Agenda

Advisory Committee on Rules of Civil Procedure

January 28, 2004
4:00 to 6:00 p.m.

Administrative Office of the Courts
Scott M. Matheson Courthouse
450 South State Street
Council Room, Suite N31

Approval of minutes	Fran Wikstrom
Rule 65B. Request by Clifton Panos	Tim Shea
Comments to amendments	Tim Shea
Rule 47. Communication with jurors	Tim Shea

Meeting Schedule

February 25
March 24
April 28
May 26
September 22
October 27
November 17 (3rd Wednesday)

MINUTES

UTAH SUPREME COURT ADVISORY COMMITTEE ON THE RULES OF CIVIL PROCEDURE

Wednesday, November 19, 2003
Administrative Office of the Courts

Francis Wikstrom, Presiding

PRESENT: Francis Wikstrom, Janet H. Smith, Francis J. Carney, Terrie T. McIntosh, Thomas R. Lee, Virginia S. Smith, W. Cullen Battle, Honorable Lyle R. Anderson, James T. Blanch, Honorable David O. Nuffer

STAFF: Tim Shea, Judith Wolferts

EXCUSED: David W. Scofield, Paula Carr, Leslie W. Slaugh, Thomas R. Karrenberg, R. Scott Waterfall, Glenn C. Hanni, Honorable Anthony B. Quinn, Honorable Anthony W. Schofield, Todd M. Shaughnessy, Debora Threedy

GUESTS: Matty Branch
Paul Barron
Jerome Battle

I. WELCOME AND APPROVAL OF MINUTES.

Francis Wikstrom called the meeting to order at 4:00 p.m. The Minutes of the October 22, 2003, meeting were reviewed, and Thomas Lee moved that they be approved as written. The motion was seconded, and approved unanimously.

II. ELECTRONIC FILING DEMONSTRATION.

Mr. Wikstrom introduced Paul Barron and Jerome Battle of the IT Department, who led a discussion and demonstration of electronic filing. Mr. Battle began the discussion by explaining what electronic filing will entail, including that filings will be digitally signed, validated by the court clerk, and that the document will be maintained electronically by the court. Mr. Battle also discussed the differences between the state electronic filing model, and the federal electronic filing model. He stated that whereas federal electronic filing consists of e-mail with an attached .pdf file, the state model will accept documents in either Word or WordPerfect, from which the state court will then extract the document. Once the document "filed" in state court is digitally signed, it is "locked in" and cannot be changed. This adds a level of security not available where "signatures" consist of a password. The state can also guarantee that nothing will happen to the document during transmission, which the federal court cannot guarantee. Mr. Battle stated that electronic filing will save time and money for both attorneys and for the court. In response to

questions from the Committee, Mr. Battle stated that electronic filing will not be the exclusive method of filing allowed by the court. Mr. Barron then gave a demonstration of how documents can be filed electronically.

Judge David Nuffer briefly explained the federal electronic filing model that will soon be implemented in the United States District Court for the District of Utah. He stated that there will be a limit for electronic filing in that court based on the number of pages to be filed.

Committee members then discussed electronic filing and gave opinions both pro and con. Mr. Wikstrom thanked Mr. Barron and Mr. Battle for meeting with the Committee to answer questions and provide the demonstration.

III. RE-PUBLICATION OF SUPREME COURT RULES FOR COMMENT.

As discussed in earlier meetings, the recent amendments to the Rules were e-mailed to Bar members for comment, and there had been some question as to whether Bar members received those proposed amended Rules. Tim Shea informed the Committee that, in light of this, the Supreme Court has asked that the proposed amended Rules be submitted for comment a second time, which is presently being done. Comments accordingly will be accepted through the end of 2003. Mr. Shea also stated that amended Rules due to take effect on November 1, 2003, will be in effect during the extended comment period, under the Supreme Court's emergency rules.

IV. NEW JUDGE AFTER REMAND.

At the October 22, 2003, Meeting, Thomas Lee was asked to prepare a statement detailing the extensive time and efforts expended by the Committee over a period of several months in considering the "change of judge after remand" issue, and in drafting proposed Rule 63(c). At today's meeting, Mr. Lee presented the proposed statement to the Committee, and made suggestions for revisions, including suggesting that the Committee adopt Mr. Wikstrom's recommendation to delete the language in paragraph two, after "extensive discussion" and ending with "on remand." Mr. Wikstrom also suggested that wording be included pointing out that this Rule would also apply to criminal procedure. In addition, other Committee members, including Francis Carney and Judge Nuffer, made suggestions regarding the statement. Mr. Shea asked Mr. Lee to have a revised statement finalized by mid-December of 2003, which will then be circulated to Committee members.

V. MOTION TO RECONSIDER.

Mr. Carney stated that he has received an e-mail from another lawyer regarding regulating motions to reconsider. Mr. Carney commented that the e-mail caused him to ask himself whether this is such a concern that the Committee needs to consider whether there even is a "motion to reconsider." In response, Mr. Wikstrom posed the question of whether a "motion to reconsider" should be specifically provided for in a rule, which would require that a movant

follow certain procedure. Janet H. Smith stated that she preferred a situation where discretion was left with the trial judge with regard to whether to reconsider. Mr. Lee and James Blanch agreed that greater flexibility may be preferable to a strict procedure, with Mr. Blanch pointing out that Rule 54(b) already states that all motions may be reconsidered. Judge Lyle Anderson commented that he sees both sides on this issue, and that when a responsible attorney files a motion to reconsider, he is inclined to look at it.

Mr. Wikstrom suggested that one approach might be for a movant submit a Request to Submit a Motion to Reconsider, with no response brief allowed. Judge Nuffer agreed that he would prefer a situation where a judge has the opportunity to decide whether to allow a motion to reconsider to be filed. Cullen Battle opined that having a rule that specifically allows a motion to reconsider would seem to encourage such motions, and that perhaps lawyers should have to stick their necks out if they choose to file one.

After further discussion, Mr. Wikstrom stated that there did not seem to be an overwhelming desire by the Committee to change the present practice. He asked if anyone would like to make a motion regarding adopting such a rule. There was no response, and the discussion ended.

V. REMEDIES RULES.

The Committee discussed the proposed amendments to the remedies rules. In response to Mr. Lee's question of whether there is a good pattern for these rules from another state, Mr. Shea stated that he has reviewed the remedies rules of many other states, and he believes that what the Committee has proposed is an improvement on those. Mr. Wikstrom suggested that the Committee send the proposed amended rules out to practitioners and others who use them on a consistent basis, such a bank lawyers and Legal Aid lawyers, and ask them to take a fresh look. It was agreed that this would be done, with written comments being requested, and with an invitation to anyone who wishes to do so to speak to the Committee in person.

The Committee then raised questions about some of the specific terms in the proposed remedies rules. Mr. Battle asked whether "earnings remain earnings after they are paid," such as in a situation where they are placed in a savings account. Judge Nuffer commented that the practical answer is that all "earnings" are "earnings." Virginia Smith stated that the proposed rules need to make clear that it is the defendant's responsibility to object to a garnishment.

With regard to proposed Rule 64, Mr. Shea stated that he has spoken to the Office of Recovery Services and, based on that conversation, believes that some changes should be made. The Committee then discussed the meaning of "gain earned from capital" in proposed Rule 64, and also discussed the definition of "earnings." After discussion, it was agreed that the term "gain derived from capital" should be deleted.

IV. ADJOURNMENT.

The meeting adjourned at 5:40 p.m. The Committee's next meeting will be held at 4:00 p.m. on Wednesday, January 28, 2004, at the Administrative Office of the Courts.

Administrative Office of the Courts

Chief Justice Christine M. Durham
Utah Supreme Court
Chair, Utah Judicial Council

Daniel J. Becker
State Court Administrator
Myron K. March
Deputy Court Administrator

MEMORANDUM

To: Civil procedures Committee
From: Tim Shea
Date: January 7, 2004
Re: Rule 65B

Clifton Panos requests an amendment to URCP 65B. He does not suggest a specific amendment, but in his letter, which is attached, he complains that an extraordinary writ under Rule 65B(d)(2) cannot be based on abuse of discretion because a petition for an extraordinary writ is an original proceeding and abuse of discretion involves reviewing the decision of another, which is an appellate proceeding.

I believe no change to the rule is necessary. Although appeals necessarily involve reviewing proceedings or decisions in another tribunal, not all reviews are appeals. Extraordinary writs remain, properly, an original proceeding the grounds for which include abuse of discretion. Extraordinary writs are limited to circumstances in which there is "no other plain, speedy and adequate remedy." Someone whose circumstances meet that threshold may petition the court for an extraordinary writ based on an official's abuse of discretion. Mr. Panos observes that the standard for abuse of discretion as grounds for a writ is higher than the standard for abuse of discretion as grounds for an appeal, but this goes only to the test the reviewing court applies, not to the nature of the proceeding.

Encl. Letter of November 19, 2003

Copy: Clifton Panos

ORIGINAL

telephone: (801) 582-0645
996 Oak Hills Way
Salt Lake City, Utah 84108-2022
November 19th, 2003

Sr. Staff Attorney Timothy Shea
Administrative Office of the Courts
Scott M. Matheson Courthouse, Suite N31
450 South State Street
P.O. Box 140241
Salt Lake City, UT 84114-0241

Dear Tim:

This writing should be construed a Petition as designated under SUPREME COURT RULES OF PROFESSIONAL PRACTICE Rule 11-101. Subparts (1)(A) and (2)(A),(B) thereof read in relevant part:

> "Article VIII, Section 4 of the Utah Constitution provides that the Supreme Court shall adopt rules of procedure and evidence to be used in the courts of the state and shall by rule manage the appellate process....To assist the Court with these responsibilities, the Supreme Court hereby establishes a procedure for the adoption, repeal and amendment of rules of procedure and evidence...Petitions for the adoption, repeal or amendment of a rule of procedure or evidence or a rule governing the practice of law may be filed by any interested individual with the Utah Supreme Court's Advisory Committees, Administrative Office of the Court...Petitions shall be in writing, shall set forth the proposed rule or amendment or the text of the rule proposed for repeal, and shall specify the need for and anticipated effect of the proposal....All petitions shall be placed on the committee's agenda for consideration and the committee shall provide written notification of committee action to all individuals who file a petition." (Underlining added.)

To specify per the above, the Rule of Civil Procedure which must be modified to make it consistent with Utah Supreme Court holdings is 65B(d)(2)(A), to wit: **"Appropriate relief may be granted: (A) where an inferior court, administrative agency, or officer exercising judicial functions has exceeded its jurisdiction *or abused its discretion*".** (The portion to which italicization has been added for emphasis is what is key.)

The Constitution of Utah Article VIII, Section 3 [Jurisdiction of Supreme Court] states (in

relevant part), "The Supreme Court shall have original jurisdiction to issue all writs...." And Utah Code Ann. § 78-2-2(1) reaffirms (in relevant part), "The Supreme Court has original jurisdiction to issue all extraordinary writs...." And in its holding in *State v. Johnson,* 114 P.2d 1034 (Utah 1941), the Utah Supreme Court has clearly defined "original jurisdiction". To wit:

> "'Original jurisdiction' as contradistinguished from 'appellate jurisdiction' is the right to hear a cause and to make an original determination of the issues from the evidence as submitted directly by the witnesses, or of the law as presented, uninfluenced or limited by any prior determination of any other court juridically determining the same controversy." (Underlining added.)
>
> Words and Phrases, 30 *Original Jurisdiction* 520 citing *State v. Johnson,* 114 P.2d 1034, 1036, 1037, 100 Utah 316.

> "'Original jurisdiction' as used in the constitutional provision... means the right of the...court to make its own record, its own finding, and its own original, independent determination not founded on one previously made and not based upon or limited to the review of another court's judgment or proceedings." (Underlining added.)
>
> Words and Phrases, 30 *Original Jurisdiction* 520 citing *State v. Johnson,* 114 P.2d 1034, 1036, 1037, 100 Utah 316.

> "'Jurisdiction' is the power to hear and determine, and ...the power of an appellate court in dealing with the pleadings and the evidence, in the application of the law and in the rendition of the judgment according to the right of the case, all independent of the action of the lower court, ...is not 'appellate jurisdiction' within the meaning of laws creating jurisdiction." (Underlining added.)
>
> Words and Phrases, 30 *Original Jurisdiction* 521 citing *State v. Johnson,* 114 P.2d 1034, 1038, 100 Utah 316.

> "Original jurisdiction as here used means the right of the court to make its own record, its own finding and determination. An original determination is not one founded upon one previously made. It is original in the sense that it stands alone upon its own base, not the

outgrowth of some other." (Underlining added.)

State v. Johnson, 114 P.2d 1034, 1037, 100 Utah 316.

"The right of the ...Court to hear and determine for itself, upon its own record, any cause which is lawfully before the court cannot be denied because the Constitution grants it the jurisdiction to make an original determination."

State v. Johnson, 114 P.2d 1034, 1039, 100 Utah 316.

"Each hearing which starts from 'scratch' and permits the parties to produce all available proper evidence on all of the issues is an original hearing before the court, — one unfettered, unlimited, or unconfined by the hearing had before any other court or tribunal." (Underlining added.)

State v. Johnson, 114 P.2d 1034, 1038, 100 Utah 316.

"It will at once be noted that *original jurisdiction* is used here in contradistinction to *appellate jurisdiction.* That jurisdiction which is not *appellate* is *original.* Appellate jurisdiction is the jurisdiction to review the decision or judgment of an inferior tribunal, upon the record made in that tribunal, and to affirm, reverse or modify such decision; judgment, or decree."

State v. Johnson, 114 P.2d 1034, 1037, 100 Utah 316.

"I concur. The opinion very clearly develops the thesis that "original jurisdiction" as used in the Constitution does not mean that an action must be brought in the court having original jurisdiction, nor that there is a right originally to initiate it in that court. The word "original" expresses an adjudicative power of the court to function originally in regard to that litigation, independently of another tribunal, as it could have done if originally brought in that court and not as a court reviewing the action of another tribunal. I think the distinction sound and the only one workable under the various provisions of our constitution." (Underlining added.)

State v. Johnson, 114 P.2d 1034, 1044, 100 Utah 316.

"[W]hat is the meaning of the term *original jurisdiction*? DOES IT REFER TO THE LOCUS OR SITUS OF THE INITIAL INSTIGATION OF A LEGAL CONTROVERSY, or does it refer to the nature of the adjudicative power of the tribunal? DOES IT REFER TO THE TRIBUNAL WHERE THE PROCESSES INVOKING JUDICIAL ACTION MUST EMANATE OR BE FILED IN THE FIRST INSTANCE, or does it define the form and extent of the juridical power? *We have no hesitancy in saying it is the latter.*" (Italics, emphatic capitalization, and underlining added.)

State v. Johnson, 114 P.2d 1034, 1036, 100 Utah 316.

AND THIS IS FULLY IN KEEPING WITH THE JURISPRUDENCE OF A NUMBER OF OTHER JURISDICTIONS:

"The 'jurisdiction' to consider causes...and to decide them on the law and evidence according to the right of the case, independent of the rulings and judgment of the lower court, is original and not appellate." (Underlining added.)

In re Burnette, 85 P. 575, 577, 73 Kansas 609.

"Original jurisdiction as used in the constitutional provision means an independent jurisdiction, one not based upon or limited to review of another court's judgment or proceedings."

Wheeler v. Northern Colo. Irrig. Co., 9 Colo. 248, 250, 11 P. 103.

"'Appellate' pertains to the judicial review of adjudications. 'Appellate jurisdiction' is the power to take cognizance of and review proceedings had in an inferior court...."

Ex parte Henderson, 6 Fla. 279.

"Action challenging findings of fact, conclusions of law or order of Public Utility Commission was not 'original proceeding' or 'original action,' but was an appeal...."

US West Communications, Inc. v. Eachus, 862 P.2d 102, 124 Or.App. 325.—Pub Ut 189.

> **"When an instrument...define[s] the jurisdiction of the supreme court by declaring the cases in which it shall take original jurisdiction, and that in others it shall take appellate jurisdiction; the plain import of the words seems to be, that in one class of cases its jurisdiction is original and not appellate; in the other it is appellate, and not original. ... It is the essential criterion of appellate jurisdiction, that it *revises and corrects the proceedings in a cause already instituted, and does not create that cause.*" (Italics and underlining added.)**
>
> *Marbury v. Madison*, 1 Cranch 137, 175, 5 U.S. 137, 2 L.Ed. 60.

> **"To issue a writ of mandamus to an officer for the delivery of a paper is in effect the same as to sustain an original action for the paper, and belongs to "original jurisdiction and not to appellate jurisdiction."**
>
> *Marbury v. Madison*, Dist.Col., 5 O.S. 137, 1 Cranch 137, 2 L.Ed. 60.

We thus have an apparently irreconcilable conflict between the Court's holding in *State v. Johnson* and R.Civ.P. 65B(d)(2)(A). For how can an action of the Court in granting or denying extraordinary relief under its "original jurisdiction" be conditioned upon the question of whether or not there was an "abuse of discretion" in the underlying proccedings? In trying to settle that issue below, one can hardly be in keeping with the Court's conclusion that an exercise of original jurisdiction is **"to hear [a] cause...uninfluenced or unconcerned or limited by any prior determination, or the action of any other court juridically determining the same controversy."** (*Johnson* at 1037).

However, one very complicating factor which will confront the Committee, in any attempt to unscrew the inscrutable and discern whether Rule 65B(d)(2)(A) conflicts with a prior established position of the appellate courts, is that later utterances by them make it look like the moorings of *State v. Johnson* have somewhat been slipped. For example, the no-hope stumblebums of Utah's First Jerk-It Court of Schlemiels across the hallway (I

must needs say that, or the Supreme Court is liable to conclude I'm not evenhanded in my dealings, which is not the case) held, in *State v. Stirba*, 972 P.2d 918 at 922 (Utah App. 1998), that a court in an original proceeding for extraordinary relief NOT ONLY has to be reviewing the action of another tribunal for abuse of discretion (which conflicts even with *Marbury v. Madison as* cited above), but (Jesus wept!), "'[A]buse of discretion' for Rule 65B(d)(2)(A) writs must be much more blatant than the garden variety 'abuse of discretion' featured in routine appellate review. *See Renn,* 904 P.2d at 683 (holding courts may employ Rule 65B writ to correct a *'gross and flagrant'* abuse of discretion') (emphasis added)".

Whether my strivings and remonstrances will avail anything with the Committee, I know not. But henceforth let all men take heed that the reprobation for these things rests not with me.

Yours in His bonds,

Clifton W. Panos

Clifton W. Panos

Administrative Office of the Courts

Chief Justice Christine M. Durham
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MEMORANDUM

To: Civil Procedures Committee
From: Tim Shea
Date: January 7, 2004
Re: Comments to amendments

Two sets of rule amendments were published for comment with a closing deadline of December 31. The first set were those rules originally published for comment in May 2003, which the Supreme Court eventually approved effective November 1. Notice of the amendments had been emailed to lawyers under Rule 2-203, rather than mailed under Rule 11-101. Because of this error the Supreme Court directed the comment period reopened and notice of the amendments mailed to the Bar. However, because publishers had already prepared and distributed the amendments, the Supreme Court allowed the amendments to go into effect during the comment period. The primary purpose of most of these amendments was to incorporate the procedural provisions of the Judicial Council's Code of Judicial Administration into the Supreme Court's rules of civil, criminal, appellate and juvenile procedure.

The second set were those rules approved by this committee and published for comment in the normal course.

I've listed the comments in numerical order of the rules without regard to whether they were published in the first or second set of amendments. I've attached the entire second set of proposed amendments as I normally do. Regarding the first set, those rules already in effect during the comment period, I've attached only the rules for which I've drafted further amendments.

One of the proposed amendments to Rule 11-101 (not attached) would permit notice of future rule changes by email rather than by mail. I received only one comment, which opposed that change. I've sent the rule and comment to the Supreme Court with my recommendation that the change be adopted.

The JRRC is the Judicial Rules Review Committee, a joint committee of the Utah Legislature established to review and comment upon Supreme Court and Judicial Council rules. The JRRC met on December 30. They did not have a quorum and so could not take any official positions, but I've provided a summary of the comments of committee members. Committee members recommended a few minor changes to the small claims rules, which I have incorporated into the current draft without note.

SMALL CLAIMS

From: George McCune
Date: December 29, 2003

Mr. McCune suggests several changes to various rules of small claims procedure. Rather than quote or summarize them individually, I've attached his letter to which he has attached the draft rules with his further changes shown by interlineation. Some suggestions are changes in writing style, others are changes of substance. I recommend against all of them.

From: "Lisa McGarry" <Lisa@cullimore.net>
Date: 9/25/2003 11:42 AM
Changes in small claims rules are long overdue. As a former judge "pro tem," I saw constant abuses of the process. These changes should stop these unnecessary practices.

Rule 3.

From: "Elayne Storrs" <estorrs@co.carbon.ut.us>
Date: 9/24/2003 10:02 AM
Is there anyway we can clarify the rule or the statue on service?
Rule 3 leads you to believe any process server can serve small claims affidavit. However 78-12a-2 says people who are not peace officers can't server any papers other than complaints, summonses and subpoenas. Then (3) says only private investigators can serve ...complaints, ...small claims affidavits.
R Schwermer clarified this statute for me saying a process server can server a million dollar complaint but not a small claims affidavit.
The process server in our area went through the process to get his private inv. license so he can serve small claims affidavits. I have another lady who is threatening to sue me because she says a complaint is a complaint whether it is a civil or small claims. (I have refused to accept her service as she is not a peace officer under the definition nor is she a licensed private investigator.

Recommendation. Further amend Rule 3 to recognize an affidavit as a complaint for purposes of §78-12a-2. Draft attached.

Rule 4.

From: JRRC
A prior small claims judgment will preclude the district court from considering a counter claim for amounts greater than the small claims jurisdiction.

Analysis. This is by far the most significant change in these small claims rules. Currently, the rule requires the entire case be transferred to the district court civil docket if the counter claim exceeds the jurisdiction of small claims. Two problems exist: First, if the defect is lack of subject matter jurisdiction, the small claims court has no authority to do anything but dismiss the case. Transferring the case to a court with jurisdiction should not be an option. Second, the rule gives

no direction regarding which rules govern the case after transfer. If the URCP, then the affidavit is insufficient as a complaint and should be dismissed (making transfer somewhat futile). If the small claims rules, then there is no discovery and the rules of evidence are significantly relaxed. Current practices vary.

The proposed solution to these problems is to bifurcate the claims. It's difficult to anticipate the full effect of such a change, but res judicata should not be an issue.

The Supreme Court recently summarized the elements of res judicata in *Snyder v. Murray City Corporation*, 2003 UT 13; 73 P.3d 325 (Utah 2003) (Citations omitted):

> P33 "'The doctrine of res judicata serves the important policy of preventing previously litigated issues from being relitigated.' Res judicata encompasses two distinct doctrines: claim preclusion and issue preclusion."
>
> P34 "Generally, 'claim preclusion bars a party from prosecuting in a subsequent action a claim that has been fully litigated previously.'" In order for a claim to be precluded under this doctrine the party seeking preclusion must establish three elements:
>
> "First, both cases must involve the same parties or their privies. Second, the claim that is alleged to be barred must have been presented in the first suit or be one that could and should have been raised in the first action. Third, the first suit must have resulted in a final judgment on the merits."
>
> P35 On the other hand, issue preclusion "'arises from a different cause of action and prevents parties or their privies from relitigating facts and issues in the second suit that were fully litigated in the first suit.'" The doctrine of issue preclusion applies where the party seeking preclusion establishes the following four elements:
>
> "(i) The party against whom issue preclusion is asserted must have been a party to or in privity with a party to the prior adjudication; (ii) the issue decided in the prior adjudication must be identical to the one presented in the instant action; (iii) the issue in the first action must have been completely, fully, and fairly litigated; and (iv) the first suit must have resulted in a final judgment on the merits."

Claim preclusion will not be an issue. With the suggested change in place, a counterclaim is barred in small claims if it's greater than the small claims jurisdiction. It therefore fails one of the required elements for claim preclusion. Indeed, claim preclusion is more of an issue under the current rules, which permit the counterclaim to be filed. Whether issue preclusion will be an issue is less certain. It's arguable that issue preclusion does not apply at all since "issue preclusion arises from a different cause of action", and the scenarios woven around this amendment invariably involve a single cause of action. If the small claims case is determined to be a different cause of action from the district court case, the outcome will likely depend on whether "the issue in the first action [was] completely, fully, and fairly litigated". Small claims procedures are presumably fair but are not necessarily full and complete, given the relaxed rules of evidence and the lack of discovery. Until a court decides the question, this variable is largely an unknown.

A judgment from the district court certainly would be res judicata in small claims court, but it's unlikely the district court action would proceed to judgment before the small claims action.

Although res judicata may not be a problem, inconsistent results almost certainly will be: one party prevailing in one action and the other party prevailing in the other action. It may not happen frequently or even regularly, but it will happen.

Rule 6:

From: Chris Killpack
Date: 9/25/03 4:13PM

First under provision (a) it is proposed that no discovery may be conducted. I'm wondering if this will apply to the Subpoena Duces Tecum? Currently the Court allows small claims parties to subpoena documents. I have many parties that ask me if they can hold an informal deposition on a date prior to the trial where they will subpoena documents to be reviewed. Is it improper to allow them to do this? If they wish to subpoena documents can they only be subpoenaed for the trial date? And does the Court have contempt power in a situation where a party does not comply with the subpoena?

Second under provision (b): "Written motions and responses may be filed prior to trial". Will this mean that any motion or response filed by a party must be reviewed by a pro tem judge prior to the trial? And will the same pro tem judge that rules on the motion need to preside at the trial? This may cause a lot of scheduling problems in courts that rotate their pro tems from week to week.

Recommendation. No change. No discovery has long been the rule of small claims cases. Subpoenas for trial are permitted. Subpoenas for discovery are not. Contempt power is not brought into issue by these rules. Filing motions prior to trial also has been a long-standing practice in small claims cases, but the motion typically is heard on the day of trial. Other courts hear motions before trial even though the rule prohibits it.

From: Robert Thorup <rthorup@RQN.COM>
Date: 9/25/03 11:26AM

With the higher jurisdiction limit of $5000, and the likelihood of even higher jurisdiction limits in the future, there is an increasing number of out of town defendants who are appearing to defend small claims actions. As both a judge in Third District and as a witness in another district, I have seen last minute postponements (within 5 days of the hearing) severely inconvenience out of town parties and witnesses who fly or drive in only to find out that there was a postponement given. It would be wise to require that a plaintiff and defendant provide a telephone number, fax number and email address on the respective filings. It would not be unreasonable to require at least a phone number of a defendant be provided by plaintiff. The clerk and/or the plaintiff should be required to affirmatively notify the other parties by phone, fax and email of the postponement. In thinking about this, it would not be a bad idea to require a served defendant to file a response in every case. The response would be as simple as the complaint and could be a form served on the party with a return envelope. This way cases would be joined, parties would be aware of the position of the other party, and the email, phone and fax numbers of the defendant(s) could be harvested.

Recommendation. No change. The plaintiff is already required to provide defendant's address and phone number on the form affidavit. The clerk is already required to notify the other party of a continuance. Compliance may be a problem but the rules appear adequate.

URCP 6

From: Compulaw (phone call)

The editors at Compulaw observed that URCP 6(d) may conflict with the recent amendments to Rule 7 extensively regulating motion practice.

Recommendation. I couldn't think of any scenarios in which Rule 6 would govern the timing of motions over Rule 7, so I've proposed an amendment that limits the applicability of URCP 6(d) to 5-days notice of hearings.

URCP 7

From: Commissioner Michael Evans

Date: 12/4/03 10:48AM

First, and most importantly, amended Rule 7 does not specify the described motion procedure does not apply to proceedings before court commissioners as the prior CJA Rule 4-501 did in the paragraph entitled "Applicability". I trust this is simply an oversight as it would represent a dramatic change in the long-standing practice in the area of domestic relations and require a complete overhaul of the commissioner system.

URCP 7 (g) provides an objection to the commissioner's recommended order may be filed "within 10 days after the recommended order is entered." If "entered" means the day the written order is filed by the clerk after signature by the court, this language represents a substantial departure from the prior rule and historical practice and, in my view, is problematic and objectionable. If, however, "entered" was simply intended as a more brief way to restate the prior language, I suggest it falls short. In either event, I request the committee consider adopting the precise language from the prior rule that is clear and consistent with hisorical practice, "Objections shall be filed within tem days or the date the recommendation was made in open court or if taken under advisement, ten days after the date of the subsequent written recommendation..." (which means minute entry).

From: Judge Robert Hilder

Date: 12/31/2003 10:18 AM

The pre-existing Rule 4-501 expressly did not apply to court commissioners and small claims cases. These exceptions do not appear to have been retained, and in the view of both the judges and commissioners, an apparent requirement that commissioners follow the new Rule 7 will cripple effective functioning of the high volume domestic calendar. While I have never seen anyone invoke the previous 4-501 in small claims court, I do not see how requiring application of Rule 7 would be beneficial in any respect. A district court member of the rules committee, Judge Quinn, was present at the judges' meeting, and he indicated that there was no discussion of the applicability to commissioners and small claims; therefore, it is likely the omission was not intentional.

From: Steven Kuhnhausen
Date: November 20, 2003

One of the things that has caused and will cause problems for domestic relations practitioners and commissioners is the requirement in Rule 7(g) that the Domestic Relations Objections and all Motions need to be accompanied by a Memorandum of Law and Affidavits. For the majority of people who seek relief in the Domestic Relations Courts of this state, they cannot afford to pay lawyers to do a Memorandum of Law and Affidavit each time that they need to seek relief in the courts. Additionally, in talking with commissioners regarding this issue, it appears that it will further delay rulings and clog the system even further. One wonders whether we even need commissioners in the 3rd District if we are going to brief every Motion. If this was merely an oversight to exclude domestic relations motions from the Rule 7 requirements, please ensure that the amendments are modified.

Recommendation. Amend to exempt cases pending before a court commissioner from Rule 7. The rules of civil procedure do not apply to small claims cases except as adopted in those rules (currently limited to collection under the Rule 64 series), so there is no need to exclude small claims cases from Rule 7. Amend Rule 7(g) to clarify the time in which to object to the commissioner's recommendation runs from the in-court oral recommendation or the written minute entry of a later decision.

From: Brad Rich (Phone call)
Date: December 2, 2003

Rule 4-504 required counsel to share the order with opposing counsel prior to submitting it to the court. The amendments to Rule 7 and Rule 54 do not contain a similar requirement. Although judgments are orders, it's unclear that the requirements of Rule 7 regulating orders apply to judgments.

From: "Jeff" <jeffb@lansrc.com>
Date: 12/23/2003 9:36 AM

Rule 7(f) and it's subparts do not clarify if that section only applies to orders based upon motion practice, to which Rule 7 applies, or all orders that need to be submitted in a case. That could be firmed up because the old Rule 4-504 clearly applied to orders as a result of any proceeding, not just motion practice.

From: Judge Robert Hilder
Date: 12/31/2003 10:18 AM

Rule 7(f) regarding submission of orders is generally fine, but it raises the possibility of addressing a longstanding problem. We believe most trial judges greatly favor a provision that would require service of a proposed Order on opposing counsel within a set time (the fifteen days in 7(f)(2) is fine), but that the Order not be filed or presented for signature until the time for objection has passed. Again, the volume of civil paperwork results in orders being signed without objections being considered, or duplicative or even inconsistent orders being signed.

Recommendation. Amend Rule 7 so that the proposed order is filed with the court only after the time to object has passed.

There is nothing in the current rule that limits its application to orders resulting from motions, but the placement, following all of the motion procedures, may imply that. I've drafted a short committee note to the effect that it applies to all orders, or a similar sentence could be included as part of paragraph (f).

From: Petrogeorge, Michael P.
Sent: Tuesday, December 09, 2003 7:14 PM
As GED previously noted, Rule 4-501 of the Rules of Judicial Administration (concerning motions and memoranda) has been repealed and replaced in large part by new Rule 7 of the Utah Rules of Civil Procedure. I don't see any provision in the new rule, however, for expedited hearings? Is there a new rule for expedited hearings I simply can't locate? Do you simply request it pursuant to general hearings provision of Rule 7(e)? Any insight here would be appreciated.

Recommendation. No change. The former Rule 4-501 allowed the judge to shorten the various time frames if "time is of the essence and compliance [with the rule] would be impracticable" or if "the motion does not raise significant legal issues and could be resolved summarily." Basically, if there's an emergency or if it's a no-brainer. There is no comparable provision in Rule 7. The claim that a motion (or presumably opposition to the motion) raises no significant legal issues does not seem appropriate grounds to make everyone hurry up. Indeed, 4-501 required a motion, notice and a showing of good cause, which attaches significant process (and time) to determining whether the issues are simple. It seems a better policy to let the briefing run its course rather than argue about whether the issues are simple.

Conceptually, it may be sound to permit the judge discretion to shorten the time frames if there is an emergency, although the occurrence of an emergency in the context of motion practice is probably much more rare than for, say, an injunction or an attachment. Practically, the time cannot be significantly reduced since the only time frames to work with are the time to file in opposition to the motion (10 days) and the time to reply to the opposition (5 days). Again, it may take longer to argue about the need for speed than simply to let briefing run its normal course.

From: Judge Robert Hilder
Date: 12/31/2003 10:18 AM
Increased page limits for Rule 56 motions. The sentiment is very strong that increasing the limits will lead to routine 25 page memoranda where no purpose is served and, based on experience, when lawyers submit lengthy memoranda without justifying the need, all we get are rambling memos, with points rehashed ad nauseam, but rarely does the increased volume shed new light or aid the decision-making process. Again, Judge Quinn commented, and stated that the committee believed that because requests to submit overlength memos are routinely granted, the increased limit merely recognizes the status quo. Not so. Some judges do deny motions if not persuaded that more pages are needed. More importantly, the requirement to file a motion for overlength memoranda drastically limits the number of cases where counsel even consider submitting more than ten pages. When compared to the many motions we receive, overlength filings are presently a very small percentage (for example, I have received and granted just one such motion in the past month, but I have decided at least 20-25 motions during the same time

period, although nor all for summary judgment). If this rule is passed, 25 pages will be the norm, and given the large caseloads (for example, I presently have 1,360 pending civil matters, which is fairly average in Salt Lake) and lack of law clerk support, we do not need routinely long memoranda. Let's preserve the old limit.

Recommendation. No change. We've been the rounds on this one, which may simply come down to judges who prefer shorter briefs vs. lawyers who feel the need for more words. We may need to rely on the sound judgment of the lawyer to draft a brief of appropriate length. If it's redundant, verbose, superfluous and arcane, judges will not be favorably disposed.

From: "P. Bruce Badger" <bbadger@fabianlaw.com>
Date: 12/30/2003 1:02 PM
Please allow this to serve as my comment on Rule 7(c)(1) which, in the final sentence reads: "A party may attach a proposed order to its initial memorandum" and Rule 7 (f)(2) which deals with proposed orders and objections thereto. Allowing a party to include a proposed order with its motion is a bad idea. The eventual order should be crafted to conform to the Judge's decision, not the other way around. Furthermore, Rule 7(f)(2) is very poorly drafted. It does not address when a party must file its objection to a proposed order that the other side includes with its initial memorandum under Rule 7(c)(1). Must the objection to a proposed order be included in the opposing memorandum? If so, we will now have to spend time, and more importantly, precious space in an opposing memorandum, detailing for the court why the proposed order is improper. I think this business of including an order with the initial memorandum is ill advised and would recommend that it be deleted from Rule 7.

Recommendation. Committee's call. We've been the rounds on this one as well. This is a new procedure in Utah suggested by experience in other states. Some argue it will force parties to think in concrete terms about the relief requested and its supporting elements (even if it has to be changed after the judge's decision). Others think it a waste of time. Filing the proposed order is optional so there should be no adverse impact on the moving party. Since there would be, as yet, no ruling, there's no need to object that the order does not reflect the ruling. A party might object if the proposed order is not consistent with the requested relief.

URCP 24.

From: JRRC
The rule should include some sanction against a party who is required to notify the AG of a constitutional challenge to a statute but does not. Perhaps make the judgment voidable by the AG.

From: Annina Mitchell, Solicitor General
Date: December 31, 2003
Opposed. See attached letter.

Recommendation. Repeal Paragraph (d). Despite the AG's support of this change when it was being discussed, he now opposes it, arguing that the state's, county's or municipality's

interests are adequately protected by statute. I suspect if he had taken this position earlier, we never would have pursued it.

URCP 62

From: "Bob Wilde" <wilderh@qwest.net>
Date: 9/25/2003 11:48 AM

The proposed amendment to Rule 62 U.R.C.P. allowing execution or other proceedings on "the entry of final judgment" ignores the large number of domestic cases in judgments are entered before trail. In these cases there is either a temporary order or a stipulation to pay child support and/or alimony. The obligated spouse often falls behind, sometimes intentionally, and the other spouse is then left to seek a judgment followed by execution or garnishment in order to collect the child support and/or alimony. The change to the rule suggests, by implication, that these amounts will not be able to be collected until a final decree of divorce is entered. A better solution would be to allow a party against whom judgment has been entered, in a case which is not otherwise final, to seek a stay of execution from the court, for good cause.

Was there consideration that in some instances attorney fees may be awarded "as part of costs" like in a title vii case? Is the modification intended to reverse the attorney fees presumption in those cases?

Recommendation. No change. The proposed changes to Rule 62 appear not to involve attorney fees in any way. Writs of attachment and garnishment are available to collect upon an obligation to pay prior to final judgment. Rule 7 provides that any order to pay money may be enforced in the same manner as a judgment.

URCP 56

From: "Hadley & Associates" <hadlaw@mstar.net>
Date: 11/26/2003 1:47 PM

Rule 56(c) URCP needs to be modified to delete the reference to Rule 4-501 CJA and add in its place Rule 7 URCP The changes in adopting much of CJA into URCP was needed.

Recommendation. Make the correction. Draft attached.

URCP 64D

From: Stephanie Saperstein
Date: 11/12/03 3:16PM

The proposed changes in Rule 64D reflect a statutory and program change. As of July 1, 2003, the Department of Workforce Services, not ORS, collects the overpayment of public assistance benefits. However, ORS still collects, via agreement, overpayment of Medicaid payments for the Department of Health in many instances that arise in the Third Party Liability collection program. I respectfully request that the committee simply add the Department of Workforce Services to Rule 64D(u)(i) rather than replace ORS with DWS. ORS needs this section in order to continue to pursue reimbursement on behalf of the Department of Health.

From: Emma Chacon
Date: 12/30/03 8:42AM

I have attached the proposed rule with two comments. On page 40 Line 27 please do not want to delete the Office of Recovery Services from this section. The same applies to Page 41 line 2. DWS needs to have the same authority; however, we still have cases which are technically overpayments of public assistance and we need to retain the ability to do continuous garnishments to collect these debts.

Recommendation. Include both ORS and DWS within the scope of writs of continuing garnishment. Draft attached.

URCP 68

From: "Hal Christensen" <hchristensen@scmlaw.com>
Date: 12/1/03 2:37PM

The proposed amendment to Rule 68 is confusing if not unintelligible. It does not go far enough and does not level the playing field.

The purpose of the rule is to encourage settlement by offering both a stick and a carrot. The proposed amendment needs to put the offeree at risk of paying the offeror's attorneys fees. It can be done very simply: add following the word "costs" the words "and reasonable attorneys fees" to the existing rule.

As proposed plaintiff's would receive a carrot but not a stick. They would receive their attorneys fees if the award exceeds the offer but the defendant would not receive attorneys fees if the award is less than the offer.

This would provide a better solution than to adopt the British rule that losers pay under all circumstances.

From: "Bob Wilde" <wilderh@qwest.net>
Date: 9/25/2003 3:35 PM

I have reviewed the new proposed Rule 68 U.R.C.P. I have concern about the issue of costs. At least one statute, 42 U.S.C. Sec. 2000e-5, makes and award of attorney fees "costs." Is the effect of the rule, at paragraph a to allow an offeror to claim its attorney fees under such a statute from and after the offer is made.

Parenthetically, as a member of the Advisory Committee on the Rules of Evidence I am aware of the bias of advisory committees towards enacting a rule after the legislature has threatened to change a rule in order to pre-empt the legislature. The bill which was proposed last session to amend Rule 68 was a very poorly drafted attempt to fix a problem which doesn't exist. I see no reason to make this change merely to beat the legislature to the punch.

From: "Randy B. Birch" <rbbirch@yahoo.com
Date: 9/26/03 11:18AM

From the summary, I would say, having argued this on a couple of occasions (coincidentially mechanic's lien cases), 1) that the fees should be awardable against either party that rejected an offer and which gets less than the offer. I don't see why to provide it only to "defending a claim". As a practical matter, every mechanic's lien case usually includes a claim for payment,

and a counterclaim for defective work. BUT, it should still be reciprocal; that would help avoid the inevitable disparated application and treatment by Judges trying to interpret the rule.

From a practitioner's standpoint, I am concerned that while the proposed changes are intended to dissuade meritless litigation, the rule changes would dampen creative litigation, i.e. tobacco litigation, that while initially losing, later becomes successful.

I am also concerned that the rule changes are drafted for the benefit of only the defense. That makes no sense at all. I think it is also important to note that the changes take Utah further from the Federal Rules and hence, further complicate multi jurisdictional practice.

I do like the fact that the rule is clarified to include attorneys fees, when the same are available in the litigation.

From: "Dave Lambert" <lambertd@hlpattorneys.com>
Sent: Wednesday, October 01, 2003 8:15 AM

My concern is whether it is a good idea to permit a defendant to exclude attorneys fees or any other issue from the offer of judgment so that it turns out to be an offer of partial judgment, leaving issues to be tried. It seems that the ability to offer partial judgment may be susceptible to abuse or manipulation and, because the rule only permits defendants to make such offers, it may give the defense an unfair advantage. It seems to me that the main advantage of the offer of judgment rule is to have a case totally resolved, both for the court system and for the parties. Les agrees with me that the proposed new rule would likely permit a party to exclude and reserve at least the attorney fee issue in making an offer of judgment.

From: "Jon H. Rogers" <jhrogers@burgoyne.com>
Date: 11/12/2003 4:28 PM
From: "Eric K. Johnson" <eric@johnsonstone.com>
Date: 11/12/2003 6:30 PM

I am writing you within the comment period established through December 31, 2003, with regards to the proposed modification of Rule 68 [OFFER OF JUDGMENT] of the Utah Rules of Civil Procedure. I am completely against this proposed modification for a number of reasons. I would like to tell you about them and request that you not approve this rule as proposed. My concerns are as follows:

1. Amounts at issue suddenly will have gone up dramatically. In the past, this rule has applied simply with respect to costs. As such, in the typical case, an award against a Plaintiff was potentially limited from a few hundred dollars to a few thousand dollars. The proposed rule, which contemplates attorney fees and interest, magnifies a potential loss under this section to a significantly larger figure which could be (at least in theory with regards to attorney fees) in the millions of dollars.

2. Is a Plaintiff required to guess what a Court will award as fees or what a Court/Jury will award as damages? A determination of reasonable attorney fees has always been the province of the Court (where the parties were unable to agree upon the amount of applicable attorney fees). This proposed rule would cut off attorney fees after the offer (if less favorable than the offer) even though the parties cannot know what the Court might award as attorney fees. This makes a legitimately injured Plaintiff speculate on what the Court might award as attorney fees without having that factor within the control of the Plaintiff.

3. There is a lack of mutuality to this provision. This proposed modification of the existing rule only benefits Defendants. If the rule needs to be amended, why cannot the rule be amended

to permit Plaintiff's to make offers which have similar results for the Defendants. For example, if a Plaintiff believes he will obtain a Judgment against a Defendant in a certain amount or on certain conditions, why can't the Plaintiff make an offer specifying the terms upon which the Plaintiff believes he is likely to succeed and then, if the Plaintiff does succeed to that extent, the Defendant should have to pay all costs, interest, and an enhanced attorney fee (where such an attorney fee award is applicable). The enhanced attorney fee award need not be exorbitant but could reflect 110-125% of the attorney's standard hourly rate for that type of case.

4. Why fix it if it ain't broke? While I generally act as a Plaintiff's attorney, I do some defense work for consumers and small businesses. I still see the proposed rule changes as biased toward the defense. So far as I can tell, our system has seemed to function properly. Why do we need such a one-sided rule change? All it will do is make injured parties with sincere claims be more afraid to go to Court. What to the defendants (lots of times big businesses and insurance companies) risk if they make an offer which is rejected and where the Plaintiff succeeds beyond the offer?

I feel very strongly that this proposed rule is one-sided and is a way of discouraging injured parties from having their matters heard by the finder of fact. If we need to modify the existing rule, then let's make sure that it has teeth in it which can potentially benefit either of the parties, depending upon who prognosticates what the finder of fact (and Court with respect to attorney fees) holds. I realize you will consider many comments about the proposed rule changes. I thank you for your time in considering my objections/concerns.

From: M. Darin Hammond

Date: November 13, 2003

This office wishes to make a comment with regard to proposed amendments to the Utah Court Rules. This comment is specifically made with regard to Rule 68, Offer of Judgment,

First, we believe that the current offer of judgment rule has very little, if any, practical meaning and that the proposed amendment is helpful towards increasing the effectiveness thereof. We believe that it is very important to have an offer of judgment rule similar to that of other states which forces parties to consider the true strengths and weaknesses of their case early on. Thus, the proposed amendment is highly favored by this office.

In addition, we just would like to comment that we believe that the proposed amendment does not go far enough in this area. Some of the other surrounding states have offer of judgment statutes which are very strong in awarding attorney's fees to the tendering party, not just removing the right to attorney's fees from the recipient party.

In any event, we arc encouraged by the proposed amendment to the Rule 68, Offer of Judgment, and hope that it is approved in its current format or in some more aggressive version, Should you have any questions or concerns regarding this comment, do not hesitate to give any one of us a call.

From: JRRC

Rule should apply equally to plaintiffs and defendants. Rule should permit judge to award attorney fees as well as costs to the offeror.

Recommendation. Draft the rule so that it applies regardless who makes the offer. This can be done by deleting the phrase “by a party defending against a claim” in paragraph (a).

Whether the “stick” should include attorney fees of the offeror imposed on the offeree is a policy decision for the Committee and Court. I’ve drafted a provision that would make the award discretionary with the judge. This is similar to the Nevada statute. With the obligations running both directions it may be fair to include attorney fees.

URCP 73

From: Judge Paul Lyman
Date: 11/20/03 11:57AM

I have a concern about one of the Rules Effective November 1, 2003. Rules of Civil Procedure 73 deals with attorney fees. Subpart (b)(2) expands attorney fees to include "paralegal, administrative assistant, etc." Why not include office overhead, rent, etc? Traditionally, all of the people working for the attorney were paid out of the fee charged by the attorney. Is there some statutory basis for this expansion, or is this just legislation by rule?

Recommendation. No change. The former Rule 4-505 distinguished between attorney rates and rates for others employed by the attorney. Although the text is different, the concept is the same.

URCP 74

From: Judge Michael Lyon
Date: 11/21/03 2:08PM

I request amendments to proposed Rule 74:

First, in the event an attorney files a motion to withdraw as counsel, he or she must state affirmatively whether there is a pending motion or trial or certificate or readiness for trial filed, the pending dates set for these matters, and the reasons for the motion nonetheless. This requirement will allow the judge to access whether or not to grant the motion. This requirement will also enable us to distinguish real motions from circumstances when lawyers inadvertently file a motion when a notice would suffice.

Second, the withdrawing lawyer must provide to opposing counsel his or her client's most current address, thus allowing the other lawyer to send a reliable notice to appear or appoint counsel.

Recommendation. The second requested change is already part of Rule 74. Regarding the first requested change, the rule already requires the withdrawing attorney to state whether there is a motion or certificate of readiness filed (which was as far as the former Rule 4-506 went). The further information not now in the rule is: whether a trial is set; dates of hearings already scheduled; and the reason for the motion to withdraw even though matters are pending. The additional information appears to be information useful to the judge. I’ve drafted this further change.

URCP 101

From: Commissioner Michael Evans
Date: 12/4/03 10:48AM

Rule 101 requires the commissioner to issue a pretrial order identifying not only disputed issues but stipulated issues and recommendations on those "if the commissioner conducted and evidentiary hearing on those issues." Not only does this require something more of commissioners than the prior CJA Rule 6-40l, but does not make clear counsel are to prepare orders (I don't believe the intent was commissioner's literally generate a pleading in any form other than minute entry) and fails to recognize that pretrial settlement conferences as historically conducted by commissioners are NEVER evidentiary hearings. My practice for 13+ years has been to identify only disputed issues requiring trial together with settlement "suggestions." (Although the prior rule required "recommendations" after pre-trial, it clarified that such were NOT the order until modified by a judge, as are recommended orders resulting from law and motion hearings).

My suggestion is to simply repeal 4-905 and delete the new rule 101. Reference to evidentiary hearings at pre-trial before a commissioner is misplaced as such never occur. Rule 6-401 is adequate, accurately reflects the historical practice of commissioner's.

Recommendation. Repeal Rule 101.

URCP 106

From: Randy Hudson
Date: 11/24/03 6:28PM
This is the current rule:
Rule 106. Modification of divorce decrees.
Proceedings to modify a divorce decree shall be commenced by filing a petition to modify in the original divorce action. Service of the petition and summons upon the opposing party shall be in accordance with Rule 4. No request to modify a decree shall be raised by an order to show cause. The responding party shall serve the answer within twenty days after service of the petition.
This is my suggestion for change:
Rule 106. Modification of custody, parent time, alimony or child support orders.
Proceedings to modify custody, parent time, alimony or child support, shall be commenced by filing a petition to modify in the original action. Service of the petition and summons upon the opposing party shall be in accordance with Rule 4. No request to modify a custody, parent time, alimony or child support order, including temporary child support orders, shall be raised by an order to show cause. The responding party shall serve the answer within twenty days after service of the petition.
Rationale for changing the rule: there is no reason to limit the rule to divorce proceedings only. Paternity proceedings, custody and parent time proceedings, guardianships, separate maintenance and independent child support proceedings also resolve issues that are subject to modification based on changed circumstances. There is no reason to insist on a petition to modify in a divorce action but allow some other type of procedure in a variety of other actions that involve the same modifiable issues.
Temporary child support orders deserve special mention because there is a perception among some members of the family law bar (and some courts) that temporary child support orders are somehow entitled to less dignity than final orders and are subject to retroactive adjustment.

That is not the case. See Whitehead v. Whitehead, 836 P2d 814 (Utah App. 1992), Utah Code Ann. §§ 62A-11-312.5 and 78-45-9.3. The idea that temporary child support orders can be adjusted, essentially at will, probably derives from the provisions of Utah Code Ann. § 30-3-3(4) which indicates that support orders entered in divorce actions "may be amended during the course of the action or in the final order or judgment". Whatever Section 30-3-3(4) means (note it speaks in terms of amendment, not modification), the Whitehead case and Utah Code Ann. §§ 62A-11-312.5 and 78-45-9.3 make it clear that temporary child support orders may not be modified retroactively. It is well to note that §§ 62A-11-312.5 and 78-45-9.3 satisfy federal requirements for states operating child support enforcement programs found at 42 USC 666(a)(9).

The bottom line is that temporary child support orders are modifiable like any other support order. They are entitled to the same dignity of a final order and the procedure to modify them should be the same as any other support order, i.e., by petition to modify. To allow any other procedure invites confusion as to the effect of a temporary support order, and further invites parties to attempt to circumvent the rule of law (child support guidelines) as to what constitutes an appropriate basis for adjusting a temporary child support award.

Recommendation. No change. Regarding temporary orders, there is no need to require a petition to change that which will be eliminated in the normal course. *Whitehead* may prevent the court from making changes to the terms of the temporary order apply retroactively, but it's the final order (the terms of which may or may not be different from the terms of the temporary order) that will govern the future relationship of the parties. The committee may want to consider at some point whether other decrees establishing child custody, visitation or support (such as paternity and separate maintenance) should be raised by petition but that's a substantial change from the former Rule 6-404, which this rule replaces.

From: Commissioner Michael Evans
Date: 12/4/03 10:48AM

Rule 106 provides "No request to modify a decree shall be raised by an order to show cause." I request "or motion" be added to this sentence as some practitioners perceive OSC's and motions differ.

Recommendation. Rather than list all the ways in which one is not to raise modification of a divorce decree, delete the existing prohibition and rely exclusively on the affirmative requirement that modification be made by petition. Draft attached.

Encl. Letter from George McCune
Letter from Aninna Mitchell
Rule of Small Claims Procedure 1,2 ,3, 4, 6, 7, 8, 9, 10, 11 and 12
Rules of Civil Procedure 4, 6, 7, 24, 56, 62, 64D, 68, 74 and 106

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THIS LETTER ORIGINATES FROM
SALT LAKE ☒
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SHIGERU SUZUKI
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FACSIMILE TRANSMISSION FROM FAX NO. 801-964-0551

Monday, December 29, 2003 3:05 P.M. MST

Mr. Tim Shea
Senior Staff Attorney
ADMINISTRATIVE OFFICE OF THE COURTS OF UTAH
PO Box 140241
Salt Lake City, U 84114-0241
801-578-3808
tims@email.utcourts.gov
TO FAX NO. 801-578-3843

Re: Comment on Proposed Amendments to Several Utah Court Rules

Dear Jim:

Here's my comment on the proposed rule changes.

Pages where I have suggested changes and what I consider improvements in the interest of justice and equity are FAXed herewith. Pages which I have not touched are not sent to you.

Best wishes for the New Year.

Very truly yours,

George M. McCune
Bar No. 2171

Attachments

(a) After filing the affidavit and receiving a trial date, plaintiff must serve the affidavit and summons on defendant. To serve the affidavit, plaintiff must either:

(1) have the affidavit served on defendant by a sheriff's department, constable, or person

UTAH RULES OF SMALL CLAIMS PROCEDURE

Rule 1. ~~Scope, purpose, and forms~~ General provisions.

(a) These rules constitute the "simplified rules of procedure and evidence" in small claims cases required by Utah Code Section 78-6-1 and shall be referred to as the Rules of Small Claims Procedure. They are to be interpreted to carry out the statutory purpose of small claims cases, dispensing speedy justice between the parties.

(b) These rules apply to the initial trial and any appeal under Rule 12 of all actions pursued as a small claims action under Utah Code Section 78-6-1 et. seq.

(c) If the Supreme Court has approved a form for use in small claims actions, parties must file documents substantially similar in form to the approved form.

(d) By presenting a document, a party is certifying that to the best of the party's knowledge it is not being presented for an improper purpose and the legal and factual contentions are made in good faith. If the court determines that this certification has been violated, the court may impose an appropriate sanction upon the attorney or party.

Rule 2. Beginning the case.

(a) A case is begun by plaintiff filing ~~a Small Claims Affidavit (Form A)~~ with the clerk of the court either:

(1) a small claims affidavit stating facts showing the right to recover money from defendant; or

(2) an interpleader affidavit showing that plaintiff is holding money claimed by two or more defendants.

(b) The affidavit qualifies as a complaint under Utah Code Section 78-27-25.

~~(b)~~(c) Unless waived upon filing an affidavit of impecuniosity, the appropriate filing fee must accompany the small claims affidavit.

~~(c) A separate form of Affidavit (Form C) is available for an "interpleader action" -- action in which plaintiff is holding money that is claimed by two or more other parties.~~ (d) In an interpleader action, plaintiff must pay the money into the court at the time of filing the affidavit or acknowledge that it will pay the money to whomever the court directs.

(e) Upon filing the small claims or interpleader affidavit, the clerk of the court shall schedule the trial and issue the summons for the defendant to appear.

Rule 3. Service of the affidavit.

~~(d) In a case filed in district court, if the counter affidavit alleges that plaintiff owes defendant more than the monetary limit for small claims procedures, the entire case will proceed as a regular civil case.~~

~~(e) In a case filed in justice court, if the counter affidavit alleges that plaintiff owes defendant more than the monetary limit for small claims procedures, the entire case must be transferred to district court and will proceed as a regular civil case.~~

~~(f) Defendant must pay both parties' additional filing fees imposed as a result of the case proceeding as a regular civil case. If necessary, defendant must arrange for transfer of the case.~~

(d) A counter affidavit for more than the monetary limit for small claims actions may not be filed under these rules.

Rule 6. Pretrial.

(a) No ~~formal~~ discovery may be conducted ~~but the parties are urged to exchange information prior to the trial.~~ except URCP Rule 36 does apply for request for admissions

(b) Written motions and responses may be filed prior to trial. Motions may be made in writing at the beginning of the trial. ~~No motions will be heard prior to trial.~~

(c) One postponement of the trial date ~~("continuance")~~ per side may be granted by the ~~court~~ clerk of the court. To request a ~~continuance~~ postponement, a party must file a ~~request~~ motion for ~~continuance (Form E)~~ postponement with the court at least 5 business days before trial. The clerk will give notice to the other party. ~~A Request for Continuance must be received by the court at least five calendar days before trial.~~ A ~~continuance~~ postponement for more than ~~forty-five~~ 45 calendar days may be granted only by the judge. The court may require the party requesting the postponement to pay the costs incurred by the other party.

Rule 7. Trial.

(a) All parties must bring to the trial all documents related to the controversy regardless of whose position they support. ~~Possible documents include medical bills, damage estimates, receipts, rental agreements, leases, correspondence, and any contracts on which the case is based.~~

(b) Parties may have witnesses testify at trial and bring documents. To require attendance by a witness who will not attend voluntarily, a party must "subpoena" the witness. The clerk of the court or a party's attorney may issue a subpoena pursuant to Utah Rule of Civil Procedure 45. The party requesting the subpoena is responsible for service of the subpoena and payment of any fees. A subpoena must be served at least ~~five calendar~~ 5 business days prior to trial.

(c) The judge will conduct the trial and question the witnesses. The trial will be conducted in such a way as to give all parties a reasonable opportunity to present their positions. The judge may allow parties or their counsel to question witnesses.

(d) The judge may receive the type of evidence commonly relied upon by reasonably prudent persons in the conduct of their business affairs. The rules of evidence shall not be applied strictly. The judge may allow hearsay that is probative, trustworthy and credible. Irrelevant or unduly repetitious evidence shall be excluded.

(e) After trial, the judge shall decide the case and direct the entry of judgment. No written findings are required. ~~The small claims judgment (Form F or G) with the notice of Entry of judgment completed shall be provided to each party by the court if all parties are present at trial or by the prevailing party if fewer than all parties are present.~~ The clerk of the court will serve all parties present with a copy of the judgment.

(f) ~~Filing fees and costs~~ Costs will be awarded to the prevailing party and to plaintiff in an interpleader action unless the judge otherwise orders.

Rule 8. Dismissal.

(a) Except in interpleader cases, if plaintiff fails to appear at the time set for trial, plaintiff's claim will be dismissed ~~with prejudice unless the judge otherwise orders~~.

(b) If defendant has filed a counter affidavit and fails to appear at the time set for trial, defendant's claim will be dismissed ~~with prejudice unless the judge otherwise orders~~.

~~(c) The prevailing party shall send all other parties a copy of the small claims judgment (Form F or G) with the notice of entry of judgment completed and file the completed copy with the court.~~

(c) A party may move to dismiss its claim at any time before trial.

(d) Dismissal is without prejudice unless the judge otherwise orders. The appearing party shall serve the order of dismissal on the non-appearing party.

Rule 9. Default judgment.

(a) If defendant fails to appear at the time set for trial, the court may grant plaintiff judgment in an amount not to exceed the amount requested in plaintiff's affidavit.

(b) If defendant has filed a counter affidavit and plaintiff fails to appear at the time set for trial, the court may grant defendant judgment in an amount not to exceed the amount requested in defendant's counter affidavit.

(c) ~~Any party granted a default judgment shall promptly send a copy of a completed Notice of Default judgment (Form H) to the other party and file the original with the court. The appearing party shall serve the default judgment on the non-appearing party.~~ clerk of the court will serve all parties with a copy of the default judgment.

(d) In an interpleader action, if a defendant fails to appear, a default judgment may be entered against the non-appearing defendant. The clerk of the court will serve all parties with a copy of the default judgment.

Rule 10. Set aside of default judgments and dismissals.

(a) ~~Within thirty calendar days from the mailing of the notice of default judgment or the date of dismissal, a~~ A party may request that the default judgment or dismissal be set aside by filing a ~~request~~ motion to set aside ~~judgment (Form I)~~ within 30 calendar days after mailing of the judgment or dismissal. If the court receives a timely ~~request~~ motion to set aside the default judgment or dismissal and good cause is shown, the court may grant the ~~request~~ motion and reschedule a trial. The court may require the ~~requesting~~ moving party ~~s payment of~~ to pay the costs incurred by the ~~other~~ party ~~in obtaining the default judgment or dismissal~~. who has a default judgment setaside or not setaside.

(b) The ~~thirty day~~ period for ~~requesting the~~ moving to set aside ~~of~~ a default judgment or dismissal may be extended by the court for good cause if the ~~request~~ motion is made in a reasonable time.

Rule 11. Collection of judgments.

(a) Judgments may be collected under the Utah Rules of Civil Procedure.

~~(b) Upon full payment of the judgment including post-judgment costs and interest, the prevailing party shall promptly file a satisfaction of judgment (Form J) with the court.~~

~~(c) The court may enter a Satisfaction of Judgment at the request of a party after ten calendar days notice to all parties.~~ (b) Upon payment in full of the judgment, including post-judgment costs and interest, the judgment creditor shall file a satisfaction of judgment with the court. Upon receipt of a satisfaction of judgment from the judgment creditor, the clerk of the court shall enter the satisfaction upon the docket. The judgment debtor may file a satisfaction of judgment and proof of payment. If the judgment creditor fails to object within 10 business days after notice, the court may enter satisfaction of the judgment. If the judgment creditor objects to the proposed satisfaction, the court shall rule on the matter and may conduct a hearing.

(c) If the judgment creditor is unavailable to accept payment of the judgment, the judgment debtor may pay the amount of the judgment into court and serve the creditor with notice of payment in the manner directed by the court as most likely to give the creditor actual notice.

which may include publication. After 30 calendar days after final notice, the debtor may file a satisfaction of judgment and the court may conduct a hearing. The court will hold the money in trust for the creditor for the period required by state law. If not claimed by the judgment creditor, the clerk of the court shall transfer the money to the Unclaimed Property Division of the Office of the State Treasurer.

Rule 12. Appeals.

(a) ~~Either~~ Any party may appeal a ~~small claims~~ final order or judgment within ~~ten~~ 10 business days ~~(not counting weekends and holidays) of receipt of~~ after notice of entry of judgment or order or after denial of a motion to set aside the judgment or order, whichever is later.

(b) To appeal, the appealing party must file a notice of appeal ~~(Form K)~~ in the court issuing the judgment ~~and mail a copy to each party~~. ~~The~~ Unless waived upon filing an affidavit of impecuniosity, the appropriate fee must accompany the notice of appeal.

(c) ~~On appeal, a new trial will be held ("trial de novo").~~ Upon the receipt of the notice of appeal, the clerk of the district court shall schedule the new trial and notify the parties. All proceedings on appeal will be held in accordance with these rules, except that the parties will not file ~~a~~ affidavit or counter affidavit.

a new small claims affidavit, interpleader affidavit, or counter affidavit.

(d) The district court shall issue all orders governing the new trial. The new trial of a justice court adjudication shall be heard in the district court nearest to and in the same county as the justice court from which the appeal is taken. The new trial of an adjudication by the small claims department of the district court shall be held at the same district court.

(e) A judgment debtor may stay the judgment during appeal by posting a supersedeas bond with the district court. The stay shall continue until entry of the final judgment or order of the district court.

(f) Within 10 business days after filing the notice of appeal, the justice court shall transmit to the district court the notice of appeal, the district court fees, ~~a certified copy of the register of actions~~ and the original ~~all papers filed in the case~~ of only the small claims affidavit, interpleader affidavit, and counter affidavit.

(g) Upon the entry of the judgment or final order of the district court, the clerk of the district court shall transmit to the justice court that rendered the original judgment notice of the manner of disposition of the case.

(h) The district court may dismiss the appeal and remand the case to the justice court if the appellant:

(1) fails to appear;

(2) fails to take any step necessary to prosecute the appeal; or

(3) requests the appeal be dismissed.

(i) The case + all its issues may be appealed to the appellate courts if the de novo court ruled upon the constitutionality of any law (including statute, rule, or ordinance) or any constitutional question or all question arising out of or pertaining to any law (including statute, rule, or ordinance).

UTAH RULES OF CIVIL PROCEDURE

Rule 4. Process.

(a) Signing of summons. The summons shall be signed and issued by the plaintiff or the plaintiff's attorney. Separate summonses may be signed and served.

(b) Time of service. In an action commenced under Rule 3(a)(1), the summons together with a copy of the complaint shall be served no later than 120 days after the filing of the complaint unless the court allows a longer period of time for good cause shown. If the summons and complaint are not timely served, the action shall be dismissed, without prejudice on application of any party or upon the court's own initiative. In any action brought against two or more defendants on which service has been obtained upon one of them within the 120 days or such longer period as may be allowed by the court, the other or others may be served or appear at any time prior to trial.

(c) Contents of summons.

(c)(1) The summons shall contain the name of the court, the address of the court, the names of the parties to the action, and the county in which it is brought. It shall be directed to the defendant, state the name, address and telephone number of the plaintiff's attorney, if any, and otherwise the plaintiff's address and telephone number. It shall state the time within which the defendant is required to answer the complaint in writing, and shall notify the defendant that in case of failure to do so, judgment by default will be rendered against the defendant. It shall state either that the complaint is on file with the court or that the complaint will be filed with the court within 10 days of service.

(c)(2) If the action is commenced under Rule 3(a)(2), the summons shall state that the defendant need not answer if the complaint is not filed within 10 days after service and shall state the telephone number of the clerk of the court where the defendant may call at least 13 days after service to determine if the complaint has been filed.

STATE OF UTAH
OFFICE OF THE ATTORNEY GENERAL

MARK L. SHURTLEFF
ATTORNEY GENERAL

RAYMOND A. HINTZE
Chief Deputy

KIRK TORGENSEN
Chief Deputy

31 December 2003

Tim Shea
Senior Staff Attorney
Administrative Office of the Courts
45 South State Street
PO Box 140241
Salt Lake City, UT 84114-0241

Re: Proposed Amendments to Court Rules Concerning Intervention by the Attorney General and Participation by Amicus Curiae

Dear Tim:

I write to provide the Utah Attorney General's views on some proposed amendments to the Utah court rules (copy attached) that would substantially affect the interests of the State of Utah, and of its agencies and political subdivisions.

Utah R. Civ P. 24 Intervention. The proposed amendment would add section 24(d) of the rule to address cases in which a party challenges the constitutionality of state statutes or local ordinances. The Attorney General opposes the adoption of proposed rule 24(d).

As you likely know, Utah law provides:

> When declaratory relief is sought all persons shall be made parties who have any claim or interest which would be affected by the declaration, and no declaration shall prejudice the right of persons not parties to the proceeding. In any proceeding which involves the validity of a municipal or county ordinance or franchise such

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> municipality or county shall be made a party, and shall be entitled to be heard, and if a statute or state franchise or permit is alleged to be invalid the attorney general shall be served with a copy of the proceeding and be entitled to be heard.

Utah Code Ann. § 78-33-11 (2002). Federal law and local federal court rule also require notification of the Utah Attorney General when the constitutionality of a state law is challenged in a federal court proceeding. See 28 U.S.C. § 2403; DUCivR 24-1b (attached). Each year I review two to three dozen such notices concerning actions pending in state and federal courts, though there are undoubtedly many more cases in which statutes are challenged but the parties simply do not comply with section 78-33-11.

The Utah Legislature's use of the term "party" in section 78-33-11 is unfortunate, as it appears its intent was to permit the State's, the municipality's, or the county's participation and input only regarding the narrow issue of an enactment's validity, not to make them "parties" in the action in the more formal sense of the term. If these governmental entities must actually be made parties in order to be heard on the question of a challenged enactment's validity, they will thereafter be arguably subject to all the diverse burdens of being a party to litigation: protracted and costly discovery, motion practice, court appearances, trials, costs, etc.

The proposed rule amendment unfortunately takes the same misguided approach, since intervention via rule 24 results in formal party status. In this circumstance, the Utah Attorney General would have to examine each case carefully with the aforementioned concerns in mind, making involvement by the Attorney General's Office unlikely in nearly all cases because of resource constraints.

Although we appreciate the rules committee's effort to create a process through which the Attorney General can act under section 78-33-11, we believe the statute contemplates a role for the governmental entity that is more akin to that of an amicus curiae on the narrow legal issue of a statute's validity. But there is no current rule in the Utah Rules of Civil Procedure governing any appearance in the district court by an amicus curiae, although we believe that there should be, perhaps in a new Rule 24A. As discussed below concerning the current appellate rule, such a new rule of civil procedure should provide for the

State's appearance in a case as amicus curiae without the consent of the parties or leave of court.

Moreover, any amicus rule carrying out section 78-33-11's intent should specify how and when the notice should be given to the governmental entity, which would then give guidance about whether its appearance would be "timely," a reasonable restriction the proposed amendment uses but does not delineate for the governmental entities, the courts, or litigants.

Utah R. App. P. 25 Brief of an amicus curiae or guardian ad litem.

The Attorney General opposes the current rule as well as the proposed amendment, which would eliminate appearances by the State of Utah as amicus curiae, except by leave of court upon motion. This contravenes section 78-33-11, under which the Attorney General is entitled to be heard by the court considering a challenge to the validity of a state statute; thus, a trial or appellate court may not deny the State permission to appear as amicus on this issue.

Just as importantly, we believe Utah should adopt the workable federal rules approach and allow the State to file an amicus brief on appeal without consent of the parties or leave of court, regardless of the nature of the issue addressed. See Fed. R. App. P. 29(a) (attached).

If the advisory committee or the Court is persuaded by these suggestions, I would be happy to draft an alternative proposed amendment to Utah R. App. P. 25 and a new Utah R. Civ. P. 24A to address amicus curiae participation.

Thank you in advance for your careful consideration of these comments.

Very truly yours,

ANNINA M. MITCHELL
Utah Solicitor General

Rule 24. Intervention.

(a) Intervention of right. Upon timely application anyone shall be permitted to intervene in an action: (1) when a statute confers an unconditional right to intervene; or (2) when the applicant claims an interest relating to the property or transaction which is the subject of the action and he is so situated that the disposition of the action may as a practical matter impair or impede his ability to protect that interest, unless the applicant's interest is adequately represented by existing parties.

(b) Permissive intervention. Upon timely application anyone may be permitted to intervene in an action: (1) when a statute confers a conditional right to intervene; or (2) when an applicant's claim or defense and the main action have a question of law or fact in common. When a party to an action relies for ground of claim or defense upon any statute or executive order administered by a governmental officer or agency or upon any regulation, order, requirement, or agreement issued or made pursuant to the statute or executive order, the officer or agency upon timely application may be permitted to intervene in the action. In exercising its discretion the court shall consider whether the intervention will unduly delay or prejudice the adjudication of the rights of the original parties.

(c) Procedure. A person desiring to intervene shall serve a motion to intervene upon the parties as provided in Rule 5. The motions shall state the grounds therefor and shall be accompanied by a pleading setting forth the claim or defense for which intervention is sought.

(d) Constitutionality of statutes and ordinances.

(d)(1) If a party challenges the constitutionality of a statute in an action in which the Attorney General has not appeared, the party raising the question of constitutionality shall notify the Attorney General of such fact. The court shall permit the state to intervene upon timely application.

(d)(2) If a party challenges the constitutionality of a county or municipal ordinance in an action in which the county or municipal attorney has not appeared, the party raising the question of constitutionality shall notify the county or municipal attorney of such fact. The court shall permit the county or municipality to intervene upon timely application.

(d)(3) Failure of a party to provide notice as required by this rule is not a waiver of any constitutional challenge otherwise timely asserted.

Rule 25. Brief of an amicus curiae or guardian ad litem.

A brief of an amicus curiae or of a guardian ad litem representing a minor who is not a party to the appeal may be filed only ~~if accompanied by written consent of all parties, or~~ by leave of court granted on motion or at the request of the court. Parties to the case may indicate their support for, or opposition to, the motion. A motion for leave shall identify the interest of the applicant and shall state the reasons why a brief of an amicus curiae or the guardian ad litem is desirable. Except as all parties otherwise consent, an amicus curiae or guardian ad litem shall file its brief within the time allowed the party whose position as to affirmance or reversal the amicus curiae or guardian ad litem will support, unless the court for cause shown otherwise orders. A motion of an amicus curiae or guardian ad litem to participate in the oral argument will be granted when circumstances warrant in the court's discretion.

U.S. Court of Appeals for the Tenth Circuit

Fed. R. App. P. Rule 29. Brief of an Amicus Curiae

(a) When Permitted. The United States or its officer or agency, or a State, Territory, Commonwealth, or the District of Columbia may file an amicus-curiae brief without the consent of the parties or leave of court. Any other amicus curiae may file a brief only by leave of court or if the brief states that all parties have consented to its filing.

(b) Motion for Leave to File. The motion must be accompanied by the proposed brief and state:

(1) the movant's interest; and

(2) the reason why an amicus brief is desirable and why the matters asserted are relevant to the disposition of the case.

(c) Contents and Form. An amicus brief must comply with Rule 32. In addition to the requirements of Rule 32, the cover must identify the party or parties supported and indicate whether the brief supports affirmance or reversal. If an amicus curiae is a corporation, the brief must include a disclosure statement like that required of parties by Rule 26.1. An amicus brief need not comply with Rule 28, but must include the following:

(1) a table of contents, with page references;

(2) a table of authorities -- cases (alphabetically arranged), statutes and other authorities -- with references to the pages of the brief where they are cited;

(3) a concise statement of the identity of the amicus curiae, its interest in the case, and the source of its authority to file;

(4) an argument, which may be preceded by a summary and which need not include a statement of the applicable standard of review; and

(5) a certificate of compliance, if required by Rule 32(a)(7).

(d) Length. Except by the court's permission, an amicus brief may be no more than one-half the maximum length authorized by these rules for a party's principal brief. If the court grants a party permission to file a longer brief, that extension does not affect the length of an amicus brief.

(e) Time for Filing. An amicus curiae must file its brief, accompanied by a motion for filing when necessary, no later than 7 days after the principal brief of the party being supported is filed. An amicus curiae that does not support either party must file its brief no later than 7 days after the appellant's or petitioner's principal brief is filed. A court may grant leave for later filing, specifying the time within which an opposing party may answer.

No corresponding local rule; however, see DUCivR 67-1 for provisions on deposit of funds into the court registry.

FED. R. CIV. P. 23 - CLASS ACTIONS

DUCivR 23-1 DESIGNATION OF PROPOSED CLASS ACTION

In any case sought to be maintained as a class action, the complaint or other pleading asserting a class action must include within the caption the words, "Proposed Class Action."

FED. R. CIV. P. 23.1 - DERIVATIVE ACTIONS BY SHAREHOLDERS

No corresponding local rule.

FED. R. CIV. P. 23.2 - ACTIONS RELATING TO UNINCORPORATED ASSOCIATIONS

No corresponding local rule.

FED. R. CIV. P. 24 - INTERVENTION

DUCivR 24-1 NOTIFICATION OF CLAIM OF UNCONSTITUTIONALITY

(a) An Act of Congress. Whenever the constitutionality of any act of Congress affecting the public interest is, or is intended to be, drawn into question in any suit or proceeding to which the United States, or any of its agencies, officers, or employees, is not a party, counsel for the party raising or intending to raise such constitutional issue must promptly notify the clerk, in writing, specifying the applicable act or the provisions, a proper reference to the title and section of the United States Code if the act is included in it, and a description of the claim of unconstitutionality.

Upon receipt of such notice, the clerk on behalf of the court will file a certificate with the Attorney General of the United States in substantially the following form:

The United States District Court for the District of Utah hereby certifies to the Attorney General of the United States that the constitutionality of an Act of Congress, Title _____, Section _____, United States Code (or other description) is drawn into question the case of _____ v. _____, Case No. _____, to which neither the United States, nor any of its agencies, officers, or employees, is a party. Under Title 28, section 2403(a) of the United States Code, the United States is permitted to intervene in the case for the presentation of evidence, if admissible, and for argument on the question of constitutionality.

The clerk will send copies of the certificate to the United States attorney for the District of Utah and to the district judge to whom the case is assigned.

(b) A Statute of a State. Whenever the constitutionality of any statute of a state affecting the public interest is, or is intended to be, drawn into question in any suit or proceeding to which the state or any of its agencies, officers, or employees, is not a party, counsel for the party raising or intending to raise such constitutional issue must promptly notify the clerk, in writing, specifying the act or its provisions, a

reference to the title and section of the statute, if any, of which the act is part, and a description of the claim of unconstitutionality.

Upon the receipt of such notice, the clerk on behalf of the court will file a certificate with the attorney general of the state in substantially the following form:

The United States District Court for the District of Utah hereby certifies to the Attorney General of the State of _____, that the constitutionality of Title _____, Chapter _____, Section _____, (or other description) is drawn in question in the case of _____ v._____, Case No. _____, to which neither the State of _____, nor any of its agencies, officers, or employees, is a party. Under Title 28, section 2403(b) of the United States Code, the State of _____ is permitted to intervene in the case for the presentation of evidence, if admissible, and for argument on the question of constitutionality.

The clerk will send a copy of the certificate to the district judge to whom the case is assigned.

FED. R. CIV. P. 25 - SUBSTITUTION OF PARTIES

No corresponding local rule.

FED. R. CIV. P. 26 - GENERAL PROVISIONS GOVERNING DISCOVERY; DUTY TO DISCLOSE

DUCivR 26-1 DISCOVERY REQUESTS AND DOCUMENTS

(a) Form of Responses to Discovery Requests. Parties responding to interrogatories under Fed. R. Civ. P. 33, requests for production of documents or things under Fed. R. Civ. P. 34, or requests for admission under Fed. R. Civ. P. 36 must repeat in full each such interrogatory or request to which response is made. The parties also must number sequentially each interrogatory or request to which response is made.

(b) Filing and Custody of Discovery Materials.

(1) Filing. Unless otherwise ordered by the court, counsel must not file with the court the following:

(A) all disclosures made under Fed. R. Civ P. 26 (a)(1);

(B) depositions or notices of taking deposition required by Fed R. Civ. P. 30(b)(1);

(C) interrogatories;

(D) requests for production, inspection or admission; and

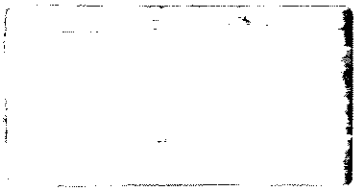
(E) answers and responses to such requests.

C
UNITED STATES CODE ANNOTATED
TITLE 28. JUDICIARY AND JUDICIAL PROCEDURE
PART VI--PARTICULAR PROCEEDINGS
CHAPTER 161--UNITED STATES AS PARTY GENERALLY

§ 2403. Intervention by United States or a State; constitutional question

(a) In any action, suit or proceeding in a court of the United States to which the United States or any agency, officer or employee thereof is not a party, wherein the constitutionality of any Act of Congress affecting the public interest is drawn in question, the court shall certify such fact to the Attorney General, and shall permit the United States to intervene for presentation of evidence, if evidence is otherwise admissible in the case, and for argument on the question of constitutionality. The United States shall, subject to the applicable provisions of law, have all the rights of a party and be subject to all liabilities of a party as to court costs to the extent necessary for a proper presentation of the facts and law relating to the question of constitutionality.

(b) In any action, suit, or proceeding in a court of the United States to which a State or any agency, officer, or employee thereof is not a party, wherein the constitutionality of any statute of that State affecting the public interest is drawn in question, the court shall certify such fact to the attorney general of the State, and shall permit the State to intervene for presentation of evidence, if evidence is otherwise admissible in the case, and for argument on the question of constitutionality. The State shall, subject to the applicable provisions of law, have all the rights of a party and be subject to all liabilities of a party as to court costs to the extent necessary for a proper presentation of the facts and law relating to the question of constitutionality.



Small Claims Rules

Rule 1. ~~Scope, purpose, and forms~~ General provisions.

(a) These rules constitute the ~~"~~simplified rules of procedure and evidence~~"~~ in small claims cases required by Utah Code Section 78-6-1 and shall be referred to as the Rules of Small Claims Procedure. They are to be interpreted to carry out the statutory purpose of small claims cases, dispensing speedy justice between the parties.

(b) These rules apply to the initial trial and any appeal under Rule 12 of all actions pursued as a small claims action under Utah Code Section 78-6-1 et~~.~~ seq.

(c) If the Supreme Court has approved a form for use in small claims actions, parties must file documents substantially similar in form to the approved form.

(d) By presenting a document, a party is certifying that to the best of the party's knowledge it is not being presented for an improper purpose and the legal and factual contentions are made in good faith. If the court determines that this certification has been violated, the court may impose an appropriate sanction upon the attorney or party.

Rule 2. Beginning the case.

(a) A case is begun by plaintiff filing ~~a Small Claims Affidavit (Form A)~~ with the clerk of the court either:

(1) an affidavit stating facts showing the right to recover money from defendant; or

(2) an interpleader affidavit showing that plaintiff is holding money claimed by two or more defendants.

(b) The affidavit qualifies as a complaint under Utah Code Section 78-12a-2 and Section 78-27-25.

~~(b)~~(c) Unless waived upon filing an affidavit of impecuniosity, the appropriate filing fee must accompany the small claims affidavit.

~~(c) A separate form of Affidavit (Form C) is available for an "interpleader action" – action in which plaintiff is holding money that is claimed by two or more other parties.~~ (d) In an interpleader action, plaintiff must pay the money into the court at the time of filing the affidavit or acknowledge that it will pay the money to whomever the court directs.

(e) Upon filing the affidavit, the clerk of the court shall schedule the trial and issue the summons for the defendant to appear.

Rule 3. Service of the affidavit.

(a) After filing the affidavit and receiving a trial date, plaintiff must serve the affidavit and summons on defendant. To serve the affidavit, plaintiff must either:

(1) have the affidavit served on defendant by a sheriff's department, constable, or person regularly engaged in the business of serving process and pay for that service; or

(2) have the affidavit delivered to defendant by a method of mail or commercial courier service that requires defendant to sign a ~~document indicating~~ receipt and provides for return of that ~~document~~ receipt to plaintiff.

(b) The affidavit must be served at least ~~thirty~~ 30 calendar days before the trial date. Service by mail or commercial courier service is complete on the date the receipt is signed by defendant.

(c) Proof of service of the affidavit must be filed with the court no later than ~~ten calendar~~ 10 business days after service. If service is by mail or commercial courier service, plaintiff must file a proof of service ~~(Form D)~~. If service is by a sheriff, constable, or person regularly engaged in the business of serving process, proof of service must be filed by the person completing the service.

(d) Each party shall serve on all other parties a copy of all documents filed with the court other than the counter affidavit. Each party shall serve on all other parties all documents as ordered by the court. Service of all papers other than the affidavit and counter affidavit may be by first class mail to the other party's last known address. The party mailing the papers shall file proof of mailing with the court no later than 10 business days after service. If the papers are returned to the party serving them as undeliverable, the party shall file the returned envelope with the court.

Rule 4. Counter affidavit.

(a) ~~If defendant claims plaintiff owes defendant money, defendant~~ Defendant may file with the clerk of the court a counter affidavit stating facts showing the right to recover money from plaintiff.

(b) Unless waived upon filing an affidavit of impecuniosity, the appropriate filing fee must accompany the counter affidavit ~~(Form B)~~.

(c) Any counter affidavit must be filed at least ~~fifteen~~ 15 calendar days before the trial. The ~~court~~ clerk of the court will mail a copy of the counter affidavit to plaintiff at the address provided by plaintiff on the affidavit.

~~(d) In a case filed in district court, if the counter affidavit alleges that plaintiff owes defendant more than the monetary limit for small claims procedures, the entire case will proceed as a regular civil case.~~

~~(e) In a case filed in justice court, if the counter affidavit alleges that plaintiff owes defendant more than the monetary limit for small claims procedures, the entire case must be transferred to district court and will proceed as a regular civil case.~~

~~(f) Defendant must pay both parties' additional filing fees imposed as a result of the case proceeding as a regular civil case. If necessary, defendant must arrange for transfer of the case.~~

(d) A counter affidavit for more than the monetary limit for small claims actions may not be filed under these rules.

Rule 6. Pretrial.

(a) No ~~formal~~ discovery may be conducted but the parties are urged to exchange information prior to the trial.

(b) Written motions and responses may be filed prior to trial. Motions may be made orally or in writing at the beginning of the trial. No motions will be heard prior to trial.

(c) One postponement of the trial date ~~("continuance")~~ per side may be granted by the ~~court~~ clerk of the court. To request a ~~continuance~~ postponement, a party must file a ~~request~~ motion for ~~continuance (Form E)~~ postponement with the court at least 5 business days before trial. The clerk will give notice to the other party. ~~A Request for Continuance must be received by the court at least five calendar days before trial.~~ A ~~continuance~~ postponement for more than ~~forty five~~ 45 calendar days may be granted only by the judge. The court may require the party requesting the postponement to pay the costs incurred by the other party.

Rule 7. Trial.

(a) All parties must bring to the trial all documents related to the controversy regardless of whose position they support. ~~Possible documents include medical bills, damage estimates, receipts, rental agreements, leases, correspondence, and any contracts on which the case is based.~~

(b) Parties may have witnesses testify at trial and bring documents. To require attendance by a witness who will not attend voluntarily, a party must ~~"~~subpoena~~"~~ the witness. The clerk of the court or a party's attorney may issue a subpoena pursuant to Utah Rule of Civil Procedure 45. The party requesting the subpoena is responsible for service of the subpoena and payment of any fees. A subpoena must be served at least ~~five calendar~~ 5 business days prior to trial.

(c) The judge will conduct the trial and question the witnesses. The trial will be conducted in such a way as to give all parties a reasonable opportunity to present their positions. The judge may allow parties or their counsel to question witnesses.

(d) The judge may receive the type of evidence commonly relied upon by reasonably prudent persons in the conduct of their business affairs. The rules of evidence shall not be applied strictly. The judge may allow hearsay that is probative, trustworthy and credible. Irrelevant or unduly repetitious evidence shall be excluded.

(e) After trial, the judge shall decide the case and direct the entry of judgment. No written findings are required. ~~The small claims judgment (Form F or G) with the notice of Entry of judgment completed shall be provided to each party by the court if all parties are present at trial or by the prevailing party if fewer than all parties are present.~~ The clerk of the court will serve all parties present with a copy of the judgment.

(f) ~~Filing fees and costs~~ Costs will be awarded to the prevailing party and to plaintiff in an interpleader action unless the judge otherwise orders.

Rule 8. Dismissal.

(a) Except in interpleader cases, if plaintiff fails to appear at the time set for trial, plaintiff's claim will be dismissed ~~with prejudice unless the judge otherwise orders~~.

(b) If defendant has filed a counter affidavit and fails to appear at the time set for trial, defendant's claim will be dismissed ~~with prejudice unless the judge otherwise orders~~.

~~(c) The prevailing party shall send all other parties a copy of the small claims judgment (Form F or G) with the notice of entry of judgment completed and file the completed copy with the court.~~

(c) A party may move to dismiss its claim at any time before trial.

(d) Dismissal is without prejudice unless the judge otherwise orders. The appearing party shall serve the order of dismissal on the non-appearing party.

Rule 9. Default judgment.

(a) If defendant fails to appear at the time set for trial, the court may grant plaintiff judgment in an amount not to exceed the amount requested in plaintiff's affidavit.

(b) If defendant has filed a counter affidavit and plaintiff fails to appear at the time set for trial, the court may grant defendant judgment in an amount not to exceed the amount requested in defendant's counter affidavit.

(c) ~~Any party granted a default judgment shall promptly send a copy of a completed Notice of Default judgment (Form H) to the other party and file the original with the court.~~ The appearing party shall serve the default judgment on the non-appearing party.

(d) In an interpleader action, if a defendant fails to appear, a default judgment may be entered against the non-appearing defendant.

Rule 10. Set aside of default judgments and dismissals.

(a) ~~Within thirty calendar days from the mailing of the notice of default judgment or the date of dismissal, a~~ A party may request that the default judgment or dismissal be set aside by filing a ~~request~~ motion to set aside ~~judgment (Form I)~~ within 30 calendar days after mailing of the judgment or dismissal. If the court receives a timely ~~request~~ motion to set aside the default judgment or dismissal and good cause is shown, the court may grant the ~~request~~ motion and reschedule a trial. The court may require the ~~requesting~~ moving party~~'s payment of~~ to pay the costs incurred by the other party ~~in obtaining the default judgment or dismissal~~.

(b) The ~~thirty day~~ period for ~~requesting the~~ moving to set aside ~~of~~ a default judgment or dismissal may be extended by the court for good cause if the ~~request~~ motion is made in a reasonable time.

Rule 11. Collection of judgments.

(a) Judgments may be collected under the Utah Rules of Civil Procedure.

~~(b) Upon full payment of the judgment including post-judgment costs and interest, the prevailing party shall promptly file a satisfaction of judgment (Form J) with the court.~~

~~(c) The court may enter a Satisfaction of Judgment at the request of a party after ten calendar days notice to all parties.~~ (b) Upon payment in full of the judgment, including post-judgment costs and interest, the judgment creditor shall file a satisfaction of judgment with the court. Upon receipt of a satisfaction of judgment from the judgment creditor, the clerk of the court shall enter the satisfaction upon the docket. The judgment debtor may file a satisfaction of judgment and proof of payment. If the judgment creditor fails to object within 10 business days after notice, the court may enter satisfaction of the judgment. If the judgment creditor objects to the proposed satisfaction, the court shall rule on the matter and may conduct a hearing.

(c) If the judgment creditor is unavailable to accept payment of the judgment, the judgment debtor may pay the amount of the judgment into court and serve the creditor with notice of payment in the manner directed by the court as most likely to give the creditor actual notice,

which may include publication. After 30 calendar days after final notice, the debtor may file a satisfaction of judgment and the court may conduct a hearing. The court will hold the money in trust for the creditor for the period required by state law. If not claimed by the judgment creditor, the clerk of the court shall transfer the money to the Unclaimed Property Division of the Office of the State Treasurer.

Rule 12. Appeals.

(a) ~~Either~~ Any party may appeal a ~~small claims~~ final order or judgment within ~~ten~~ 10 business days ~~(not counting weekends and holidays) of receipt of~~ after notice of entry of judgment or order or after denial of a motion to set aside the judgment or order, whichever is later.

(b) To appeal, the appealing party must file a notice of appeal ~~(Form K)~~ in the court issuing the judgment ~~and mail a copy to each party~~. ~~The~~ Unless waived upon filing an affidavit of impecuniosity, the appropriate fee must accompany the notice of appeal.

(c) ~~On appeal, a new trial will be held ("trial de novo").~~ Upon the receipt of the notice of appeal, the clerk of the district court shall schedule the new trial and notify the parties. All proceedings on appeal will be held in accordance with these rules, except that the parties will not file an affidavit or counter affidavit.

(d) The district court shall issue all orders governing the new trial. The new trial of a justice court adjudication shall be heard in the district court nearest to and in the same county as the justice court from which the appeal is taken. The new trial of an adjudication by the small claims department of the district court shall be held at the same district court.

(e) A judgment debtor may stay the judgment during appeal by posting a supersedeas bond with the district court. The stay shall continue until entry of the final judgment or order of the district court.

(f) Within 10 business days after filing the notice of appeal, the justice court shall transmit to the district court the notice of appeal, the district court fees, a certified copy of the register of actions, and the original of all papers filed in the case.

(g) Upon the entry of the judgment or final order of the district court, the clerk of the district court shall transmit to the justice court that rendered the original judgment notice of the manner of disposition of the case.

(h) The district court may dismiss the appeal and remand the case to the justice court if the appellant:

(1) fails to appear;

(2) fails to take any step necessary to prosecute the appeal; or

(3) requests the appeal be dismissed.

Note: The Judicial Council will repeal CJA 4-802 and CJA 4-803 as these will be superceded .by Small Claims Rules 10 and 12.

Rules of Civil Procedure

Rule 4. Process.

(a) Signing of summons. The summons shall be signed and issued by the plaintiff or the plaintiff's attorney. Separate summonses may be signed and served.

(b) Time of service. In an action commenced under Rule 3(a)(1), the summons together with a copy of the complaint shall be served no later than 120 days after the filing of the complaint unless the court allows a longer period of time for good cause shown. If the summons and complaint are not timely served, the action shall be dismissed, without prejudice on application of any party or upon the court's own initiative. In any action brought against two or more defendants on which service has been obtained upon one of them within the 120 days or such longer period as may be allowed by the court, the other or others may be served or appear at any time prior to trial.

(c) Contents of summons.

(c)(1) The summons shall contain the name of the court, the address of the court, the names of the parties to the action, and the county in which it is brought. It shall be directed to the defendant, state the name, address and telephone number of the plaintiff's attorney, if any, and otherwise the plaintiff's address and telephone number. It shall state the time within which the defendant is required to answer the complaint in writing, and shall notify the defendant that in case of failure to do so, judgment by default will be rendered against the defendant. It shall state either that the complaint is on file with the court or that the complaint will be filed with the court within ten days of service.

(c)(2) If the action is commenced under Rule 3(a)(2), the summons shall state that the defendant need not answer if the complaint is not filed within 10 days after service and shall state the telephone number of the clerk of the court where the defendant may call at least 13 days after service to determine if the complaint has been filed.

(c)(3) If service is made by publication, the summons shall briefly state the subject matter and the sum of money or other relief demanded, and that the complaint is on file with the court.

(d) Method of Service. Unless waived in writing, service of the summons and complaint shall be by one of the following methods:

(d)(1) Personal service. The summons and complaint may be served in any state or judicial district of the United States by the sheriff or constable or by the deputy of either, by a United States Marshal or by the marshal's deputy, or by any other person 18 years of age or older at the time of service and not a party to the action or a party's attorney. If the person to be served refuses to accept a copy of the process, service shall be sufficient if the person serving the same shall state the name of the process and offer to deliver a copy thereof. Personal service shall be made as follows:

(d)(1)(A) Upon any individual other than one covered by subparagraphs (B), (C) or (D) below, by delivering a copy of the summons and the complaint to the individual personally, or by leaving a copy at the individual's dwelling house or usual place of abode with some person of suitable age and discretion there residing, or by delivering a copy of the summons and the complaint to an agent authorized by appointment or by law to receive service of process;

(d)(1)(B) Upon an infant (being a person under 14 years) by delivering a copy of the summons and the complaint to the infant and also to the infant's father, mother or guardian or, if none can be found within the state, then to any person having the care and control of the infant, or with whom the infant resides, or in whose service the infant is employed;

(d)(1)(C) Upon an individual judicially declared to be of unsound mind or incapable of conducting the person’s own affairs, by delivering a copy of the summons and the complaint to the person and to the person's legal representative if one has been appointed and in the absence of such representative, to the individual, if any, who has care, custody or control of the person;

(d)(1)(D) Upon an individual incarcerated or committed at a facility operated by the state or any of its political subdivisions, by delivering a copy of the summons and the complaint to the person who has the care, custody, or control of the individual to be served, or to that person's

designee or to the guardian or conservator of the individual to be served if one has been appointed, who shall, in any case, promptly deliver the process to the individual served;

(d)(1)(E) Upon any corporation not herein otherwise provided for, upon a partnership or upon an unincorporated association which is subject to suit under a common name, by delivering a copy of the summons and the complaint to an officer, a managing or general agent, or other agent authorized by appointment or by law to receive service of process and, if the agent is one authorized by statute to receive service and the statute so requires, by also mailing a copy of the summons and the complaint to the defendant. If no such officer or agent can be found within the state, and the defendant has, or advertises or holds itself out as having, an office or place of business within the state or elsewhere, or does business within this state or elsewhere, then upon the person in charge of such office or place of business;

(d)(1)(F) Upon an incorporated city or town, by delivering a copy of the summons and the complaint to the recorder;

(d)(1)(G) Upon a county, by delivering a copy of the summons and the complaint to the county clerk of such county;

(d)(1)(H) Upon a school district or board of education, by delivering a copy of the summons and the complaint to the superintendent or business administrator of the board;

(d)(1)(I) Upon an irrigation or drainage district, by delivering a copy of the summons and the complaint to the president or secretary of its board;

(d)(1)(J) Upon the state of Utah, in such cases as by law are authorized to be brought against the state, by delivering a copy of the summons and the complaint to the attorney general and any other person or agency required by statute to be served; and

(d)(1)(K) Upon a department or agency of the state of Utah, or upon any public board, commission or body, subject to suit, by delivering a copy of the summons and the complaint to any member of its governing board, or to its executive employee or secretary.

(d)(2) Service by mail or commercial courier service.

(d)(2)(A) The summons and complaint may be served upon an individual other than one covered by paragraphs (d)(1)(B) or (d)(1)(C) by mail or commercial courier service in any state or judicial district of the United States provided the defendant signs a document indicating receipt.

(d)(2)(B) The summons and complaint may be served upon an entity covered by paragraphs (d)(1)(E) through (d)(1)(I) by mail or commercial courier service in any state or judicial district of the United States provided defendant's agent authorized by appointment or by law to receive service of process signs a document indicating receipt.

(d)(2)(C) Service by mail or commercial courier service shall be complete on the date the receipt is signed as provided by this rule.

(d)(3) Service in a foreign country. Service in a foreign country shall be made as follows:

(d)(3)(A) by any internationally agreed means reasonably calculated to give notice, such as those means authorized by the Hague Convention on the Service Abroad of Judicial and Extrajudicial Documents;

(d)(3)(B) if there is no internationally agreed means of service or the applicable international agreement allows other means of service, provided that service is reasonably calculated to give notice:

(d)(3)(B)(i) in the manner prescribed by the law of the foreign country for service in that country in an action in any of its courts of general jurisdiction;

(d)(3)(B)(ii) as directed by the foreign authority in response to a letter rogatory or letter of request; or

(d)(3)(B)(iii) unless prohibited by the law of the foreign country, by delivery to the individual personally of a copy of the summons and the complaint or by any form of mail requiring a signed receipt, to be addressed and dispatched by the clerk of the court to the party to be served; or

(d)(3)(C) by other means not prohibited by international agreement as may be directed by the court.

(d)(4) Other service.

(d)(4)(A) Where the identity or whereabouts of the person to be served are unknown and cannot be ascertained through reasonable diligence, where service upon all of the individual parties is impracticable under the circumstances, or where there exists good cause to believe that the person to be served is avoiding service of process, the party seeking service of process may file a motion supported by affidavit requesting an order allowing service by publication or by some other means. The supporting affidavit shall set forth the efforts made to identify, locate or

serve the party to be served, or the circumstances which make it impracticable to serve all of the individual parties.

(d)(4)(B) If the motion is granted, the court shall order service of process by publication or by other means, provided that the means of notice employed shall be reasonably calculated, under all the circumstances, to apprise the interested parties of the pendency of the action to the extent reasonably possible or practicable. The court's order shall also specify the content of the process to be served and the event or events as of which service shall be deemed complete. ~~A~~ Unless service is by publication, a copy of the court's order shall be served upon the defendant with the process specified by the court.

(d)(4)(C) In any proceeding where summons is required to be published, the court shall, upon the request of the party applying for publication, designate the newspaper in which publication shall be made. The newspaper selected shall be a newspaper of general circulation in the county where such publication is required to be made and shall be published in the English language.

(e) Proof of Service.

(e)(1) If service is not waived, the person effecting service shall file proof with the court. The proof of service must state the date, place, and manner of service. Proof of service made pursuant to paragraph (d)(2) shall include a receipt signed by the defendant or defendant’s agent authorized by appointment or by law to receive service of process. If service is made by a person other than by an attorney, the sheriff or constable, or by the deputy of either, by a United States Marshal or by the marshal's deputy, the proof of service shall be made by affidavit.

(e)(2) Proof of service in a foreign country shall be made as prescribed in these rules for service within this state, or by the law of the foreign country, or by order of the court. When service is made pursuant to paragraph (d)(3)(C), proof of service shall include a receipt signed by the addressee or other evidence of delivery to the addressee satisfactory to the court.

(e)(3) Failure to make proof of service does not affect the validity of the service. The court may allow proof of service to be amended.

(f) Waiver of Service; Payment of Costs for Refusing to Waive.

(f)(1) A plaintiff may request a defendant subject to service under paragraph (d) to waive service of a summons. The request shall be mailed or delivered to the person upon whom service is authorized under paragraph (d). It shall include a copy of the complaint, shall allow the defendant at least 20 days from the date on which the request is sent to return the waiver, or 30

days if addressed to a defendant outside of the United States, and shall be substantially in the form of the Notice of Lawsuit and Request for Waiver of Service of Summons set forth in the Appendix of Forms attached to these rules.

(f)(2) A defendant who timely returns a waiver is not required to respond to the complaint until 45 days after the date on which the request for waiver of service was mailed or delivered to the defendant, or 60 days after that date if addressed to a defendant outside of the United States.

(f)(3) A defendant who waives service of a summons does not thereby waive any objection to venue or to the jurisdiction of the court over the defendant.

(f)(4) If a defendant refuses a request for waiver of service submitted in accordance with this rule, the court shall impose upon the defendant the costs subsequently incurred in effecting service.

Rule 6. Time

(a) Computation. In computing any period of time prescribed or allowed by these rules, by the local rules of any district court, by order of court, or by any applicable statute, the day of the act, event, or default from which the designated period of time begins to run shall not be included. The last day of the period so computed shall be included, unless it is a Saturday, a Sunday, or a legal holiday, in which event the period runs until the end of the next day that is not a Saturday, a Sunday, or a legal holiday. When the period of time prescribed or allowed, without reference to any additional time provided under subsection (e), is less than 11 days, intermediate Saturdays, Sundays and legal holidays shall be excluded in the computation.

(b) Enlargement. When by these rules or by a notice given thereunder or by order of the court an act is required or allowed to be done at or within a specified time, the court for cause shown may at any time in its discretion (1) with or without motion or notice order the period enlarged if request therefor is made before the expiration of the period originally prescribed or as extended by a previous order or (2) upon motion made after the expiration of the specified period permit the act to be done where the failure to act was the result of excusable neglect; but it may not extend the time for taking any action under Rules 50(b), 52(b), 59(b), (d) and (e), and 60(b), except to the extent and under the conditions stated in them.

(c) Unaffected by expiration of term. The period of time provided for the doing of any act or the taking of any proceeding is not affected or limited by the continued existence or expiration of a term of court. The continued existence or expiration of a term of court in no way affects the

power of a court to do any act or take any proceeding in any civil action that has been pending before it.

(d) ~~For motions – Affidavits. A written motion, other than one that may be heard ex parte, and notice~~ Notice of hearings. Notice of ~~the~~ a hearing ~~thereof~~ shall be served not later than 5 days before the time specified for the hearing, unless a different period is fixed by these rules~~,~~ or by order of the court. Such an order may for cause shown be made on ex parte application. ~~When a motion is supported by affidavit, the affidavit shall be served with the motion; and, except as otherwise provided in Rule 59(c), opposing affidavits may be served not later than 1 day before the hearing, unless the court permits them to be served at some other time.~~

(e) Additional time after service by mail. Whenever a party has the right or is required to do some act or take some proceedings within a prescribed period after the service of a notice or other paper upon him and the notice or paper is served upon him by mail, 3 days shall be added to the end of the prescribed period as calculated under subsection (a). Saturdays, Sundays and legal holidays shall be included in the computation of any 3-day period under this subsection, except that if the last day of the 3-day period is a Saturday, a Sunday, or a legal holiday, the period shall run until the end of the next day that is not a Saturday, Sunday, or a legal holiday.

Rule 7. Pleadings allowed; motions, memoranda, hearings, orders, objection to commissioner's order.

(a) Pleadings. There shall be a complaint and an answer; a reply to a counterclaim; an answer to a cross claim, if the answer contains a cross claim; a third party complaint, if a person who was not an original party is summoned under the provisions of Rule 14; and a third party answer, if a third party complaint is served. No other pleading shall be allowed, except that the court may order a reply to an answer or a third party answer.

(b) Motions. An application to the court for an order shall be by motion which, unless made during a hearing or trial or in proceedings before a court commissioner, shall be made in accordance with this rule. A motion shall be in writing and state succinctly and with particularity the relief sought and the grounds for the relief sought.

(c) Memoranda.

(c)(1) Memoranda required, exceptions, filing times. All motions, except uncontested or ex parte motions, shall be accompanied by a supporting memorandum. Within ten days after service of the motion and supporting memorandum, a party opposing the motion shall file a

memorandum in opposition. Within five days after service of the memorandum in opposition, the moving party may file a reply memorandum, which shall be limited to rebuttal of matters raised in the memorandum in opposition. No other memoranda will be considered without leave of court. A party may attach a proposed order to its initial memorandum.

(c)(2) Length. Memoranda shall not exceed the following pages of argument without leave of the court:

(c)(2)(A) initial memorandum supporting or opposing a motion other than a motion for summary judgment: 10 pages;

(c)(2)(B) initial memorandum supporting or opposing a motion for summary judgment: 25 pages;

(c)(2)(C) reply to memorandum opposing a motion other than a motion for summary judgment: 5 pages; and

(c)(2)(D) reply to memorandum opposing a motion for summary judgment: 10 pages.

The court may permit a party to file an over-length memorandum upon ex parte application and a showing of good cause.

(c)(3) Content.

(c)(3)(A) A memorandum supporting a motion for summary judgment shall contain a statement of material facts as to which the moving party contends no genuine issue exists. Each fact shall be separately stated and numbered and supported by citation to relevant materials, such as affidavits or discovery materials. Each fact set forth in the moving party's memorandum is deemed admitted for the purpose of summary judgment unless controverted by the responding party.

(c)(3)(B) A memorandum opposing a motion for summary judgment shall contain a verbatim restatement of each of the moving party's facts that is controverted, and may contain a separate statement of additional facts in dispute. For each of the moving party's facts that is controverted, the opposing party shall provide an explanation of the grounds for any dispute, supported by citation to relevant materials, such as affidavits or discovery materials. For any additional facts set forth in the opposing memorandum, each fact shall be separately stated and numbered and supported by citation to supporting materials, such as affidavits or discovery materials.

(c)(3)(C) A memorandum with more than 10 pages of argument shall contain a table of contents and a table of authorities with page references.

(c)(3)(D) A party may attach as exhibits to a memorandum relevant portions of documents cited in the memorandum, such as affidavits or discovery materials.

(d) Request to submit for decision. When briefing is complete, either party may file a "Request to Submit for Decision." The request to submit for decision shall state the date on which the motion was served, the date the opposing memorandum, if any, was served, the date the reply memorandum, if any, was served, and whether a hearing has been requested. If no party files a request, the motion will not be submitted for decision.

(e) Hearings. The court may hold a hearing on any motion. A party may request a hearing in the motion, in a memorandum or in the request to submit for decision. A request for hearing shall be separately identified in the caption of the document containing the request. The court shall grant a request for a hearing on a motion under Rule 56 or a motion that would dispose of the action or any claim or defense in the action unless the court finds that the motion or opposition to the motion is frivolous or the issue has been authoritatively decided.

(f) Orders.

(f)(1) An order includes every direction of the court, including a minute order entered in writing, not included in a judgment. An order for the payment of money may be enforced in the same manner as if it were a judgment. Except as otherwise provided by these rules, any order made without notice to the adverse party may be vacated or modified by the judge who made it with or without notice. Orders shall state whether they are entered upon trial, stipulation, motion or the court's initiative.

(f)(2) Unless the court approves the proposed order submitted with an initial memorandum, or unless otherwise directed by the court, the prevailing party shall, within fifteen days after the court's decision, ~~file~~ serve upon the other parties a proposed order in conformity with the court's decision. Objections to the proposed order shall be filed within five days after service. The party preparing the order shall file the proposed order upon being served with an objection or upon expiration of the time to object.

(g) Objection to court commissioner's ~~order~~ recommendation. A ~~recommended order~~ recommendation of a court commissioner is the order of the court until modified by the court. A party may object to the ~~recommended order of a court commissioner~~ recommendation by filing an objection in the same manner as filing a motion within ten days after the ~~recommended order is entered~~ recommendation is made in open court or, if the court commissioner takes the matter

under advisement, ten days after the minute entry of the recommendation. A party may respond to the objection in the same manner as responding to a motion.

Advisory Committee Note. Paragraph (f) applies to all orders, not just orders upon motion.

Rule 24. Intervention.

(a) Intervention of right. Upon timely application anyone shall be permitted to intervene in an action: (1) when a statute confers an unconditional right to intervene; or (2) when the applicant claims an interest relating to the property or transaction which is the subject of the action and he is so situated that the disposition of the action may as a practical matter impair or impede his ability to protect that interest, unless the applicant's interest is adequately represented by existing parties.

(b) Permissive intervention. Upon timely application anyone may be permitted to intervene in an action: (1) when a statute confers a conditional right to intervene; or (2) when an applicant's claim or defense and the main action have a question of law or fact in common. When a party to an action relies for ground of claim or defense upon any statute or executive order administered by a governmental officer or agency or upon any regulation, order, requirement, or agreement issued or made pursuant to the statute or executive order, the officer or agency upon timely application may be permitted to intervene in the action. In exercising its discretion the court shall consider whether the intervention will unduly delay or prejudice the adjudication of the rights of the original parties.

(c) Procedure. A person desiring to intervene shall serve a motion to intervene upon the parties as provided in Rule 5. The motions shall state the grounds therefor and shall be accompanied by a pleading setting forth the claim or defense for which intervention is sought.

~~(d) Constitutionality of statutes and ordinances.~~

~~(d)(1) If a party challenges the constitutionality of a statute in an action in which the Attorney General has not appeared, the party raising the question of constitutionality shall notify the Attorney General of such fact. The court shall permit the state to intervene upon timely application.~~

~~(d)(2) If a party challenges the constitutionality of a county or municipal ordinance in an action in which the county or municipal attorney has not appeared, the party raising the question of constitutionality shall notify the county or municipal attorney of such fact. The court shall permit the county or municipality to intervene upon timely application.~~

~~(d)(3) Failure of a party to provide notice as required by this rule is not a waiver of any constitutional challenge otherwise timely asserted.~~

Rule 56. Summary judgment.

(a) For claimant. A party seeking to recover upon a claim, counterclaim or cross-claim or to obtain a declaratory judgment may, at any time after the expiration of 20 days from the commencement of the action or after service of a motion for summary judgment by the adverse party, move ~~with or without supporting affidavits~~ for ~~a~~ summary judgment ~~in his favor~~ upon all or any part thereof.

(b) For defending party. A party against whom a claim, counterclaim, or cross-claim is asserted or a declaratory judgment is sought, may, at any time, move ~~with or without supporting affidavits~~ for ~~a~~ summary judgment ~~in his favor~~ as to all or any part thereof.

(c) Motion and proceedings thereon. The motion, memoranda and affidavits shall be ~~filed and served~~ in accordance with ~~CJA 4-501~~ Rule 7. The judgment sought shall be rendered if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law. A summary judgment, interlocutory in character, may be rendered on the issue of liability alone although there is a genuine issue as to the amount of damages.

(d) Case not fully adjudicated on motion. If on motion under this rule judgment is not rendered upon the whole case or for all the relief asked and a trial is necessary, the court at the hearing of the motion, by examining the pleadings and the evidence before it and by interrogating counsel, shall if practicable ascertain what material facts exist without substantial controversy and what material facts are actually and in good faith controverted. It shall thereupon make an order specifying the facts that appear without substantial controversy, including the extent to which the amount of damages or other relief is not in controversy, and directing such further proceedings in the action as are just. Upon the trial of the action the facts so specified shall be deemed established, and the trial shall be conducted accordingly.

(e) Form of affidavits; further testimony; defense required. Supporting and opposing affidavits shall be made on personal knowledge, shall set forth such facts as would be admissible in evidence, and shall show affirmatively that the affiant is competent to testify to the matters stated therein. Sworn or certified copies of all papers or parts thereof referred to in an affidavit

shall be attached thereto or served therewith. The court may permit affidavits to be supplemented or opposed by depositions, answers to interrogatories, or further affidavits. When a motion for summary judgment is made and supported as provided in this rule, an adverse party may not rest upon the mere allegations or denials of ~~his~~ the pleadings, but ~~his~~ the response, by affidavits or as otherwise provided in this rule, must set forth specific facts showing that there is a genuine issue for trial. ~~If he does not so respond, summary~~ Summary judgment, if appropriate, shall be entered against ~~him~~ a party failing to file such a response.

(f) When affidavits are unavailable. ~~Should it appear from the affidavits of a party opposing the motion that he cannot~~ If for reasons stated a party cannot present by affidavit facts essential to ~~justify his opposition~~ oppose the motion, the court may ~~refuse the application for judgment~~ deny the motion or may order a continuance to permit affidavits to be obtained or depositions to be taken or discovery to be had or may make such other order as is just.

(g) Affidavits made in bad faith. ~~Should it appear to the satisfaction of the court at any time that~~ If any of the affidavits presented pursuant to this rule are presented in bad faith or solely for the purpose of delay, the court shall forthwith order the party ~~employing~~ presenting them to pay to the other party the amount of the reasonable expenses which the filing of the affidavits caused ~~him to incur~~, including reasonable attorney's fees, and any offending party or attorney may be adjudged guilty of contempt.

Rule 62. Stay of proceedings to enforce a judgment.

(a) Stay upon entry of judgment. Execution or other proceedings to enforce a judgment may issue immediately upon the entry of the final judgment, unless the court in its discretion and on such conditions for the security of the adverse party as are proper, otherwise directs.

(b) Stay on motion for new trial or for judgment. In its discretion and on such conditions for the security of the adverse party as are proper, the court may stay the execution of, or any proceedings to enforce, a judgment pending the disposition of a motion for a new trial or to alter or amend a judgment made pursuant to Rule 59, or of a motion for relief from a judgment or order made pursuant to Rule 60, or of a motion for judgment in accordance with a motion for a directed verdict made pursuant to Rule 50, or of a motion for amendment to the findings or for additional findings made pursuant to Rule 52(b).

(c) Injunction pending appeal. When an appeal is taken from an interlocutory order or final judgment granting, dissolving, or denying an injunction, the court in its discretion may suspend,

modify, restore, or grant an injunction during the pendency of the appeal upon such conditions as it considers proper for the security of the rights of the adverse party.

(d) Stay upon appeal. When an appeal is taken the appellant by giving a supersedeas bond may obtain a stay, unless such a stay is otherwise prohibited by law or these rules. The bond may be given at or after the time of filing the notice of appeal. The stay is effective when the supersedeas bond is approved by the court.

(e) Stay in favor of the state, or agency thereof. When an appeal is taken by the United States, the state of Utah, or an officer or agency of either, or by direction of any department of either, and the operation or enforcement of the judgment is stayed, no bond, obligation, or other security shall be required from the appellant.

(f) Stay in quo warranto proceedings. Where the defendant is adjudged guilty of usurping, intruding into or unlawfully holding public office, civil or military, within this state, the execution of the judgment shall not be stayed on an appeal.

(g) Power of appellate court not limited. The provisions in this rule do not limit any power of an appellate court or of a judge or justice thereof to stay proceedings or to suspend, modify, restore, or grant an injunction, or extraordinary relief or to make any order appropriate to preserve the status quo or the effectiveness of the judgment subsequently to be entered.

(h) Stay of judgment upon multiple claims. When a court has ordered a final judgment on some but not all of the claims presented in the action under the conditions stated in Rule 54(b), the court may stay enforcement of that judgment until the entering of a subsequent judgment or judgments and may prescribe such conditions as are necessary to secure the benefit thereof to the party in whose favor the judgment is entered.

(i) Form of supersedeas bond; deposit in lieu of bond; waiver of bond; jurisdiction over sureties to be set forth in undertaking.

(i)(1) A supersedeas bond given under Subdivision (d) may be either a commercial bond having a surety authorized to transact insurance business under Title 31A, or a personal bond having one or more sureties who are residents of Utah having a collective net worth of at least twice the amount of the bond, exclusive of property exempt from execution. Sureties on personal bonds shall make and file an affidavit setting forth in reasonable detail the assets and liabilities of the surety.

(i)(2) Upon motion and good cause shown, the court may permit a deposit of money in court or other security to be given in lieu of giving a supersedeas bond under Subdivision (d).

(i)(3) The parties may by written stipulation waive the requirement of giving a supersedeas bond under Subdivision (d) or agree to an alternate form of security.

(i)(4) A supersedeas bond given pursuant to Subdivision (d) shall provide that each surety submits to the jurisdiction of the court and irrevocably appoints the clerk of the court as the surety's agent upon whom any papers affecting the surety's liability on the bond may be served, and that the surety's liability may be enforced on motion and upon such notice as the court may require without the necessity of an independent action.

(j) Objecting to sufficiency or amount of security. Any party whose judgment is stayed or sought to be stayed pursuant to Subdivision (d) may object to the sufficiency of the sureties on the supersedeas bond or the amount thereof, or to the sufficiency or amount of other security given to stay the judgment by filing and giving notice of such objection. The party so objecting shall be entitled to a hearing thereon upon five days notice or such shorter time as the court may order. The burden of justifying the sufficiency of the sureties or other security and the amount of the bond or other security, shall be borne by the party seeking the stay. The fact that a supersedeas bond, its surety or other security is generally permitted under this rule shall not be conclusive as to its sufficiency or amount.

Rule 64D. Garnishment. **Amendments effective August 4, 2003 under Rule 11-101(4)(E).**

(a) Availability of writ of garnishment (pre-judgment and after judgment). Except as provided in Rule 64A and as authorized and permitted therein a writ of garnishment is available as provided for herein.

(a)(i) Before judgment. A writ of garnishment is available as a means of attachment before judgment, other than for defendant's earnings from personal services as hereinafter defined in Subdivision (d)(vii), at any time after the filing of a complaint in cases in which a writ of attachment is available under Rule 64C.

(a)(ii) After judgment or order. A writ of garnishment is available in aid of execution to satisfy a money judgment or other order requiring the payment of money. Such judgments and orders are hereinafter sometimes referred to collectively as "judgment".

(a)(iii) Property subject to garnishment. The property subject to garnishment that a writ may be used to levy upon or affect is all the accrued credits, chattels, goods, effects, debts, choses in action, money and other personal property and rights to property of the defendant in the possession of a third person, or under the control or constituting a performance obligation to the defendant of any third person, whether due or yet to become due at the time of service of the writ of garnishment, which are not exempt from garnishment or exempt under any applicable provisions of state or federal law (hereinafter sometimes referred to as "Property Subject to Garnishment").

(a)(iv) As used in this Rule 64D, the term "plaintiff" means the person or entity seeking by garnishment to attach or execute upon the property of another subject to garnishment and the term "defendant" means the person or entity whose property subject to garnishment is sought to be attached or executed upon by the plaintiff.

(b) Requirements for issuance of a prejudgment writ of garnishment. The clerk shall issue a prejudgment writ or writs of garnishment, with or without notice to the defendant, directed to the person(s) sought to be charged as garnishee(s) and so identified in the affidavit required by Subdivision (b)(i) herein only upon the order of the court in which the action is filed. Several writs may be issued at the same time so long as there is only one named garnishee in a single writ. No writ shall issue unless there is attached thereto the fee required by Subdivision (d)(ii). Subject to Rule 64A, the court shall issue its order for the issuance of a prejudgment writ of garnishment only upon the occurrence of the following:

(b)(i) A finding that the plaintiff has filed with the clerk an affidavit briefly setting forth: admissible evidence of facts showing that plaintiff's claim is one for which attachment is authorized by Rule 64C; the amount due the plaintiff for which the complaint seeks judgment; that plaintiff has good reason to believe and does believe that defendant has Property Subject to Garnishment in the possession or in the control of or otherwise owing from one or more specified third persons who plaintiff seeks to charge as garnishees or that such third persons plaintiff seeks to charge as garnishees are otherwise indebted to the defendant; and that such Property Subject to Garnishment is not earnings for the personal services of the defendant, or otherwise exempt from garnishment.

(b)(ii) A finding that plaintiff has filed with the clerk a bond or undertaking in the form and amount required for the issuance of a writ of attachment.

(b)(iii) Exceptions to the sufficiency of the sureties on plaintiff's prejudgment garnishment bond or undertaking and the justification of such sureties shall be made within the times and in the manner and with the effect provided in Rule 64C(c).

(c) Requirements for issuance of writ of garnishment after judgment or other order. After the entry of a judgment or other order requiring the payment of money, the clerk of any court from which execution thereon may be issued shall issue a writ or writs of garnishment, without the necessity for an undertaking, upon the filing of an application by the plaintiff: (i) identifying the person sought to be charged as a garnishee; (ii) stating whether such property consists in whole or in part of earnings from personal services as hereinafter defined in Subdivision (d)(vii) of this rule and (iii) stating the remaining amount due on the judgment. Several writs may be issued at the same time so long as there is only one named garnishee in a single writ. No writ shall issue unless there is attached thereto the fee required by Subdivision (d)(ii).

(d) Content and effect of writ; to whom directed (pre-judgment or after judgment).

(d)(i) The writ of garnishment shall be issued in the name of the State of Utah and shall be directed to the person or persons designated in the plaintiff's affidavit or application as garnishee or garnishees, advising each such person that each is attached as garnishee in the action, and commanding each of them not to pay or deliver any non-exempt Property Subject to Garnishment as defined in Subdivision (a)(iii) herein in their possession, custody or control, or part thereof, due or to become due to the defendant up to the amount remaining due on the judgment (Subdivision (c)(iii)) if the writ is issued after judgment or the amount claimed to be due the plaintiff (Subdivision (b)(i)) if a prejudgment writ is issued, whichever is applicable, and to retain possession and control of all such property until further order of the court or as otherwise discharged or released as provided for herein. In the case of a prejudgment writ, the writ shall contain a designation that it is a prejudgment writ and further note the date and time of expiration of the writ. At the time the writ of garnishment is issued, the clerk shall attach to the writ a notice of garnishment and exemptions, interrogatories to the garnishee and two copies of an application by which the defendant may request a hearing.

(d)(ii) The writ shall require the garnishee to give answers to interrogatories within five (5) business days from the date of service of the writ. Service of a copy of the answers to interrogatories shall be made upon the plaintiff and the original filed with the clerk. The plaintiff shall provide a fee to the garnishee in an amount set by the Legislature. The interrogatories may

in substance inquire: (1) whether the garnishee is indebted to the defendant, either in property or in money, whether the same is now due and, if not, when it is to become due; (2) whether there is any Property Subject to Garnishment in the possession, custody or control of the garnishee and, if so, the value of the same; (3) whether the garnishee knows of any debts owing to the defendant, whether due or not, or of any Property Subject to Garnishment belonging to the defendant or in which defendant has an interest, whether in the possession or under the control of the garnishee or another, and, if so, the particulars thereof; (4) whether the garnishee is retaining or deducting any amount in satisfaction of a claim the garnishee has against the plaintiff or the defendant, a designation as to whom such claim relates, and the amount retained or deducted; and (5) as to any other relevant information plaintiff may desire, including defendant's job, position or occupation, defendant's rate and method of compensation, defendant's pay period and the computation of the amount of defendant's accrued disposable earnings attached by the writ.

(d)(iii) If the garnishee has possession, custody or control of Property Subject to Garnishment, the garnishee shall serve within five (5) business days of service of the writ of garnishment upon the garnisheea copy of the writ of garnishment, answers to interrogatories, notice of garnishment and exemptions, and two copies of an application by which a hearing may be requested, upon: (1) the defendant at the last known address of the defendant shown on the records of the garnishee at the time the writ of garnishment was served on the garnishee; and (2) upon any other person shown upon the records of the garnishee to be a co-owner or having an interest in the property or money garnisheed at the last known address of the co-owner or other interested person as shown on the records of the garnishee at the time the writ of garnishment was served on the garnishee. If that which is garnisheed is an account, such as a bank account or the like, the copies of the writ of garnishment, answers to interrogatories, notice of garnishment and exemptions, and applications for hearing shall be served at the addresses maintained in the records of the garnishee for that account. Service shall be by first class mail or by hand delivery to the defendant and all others. In the answer to interrogatories, the garnishee shall state that the garnishee has mailed or hand delivered a copy of the writ of garnishment, answers to interrogatories, notice of garnishment and exemptions, and two copies of an application by which a hearing may be requested to the defendant and all other persons entitled thereto and state the manner and date of compliance therewith.

(d)(iv) The notice of garnishment and exemptions that is to be served upon the defendant and others entitled to its receipt shall indicate in substance that certain money is exempt from garnishment including but not limited to, Social Security benefits, Supplemental Security Income benefits, Veterans' benefits, unemployment benefits, Workers' Compensation benefits, public assistance (welfare), alimony, child support, certain pensions, and part or all of wages or other earnings from personal services. The notice shall also indicate that the defendant or other person notified must request a hearing within ten days from the date of service of the notice upon the defendant or other person, but in no case later than the time at which the court orders the disposition of the Property Subject to Garnishment provided for herein, which shall not be sooner than ten (10) days from the service of the notice, if such defendant or other person desires to claim any exemption that has not already been reflected in the answers to interrogatories, believes that the writ of garnishment was issued improperly, or that the answers to interrogatories are inaccurate. For purposes of this provision, the date of service shall be the date of mailing, if mailed, or date of delivery, if hand-delivered, and no period for mailing (Rule 6(e)) shall be used in computing the time period.

(d)(v) Priority among writs of garnishment served upon a garnishee shall be in order of their service.

(d)(vi) A writ of garnishment attaching earnings for personal services shall attach only that portion of the defendant's accrued and unpaid disposable earnings hereinafter specified. The writ shall so advise the garnishee and shall direct the garnishee to withhold from the defendant's accrued disposable earnings only the amount attached pursuant to the writ. Earnings for personal services shall be deemed to accrue on the last day of the period in which they were earned or to which they relate. If the writ is served before or on the date the defendant's earnings accrue and before the same have been paid to the defendant, the writ shall be deemed to have been served at the time the periodic earnings accrued;

(d)(vii) "Earnings" or "earnings from personal services" means compensation paid or payable for personal services, whether denominated as wages, salary, commission, bonus, or otherwise, and includes periodic payments pursuant to a pension or retirement program. "Disposable earnings" means that part of a defendant's earnings remaining after the deduction of all amounts required by law to be withheld. For purposes of a garnishment to enforce payment of a judgment arising out of a failure to support dependent children, earnings also include, in addition to those

items listed above, periodic payments pursuant to insurance policies of any type, including unemployment compensation, insurance benefit payments, and all gain derived from capital, from labor, or from both combined, including profit gained through sale or conversion of capital assets or as otherwise modified or adopted by law for the support of dependent children.

(d)(viii) The maximum portion of the aggregate disposable earnings of defendant (if an individual) becoming due the defendant which is subject to garnishment is the lesser of:

(d)(viii)(A) Twenty-five per centum of defendant's disposable earnings (fifty per centum for a garnishment to enforce payment of a judgment arising out of failure to support dependent children) computed for the pay period for which the earnings accrued; or

(d)(viii)(B) The amount by which the defendant's aggregate disposable earnings computed for the pay period for which the earnings accrued exceeds the number of weeks in the period multiplied by thirty times the federal minimum hourly wage prescribed by the Fair Labor Standards Act in effect at the time the earnings are payable.

(d)(ix) Unless otherwise ordered by the Court, the garnishee shall treat the defendant's earnings becoming due from the garnishee as the defendant's entire aggregate earnings for the purpose of computing the sum attached by the garnishment.

(e) Service of writ; return; general service (pre-judgment or after judgment). The writ, any order pursuant to subdivision(s) of this rule, and any order pursuant to Rule 64A(3), shall be served upon the garnishee by a sheriff, constable, deputy, or such other person designated by court order and return thereof made in the same manner as a return of service upon a summons. All other service may be by first class mail or hand delivery.

(f) Release or discharge of garnishment (pre-judgment or after judgment). At any time either before or after the service of any writ of garnishment, the defendant may obtain a release or discharge thereof in the same manner and under the same conditions as a release or discharge of a writ of attachment may be obtained under the provisions of Subdivision (f) of Rule 64C. The plaintiff may release a writ of garnishment by filing with the clerk a release of garnishment and serving a copy thereof upon the garnishee.

(g) Answer of garnishee; delivery of property (pre-judgment or after judgment). The garnishee shall, within the time required by Subdivision (d)(ii) hereof, serve upon the court and the plaintiff verified answers to the interrogatories and provide proof(s) of service upon defendant of the copy of the writ of garnishment, answers to interrogatories, the notice of

garnishment and exemptions, and the applications by which a hearing may be requested, stating the manner and date of service. The garnishee may also deliver to the officer serving the writ the Property Subject to Garnishment as shown by the answer of the garnishee, and the officer shall make return of such property and money with the writ to the court, to be dealt with as thereafter ordered by the court. Thereupon, the garnishee shall be relieved from further liability in the proceedings, unless the answer shall be successfully controverted as hereinafter provided or the garnishee has willfully failed to serve copies of the writ of garnishment, answers to interrogatories, notice of garnishment and exemptions, and the applications by which a request for a hearing may be made on the defendant and other persons entitled thereto.

(h) Procedure (pre-judgment or after judgment). The defendant or any other person who owns or claims an interest in the property subject to garnishment that is garnisheed may request a hearing to claim any exemption to the garnishment, or to challenge the issuance of the writ or the accuracy of the answers to interrogatories. Such request must be filed within ten days of the service (for purposes of this provision the date of service shall be the date of mailing if mailed or date of delivery if hand-delivered and no period for mailing pursuant to Rule 6(e) shall be used in computing the time period) of the copy of the materials required to be served by Subdivision (d)(iii) upon the defendant and all others entitled to receive the same. Any person filing a request for hearing shall serve a copy of the request for hearing on the plaintiff, the garnishee, and other persons claiming an interest in the property. The request for a hearing shall be in a form to enable the defendant or other person to specify the grounds upon which the defendant or other person challenges the issuance of the writ orthe accuracy of the answers to interrogatories, or claims the amount garnisheed to be exempt, in whole or in part, including, but not limited to exemptions claimed for Social Security benefits, Supplemental Security Income benefits, Veterans' benefits, unemployment benefits, Workers' Compensation benefits, public assistance (welfare) benefits, alimony and child support, pensions, wage or other earnings for personal service, and non-ownership of the garnisheed property. Where personal services are compensated, but no amounts are required by law to be withheld, the amounts that would have been required to be withheld by law had the defendant been an employee of the garnishee are exempt.

(h)(i) If no request for hearing is filed. If the garnishee does not receive a copy of a request for hearing within 20 days after service of copies of materials required to be served by

Subdivision (d)(iii), the garnishee shall pay Property Subject to Garnishment to plaintiff or plaintiff’s attorney. If a request for hearing is not filed as provided for in this Rule and the time for doing so has expired and the writ issued was a prejudgment writ of garnishment, then the court or the clerk, upon plaintiff's request, shall issue an order to the garnishee to pay the Property Subject to Garnishment into court by delivery of such property to the sheriff or constable for that purpose. Property Subject to Garnishment that is paid into court pursuant to a prejudgment writ of garnishment or at any time when a request for hearing has been filed shall be held by the clerk pending order of the court.

(h)(ii) Effect of failure to request hearing. If the defendant or any other person to whom the materials required to be served by Subdivision (d)(iii) fails to request a hearing as provided for herein, then defendant and such other persons shall be deemed to have accepted as correct the garnishee's answers to interrogatories and the amounts stated therein to be not exempt from garnishment except as reflected in the answers to interrogatories.

(h)(iii) If a request for hearing is filed. If a request for hearing is filed by or on behalf of the defendant or by any other person, the court shall set the matter for hearing within ten (10) days from the filing of the request and serve notice of that hearing upon all parties and claimants by first class mail. If the court determines at the hearing that the writ was issued improperly, that the answers to interrogatories are inaccurate, or that any assets garnisheed are exempt from or are not subject to garnishment, the court shall immediately issue an order to the garnishee releasing such assets or portion thereof from the writ of garnishment. If the court finds that the assets or a portion thereof are subject to garnishment and not exempt, it shall issue an order to pay the Property Subject to Garnishment directly to plaintiff or plaintiff's attorney or as otherwise ordered by the court, except in the case of a prejudgment writ of garnishment where the order shall require that such property be paid into court by delivery of such property to the sheriff or constable for that purpose. Property Subject to Garnishment that is paid into court shall be held by the clerk pending order of the court.

(h)(iv) If the property is other than money or its equivalent. Where the property is other than money or its equivalent, the court shall order that the garnishee deliver such property to the sheriff, constable, deputy, or such other person designated by court order. In the case of a writ issued after judgment, the person to whom the property was delivered shall sell as much of such property as may be necessary to satisfy the judgment together with costs of the garnishment

proceedings and deposit the proceeds into court to be distributed by order of the court. Any surplus of such personal property or the proceeds thereof necessary to satisfy the writ of garnishment shall be returned to the defendant unless otherwise ordered by a court of competent jurisdiction. In the case of a prejudgment writ, the person to whom the property is delivered shall maintain possession of the property until further order of the court.

(i) Reply to answer of garnishee; trial of issues; judgment (pre-judgment or after judgment). The plaintiff or defendant may, within 10 days after the service of any answers to interrogatories, file and serve upon the garnishee and the other party to the principal action a reply to the whole or any part thereof and may also allege any matters which would charge the garnishee with liability except that all claims for exemptions to garnishment or non-ownership of property garnisheed shall be resolved under the procedures as otherwise provided for in Subdivision (h) herein. Such new matter in reply shall be taken as denied and the matter thus at issue shall be tried in the same manner as other issues of like nature. Judgment shall be entered upon the verdict or finding the same as if the garnishee had answered according to such verdict or finding. Costs shall be awarded in accordance with the provisions of Rule 54(d).

(j) Proceedings on failure of garnishee to comply with rule (pre-judgment or after judgment). If a garnishee fails to answer interrogatories after payment of the required fee, or if any garnishee shall fail to send to the defendant the copy of the writ, answers to interrogatories, notice and applications required by Sections (d)(iii) of this Rule, the court may order the garnishee to appear before the court and show cause why the garnishee should not be held in contempt therefor and why the court should not order the garnishee to pay expenses and costs incurred by other parties to the proceeding as a result of garnishee's failure. After the garnishee has been personally served with an order to appear before the court and show cause, the court may make such orders as are just. Unless the court finds there was substantial justification for the garnishee's failure or that other circumstances make an award of expenses or costs unjust, the court shall order the garnishee to pay reasonable expenses, including attorney's fees, incurred as a result of garnishee's failure.

If a garnishee fails to serve upon the court answers to interrogatories or an Affidavit of Garnishee as to Continuing Garnishment but delivers to the court Property Subject to Garnishment, the plaintiff may obtain a release of such property by filing with the court 60 days after the writ of garnishment was issued, or, in the case of a continuing garnishment, 60 days

after the Property Subject to Garnishment was delivered to the court, an Ex Parte Motion to Release Garnishment Funds and by mailing a copy of the motion to the defendant. The motion shall state the amount of the property delivered to the court by the garnishee, that the garnishee failed to answer the interrogatories or file an Affidavit of Garnishee as to Continuing Garnishment, that 60 days have elapsed since the issuance of the writ (or, in the case of a continuing garnishment, 60 days have elapsed since the Property Subject to Garnishment was delivered to the court), and that the defendant has made no objection to the garnishment. No earlier than 10 days after a copy of the motion is mailed to the defendant, the court may enter an order that the Property Subject to Garnishment shall be released to the plaintiff to be applied to the judgment against the defendant. If the defendant objects to such release of property, the defendant shall file an objection to the motion with the court prior to the order being entered and shall mail a copy of the objection to the plaintiff. The plaintiff shall mail a copy of the executed order to the defendant.

(k) Release of garnishee for amount paid (pre-judgment or after judgment). Except as provided for herein, a garnishee who acts in accordance with this Rule shall be released from all demands by the defendant for all Property Subject to Garnishment that is paid, delivered or accounted for by the garnishee pursuant to this Rule.

(l) Interpleader of third persons (pre-judgment or after judgment). When any person other than the defendant claims or may claim that the property held in the possession, custody, or control of the garnishee pursuant to a Writ is not subject to garnishment, the court may on motion order that such claimant be interpleaded as a defendant to the garnishment action, and if not already subject to the jurisdiction of the court, provide for notice thereof, in such form as the court shall direct, together with service of a copy of the order upon such third-party claimant in the manner required for the service of a summons. Thereupon the garnishee may pay or deliver to the court such property held pursuant to the Writ, which shall be a complete discharge from all liability to any party for the amount so paid or property so delivered. The third-party claimant shall thereupon be deemed a defendant to the garnishment action and shall answer within 10 days, setting forth any claim or defense. In case of default, judgment may be rendered as in any other cases of default which shall extinguish any claim of such third-party claimant.

(m) Claims of garnishee against plaintiff or defendant (pre-judgment or after judgment). Every garnishee shall be allowed to retain or deduct out of the Property Subject to Garnishment

all demands against the plaintiff and against the defendant of which the garnishee could have availed itself if the garnishee had not been served as garnishee, whether the same are at the time due or not so long as the claims are liquidated, but only to the extent that the amounts retained and deducted are applied to reduce a debt or other obligation of the plaintiff or defendant, except that should such property, otherwise subject to garnishment, be held as security for the payment of a debt or other obligation of the defendant to the garnishee, then such property need not be applied at that time but must remain subject to being applied at any time pending the payment in full of the debt or other obligation. In answering the interrogatories propounded to the garnishee, the garnishee shall specify the amount retained or deducted and the person against whom the claim is made. Amounts retained and deducted for amounts owed by the plaintiff to the garnishee shall also be applied in reduction of any judgment amount rendered in favor of plaintiff and against defendant. All amounts properly garnisheed in excess of those amounts retained or deducted pursuant to this subdivision are subject to payment and distribution in accordance with this Rule.

(n) Liability of garnishee on negotiable instruments (pre-judgment or after judgment). No person shall be liable as garnishee by reason of having drawn, accepted, made or endorsed any negotiable instrument which is not in the possession, custody, or control of the garnishee at the time of service of the writ of garnishment.

(o) When garnishee is mortgagee or pledgee (pre-judgment or after judgment). When any Property Subject to Garnishment is mortgaged or pledged, or in any way held for the payment of a debt to the garnishee, the plaintiff may obtain an order from the court authorizing the plaintiff to pay the total amount of the obligation to the garnishee in accordance with the terms of the mortgage, pledge or obligation, and requiring the garnishee to deliver such Property Subject to Garnishment according to the order of the court upon payment to such garnishee of the total obligation.

(p) Where property is held to secure performance of other obligation (pre-judgment or after judgment). If the Property Subject to Garnishment secures any obligation other than the payment of money and if the obligation secured does not require the personal performance of the defendant and can be performed by the plaintiff or its designee, the court may, upon plaintiff's motion, authorize the plaintiff or its designee to perform the obligation or tender performance

and that upon such performance, or any tender thereof which is refused, the garnishee shall deliver the Property Subject to Garnishment in accordance with the order of the Court.

(q) Disposition of property (pre-judgment or after judgment). The Property Subject to Garnishment under either Subdivision (o) or (p) of this Rule or the proceeds from the sale thereof shall be applied to the extent available, first to satisfy any costs of sale, then to repay any amount paid by the plaintiff to the garnishee to satisfy the obligation of the defendant to the garnishee, then to pay the costs to perform the obligation of the defendant to the garnishee for an obligation other than the payment of money, and then to satisfy the writ of garnishment.

(r) Order against garnishee for debt not due (pre-judgment or after judgment). When an order is made requiring a garnishee to pay an amount to the plaintiff or plaintiff's attorney or into court or otherwise provide property for disposition by the court and the same is not yet due to the defendant, payment or providing of property shall not be required until such payment or property is otherwise due the defendant from the garnishee.

(s) Failure to proceed against garnisheed property (pre-judgment or after judgment). Notwithstanding any other provision of this Rule, if a plaintiff fails, within sixty days from the filing of the garnishee's answers to interrogatories, to secure and personally serve on the garnishee an order requiring the garnishee to pay the property garnisheed into court or as otherwise provided herein, then the writ, which commanded the garnishee to hold the amount or property, shall be released and the garnishee discharged without further order of the court. If the Property Subject to Garnishment or any part thereof has been deposited with the court and the writ of garnishment was issued in aid of the execution of a judgment or order for the payment of money, and the plaintiff fails, within sixty days from the filing of the garnishee's answers to interrogatories, to request a release of the property garnisheed from the court in accordance with Subdivision (h)(i), then the writ shall be released; the garnisheed property shall be returned to the garnishee; and the garnishee discharged without further order of the court. Property Subject to Garnishment deposited with the court pursuant to a prejudgment writ of garnishment shall be released only upon order of the court. A release under this subdivision may be stayed upon order of the court for good cause shown. Such order shall not be binding upon the garnishee until served upon it.

(t) Costs (pre-judgment or after judgment).

(t)(i) Costs shall be allowed as a matter of course to the plaintiff and against the defendant in the pursuit of any garnishee action instituted after judgment unless the court otherwise directs; provided, however, where an appeal or other proceeding for review is taken, costs of the garnishee action shall abide the final determination of the cause. Costs against the State of Utah, its officers and agencies shall be imposed only to the extent permitted by law.

(t)(ii) The plaintiff must serve upon the defendant a copy of a memorandum of the items of necessary costs and disbursements in the garnishee action or actions, and file with the court a like memorandum duly verified stating that the items are correct, the disbursements have been necessarily incurred in the garnishee action, and the items of costs have not been claimed in any previous memorandum. The memorandum or memoranda may be filed at any time after judgment is rendered but in no event later than five days after the receipt of funds that would pay the judgment in full but for the payment of any costs associated with a garnishee action for which a memorandum or memoranda have not been filed with the court. A party dissatisfied with the costs claimed, may, within seven days after service of the memorandum of costs of the garnishee action, file a motion to have the costs taxed by the court.

(t)(iii) All costs incurred in garnishee actions prior to the rendering of a judgment shall be taxed according to Rule 54(d) of these rules.

(u)(i) A garnishment issued to enforce a judgment obtained by the Office of Recovery Services, within the Department of Social Services, for repayment of overpayments, as defined in Utah Code Section 62A-11-202 or by the Department of Workforce Services for repayment of overpayments as defined in Utah Code Section 35A-3-602, shall continue to operate and require the garnishee to withhold the nonexempt portion of disposable earnings, as defined in Utah Code Subsection 62A-11-103~~(2)~~(4), at each succeeding earnings disbursement interval until the garnishment is released in writing by the court, ~~or~~ the Office of Recovery Services, or the Department of Workforce Services.

(u)(ii) The garnishment described in Subdivision (u)(i) may not exceed 25% of disposable earnings, as defined in Utah Code Subsection 62A-11-103~~(3)~~(4), or the amount permitted under Section 303(a) of the Consumer Credit Protection Act, l5 U.S.C. Section 1673(a), whichever is less.

(v) Writ of continuing garnishment on earnings.

(v)(i) "Continuing garnishment" means any procedure for withholding the earnings of a defendant for successive pay periods for payment of a judgment debt, other than a judgment for support. "Earnings" and "Disposable Earnings" shall have the meaning set forth in Subdivision (d) of this rule. In addition to garnishment proceedings otherwise available under this rule, in any case in which a money judgment is obtained in a court of competent jurisdiction, the plaintiff or plaintiff's assignee shall be entitled, in accordance with this subdivision, to have the clerk of the court issue a writ of continuing garnishment against any garnishee who may owe earnings to the defendant. The person who serves a writ of continuing garnishment, together with the notices required by this rule, on the garnishee shall note the date and time of such service on the copy served. A writ of continuing garnishment shall be subject to the same exemptions from garnishment and portion of aggregate disposable earnings of defendant subject to garnishment as are described in Subdivision (d) of this rule.

(v)(ii) To the extent that the earnings are not exempt from garnishment, the writ of continuing garnishment shall be a continuing lien on all disposable earnings due or to become due to the defendant from the date of service of the writ and continuing until the earlier of the following events:

(v)(ii)(A) 120 days has expired from the date of service of the writ or, in the case of multiple garnishments, 120 days from the date a garnishment becomes effective as described hereafter in Subdivision (v)(iii);

(v)(ii)(B) the end of the last pay period after the defendant's employment relationship is terminated;

(v)(ii)(C) the underlying judgment is stayed, vacated or satisfied in full;

(v)(ii)(D) the plaintiff releases the garnishment; or

(v)(ii)(E) the writ of continuing garnishment is dismissed, vacated, or stayed by a court of competent jurisdiction.

The plaintiff shall notify the garnishee in writing by first class mail within 5 days after a judgment is stayed, vacated, or satisfied or a writ of continuing garnishment is dismissed, vacated, or stayed by the court.

(v)(iii) Only one writ of garnishment (continuing or otherwise) shall be in effect and satisfied at one time. When more than one writ of garnishment has been issued against earnings due the same defendant and served on the same garnishee, the writs shall be satisfied in the order of

service on the garnishee. Upon expiration of a writ of continuing garnishment, as provided in Subdivision (v)(ii) above, any other writ of continuing garnishment that has been issued and served upon a garnishee against earnings due the defendant shall then become effective and shall continue for the period described in Subdivision (v)(ii) above. No plaintiff may have issued more than one writ of continuing garnishment against the same earnings of any individual defendant during the term of the lien created by any writ of continuing garnishment previously issued and served in favor of that plaintiff. Any writ of continuing garnishment served upon a garnishee while any previous writ is still in effect shall be answered by the garnishee with a statement that the garnishee has been served previously with one or more writs of garnishment against earnings and specifying the date on which all such liens previously served are expected to terminate.

(v)(iv) Garnishee shall answer any interrogatories and serve upon the defendant information as required by Subdivisions (d) and (g) of this rule. Thereafter, the defendant shall have the right to request a hearing as provided in Subdivision (h) of this rule. If garnishee does not receive a copy of a request for hearing within 20 days after service of copies of materials required to be served by Subdivision (d)(iii), garnishee shall pay Property Subject to Garnishment from the first applicable pay period to plaintiff or plaintiff’s attorney. Any hearing requested by the defendant outside of that provided for in Subdivision (h) shall be requested by motion to the court and held within the judge's sole discretion. Unless the writ shall terminate pursuant to Subdivision (v)(ii) above or unless a request for hearing has been served on the garnishee but there has been no subsequent court order, within 10 days after the end of each subsequent pay period, the garnishee shall deliver the Property Subject to Garnishment either to the plaintiff or to the plaintiff's attorney, together with an affidavit which shall state (1) whether the garnishee is indebted to the defendant for earnings, specifying the beginning and ending dates of the applicable pay period, and the total earnings for the pay period; (2) whether garnishee is retaining or deducting any amount in satisfaction of a claim the garnishee has against the plaintiff or the defendant, a designation as to whom such claim relates, and the amount retained or deducted; (3) the computation of the amount of defendant's accrued disposable earnings attached by the writ for the applicable pay period; and (4) that garnishee has served defendant with a copy of the writ of garnishment and notice of garnishment and exemptions as required by Subdivision (d) of this rule. Proceedings on failure of garnishee to comply with this Subdivision (v) shall follow

Subdivision (j) of this rule. Reply to any answer or affidavit of garnishee completed pursuant to this Subdivision (v) shall follow Subdivision (i) of this rule.

(v)(v) Notwithstanding any other provision of this Subdivision (v), a writ of continuing garnishment issued to enforce a judgment obtained by the Office of Recovery Services, within the Department of Social Services, shall have priority over any other writ of continuing garnishment in accordance with Subdivision (u) of this rule. If a writ of continuing garnishment issued by the Office of Recovery Services is served during the term of a lien created by any other writ of continuing garnishment, the term of that lien shall be tolled and all priorities preserved until the expiration of the Office of Recovery Services writ.

(v)(vi) The plaintiff shall be responsible for insuring that the amounts garnished do not exceed the amount due on the judgment.

(v)(vii) Except as specifically noted in this Subdivision (v), all other provisions of this rule apply to this subdivision.

Rule 68. Offer of judgment.

(a) Unless otherwise specified, an offer made under this rule ~~by a party defending against a claim~~ to allow judgment to be entered in accordance with the offer is an offer to resolve all claims between the parties to the date of the offer, including costs, interest and, if attorney fees are permitted by law or contract, attorney fees.

(b) If the adjusted award is not more favorable than the offer, the offeror is not liable for costs, prejudgment interest or attorney fees incurred by the offeree after the offer and the court upon motion may order the offeree ~~shall~~ to pay the offeror's costs and, if attorney fees are permitted by law or contract, attorney fees incurred after the offer. The court may suspend the application of this rule to prevent manifest injustice.

(c) An offer made under this rule shall:

(c)(1) be in writing;

(c)(2) expressly refer to this rule;

(c)(3) be made more than 10 days before trial;

(c)(4) remain open for at least 10 days; and

(c)(5) be served on the offeree under Rule 5.

Acceptance of the offer shall be in writing and served on the offeror under Rule 5. Upon acceptance, either party may file the offer and acceptance with a proposed judgment under Rule 58A.

(d) "Adjusted award" means the amount awarded by the finder of fact and, unless excluded by the offer, the offeree's costs and interest incurred before the offer, and, if attorney fees are permitted by law or contract and not excluded by the offer, the offeree's reasonable attorney fees incurred before the offer. If the offeree's attorney fees are subject to a contingency fee agreement, the court shall determine a reasonable attorney fee for the period preceding the offer.

Rule 74. Withdrawal of counsel.

(a) If a motion is not pending and a certificate of readiness for trial has not been filed, an attorney may withdraw from the case by filing with the court and serving on all parties a notice of withdrawal. The notice of withdrawal shall include the address of the attorney's client and a statement that no motion is pending and no certificate of readiness for trial has been filed. If a motion is pending or a certificate of readiness for trial has been filed, an attorney may not withdraw except upon motion and order of the court. The motion to withdraw shall describe the nature of the any pending motion and the date and purpose of any scheduled hearing.

(b) If an attorney withdraws, dies, is suspended from the practice of law, is disbarred, or is removed from the case by the court, the opposing party shall serve a Notice to Appear or Appoint Counsel on the unrepresented party, informing the party of the responsibility to appear personally or appoint counsel. A copy of the Notice to Appear or Appoint Counsel must be filed with the court. No further proceedings shall be held in the case until 20 days after filing the Notice to Appear or Appoint Counsel unless the unrepresented party waives the time requirement or unless otherwise ordered by the court.

(c) Substitution of counsel. An attorney may replace the counsel of record by filing and serving a notice of substitution of counsel signed by former counsel, new counsel and the client. Court approval is not required if new counsel certifies in the notice of substitution that counsel will comply with the existing hearing schedule and deadlines.

~~**Rule 101. Domestic pretrial conferences and orders.**~~

~~(a) In the judicial districts with a court commissioner, a court commissioner shall conduct the pretrial conference in all contested matters of divorce, annulment, paternity or modification of a decree of divorce.~~

~~(b) At the pretrial conference, the commissioner shall discuss the issues with counsel and the parties, may receive proffers of evidence, and may receive evidence if authorized to do so by the presiding judge of the district. The commissioner may designate one of the parties' counsel to prepare a written order in accordance with Rule 7. Issues not resolved at the pretrial conference shall be set for trial.~~

~~(c) Following the pretrial conference, the commissioner shall issue a pretrial order which shall include:~~

~~(c)(1) the issues stipulated to by the parties;~~

~~(c)(2) the disputed issues; and~~

~~(c)(3) the commissioner's recommendations as to the disputed issues if the commissioner conducted an evidentiary hearing on those issues.~~

Rule 106. Modification of divorce decrees.

Proceedings to modify a divorce decree shall be commenced by filing a petition to modify ~~in~~ the ~~original~~ divorce ~~action~~ decree. Service of the petition and summons upon the opposing party shall be in accordance with Rule 4. ~~No request to modify a decree shall be raised by an order to show cause.~~ The responding party shall serve the answer within twenty days after service of the petition.

Administrative Office of the Courts

Chief Justice Christine M. Durham
Utah Supreme Court
Chair, Utah Judicial Council

Daniel J. Becker
State Court Administrator
Myron K. March
Deputy Court Administrator

MEMORANDUM

To: Civil Procedures Committee
From: Tim Shea
Date: January 7, 2004
Re: Communication with jurors

The Committee on Improving Jury Service recommends the following amendment to URCP 47, regulating communication with jurors. The Committee believes the proposal is more in keeping with the case law and provides clearer limits than the existing rule. If endorsed by the Civil Procedures Committee, a similar amendment will be proposed to the Advisory Committee on Rules of Criminal Procedure.

Draft Utah Rule of Civil Procedure 47. Jurors.

….

~~(l) Separation of jury. If the jurors are permitted to separate, either during the trial or after the case is submitted to them, they shall be admonished by the court that it is their duty not to converse with, or suffer themselves to be addressed by, any other person on any subject of the trial, and that it is their duty not to form or express an opinion thereon until the case is finally submitted to them.~~

(l) Communication with jurors. There shall be no off-the-record communication between jurors and lawyers, parties or witnesses or persons acting on their behalf. Jurors may communicate with court personnel and among themselves, but, unless authorized by the court, jurors shall not communicate with any person regarding a subject of the trial. Jurors shall not form or express an opinion regarding a subject of the trial except during deliberation. The judge shall so instruct the jury.

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