Agenda
Advisory Committee on Rules of Civil Procedure

October 26, 2011
4: 00 to 6:00 p.m.

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

Approval of minutes	Tab 1	Fran Wikstrom
Comments to Rule 65C. Post-conviction relief.	Tab 2	Judge Kate Toomey
Comments to: Rule 101. Motion practice before court commissioners. Rule 108. Objection to court commissioner's recommendations.	Tab 3	Tim Shea
Rule 25. Substitution of parties.	Tab 4	Leslie Slaugh
Rule 5(d)	Tab 5	Tim Shea
Disclosure and discovery blog page	Tab 6	Tim Shea

Committee Web Page: http://www.utcourts.gov/committees/civproc/

Meeting Schedule: Matheson Courthouse, Judicial Council Room, 4:00 to 6:00 unless otherwise stated.

November 16, 2011
January 25, 2012
February 22, 2012
March 28, 2012
April 25, 2012
May 23, 2012
September 26, 2012
October 24, 2012
November 28, 2012

Tab 1

MINUTES

UTAH SUPREME COURT ADVISORY COMMITTEE OF THE RULES OF CIVIL PROCEDURE

Wednesday September 28, 2011
Administrative Office of the Courts
Francis M. Wikstrom, Presiding

PRESENT: Francis M. Wikstrom, Chair, W. Cullen Battle, Terrie T. McIntosh, Janet H. Smith, Trystan B. Smith, Leslie W. Slaugh, Honorable Todd W. Shaughnessy, Honorable Kate Toomey, Francis J. Carney, Honorable David O. Nuffer

TELEPHONE: Robert J. Shelby

EXCUSED: Barbara L. Townsend, James T. Blanch, Timothy M. Shea, David W. Scofield

STAFF: Sammi V. Anderson, Diane Abegglen

I. APPROVAL OF MINUTES.

Mr. Wikstrom entertained comments from the committee concerning the August 3, 2011 minutes. The committee unanimously approved the minutes.

II. RULE 26.2 DISCLOSURES.

Mr. Carney introduced and led a discussion on Rule 26.2, a proposed disclosure rule applicable to personal injury actions only. Mr. Carney explained that Rule 26.2 is intended to take the place of the standard interrogatories that have been used in personal injury cases for some time. Mr. Carney noted that there are no interrogatories now allowed in Tier 1 and that Rule 26.2 is intended to make that more fair. The committee, receptive to proposed Rule 26.2 and appreciative to Mr. Carney for his work, turned to a discussion of the specific items required under the Rule 26.2 disclosures.

Mr. Carney discussed the issue of Medicare Eligibility information. Mr. Smith explained that this information should be produced with the initial disclosures because there is now no other mechanism by which to receive this information in a Tier I case. Mr. Smith also suggested requiring disclosure of whether the plaintiff is currently receiving Medicare or eligible for Medicare, as well as plaintiff's social security number and HICN number. The committee considered the privacy concerns implicated by such a requirement. Mr. Slaugh opined that a general requirement to disclose ten years employment or medical history is too onerous and that five years is more proportionate. Mr. Slaugh also opined that investigative reports should be produced when they are in the possession of defendant, counsel or insurer's counsel. Regarding the statement of the amount of insurance coverage applicable to the claim, the committee discussed and approved the requirement of a statement of the amount of self-insured retention, to

the extent applicable. Judge Toomey suggested that stylistic changes be made to render the language consistent throughout Rule 26.2 and volunteered to spearhead that effort. As for timing, Mr. Battle suggested and the committee confirmed that the Rule 26.2 disclosures are to be included under the Rule 26(a) disclosure requirements.

With respect to the scope of Rule 26.2, the committee discussed and concluded that Rule 26.2 disclosures for "personal injury" should apply to any action seeking damages out of personal physical injuries or illness. This is intended to apply to all tort actions seeking damages out of physical or emotional injury, including, for example, emotional torts, privacy torts and employment torts. To the extent physical injury or damage is alleged, parties are required to make disclosure under Rule 26.2. The proposed comment's earlier reference to Section 104(a) of the Internal Revenue Code was stricken.

The committee subsequently approved proposed Rule 26.2 by e-mail consensus and the rule has been sent to the Bar for comments.

III. COLLABORATIVE LAWYERING.

Brian Florence attended the meeting to help the committee understand collaborative lawyering and whether the committee should consider an amendment regarding the subsequent disqualification of lawyers that earlier participated in the collaborative lawyering process. Mr. Florence gave his opinion that there is no need for the issue to fall under any formal rule of law, Ethics, Civil Procedure or otherwise, because the contract that attorneys sign under the collaborative lawyering agreement is self-executing. Mr. Florence stated there has never been a problem with lawyers refusing to withdraw. The committee concurred. Ms. Abegglen asked the committee to prepare and submit a written recommendation to this effect.

IV. DISCOVERY DISPUTES.

Mr. Wikstrom circulated a one-page memorandum used by an Arizona judge that requires discovery disputes to be settled according to an extremely short and simplified procedure. The committee discussed the wisdom of adopting such a procedure, as well as the wisdom in various judges adopting pre-trial orders to set forth exactly how they want discovery disputes resolved.

V. VEXATIOUS LITIGANTS.

The subcommittee on proposed Rule 83 (Vexatious Litigants) reported that it has approved the version circulated to the committee. Judge Toomey reported that the Board of District Court Judges has also reviewed and approved the proposed rule. Judge Nuffer explained that the federal courts have standing orders that deal with the same issues, but offered his opinion that a rule would be preferable to standing orders. Ms. McIntosh raised a concern about the criminal penalties associated with the redundancy prohibitions in the proposed rule. Judges Toomey and Shaughnessy, together with Mr. Slaugh, explained the nature of vexatious litigation as defined under the proposed rule, the procedural safeguards in the rule and the small number of litigants to whom the proposed rule will apply. Judge Toomey moved to approve and

send out for comments. The committee unanimously approved.

VI. RULE 65C.

Judge Toomey asked that discussion on Rule 65(c) be postponed until a representative of the courts can be present to address issues associated with citing to a statute in a civil procedure rule. Discussion on the proposed amendments was tabled.

VII. RULE 4.

Judge Toomey led a discussion on the proposed amendments to Rule 4. Judge Shaughnessy discussed the case law regarding service by publication, observing that service by publication is not supposed to be a rote exercise. It is designed to maximize the potential of reaching the party. With this in mind, the amendments allow for the possibility that service may need to be published in a language other than English or in a paper of a different general circulation. The amendments were approved.

VIII. COMMITTEE NOTES RE DISCOVERY RULES.

Mr. Wikstrom asked committee members to review Mr. Shea's memorandum regarding revisions to and/or replacements of advisory committee notes in light of the committee's revisions to the rules of discovery. Barring responses to the contrary, it will be assumed that the committee is in agreement with Mr. Shea's memorandum and publication of the new rules will proceed accordingly.

IX. CLAIM PRECLUSION OF SMALL CLAIMS JUDGMENTS.

Justice Durrant instructed the Committee in the case of *Allen v. Moyer* to include a notice to all small claim litigants that they must bring all claims in one action or risk the assertion of claim preclusion in a subsequent case. Mr. Carney suggested inserting such an express notice on the Court's web page for small claims, the small claims Affidavit and Summons and the Checklist for the Affidavit and Summons. The committee discussed revising the language of the notice to acknowledge that small claims parties may knowingly waive some claims by proceeding under the jurisdictional threshold of small claims court on certain claims. The committee unanimously approved the changes to the small claims forms.

X. FALL FORUM.

Judge Shaughnessy discussed the Fall Forum and noted that there were three separate panels prepared to address the new rules. One panel, comprised of Judge Pullan and Messrs. Marsden and Slaugh, will address fact discovery. The second, comprised of Messrs. Shelby and Carney, as well as Judge Shaughnessy, will address expert discovery. The third panel will address the new disclosure requirements. It will be comprised of Mr. Battle, Judge Shaughnessy and Ms. Smith. The Fall Forum will be held on November 17 and 18, 2011. Many thanks to these committee members for their participation.

XI. ADJOURNMENT.

The meeting adjourned at 5:40 pm. The next committee meeting will be held at 4:00 p.m. on Wednesday October 26, 2011.

Tab 2

Administrative Office of the Courts

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

Daniel J. Becker
State Court Administrator
Raymond H. Wahl
Deputy Court Administrator

MEMORANDUM

To: Judicial Council
From: Tim Shea
Date: October 19, 2011
Re: Rules for comment

The comment period for the following rules has closed, and they are ready for your final recommendations.

(1) Rule Summary

URCP 065C. Post-conviction relief. Amend. Adds appointment of pro bono counsel in accordance with Sections 78B-9-109 and -202..

(2) (2) Comments

On appointment of pro-bono counsel under Rule 65C: The proposed rule should be amended to require counsel's consent before the Court may appoint him or her as pro bono counsel. There are cases in other states indicating there may be a constitutional problem with making counsel represent a party without compensation in civil cases.

Posted by Samuel D. McVey

Encl. Draft Rules

Rule 65C. Post-conviction relief.

(a) Scope. This rule governs proceedings in all petitions for post-conviction relief filed under the Post-Conviction Remedies Act, Utah Code Title 78B, Chapter 9. The Act sets forth the manner and extent to which a person may challenge the legality of a criminal conviction and sentence after the conviction and sentence have been affirmed in a direct appeal under Article I, Section 12 of the Utah Constitution, or the time to file such an appeal has expired.

(b) Procedural defenses and merits review. Except as provided in paragraph (h), if the court comments on the merits of a post-conviction claim, it shall first clearly and expressly determine whether that claim is independently precluded under Section 78B-9-106.

(c) Commencement and venue. The proceeding shall be commenced by filing a petition with the clerk of the district court in the county in which the judgment of conviction was entered. The petition should be filed on forms provided by the court. The court may order a change of venue on its own motion if the petition is filed in the wrong county. The court may order a change of venue on motion of a party for the convenience of the parties or witnesses.

(d) Contents of the petition. The petition shall set forth all claims that the petitioner has in relation to the legality of the conviction or sentence. The petition shall state:

(d)(1) whether the petitioner is incarcerated and, if so, the place of incarceration;

(d)(2) the name of the court in which the petitioner was convicted and sentenced and the dates of proceedings in which the conviction was entered, together with the court's case number for those proceedings, if known by the petitioner;

(d)(3) in plain and concise terms, all of the facts that form the basis of the petitioner's claim to relief;

(d)(4) whether the judgment of conviction, the sentence, or the commitment for violation of probation has been reviewed on appeal, and, if so, the number and title of the appellate proceeding, the issues raised on appeal, and the results of the appeal;

(d)(5) whether the legality of the conviction or sentence has been adjudicated in any prior post-conviction or other civil proceeding, and, if so, the case number and title of

those proceedings, the issues raised in the petition, and the results of the prior proceeding; and

(d)(6) if the petitioner claims entitlement to relief due to newly discovered evidence, the reasons why the evidence could not have been discovered in time for the claim to be addressed in the trial, the appeal, or any previous post-conviction petition.

(e) Attachments to the petition. If available to the petitioner, the petitioner shall attach to the petition:

(e)(1) affidavits, copies of records and other evidence in support of the allegations;

(e)(2) a copy of or a citation to any opinion issued by an appellate court regarding the direct appeal of the petitioner's case;

(e)(3) a copy of the pleadings filed by the petitioner in any prior post-conviction or other civil proceeding that adjudicated the legality of the conviction or sentence; and

(e)(4) a copy of all relevant orders and memoranda of the court.

(f) Memorandum of authorities. The petitioner shall not set forth argument or citations or discuss authorities in the petition, but these may be set out in a separate memorandum, two copies of which shall be filed with the petition.

(g) Assignment. On the filing of the petition, the clerk shall promptly assign and deliver it to the judge who sentenced the petitioner. If the judge who sentenced the petitioner is not available, the clerk shall assign the case in the normal course.

(h)(1) Summary dismissal of claims. The assigned judge shall review the petition, and, if it is apparent to the court that any claim has been adjudicated in a prior proceeding, or if any claim in the petition appears frivolous on its face, the court shall forthwith issue an order dismissing the claim, stating either that the claim has been adjudicated or that the claim is frivolous on its face. The order shall be sent by mail to the petitioner. Proceedings on the claim shall terminate with the entry of the order of dismissal. The order of dismissal need not recite findings of fact or conclusions of law.

(h)(2) A claim is frivolous on its face when, based solely on the allegations contained in the pleadings and attachments, it appears that:

(h)(2)(A) the facts alleged do not support a claim for relief as a matter of law;

(h)(2)(B) the claim has no arguable basis in fact; or

(h)(2)(C) the claim challenges the sentence only and the sentence has expired prior to the filing of the petition.

(h)(3) If a claim is not frivolous on its face but is deficient due to a pleading error or failure to comply with the requirements of this rule, the court shall return a copy of the petition with leave to amend within 20 days. The court may grant one additional 20 day period to amend for good cause shown.

(h)(4) The court shall not review for summary dismissal the initial post-conviction petition in a case where the petitioner is sentenced to death.

(i) Service of petitions. If, on review of the petition, the court concludes that all or part of the petition should not be summarily dismissed, the court shall designate the portions of the petition that are not dismissed and direct the clerk to serve a copy of the petition, attachments and memorandum by mail upon the respondent. If the petition is a challenge to a felony conviction or sentence, the respondent is the state of Utah represented by the Attorney General. In all other cases, the respondent is the governmental entity that prosecuted the petitioner.

(j) Appointment of counsel. The court may appoint counsel under Section 78B-9-109 or Section 78B-9-202.

~~(j)~~ (k) Answer or other response. Within 30 days (plus time allowed under these rules for service by mail) after service of a copy of the petition upon the respondent, or within such other period of time as the court may allow, the respondent shall answer or otherwise respond to the portions of the petition that have not been dismissed and shall serve the answer or other response upon the petitioner in accordance with Rule 5(b). Within 30 days (plus time allowed for service by mail) after service of any motion to dismiss or for summary judgment, the petitioner may respond by memorandum to the motion. No further pleadings or amendments will be permitted unless ordered by the court.

~~(k)~~ (l) Hearings. After pleadings are closed, the court shall promptly set the proceeding for a hearing or otherwise dispose of the case. The court may also order a prehearing conference, but the conference shall not be set so as to delay unreasonably the hearing on the merits of the petition. At the prehearing conference, the court may:

~~(k)(1)~~ (l)(1) consider the formation and simplification of issues;

~~(k)(2)~~ (l)(2) require the parties to identify witnesses and documents; and

~~(k)(3)~~ (l)(3) require the parties to establish the admissibility of evidence expected to be presented at the evidentiary hearing.

~~(l)~~ (m) Presence of the petitioner at hearings. The petitioner shall be present at the prehearing conference if the petitioner is not represented by counsel. The prehearing conference may be conducted by means of telephone or video conferencing. The petitioner shall be present before the court at hearings on dispositive issues but need not otherwise be present in court during the proceeding. The court may conduct any hearing at the correctional facility where the petitioner is confined.

~~(m)~~ (n) Discovery; records. Discovery under Rules 26 through 37 shall be allowed by the court upon motion of a party and a determination that there is good cause to believe that discovery is necessary to provide a party with evidence that is likely to be admissible at an evidentiary hearing. The court may order either the petitioner or the respondent to obtain any relevant transcript or court records.

~~(n)~~ (o) Orders; stay.

~~(n)(1)~~ (o)(1) If the court vacates the original conviction or sentence, it shall enter findings of fact and conclusions of law and an appropriate order. If the petitioner is serving a sentence for a felony conviction, the order shall be stayed for 5 days. Within the stay period, the respondent shall give written notice to the court and the petitioner that the respondent will pursue a new trial, pursue a new sentence, appeal the order, or take no action. Thereafter the stay of the order is governed by these rules and by the Rules of Appellate Procedure.

~~(n)(2)~~ (o)(2) If the respondent fails to provide notice or gives notice that no action will be taken, the stay shall expire and the court shall deliver forthwith to the custodian of the petitioner the order to release the petitioner.

~~(n)(3)~~ (o)(3) If the respondent gives notice that the petitioner will be retried or resentenced, the trial court may enter any supplementary orders as to arraignment, trial, sentencing, custody, bail, discharge, or other matters that may be necessary and proper.

~~(o)~~ (p) Costs. The court may assign the costs of the proceeding, as allowed under Rule 54(d), to any party as it deems appropriate. If the petitioner is indigent, the court

may direct the costs to be paid by the governmental entity that prosecuted the petitioner. If the petitioner is in the custody of the Department of Corrections, Utah Code Title 78A, Chapter 2, Part 3 governs the manner and procedure by which the trial court shall determine the amount, if any, to charge for fees and costs.

~~(p)~~ (q) Appeal. Any final judgment or order entered upon the petition may be appealed to and reviewed by the Court of Appeals or the Supreme Court of Utah in accord with the statutes governing appeals to those courts.

Advisory Committee Notes

Tab 3

Administrative Office of the Courts

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

Daniel J. Becker
State Court Administrator
Raymond H. Wahl
Deputy Court Administrator

MEMORANDUM

To: Civil Procedures Committee
From: Tim Shea
Date: October 19, 2011
Re: Rules 101 and 108

Rules 101 and 108 have been published for comment, and the comments were shared with the committee in May (http://www.utcourts.gov/committees/civproc/materials/2011-05-25.pdf#page=15). The committee made a few further changes and directed me to review the rule with the Executive Committee of the Family Law Section. I have also reviewed the rule with the Board of District Court Judges. The most recent draft shows my recommended further changes after those meetings.

Line 8. Change "quote" to "identify." The change seemed to solve the legitimate concern that the record from which to quote would not be available within the time limit. As long as the other party and the judge have notice of what the nature of the objection is, this should not be a problem.

Lines 23 and 27. Delete "at a hearing de novo." It's been observed that "de novo" implies evidence by examination, which is not always the case in this rule. I believe the phrase is not needed. Paragraph (d) explains when a party has a right to present testimony and when that is within the judge's discretion. Paragraph (f) explains the standard of review.

Line 31. The change is in keeping with the approach that the evidence might be by proffer, testimony or exhibit.

Lines 32 to 39. Paragraph (f). There were strongly held opinions that the judge should give no deference to the commissioner's findings and conclusions. There were some comments that the commissioner should not be making findings and conclusions. I disagree with the latter point, but, if the further amendment is made, the reference simply goes away. The proposed amendment may go a long way to satisfy criticism and should not affect outcomes. The proposed amendment would require independent findings and conclusions in all circumstances, but those findings and conclusions would be based on the record of the commissioner's hearing if there was no hearing before the judge.

Changes not made: Some commentators thought that the parties should have the right at the judge's hearing to present testimony by examination regardless of the issue. Some thought that the parties should be able to present any evidence on any point, even evidence and issues not presented to the commissioner. Some commented that the limits in Rule 7 (which are incorporated by reference) are too short for these topics. One attorney suggested awarding attorney fees to the party prevailing on the objection.

The remaining point of disagreement between the Board and the Executive Committee is that the Executive Committee wants line 18 to read “The judge shall hold a hearing on any objection, if requested.”

Encl. Rule 101. Motion practice before court commissioners.
Rule 108. Objection to court commissioner’s recommendation.

Rule 101. Motion practice before court commissioners.

(a) Written motion required. An application to a court commissioner for an order shall be by motion which, unless made during a hearing, 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.

(b) Time to file and serve. The moving party shall file the motion and attachments with the clerk of the court and obtain a hearing date and time. The moving party shall serve the responding party with the motion and attachments and notice of the hearing at least 14 calendar days before the hearing. A party may file and serve with the motion a memorandum supporting the motion. If service is more than 90 days after the date of entry of the most recent appealable order, service may not be made through counsel.

(c) Response; reply. The responding party shall file and serve the moving party with a response and attachments at least 5 business days before the hearing. A party may file and serve with the response a memorandum opposing the motion. The moving party may file and serve the responding party with a reply and attachments at least 3 business days before the hearing. The reply is limited to responding to matters raised in the response.

(d) Attachments; objection to failure to attach.

(d)(1) As used in this rule “attachments” includes all records, forms, information and affidavits necessary to support the party’s position. Attachments for motions and responses regarding alimony shall include income verification and a financial declaration. Attachments for motions and responses regarding child support and child custody shall include income verification, a financial declaration and a child support worksheet. A financial declaration shall be verified.

(d)(2) If attachments necessary to support the moving party’s position are not served with the motion, the responding party may file and serve an objection to the defect with the response. If attachments necessary to support the responding party’s position are not served with the response, the moving party may file and serve an objection to the defect with the reply. The defect shall be cured within 2 business days after notice of the defect or at least 2 business days before the hearing, whichever is earlier.

(e) Courtesy copy. Parties shall deliver to the court commissioner a courtesy copy of all papers filed with the clerk of the court within the time required for filing with the clerk. The courtesy copy shall state the name of the court commissioner and the date and time of the hearing.

(f) Late filings; sanctions. If a party files or serves papers beyond the time required in subsections (b) or (c), the court commissioner may hold or continue the hearing, reject the papers, impose costs and attorney fees caused by the failure and by the continuance, and impose other sanctions as appropriate.

(g) Counter motion. Opposing a motion is not sufficient to grant relief to the responding party. An application for an order may be raised by counter motion. This rule applies to counter motions except that a counter motion shall be filed and served with the response. The response to the counter motion shall be filed and served no later than the reply. The reply to the response to the counter motion shall be filed and served at least 2 business days before the hearing. A separate notice of hearing on counter motions is not required.

(h) Limit on hearing. The court commissioner shall not hold a hearing on a motion before the deadline for an appearance by the respondent under Rule 12.

(i) Limit on order to show cause. An application to the court for an order to show cause shall be made only for enforcement of an existing order or for sanctions for violating an existing order. An application for an order to show cause must be supported by affidavit or other evidence sufficient to show cause to believe a party has violated a court order.

(j) Motions to judge. The following motions shall be to the judge to whom the case is assigned: motion for alternative service; motion to waive 90-day waiting period; motion to waive divorce education class; motion for leave to withdraw after a case has been certified as ready for trial; and motions in limine. A court may provide that other motions be to the judge.

~~(k) Objection to court commissioner's recommendation. A recommendation of a court commissioner is the order of the court until modified by the court. A party may object to the recommendation by filing an objection in the same manner as filing a motion under Rule 7 within ten days after the 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 is served. A party may respond to the objection in the same manner as responding to a motion.~~

Rule 108. Objection to court commissioner's recommendation.

(a) A recommendation of a court commissioner is the order of the court until modified by the court. A party may file a written objection to the recommendation within 14 days after the recommendation is made in open court or, if the court commissioner takes the matter under advisement, within 14 days after the minute entry of the recommendation is served. A judge's counter-signature on the commissioner's recommendation does not affect the review of an objection.

(b) The objection must ~~quote~~ identify succinctly and with particularity the findings of fact, the conclusions of law, or the part of the recommendation to which the objection is made and state the relief sought. The memorandum in support of the objection must explain succinctly and with particularity why the findings, conclusions, or recommendation are incorrect. The time for filing, length and content of memoranda, affidavits, and request to submit for decision are as stated for motions in Rule 7.

(c) If there has been a substantial change of circumstances since the commissioner's recommendation, the judge may, in the interests of judicial economy, consider new evidence. Otherwise, any evidence, whether by proffer, testimony or exhibit, not presented to the commissioner shall not be presented to the judge.

(d)(1) The judge may hold a hearing on any objection.

(d)(2) If the hearing before the commissioner was held under Utah Code Title 62A, Chapter 15, Part 6, Utah State Hospital and Other Mental Health Facilities, Utah Code Title 78B, Chapter 7, Protective Orders, or on an order to show cause for the enforcement of a judgment, any party has the right, upon request, to present testimony and other evidence on genuine issues of material fact ~~at a hearing de novo~~.

(d)(3) If the hearing before the commissioner was in a domestic relations matter other than a cohabitant abuse protective order, any party has the right, upon request:

(d)(3)(A) to present testimony and other evidence on genuine issues of material fact relevant to custody ~~at a hearing de novo~~; and

(d)(3)(B) to a hearing at which the judge may require testimony or proffers of testimony on genuine issues of material fact relevant to issues other than custody.

(e) If a party does not request a hearing, the judge may hold a hearing or review the record of evidence, ~~or proffered evidence~~ whether by proffer, testimony or exhibit, before the commissioner.

(f) ~~If the judge reviews the record of the evidence or proffered evidence, the judge may affirm the commissioner's findings of fact if there is sufficient evidence to support them. The judge will review conclusions of law for correctness. If the judge holds an evidentiary hearing or is proffered evidence, the~~ The judge will ~~independently~~ make independent findings of fact and conclusions of law based on the evidence, whether by proffer, testimony or exhibit, presented to the judge, or, if there was no hearing before the judge, based on the evidence presented to the commissioner.

Tab 4

Rule 25. Substitution of parties.

(a) Death.

(a)(1) If a party dies and the claim is not thereby extinguished, the court may order substitution of the proper parties. The motion for substitution may be made by any party or by the successors or representatives of the deceased party ~~and, together with the notice of hearing, shall be served on the parties as provided in Rule 5 and upon persons not parties in the manner provided in Rule 4 for the service of a summons~~. Unless the motion for substitution is made not later than ninety days after the death is suggested upon the record by service of a statement of the fact of the death as provided herein for the service of the motion, the action shall be dismissed as to the deceased party.

(a)(2) In the event of the death of one or more of the plaintiffs or of one or more of the defendants in an action in which the right sought to be enforced survives only to the surviving plaintiffs or only against the surviving defendants, the action does not abate. The death shall be suggested upon the record and the action shall proceed in favor of or against the surviving parties.

(b) Incompetency. If a party becomes incompetent, the court upon motion served as provided in Subdivision (a) of this rule may allow the action to be continued by or against his representative.

(c) Transfer of interest. In case of any transfer of interest, the action may be continued by or against the original party, unless the court upon motion directs the person to whom the interest is transferred to be substituted in the action or joined with the original party. Service of the motion shall be made as provided in Subdivision (a) of this rule.

(d) Public officers; death or separation from office. When a public officer is a party to an action and during its pendency dies, resigns, or otherwise ceases to hold office, the action may be continued and maintained by or against his successor, if within 6 months after the successor takes office, it is satisfactorily shown to the court that there is a substantial need for so continuing and maintaining it. Substitution pursuant to this rule may be made when it is shown by supplemental pleading that the successor of an officer adopts or continues or threatens to adopt or continue the action of his

predecessor. Before a substitution is made, the party or officer to be affected, unless expressly assenting thereto, shall be given reasonable notice of the application therefor and accorded an opportunity to object.

Tab 5

Rule 5. Service and filing of pleadings and other papers.

(a) Service: When required.

(a)(1) Except as otherwise provided in these rules or as otherwise directed by the court, every judgment, every order required by its terms to be served, every pleading subsequent to the original complaint, every paper relating to discovery, every written motion other than one heard ex parte, and every written notice, appearance, demand, offer of judgment, and similar paper shall be served upon each of the parties.

(a)(2) No service need be made on parties in default except that:

(a)(2)(A) a party in default shall be served as ordered by the court;

(a)(2)(B) a party in default for any reason other than for failure to appear shall be served with all pleadings and papers;

(a)(2)(C) a party in default for any reason shall be served with notice of any hearing necessary to determine the amount of damages to be entered against the defaulting party;

(a)(2)(D) a party in default for any reason shall be served with notice of entry of judgment under Rule 58A(d); and

(a)(2)(E) pleadings asserting new or additional claims for relief against a party in default for any reason shall be served in the manner provided for service of summons in Rule 4.

(a)(3) In an action begun by seizure of property, in which no person is named as defendant, any service required to be made prior to the filing of an answer, claim or appearance shall be made upon the person having custody or possession of the property at the time of its seizure.

(b) Service: How made.

(b)(1) If a party is represented by an attorney, service shall be made upon the attorney unless service upon the party is ordered by the court. If an attorney has filed a Notice of Limited Appearance under Rule 75 and the papers being served relate to a matter within the scope of the Notice, service shall be made upon the attorney and the party.

(b)(1)(A) If a hearing is scheduled 5 days or less from the date of service, the party shall use the method most likely to give prompt actual notice of the hearing. Otherwise, a party shall serve a paper under this rule:

(b)(1)(A)(i) upon any person with an electronic filing account who is a party or attorney in the case by submitting the paper for electronic filing;

(b)(1)(A)(ii) by sending it by email to the person's last known email address if that person has agreed to accept service by email;

(b)(1)(A)(iii) by faxing it to the person's last known fax number if that person has agreed to accept service by fax;

(b)(1)(A)(iv) by mailing it to the person's last known address;

(b)(1)(A)(v) by handing it to the person;

(b)(1)(A)(vi) by leaving it at the person's office with a person in charge or leaving it in a receptacle intended for receiving deliveries or in a conspicuous place; or

(b)(1)(A)(vii) by leaving it at the person's dwelling house or usual place of abode with a person of suitable age and discretion then residing therein.

(b)(1)(B) Service by mail, email or fax is complete upon sending. Service by electronic means is not effective if the party making service learns that the attempted service did not reach the person to be served.

(b)(2) Unless otherwise directed by the court:

(b)(2)(A) an order signed by the court and required by its terms to be served or a judgment signed by the court shall be served by the party preparing it;

(b)(2)(B) every other pleading or paper required by this rule to be served shall be served by the party preparing it; and

(b)(2)(C) an order or judgment prepared by the court shall be served by the court.

(c) Service: Numerous defendants. In any action in which there is an unusually large number of defendants, the court, upon motion or of its own initiative, may order that service of the pleadings of the defendants and replies thereto need not be made as between the defendants and that any cross-claim, counterclaim, or matter constituting an avoidance or affirmative defense contained therein shall be deemed to be denied or avoided by all other parties and that the filing of any such pleading and service thereof

upon the plaintiff constitutes notice of it to the parties. A copy of every such order shall be served upon the parties in such manner and form as the court directs.

(d) Filing. All papers after the complaint required to be served upon a party shall be filed with the court either before or within a reasonable time after service. The papers shall be accompanied by a certificate of service showing the date and manner of service completed by the person effecting service. Rule ~~26(i)~~ 26(f) governs the filing of papers related to discovery.

(e) Filing with the court defined. A party may file with the clerk of court using any means of delivery permitted by the court. The court may require parties to file electronically with an electronic filing account. Filing is complete upon the earliest of acceptance by the electronic filing system, the clerk of court or the judge. The filing date shall be noted on the paper.

Advisory Committee Notes

Tab 6

Administrative Office of the Courts

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

Daniel J. Becker
State Court Administrator
Raymond H. Wahl
Deputy Court Administrator

MEMORANDUM

To: Civil Procedures Committee
From: Tim Shea
Date: October 19, 2011
Re: Blog page for disclosure and discovery discussions

Some committee members have raised the possibility of a webpage for discussions about disclosure and discovery matters. The district court judges have raised the possibility of publishing their rulings on disclosure and discovery motions. Both are feasible.

We could put the district court decisions into the same publication stream as appellate opinions. I'm told that this is a labor intensive process, and it would require the cooperation of publishers like Westlaw and LexisNexis and Casemaker. The distribution is very broad, but the limited number of opinions may not justify the effort.

Another option is to self-publish the decisions on the court's website. Such an effort would look more like the district court tax decisions, which are published at: http://www.utcourts.gov/courts/dist/tax/. The decisions would be available to any who want them, but obviously the research capabilities of Westlaw and LexisNexis and Casemaker are not available.

Both publication efforts require that the district court judges email me their discovery decisions. I have heard this referred to as "shaking the trees."

There are also two options for a discussion blog. The first is the typical blog conversation string. Someone posts a question or an opinion on any topic and anyone can respond to it. But we would make certain that a committee member responded as well. Those strings can get out of hand because there is so much noise back and forth that a reasoned opinion can get lost. And I know from processing the comments to rules that I would have to wade through a lot of irrelevant posts in order to find and publish those that are relevant.

The other option is to publish a series of short articles by committee members. Cullen has suggested some topics, but there is no limit to what could be published. From Cullen's email:

1. Rule 8(a). What if a plaintiff pleads into Tier 1 and then the defendant's counterclaim bumps the case in to Tier 2? Is the plaintiff still limited to Tier 1 damages? My initial reaction was no, it's now a tier two case, and the plaintiff is limited to tier 2 damages. But Rule 8(a) can be read differently: "A pleading that qualifies for tier 1 or tier 2 discovery shall constitute a waiver of any right to recover damages above the tier limits specified in Rule 26(c)(3), unless the pleading is amended under Rule 15." This language seems to focus on what the pleading qualifies for, not what the case qualifies for. Is that what we intended?

2. Rule 26(a)(4)(C)(i). What if a plaintiff discloses his expert at the very outset of the case? Is the opposing party's report/depo election due seven days the disclosure, or fourteen days after the close of fact discovery. It comes down to the meaning of "thereafter." Is it seven days after the actual disclosure, or seven days after the last possible date for disclosure? Note: forcing a defendant to elect before he knows anything about the case seems like a bad idea.

3. Rule 26(a)(2). What if the defendant files a 12(b)(6) motion on claims 1 and 2 , and an answer on claims 3 and 4. Are disclosures due immediately on claims 1 and 2, or do they wait for the motion to be resolved. It seems to me that they ought to wait for the motion, but it's hard to read the rule that way. I think this was an issue under the old rules, too.

We could turn the comment feature on or off thereby allowing--or not--judges and lawyers to weigh in on an article. Again, turning the comment feature on poses some risks. The articles would have to abide by any rulings that we know of. And we may have to backtrack if a future ruling is contrary to a previous post.

Using blog technology to allow the committee to write articles about the rules is something that has never been done before, so it would be wise to sound out the supreme court before proceeding.