

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

**Summary Minutes – December 6, 2023
via Webex**

THIS MEETING WAS CONDUCTED ELECTRONICALLY VIA WEBEX

Committee members	Present	Excused	Guests/Staff Present
Rod N. Andreason, Vice-Chair		X	Keisa Williams, Staff
Lauren DiFrancesco, Chair	X		Keri Sargent
Trevor Lee	X		Jacqueline Carlton
Ash McMurray	X		Michael Drechsel
Michael Stahler		X	Nick Stiles
Timothy Pack	X		Samantha Parmley
Loni Page	X		
Bryan Pattison	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	
Judge Blaine Rawson	X		
Judge Ronald Russell	X		
Rachel Sykes	X		
Judge Laura Scott, <i>Emeritus</i>	X		
James Hunnicutt, <i>Emeritus</i>	X		

(1) INTRODUCTIONS

The meeting started after forming a quorum. Ms. Lauren DiFrancesco welcomed the Committee and guests.

(2) REMINDER FROM THE SUPREME COURT REGARDING VOTING MEMBERS

Only Committee members vote. Emeritus members do not vote or second any motions. Ms. DiFrancesco mentions she does not vote except to break a tie. The non-voting members are the emeritus, ex-officio and recordings secretary.

(3) REMOTE HEARINGS.

Tim Pack begins the discussion and reminds the Committee of the memorandum from the Supreme Court and the previous discussion. In that discussion many judges liked the discretion as opposed to a default rule. There was no final consensus on this issue at the last meeting. The Supreme Court is asking for an update. The subcommittee met again in October and did not make any big decisions. Consensus from the subcommittee is that there is no a need for a rule unless there is a problem to fix or some injustice happening that would require a rule. Subcommittee's recommendation is to do nothing at this time, but opens the discussion to alternatives or other opinions.

Ms. DiFrancesco mentions Michael Drechsel sent an email that she forwarded to the Committee with additional questions from the Supreme Court. They indicate if the Committee recommends there should not be a rule of procedure that provides a presumption regarding certain hearing types, to still please identify the types of hearings that would be best presumed to be conducted remotely or in-person.

Susan Vogel indicates she received messages from an individual in Spanish with questions about her Webex hearing, but the Self Help Center cannot provide tech support. This is a problem, and she understand the judges wanting to have discretion, but there needs to be an avenue for patrons to reach out when they are having issues with Webex hearings. Would be helpful to have a rule on what the court notices should include regarding a hearing. Also, a rule that would allow a person to challenge the nature of the hearing.

Judge Stone indicates that complaints may not be the best or only way to establish presumptions. For every complaint there may just as many, if not more, times there are no complaints from parties.

Ms. DiFrancesco recalls discussing URCP rule 7 at the last meeting. Mr. Pack does not recall a consensus of adding specific hearings to rule 7, but this could be a place to start. There is discussion regarding when a court may rule on a motion without waiting for a response. Judge Cornish has seen divorce cases where one party wants to appear remotely

and the other party objects indicating the person should be present in the witness chair. She indicates she takes into account the parties' locations and decides on a case by case basis. She sees parties oppose these regularly. Rachel Sykes indicates she has sat around the courthouse on a law and motion calendar that was not evidentiary from 9:00 am to 2:00 pm awaiting a 9:00 am hearing to be called. She has also been asked for a doctor's note when asking to appear remotely. Some judges are more liberal than others in granting requests.

Ms. DiFrancesco mentions these requests are about a person attending remotely, not dictating the medium of the entire hearing. Ms. Sykes indicates some judges do not want to do anything remotely.

Michael Drechsel introduces himself and mentions there are several lawyer legislators who have reached out to the court on this issue. A few incidents have been reported where lawyers of the same firm on a similar case and motion experience different requirements for in-person attendance for courtrooms in the same courthouse. They are interested in finding something that provides consistency throughout the state. They would pursue fixing it themselves, but reaching out to see if the court is working on the issue. They also see the lack of conformity as a detriment to the people who are being served by the court.

Ms. Vogel mentions domestic violence cases and reaching out to those helping victims to get their perspective.

Judge Stone indicates it appears there are judges who are resistant to allowing virtual attendance. There do not appear to be judges who are denying requests by parties who want to be present in-person. Judge Stucki is an advocate of preserving discretion by the judge. A one size fits all may create more problems than it solves. The approach in his court is to allow parties to attend how they wish, and most attorneys appear virtually. He suggests recommending factors to be considered.

Ms. DiFrancesco mentions adding factors for the court to consider when there is a motion to appear virtually or motion to appear in-person. And must answer the question of what should be happening remotely and what should be happening in-person.

Judge Cornish mentions adding this to the request to submit for decision. And then the other party could respond or not. If a hearing is requested, what type of hearing. Commissioner Conklin states they have hearings on everything, and if looking at factors to consider would likely add the length of the hearing. She presumably does very short hearings virtually. Judge Russell notes that one reason judges have requested discretion is because each district is very different, and criminal matters are very different from civil. A one size fits all on each of these may be difficult. He has returned to many in-person hearings because it is more efficient, but that may be different elsewhere, and if there is a request he considers it. This issue has been studied extensively in other states and there may be rules in place to

consider. Minnesota and Arizona have guidelines, statements or rules. Tim indicates the subcommittee has not looked into what other states have done.

Ms. Vogel notes there may be two different requests, one for the court to schedule an in-person or a remote hearing, or two, if the court has already scheduled an in-person or remote hearing, for the person to ask to attend it in a different way than it was set. Ms. DiFrancesco clarifies, yes, there are requests for the hearing format and for how an individual will attend. There could be a sequential process for which method a party is requesting, and then a party requesting to appear in a way opposite to how the hearing was set. Do we want a process that would invite a challenge to the judge's determination as to the hearing format.

Judge Cornish returns to the Supreme Court's question regarding specific hearings and the default. Ms. DiFrancesco responds, yes that is one question, and she does not believe we have an answer to what the Supreme Court wants to do with that question, whether it be by creating a rule or providing guidance to judges with recommendations.

Mr. Drechsel indicates there is no answer to that, but it is a topic of interest and the feedback from the Legislature is being taken seriously by the Supreme Court. This is feedback from the private experience of lawyer legislators. Judge Cornish asks if there could be a district by district decision or local rule. Mr. Drechsel indicates a standing order for districts is a viable approach. Ms. DiFrancesco notes the prior experience is that the Justices do not want district by district approaches, and if that is the recommendation then it should be very clear. But do not think the Supreme Court would want that to be the recommendation. Nick Stiles also notes conformity is a good approach as we are a unified court system. The Supreme Court is curious to know if we are not doing anything, then why are we not doing anything about this issue yet. Mr. Drechsel also notes community partners including sheriffs' offices and the bar may want to know why they are transporting some inmates and not others.

Judge Stone introduces the hybrid capability. He has not had an issue with parties complaining when he listens to the requests of the parties and attorneys. Judge Scott mirrors Judge Stone's comments. Many hearings are remote, some are hybrid and she is in the office every day. This also may be resolved internally with conversations with judges. Judge Stucki notes that this is his exact experience – what do the parties and attorneys want to do. Very rarely does he impose doing something different than the parties have requested, but he has a reason and has not received pushback from parties or attorneys. Factors for judges to consider may provide for conformity over having a one size fits all rule.

Ms. DiFrancesco walks through each question specifically in order to return to the Supreme Court with a few answers.

First Question - Should there be a rule of procedure that allows participants to request their hearing be held opposite the decision of the judicial officer?

- *Committee votes to provide an option in rule 7(l) for a party to appear remotely or in-person* (opposite of the format set by the court). The Subcommittee is to come up with language for rule 7.

Second Question - Should we add a rule that gives the court guidance about what factors to be considered in granting or denying such a motion?

- *Majority of Committee votes yes to this question.* Subcommittee is to look at what has happened in other states, and what other factors have been considered. The Committee has discussed length of the hearing, distance to the court house, nature of the hearing, presentation of evidence, and burden on the parties. Judge Rawson mentions not having these factors be presumptive one way or the other because he had someone requesting to appear remotely and then four rescheduled hearings due to poor internet connection. After this he had to order they at least appear with decent internet connection or at the courthouse. Mr. Drechsel also mentions prior conduct of the parties as a factor. Ms. Vogel mentions language as a factor. It is also mentioned the Subcommittee consider a certification with the request to appear remotely that the person has adequate internet connection. Commissioner Conklin adds to the language factor whether an interpreter is needed.

Third Question - Should there be a rule of procedure that provides a presumption regarding certain hearing types?

- *Majority of Committee votes no to this question.*
- Subpart to this question, the Supreme Court requested feedback as to what should be presumptively in-person.
 - Judge Stone adds the first presumption should be the parties' preferences. Judge Stucki adds that there could be factors about taking evidence instead of a presumption because you could have an in-person trial and still allow someone to appear remotely. Then is there going to be a presumption about hybrid formats.
 - *Majority of Committee votes for the parties' preference to be a presumption.*
 - *Majority of Committee votes for trials and evidentiary hearings to have a presumption in-person.*
 - Ms. DiFrancesco also asks whether motions to dismiss and motions for summary judgment should have a presumption in-person. Judge Scott mentions that she rarely has attorneys request to be in-person for these hearings. Judge Cornish has similar experience. Commissioner Conklin mentions for dispositive motions she often has to have in chambers meetings and those are better served in-person. Judge Russell schedules all of his civil motions, even dispositive ones, remotely. He would allow someone to be in-

person if they asked but it seems more convenient, comfortable, and if counsel is out of state then there is less expense for travel. Tonya Wright adds that every attorney in her office would prefer to do motion hearings virtually. Judge Stone's experience is that people would prefer virtually, and does not think it is his place to say no, you must come in-person.

- Ms. DiFrancesco asks whether parties should be able to appear in-person as a matter of right for dispositive motions. Judge Stone adds why would that not be a right in every case. If someone wants to come in-person, then come in-person. Judge Cornish agrees with Judge Stone. She runs her criminal calendar remotely, and if they ask to appear in-person, then she schedules it in-person. She is at the courthouse every day and will be there if they want to appear. She does not think everyone should have a right to appear remotely.
- Ms. DiFrancesco asks whether there should be a presumption that parties may appear in-person for anything heard by a judge or commissioner. *Majority of Committee votes yes.* Judge Stone wants to be careful with the language and using the word "right." Judge Cornish clarifies that they should be allowed to show up in-person, not that they can require to have everyone show up in-person. Ms. DiFrancesco mentions this may be a factor, that there is a presumption that the court will grant any request by a party to be able to appear, themselves, in-person for any hearing, absent good cause. Ms. Vogel asks if the courts are set up to deal with someone who just shows up. Not all courtrooms are set up for hybrid, and they would need notice to have a bailiff present. Judge Rawson adds the use of "right" language might not be best because if there is a party housed in the maximum security part of the prison and they then say they have a right to attend a civil hearing in Layton, that could create a problem. There may be security reasons why you conduct a hearing remotely. In a lot of ways may want to leave these decisions with the judiciary who have worked on the individual cases. If he's planning to do a remote hearing and someone walks in to appear in-person, they may not be set up with enough security to accommodate them. Ms. DiFrancesco mentions this all may fall under "absent good cause." Rather if someone files a motion to appear in person, then the judge should have good cause to deny it. Judge Rawson mentions when he is ruling on said motion what if he does not know whether he will have a bailiff available. Ms. DiFrancesco mentions if they file the motion too close to the hearing then there is good cause to deny. Commissioner Conklin indicates her courtroom is not set up for a hybrid hearing, and she does remote hearings from her home. It

would not be convenient for court staff or bailiffs who are short staffed to have one hearing out of entire days because someone decided they wanted to appear in-person. She sets specific hearings on those days to be remote. Ms. DiFrancesco mentioned when she scheduled a family law case hearing the clerk sent dates and listed the ones that would be remote and the ones that would be in-person. Return to the vote, does the Committee want to include language that creates a presumption that if a person requests to be in-person that they be permitted to attend in-person. *Majority of Committee votes yes.*

- Discussion about pro se calendars. Judge Cornish says her pro se calendar is remote and understands others are as well. Some may be hybrid. Third District and Farmington family law pro se calendars are remote.
- For dispositive motions, should the format be the preference of the parties, with no listed presumption. *Committee votes yes.*
- Subpart to this question, the Supreme Court requested feedback as to what should be presumptively remote hearings.
 - Status conferences and rule 16 conferences. *Committee votes yes.*
 - Statement of discovery issues. Judge Rawson mentions that with pro se parties, especially in family law cases, parties may not have access to a laptop which makes remote hearings more difficult. There is also a presumption in URCP Rule 37 for discovery issues to be handled remotely.
 - Motion to enforce and for sanctions under Rules 7A or 7B. Judge Cornish mentions this may depend upon the underlying action whether it is debt collection or family law. Judge Russell mentions that this may be an evidentiary hearing which may be best held in-person. Judge Stone also adds if they are asking for incarceration it may change the way the hearing is held. Question is whether to default to what the parties request, unless it is an evidentiary hearing. Five committee members vote yes. Ms. Vogel indicates she is abstaining in order to flush it out more. Judge Stucki did not feel strongly one way or another. Judge Stone says he has had really good evidentiary hearings remotely and does not buy the efficacy arguments. Judge Rawson mentions he may not have the same set up with technology and it may not be the same throughout the state. Ms. Sykes agrees with Judge Stone. Ms. Vogel asks about pro se parties. Judge Stone would be opposed to a rule for pro se parties. Jim Hunnicutt mentions the southern part of the state, and he had a remote hearing experience with Judge Torgerson that was very positive. His guess is that Judge Torgerson prefers remote because of all the courtrooms he serves in throughout southern

Utah. Loni Page mentions she believes the parties in southern Utah prefer remote as well. They sometimes will receive requests for in-person attendance, followed by a stipulation to appear remotely. And she agrees with Mr. Hunnicutt that this is the experience in Seventh District.

- Ms. Wright mentions domestic case management conferences. These are essentially status conferences but have a separate rule. These are mostly held remotely.

Last Question – should there be a rule of procedure that provides an appeal process for challenging the decision of a judicial officer as it relates to remote or in-person hearings. And if so, who should consider the appeal. Previously discussed this going to the presiding judge of the district.

- *The Majority of the Committee votes no.*
- Interlocutory appeal would be the appeal process.

Ms. Vogel requests to be added to the Subcommittee, which is granted.

(4) SUBCOMMITTEE ON RULE 5(a)(2) AND 5(b)(3).

Ms. DiFrancesco summarizes this issue as whether individuals who are defaulted have to be served on an ongoing basis. This has been discussed a handful of times and have had discussions with persons at the Bar about this issue. Would like to bring this back to a new subcommittee. According to Rule 5(a)(2) a party in default is no longer required to be served except with very specific documents. This may be problematic in debt collection. Can these individuals always be easily served. Ms. DiFrancesco would like to see what is going on in other states and can send emails along with Bar Foundation information. Judge Stone recommends reaching out to debt collection bar. Subcommittee will be Ms. Vogel, Judge Cornish, Commissioner Conklin, Judge Scott, and Justin Toth. Ms. Vogel will chair this subcommittee.

(5) ADJOURNMENT.

The meeting was adjourned at 6:00 p.m. The next meeting will be January 24, 2024, at 4:00 p.m.