard. He noted that the issue before the Committee is the operating section in subsection (b) which says, “the

court may on its own." He noted that there seems to be some ambiguity whether it invites motion practice where the court may move on its own and then parties are free to respond, or whether the court can find that the individual is a vexatious litigant and impose sanctions consistent with the Rule without waiting for a response.

Judge Holmberg wondered if a fix might be inserting the phrase "after notice and opportunity to be heard" in subsection (b). Mr. King expressed that he imagines that is the general practice but as it came up in a case, he raised the issue with the Committee and that amendment should solve the issue.

Ms. Vogel questioned whether there was any information on how many self-represented parties are vexatious litigants as well as expressed that many self-represented litigants are trying to wade their way through a case with little legal knowledge and so might easily be seen as vexations and so should be given notice and opportunity to be heard before such a finding is made against them. Judge Scott added that most vexatious litigants have been given a lot of opportunity and warnings before being deemed vexatious.

After further discussion, Judge Stucki suggested adding an amendment in subsection (b) to add "after notice and opportunity to be heard." The Committee voted unanimously to include that amendment.

(5) MEMBERSHIP UPDATE

Ms. DiFrancesco noted that there are three members whose terms are coming to an end and who are not up for reappointment though they may be appointed emeritus. She noted that several applications have been received and recommendations are being reviewed by the Supreme Court.

(6) RULE 6. TIME

Ms. Stacy Haacke reported on the status of the Rule. The Rule returned from public comments with no comments and will go to the Supreme Court for final approval.

(7) RULE 12(A). DOMESTIC RELATIONS

Mr. Jim Hunnicut reported on the proposed amendment to the Rule to restructure it so that a party may not seek to default another party for filing a Motion to Dismiss as a response to a Motion to Modify instead of an Answer as seemingly implied by the Rule. He explained that there is language in 12(b) to the contrary, but even so, in hopes of restoring clarity to the Rule, he noted that these proposed changes seem prudent and consistent with the overall goals

of the 2021 amendments. The Committee discussed the changes. Mr. Hunnicut moved to adopt the amendments. Mr. Pack seconded. The motion passed unanimously.

(8) RULE 62. STAY OF PROCEEDINGS TO ENFORCE A JUDGMENT / ROTHWELL V. ROTHWELL

Mr. Hunnicut reported on the discussions he's had with various attorneys regarding the proposed Rule change. The Committee decided to halt work on the Rule given that the case is being appealed to the Supreme Court.

(9) RULE 108. OBJECTION TO COMMISSIONERS' RECOMMENDATION (RECODIFICATION IN (d)(2))

Ms. Stacy Haacke reported that the legislature recodified relevant law and the Rule needs to be recodified to match the right statute. The Committee had no discussion. Commissioner Conklin moved to adopt the amendment. Mr. Hunnicut seconded. The motion passed unanimously.

(10) RULES 69A, 69B, 69C (REAL ESTATE RECORDING)

Ms. DiFrancesco reported on the feedback received from the Sheriffs' Office. The feedback received was largely in favor of the amendment with one Sheriff pointing out the language "submit for recording" may not accomplish the goal of the amendment as the certificate may be submitted for recording and not accepted to be recorded. The suggestion was to remove "submit for recording" with "record" throughout the three Rules under 69B(ii), 69C (e); 69C(g), 72(b). Judge Stucki motioned to adopt the changes. Mr. Hunnicut seconded. The motion passed unanimously.

(11) UNIFORM USAGE OF AFFIDAVIT AND DECLARATION

Mr. Ash McMurray reported on the work of the Subcommittee in reviewing all the Rules to ensure that they refer consistently to affidavits, declarations, unsworn declarations, and verified documents. He summarized that there is inconsistency with the usage of affidavits and declarations and whether they would be sworn or unsworn. He noted that the Subcommittee went through all the Rules and pulled all references to declarations/ affidavits to make them consistent with the drafting in Rule 11(a)(2). He also noted that unless there was a specific type of declaration, such as financial declaration, the declaration was clarified to "unsworn declaration" as the default. He asked the Committee for feedback to ensure that the Subcommittee had not gone too far in the burden required by the declarant/affiant.

Ms. Vogel asked for discussion on the legal definitions of affidavit/declaration in making the decisions for amendment to ensure that cross-references are correct or whether one word suffices for both. Ms. DiFrancesco also questioned whether the word affidavit was necessary based on the Uniform Declarations Act. The Committee discussed the definitions and usage of affidavit and declaration.

Mr. Trevor Lee questioned whether the Rules could contain a Definitions Rule to define that and other terms used through the Rules. Ms. DiFrancesco noted that that is something the Committee could think about as other rules of court have definitions. Mr. McMurray agreed that he is in favor of a Definitions section. Mr. Vogel questions whether a third word might be more understandable in plain language and mentioned that some religious groups do not make oaths and could share that research with the Subcommittee. The Committee generally discussed alternative words and how requirements under the Rules might change. Ms. DiFrancesco added that she is in favor of a definition for the term chosen but hasn't gotten to the point of agreeing to a general Definitions Rule. The Committee did not take a vote on the amendments nor on having a Definitions Rule and will resume the discussion after the summer.

(12) ADJOURNMENT.

The meeting was adjourned at 6:00 p.m. The Committee exchanged wishes for a wonderful and safe summer. The next meeting will be held on September 27 at 4:00 p.m.