

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

**Summary Minutes – March 27, 2024
via Webex**

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
Trevor Lee		X	Crystal Powell, Recording Secretary
Ash McMurray	X		
Michael Stahler	X		
Timothy Pack	X		
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 began at 4:05 p.m. after forming a quorum. Ms. Lauren DiFrancesco welcomed the Committee members.

(2) APPROVAL OF MINUTES

Ms. DiFrancesco asked for approval of the February 2024 Minutes subject to amendments noted by the Minutes subcommittee. Judge Clay Stucki moved to adopt the Minutes as amended. Judge Andrew Stone seconded. The Minutes were unanimously approved.

(3) UPDATE ON NEW REMOTE HEARINGS RULE

Ms. DiFrancesco gave a brief update on the new Rule on remote hearings. She thanked everyone for their input and noted that the draft rule is moving forward with a smaller group of the Supreme Court. She passed along the gratitude of the Supreme Court for the work that the Committee did outside of regular meetings on the Rule.

(4) RULES 74. NOTICE OF WITHDRAWAL

Mr. Michael Stahler presented on the work of the subcommittee on counsel/co-counsel withdrawals from cases under Rule 74. He recounted that the subcommittee's instructions were focused on two things. First, whether the existing rule contains enough contact information for a client if an attorney withdraws. Second, the withdrawal of an attorney when the party continues to be represented by counsel. The amendments were focused under subsection (a) and the addition of a new subsection (e). Mr. Stahler also summarized some of the concerns and questions that the Committee had discussed previously. Commissioner Conklin questioned whether a substitution of counsel would already provide a satisfactory solution to the issues. Mr. Stahler explained that the situation comes up a lot in firms and at the Attorney General's Office where an associate or younger attorney leaves but there is no one to substitute in their place making the substitution of counsel not as clean as a notice to withdraw. Mr. Stahler explained the amendments to the Committee, noting that the Committee took guidance from the local federal rules.

Ms. Lauren DiFrancesco raised that there is a significant difference between the state rule and the local federal rule where the state rule is a bit ambiguous on who is required to send out the notice to appear or appoint. She suggested that there be amendments to 74(c) with a responsibility on the withdrawing counsel to serve the notice

to appoint or appear rather than opposing party. She also raised that the use of the word “proceeding” is unclear along with when the stay of proceedings is effective. Mr. Stahler suggested that the Rule undergo additional drafting from the subcommittee before a vote and welcomed all the concerns of the Committee with the goal of incorporating them. Judge Stone noted that he believes the opposing party should have the responsibility to serve the notice to appear as many withdrawing attorneys are withdrawing due to lack of contact from the client or prolonged nonpayment of legal fees. He also added that the notice to appear or appoint is an adversarial process that is most appropriately handled by the opposing party, and it would be wrong to put the withdrawn attorney under that responsibility. Ms. DiFrancesco noted that perhaps there needs to be clarification on whether service must be done under Rule 4 or 5 and that the Rule does not specify that the information provided can or can’t be used to effectuate service. Judge Stone noted that service would be under Rule 5. Ms. DiFrancesco noted that Rule 5(b) may limit the use of certain contact information in effectuating service under the Rule which should be clarified.

Ms. Vogel questioned whether a form noting that only the remaining attorneys will be proceeding with the case would suffice. The Committee generally discussed the various scenarios under which counsel or law firms withdraw as well as the malpractice and insurance implications of properly withdrawing. Mr. Jim Hunnicutt noted he sees where the 21-day deadline is easily abused where some arguments have been made that no proceedings mean no hearings and not no action within the 21-days. Ms. Tonya Wright also shared her knowledge of situations in which the 21-day stay may be abused. Ms. Vogel also shared her experience with the self-help center and noted that there should be clarification that the stay refers to all deadlines and not just hearings. Mr. Andreason questioned whether there needed to also be a penalty in the Rule. Mr. Hunnicutt raised the issue of when lawyers represent themselves and have a co-counsel. Ms. DiFrancesco noted that that issue might go beyond just this Rule.

Mr. Rod Andreason noted that under 74(a) he is concerned that the other party may contest the notice not being done properly if the attorney doesn’t provide all known contact information. He wanted to make sure that the Rule does not set a standard of compliance that is too difficult to meet. The Committee discussed the language on “all contact information.” The Committee discussed the implications of not appearing after 21 days and whether the party would then be in default under Rule 5 and whether other motions would need to be filed on the party or if the other party could file a motion to dismiss the case under Rule 74(c) for failure to appear or appoint. Judge Stone clarified that the Rule is not meant to be a default to the party or present a dispositive avenue in the case. Commissioner Conklin reminded the Committee of the case law under *Young v. Hagel* that says you can't be defaulted for not "appearing" in response to a Rule 74 notice. Mr. Andreason questioned whether the Rule is then a misnomer and should say instead notice to appoint or proceed pro se. The subcommittee will continue working on the Rule to address the many concerns raised during the discussion.

(5) RULE 5. SERVICE

Ms. Loni Page summarized the stylistic changes made to the Rule to confirm with the Style Guide. She noted substantive changes as follows:

1. Rule 5(a)(1) became easier by highlighting the exception rather than listing the documents to be served. The one exception was ex parte motions under Rule 7.
2. She noted that 5(a)(2) dealing with serving parties in default is being worked on by a different subcommittee and this subcommittee is not suggesting any changes to 5(a)(2) at this time. Ms. DiFrancesco noted that the other subcommittee is looking at the bigger picture of whether or when it is appropriate to stop serving a party and the work of the other subcommittee is not meant to preclude this subcommittee from making changes to the default language. The other subcommittee is being led by Ms. Vogel and includes Commissioner Conklin, Judge Cornish, Judge Scott, and Mr. Justin Toth. Ms. Vogel requested Mr. Stahler join, and he agreed.
3. Under 5(b)(1) (Whom to serve), some substantive changes were previously approved, so the subcommittee only made stylistic changes.
4. Under 5(b)(3)(A) (Methods of Service), Ms. Page noted that they kept a lot of the substance that had been discussed and sent out for comments before as well as in view of MyCase being programmed to conform with Rule 5. The changes added subparagraphs to cover scenarios where an attorney is licensed outside of Utah and does not have an electronic filing account. Ms. DiFrancesco questioned whether the scenario is attorneys licensed outside of Utah or licensed not in Utah, but if the outcome is the same the difference may not matter. Ms. DiFrancesco asked whether MyCase notifies all parties if a pro se party registers with MyCase. Ms. Page relayed that that is something the MyCase is being programmed for. Ms. DiFrancesco questioned whether 5(b)(3)(B)(ii) was necessary. Ms. Page explained there was some concern raised on the proper email a self-represented party could use to serve counsel of opposing party. Ms. Keri Sargent also noted that usually Coris is updated when an attorney updates their email address with the State Bar, but e-filing is not updated, and a party would need to get the email from the individual's header on their filings. The Committee generally discussed how parties are notified of updates in a case in e-filing as well emailing in documents. Mr. McMurray suggested that all instances of the usage of "and/or" should be changed to just "or."

5. Under 5(b)(3)(C) (Mail and other methods), changes were made to include that if the party does not have an electronic filing account, then service would be to the most recent address the person being served has provided. Commissioner Conklin questioned whether there should be a requirement to provide proof of what address is being used for service. Ms. Vogel noted that the certificate of service has that spot to indicate so it is always done by self-represented persons, but many attorneys do not provide that proof.
6. Under 5(b)(5) (Who serves), Ms. Page explained that this new paragraph is meant to fix the concerns raised on who must serve what. The change clarifies that orders signed by the court but not prepared by the court are to be served by the party who prepared it. Rule 7 makes it clear that proposed orders are to be served by the filing party but not signed orders. Ms. DiFrancesco noted that this change is an important change but wonders if a party would still be on notice that they are responsible for service on documents they initially prepared and suggested including that wording “documents initially prepared...” The Committee discussed whether members correctly interpret the intent of the Rule from the language. Mr. Stahler noted that he also thinks the general Bar will be surprised by the Rule change. The Committee discussed the effect MyCase will have on notifications and service to parties and suggested that with MyCase not being in effect perhaps the Rule needs to be amended in the future to accommodate that functionality. Mr. Hunnicutt suggested borrowing from the language of Rule 58A notice of judgment.
7. Under 5(d) (Certificate of service), Ms. Page indicated that right now only the court is exempt from filing a certificate of service when serving under (b)(3)(A) electronic filing. These proposed changes would not require a certificate of service from anyone with an electronic filing unless service was done by email, mail or other methods; that is—no certificate of service is required when a document is served through electronic filing but when the document is required to be served by email, mail, or other methods then a certificate of service showing the date and method of service including the email or mailing address used would be required.

Ms. DiFrancesco noted that the Committee would discuss 5(e) at another time due to time constraints. Mr. Stahler moved to approve the changes discussed. Judge Stone seconded. The amendments were unanimously approved.

(8) ADJOURNMENT

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