UTAH SUPREME COURT ADVISORY COMMITTEE ON RULES OF CIVIL PROCEDURE

Meeting Minutes – December 16, 2015

Present:	Judge Toomey, James Hunnicutt, Kent Holmberg, Barbara Townsend, Leslie Slaugh, Judge Blanch, Paul Stancil, Judge Furse, Judge Pullan, Lincoln Davies, Amber Mettler, Rod Andreason, Jonathan Hafen
Telephone:	Terri McIntosh
Staff:	Timothy M. Shea, Heather M. Sneddon, Nancy Sylvester
Not Present:	Steve Marsden, Sammi Anderson, Judge Baxter, Lori Woffinden, Judge Anderson, Trystan Smith, Scott Bell
Guests:	James H. Deans, Kirk Cullimore, Mary Jane Ciccarello, Martin Blaustein, Jacob Kent

I. Welcome and approval of minutes. [Tab 1]

Jonathan Hafen welcomed the committee and guests, and invited a motion to approve the November minutes. Judge Blanch moved to approve the minutes, and Judge Toomey seconded. The motion carried unanimously.

II. Rule 26.3. Disclosure in forcible entry and detainer actions. [Tab 2]

Mr. Hafen invited the committee's guests to address proposed Rule 26.3. James H. Deans thanked the committee for the opportunity to address the proposed rule and confirmed the circulation of his materials to the committee. He reported that there is some confusion regarding where evictions fit into Rule 26. In his experience, there are an enormous number of pro se tenants. Thanks to the forms provided to landlords, roughly 10% of landlords are also pro se. The lowest common denominator should be that the landlord attaches the rental agreement and 3 day notice to the complaint. In a sense, those are initial disclosures. The tenant responds, but if a hearing is set within 10 days as is normally the case, there is not enough time for the tenant to exchange documents. The tenant comes to the hearing, and the judge's job at that hearing is to determine possession. Documents are not exchanged. If there are issues that remain for trial following the hearing, he proposes that the Rule 26 requirements be merged into pretrial disclosures to be exchanged 14 days before trial. That allows him to know what the tenant is going to bring in terms of exhibits and witnesses, and also permits the trial to occur within the statutory time frame.

Kirk Cullimore reported that his office files roughly 350 eviction cases per month. Out of every 100 eviction cases he files, about 70% result in defaults. Of the 30% who respond, over half of those are tenants who admit they owe money but seek more time to pay. In his experience, only 10-12 cases out of every 100 present a real dispute. And of those, less than 50% show up at the hearing. Thus, he has only 3-5 cases per month where there is actually a dispute that requires an evidentiary hearing, and those cases typically involve whether rent has been paid. Mr. Cullimore has been in front of most judges in state, and in his experience, if tenants can present evidence that rent has been paid, the landlord is typically sent back to the table to deal with it. Mr. Cullimore is concerned that requiring upfront disclosures simply increases costs and paperwork for landlords and the court when 99% of eviction cases

do not present any real issue. That said, he recognizes that tenants in the remaining 1% of cases need some protection. He proposes, as is consistent with his office's practice, that landlords include both a copy of the lease agreement and the notice with service of the complaint and summons. If an answer is filed wherein the tenant raises a legitimate defense, the landlord should have an obligation to provide additional documents. In other words, the tenant should be required to do something before the landlord is required to do more. That reduces the increased burden of disclosures from 100% of cases down to roughly 20% of cases. On a pay or vacate matter, there is no hearing unless requested. The tenant could include documents with the request. Cases alleging criminal activity are more problematic, but from a legal standpoint, these cases require a fast pace because the landlord has a higher need to resolve criminal activity issues quickly. And oftentimes, those cases rely solely on testimony, not documents. Even so, he does not file complaints that reference only "criminal activity"—he wants to give notice of the activity at issue. His concern is that we are creating a rule for a very small percentage of cases. He agrees that the lease agreement and notice can be provided with the summons and complaint. An itemized calculation of damages is more difficult—he is unsure whether that can be provided so early. Judge Pullan asked whether the landlord could provide a calculation of rent past due. Mr. Cullimore said he could.

Mary Jane Ciccarello addressed the committee, and explained that she directs the self-help center of the court and deals with pro se litigants all the time, including plaintiffs and defendants in eviction actions. For fiscal year 2015, eviction actions were among the top 3 case filing types at approximately 7,500. Both sides are represented in only 4% of cases. Tenants are self-represented in 96% of cases. With respect to defaults, she raised the issue of "false defaults"—i.e., when tenants simply have no idea what's going on and they drop out despite having a legitimate defense. And eviction actions have a huge impact on tenants. They may be dealing with non-payment, but in her experience, it is more often complicated family issues. Her staff attorneys reported that having landlords provide, as many do, a copy of the lease and notice actually served with the complaint, is helpful. In her experience, pro se landlords often serve multiple copies of the notices, so tenants do not know which notice to respond to. OCAP doesn't calculate the rent due or treble damages in the complaint, so it would be nice if that was in there. The notice generated in OCAP does put in rent due and any late fees. In the minutes from the last meeting, Judge Toomey had suggested adopting a standard complaint form. OCAP is moving people to a standard complaint form, and if this rule were in place, she believes landlords would be more specific in complaints, particularly in response to Judge Pullan's comments. With respect to the burden on landlords, she reported that pro se landlords are already burdened with some pre-filing information, including military service declarations and orders (which are very burdensome to prepare, as SSN and DOB are needed), which many courts require to be filed with the complaint. Requiring landlords to serve with the complaint a copy of the lease agreement and the notice actually served on the tenant, and to provide a calculation of past due rent, would help landlords get organized and would also give tenants some real information to go on in completing a good answer. Ledgers are probably too onerous, and most pro se tenants won't know what a ledger is anyway. She is also concerned about any requirement that other complaints about the tenant be filed, as that information would then be part of the public record and it may be damaging to the pro se tenant.

Martin Blaustein responded that, under the current rules, tenants may be held responsible for treble damages but the landlord has no obligation to spell out the specifics of the debt owed in the complaint. Many cases are simple, but many are not. Eviction cases are akin to strict liability for treble damages against tenants; landlords should not be heard to complain about providing more specific information in and with their complaints to establish their entitlement to those damages. Leslie Slaugh asked whether it would be sufficient for the landlord to provide disclosures at the time the tenant requests a hearing. Mr. Blaustein thinks it should be done at the time of the complaint because the evidentiary hearing can turn into a trial. Thus, the fight in these cases occurs within the first ten days. Judge Blanch

commented that we don't have disclosure requirements that accompany the filing of a complaint in any other type of action. Our notice pleading regime arguably results in complaints that omit critical information. But all a tenant must do to place something at issue is file an answer. Then an evidentiary hearing is conducted, and if a disclosure requirement kicks in at that point, we're talking about a much smaller category of cases. That would protect defendants across the board on the default rule—that a verified complaint or affidavit be filed before default is entered. If this obligation is imposed contemporaneously with the filing of the complaint, an inordinate burden is placed on landlords and tenants do not benefit that much. Instead, we could change the pleading rule to require more detail for complaints of this type (and most that he sees include these details). If those details are required by rule, affidavits are required for the entry of default, and a disclosure requirement is imposed when a request for hearing is made, he believes that would provide the protection that Mr. Blaustein seeks without imposing an overwhelming burden of requiring disclosures with every complaint. Mr. Blaustein responded that he sees disclosures at the time of the complaint filing as a Rule 11 issue. The landlord is making an allegation that a certain amount is owed, counsel should investigate that amount and the landlord should have records and be able to provide evidence of that amount. Judge Blanch asked whether something short of a disclosure requirement at the time of filing, such as more specificity in the complaint (achieved perhaps through an amendment to Rule 8), plus a disclosure requirement when a hearing is requested, would achieve the same thing. Mr. Blaustein said that, at the time of the notice for hearing, you may have only a week. If a tenant knows he/she had an obligation but paid by money order, and the landlord claims he/she never received it, the tenant has to get verification from the maker which often takes 30 days. He has had a situation where a tenant has lost possession because the tenant could not prove payment by money order in a timely fashion.

Jacob Kent addressed the committee and supported the production of a ledger by the landlord. He explained that many times the landlord's accounting is at issue, i.e., whether rent for a particular month has been properly applied to fees owing from a previous time period. The sooner a tenant receives a ledger, the sooner a tenant can determine what kind of defense he/she really has. Judge Pullan asked whether Mr. Kent supported the production of the ledger at the time of the complaint or the time of the hearing. Mr. Kent preferred the time of the complaint, as it would help the tenant prepare an answer. The tenant has only 3 days to answer and does not have the luxury of figuring out possible defenses based upon unknown accounting errors of the landlord. Judge Blanch noted that if a tenant needs 30 days to get the evidence he/she needs, won't the hearing be long over? Mr. Kent said that issue may not be resolved, but producing the ledger will assist tenants in other cases where an amount is alleged to be owed but the tenant can see from the ledger that the landlord inappropriately applied a rent check to illegitimate fees. Mr. Hafen raised the issue of ledger formats—ledgers are not kept in any uniform fashion and it may be difficult for pro se tenants to understand them. How helpful are they? Mr. Kent said that it depends on how the ledger was prepared, but something is better than nothing. Judge Toomey questioned whether a ledger is really necessary, as other specific information is more easily produced. Mr. Kent reiterated the importance of a ledger to show what was paid and when, and how the money was applied. James Hunnicutt asked whether "ledger" is a defined term, to which Mr. Kent responded that it is not. Kent Holmberg suggested the use of "accounting," which is a term of art. Mr. Hunnicutt asked whether there is a form that could be added to OCAP that would accomplish this. Ms. Ciccarello responded that the OCAP forms do not perform that kind of calculation. Mr. Shea cautioned the committee against generalizing about the good practices of Messrs. Deans and Cullimore, as there are a lot of eviction complaints that do not provide anywhere near the same level of information. He also noted that the difficulty with the OCAP forms is that, although we encourage people to use those forms, nothing mandates that they be used.

Mr. Cullimore explained that under the unlawful detainer statute, when a 3-day notice is served, landlords must strictly adhere to the requirements. The notice says what is owed. Tenants then have 3

days to talk with the landlord and discuss what is owed. If the amount on the 3-day notice is too high, then the notice is invalid and the landlord has to start the lawsuit over again. Thus, landlords already have an incentive to plug in accurate numbers. Lincoln Davies asked how difficult it is to put an accounting in the complaint on what is due and why. Leslie Slaugh added that the complaint should at least specify for which months' rent hasn't been paid. Mr. Cullimore said that a ledger is only helpful when put in contest. Mr. Slaugh responded that a tenant doesn't know whether to contest it if they don't have the information up front. Most have a good idea, but some aren't sure which months were not paid. Mr. Cullimore said that he recognizes the threat of treble damages, but the evidentiary hearing is only on occupancy. Mr. Slaugh noted that once occupancy is determined, the motivation to continue fighting changes if the tenant loses. Mr. Cullimore said that the legislative intent was for this process to be quick. He has no problem with providing more detail in the complaint regarding what is owed, but if the entirety of a ledger must be disclosed, a complaint could be many pages long detailing several months of back rent, late fees, utility fees, etc., which is unnecessary at that point in the litigation. If the tenant files an answer, then the landlord can produce a ledger. Mr. Blaustein commented that landlords don't have to start over if the notice is defective; judges are just looking at whether a debt is owed at the evidentiary hearing, and if a debt is owed, the tenant loses possession. The initial notice is critical for the tenant to know how the landlord came to the amount that is allegedly owed. Once the notice goes out, landlords do not negotiate because they have an opportunity to get treble damages. Judge Furse noted that nothing the committee does will have an effect on what happens with the notice.

Mr. Hafen thanked the guests for their input.

Committee discussion:

- Mr. Hafen said the issues to decide are both the timing of any disclosures and their substance. Mr. Slaugh said that at least a detailed calculation of rent should be included in the complaint. Judge Toomey noted that would require a modification to Rule 8. Mr. Hafen said it could go in the complaint or in a disclosure with the complaint. Judge Pullan said that he is reluctant to mess with the pleading standard. Mr. Slaugh said that he does not have a preference for how it is done, but an upfront landlord communication on how the calculation has been done is necessary.

- Mr. Hafen asked whether the disclosure should go with the complaint or notice of hearing. Judge Blanch responded that he preferred the notice of hearing stage because of the number of tenants who default. Although he sympathizes with tenants, he will treat anything as an answer. And only then do you have evidence submitted to the court. That seems like the right time to exchange information. He also likes the idea of the complaint including more information than Rule 8. It could be accomplished through 9—pleading special matters. Another subparagraph could be added to the rule to describe the level of detail that better practitioners already include in their complaints. Mr. Hafen commented that if we're looking at Rule 26.3(b)(3), that information could be incorporated into Rule 9, as it is not necessarily evidence. But rental agreements, ledgers, and notice are evidence.

- Judge Furse noted that Rule 26.3(b)(3) is a classic Rule 26(a)(1) calculation of damages disclosure. Judge Blanch noted that in the ordinary case, those are not provided until after the answer is filed. Judge Furse said that the damages disclosure should come with the complaint in eviction actions because the landlord has already done that calculation. It may not need to be as extensive as in the proposed rule, but the basic calculation has been performed. She would also add "known at the time of filing" to that subparagraph, as many

types of damages continue to accrue post-filing. Judge Blanch agreed that the damages calculation should be furnished at the time of the complaint. Rather than a disclosure obligation, however, he favored a Rule 9 pleading obligation. Mr. Shea said that, in essence, that should be doable. The effect on the plaintiff petitioner is probably the same. Both items (b)(1) and (b)(3) are classic initial disclosure items, and accelerating the time when they are provided makes sense. Mr. Shea expressed concern about whether to include them in the complaint, however, given Ms. Ciccarello's astute observation that such information becomes part of the public record. Allegations regarding criminal misconduct could be particularly damaging. Judge Furse said that she is reluctant to use Rule 9 to address this issue, as it, along with Rule 8, is a much more substantive rule with very clear goals. We may receive more pushback if we attempt to modify Rule 9 and potentially create a heightened pleading standard in eviction cases. There may be less of a political reaction if the change is made through accelerated disclosures.

- Judge Blanch said it seemed odd to have one category of cases with an inordinate amount of defaults and to impose accelerated disclosures and more detailed complaint requirements in those cases. Judge Pullan questioned how hard it really is to itemize damages. Judge Blanch agreed that an itemization of damages should be done through Rule 9, as these actions are unique to state court. Mr. Shea cautioned the committee against drawing generalized conclusions about what people are doing. Although tenants are defaulting at a high rate, those defaults are occurring without information. They may react differently if more information is provided upfront by landlords. Paul Stancil asked what amounts to an inordinate burden on landlords, and at what point we think in terms of protecting a discrete minority. He discussed his personal and family experience with landlords and ledgers. If the change occurs in the pleading standard, the damages information is just in the complaint. The evidence is not seen. It is hard to balance the costs on plaintiffs, but he is concerned about the pleading standard as there is something different about the nature of these cases. The 3-day notice and the evidentiary hearing on possession drive the entire case. Judge Blanch agreed, and recognized that these cases have a huge impact after possession is decided. These cases proceed so quickly that the difference in the timing of the disclosures, whether with the complaint or when a request for hearing is made, is only a matter of days. If he thought that giving more information upfront would change the default rate, he might change his mind. Otherwise, he thinks we should require a more detailed calculation of damages in the complaint, and then impose a requirement for accelerated disclosures only if the tenant files an answer.

- Judge Furse suggested disclosure up front, but minimizing the burden of the disclosure at that time. For example, only include the lease agreement, eviction notice, and an itemized calculation of rent at the time of filing, and then an explanation for the factual basis for eviction and a list of witnesses at the occupancy hearing if there is one. She would not require the remaining disclosures. Instead, she would impose an obligation on the tenant to provide a short explanation of the defenses they have and their witnesses no later than 2 days before the hearing. Mr. Slaugh asked why this information shouldn't be shared at the time of the tenant's answer. From a pro se standpoint, it may be easier to include that information in a single document—the answer—rather than ask pro se tenants to prepare a separate document with the disclosure information. Judge Pullan suggested having the landlord include an itemized calculation of rent, damages, costs and attorneys' fees known at the time of the complaint, as he does not believe that is too burdensome, and then have the tenant include the disclosures proposed by Judge Furse at the time of the answer. He believes too

much mischief is created by the term "ledgers." He believes we mean an accounting, but that is too burdensome at the beginning of a case. Thus, he is in favor of the disclosures in Rule 26.3(b)(1), (2), (3), and (7) being provided with the complaint, and the information in (b)(6) being provided once a request for hearing is made. He would not require the information in (b)(4) or (5) to be provided.

- Judge Furse commented that whatever we do, the tenant needs to be notified of his/her obligation. If the tenant's disclosures are to be provided at the time of the answer, we should make it clear that changes to those disclosures before the hearing are okay. For example, if there is no hearing date yet and a party learns that someone cannot appear when the date is set, we don't want to hold people to the same standards as we would for a normal trial given the short time frames. Judge Hafen commented that if we have two disclosure stages for the landlord, perhaps we adopt two stages for the tenant as well, i.e., disclosures at the time of the complaint and the answer, and additional disclosures two days before the hearing.

- Lincoln Davies expressed his support for the inclusion of a specific damage calculation in the complaint. The advantage is that the damages are then subject to Rule 11, which holds the landlord to a higher standard and strikes the balance between efficiency and justice. Mr. Hafen suggested that the committee consider a mocked up version of Rule 9 to see what it might look like if we required an itemized damage calculation in eviction actions. Judge Blanch commented that if the calculation is in the complaint, it creates an obligation, and the tenant would have to either admit or deny the amount alleged to be owed in the answer. Amber Mettler asked whether the committee may change the contents of a complaint if the statute specifically sets forth what it must contain. Mr. Hafen said the committee needs to look at that. In addition, he suggested that the committee consider a competing proposal that the damage calculation be provided through a separate disclosure. Judge Toomey endorsed the approach of considering competing proposals on the issue. Judge Furse noted that while drafting, we should be attuned to how Rule 6(c) might affect what we do on this issue. Mr. Shea asked for clarification on the competing proposals, and Mr. Hafen responded that the committee would like to see what Judges Furse and Pullan have recommended, and then competing proposals for the Rule 26.3(b)(3) information to be included with disclosures at the time of the complaint or incorporated into the complaint through an amendment to Rule 9. Mr. Shea will also research the issue concerning the content of the complaint, and the proposals will be reviewed next month. Mr. Slaugh so moved and Mr. Davies seconded. The motion carried unanimously.

III. Nancy Sylvester.

Jonathan Hafen announced that Tim Shea is leaving our committee. He has served on the committee for 20 years, and we will find an appropriate way to recognize him at a future meeting. We are looking forward to Nancy Sylvester filling his shoes. Mr. Shea will continue to help with the transition until Ms. Sylvester is comfortable. Mr. Hafen noted Justice Durrant's compliment that Mr. Shea has done more to shape the civil procedure rules in the last 20 years than anyone else. He will continue to be a resource to us. Judge Toomey said that she has had occasion to work with Ms. Sylvester over the last year and has every confidence that she will learn quickly and work hard.

IV. Rule 6. Time. [Extra materials]

Mr. Shea reported that a difficulty has arisen with respect to Rule 6 given the changes we made to Rule 7. Rule 6 has long provided 3 extra days to respond to some triggering event if service was by mail. When we changed Rule 7 to say that the responding party must do something (usually file an opposing memorandum or reply), we used the date that the document is filed to trigger the responding event. Thus, the 3-day mailing provision in Rule 6 is not invoked because the triggering event is the filing date, not the service date. Self-represented parties have expressed some concern about this issue. If we give 7-14 days to a lawyer who was served simultaneously with the filing, we're taking 3 days off the table for pro se parties. They don't even know about the filing until 3 days later when the mail arrives.

Discussion:

- Mr. Slaugh noted that Rule 5 currently allows service by email upon agreement. Mr. Shea responded that a self-represented party has to agree to receive notice by email, and they could refuse. And even if they agree, it is still optional; other methods of service are still available. Mr. Slaugh questioned whether we should change Rule 6 to say that if a self-represented party requests service by email, it is then mandatory? That would cure the problem. He would hate to go back and change Rules 6 and 7.

- Ms. Mettler asked when this is happening, as she always gives 3 extra days when service has been accomplished by mail. Barbara Townsend commented that practically speaking, that is how it works. Mr. Shea responded that a technical reading of the rule eliminates the 3 days because the "if" clause doesn't apply. Judge Furse said that prisoners would be a significant category of people who cannot be served by email. Mr. Shea said that if Rule 6(c) is quickly amended and published, the change would catch up and we could make the amendment effective on May 1 with everything else. However, he questioned whether a change to Rule 6 was the best vehicle for accomplishing the fix. He believes the best vehicle is to change Rule 7 back to a service date rather than a filing date, although he hates to make that change since our amendments to Rule 7 were such a big deal. This issue is an unexpected repercussion of that decision, however.

- Mr. Holmberg commented that the State has significant pro se litigation in different areas, and has been operating under the assumption that if a pro se party is served by mail, 3 days are always added to the response time. Therefore, this does not represent a change in practice. Mr. Hafen said that the fix is to make practice comply with the rule. Mr. Shea also commented that he suspects most courts are generous when it comes to the back end of these deadlines. Ms. Mettler suggested that we consider giving 3 days to everyone for mailing, like the federal courts do. Mr. Townsend asked whether there was any downside to making this change in Rule 6, as opposed to Rule 7. Mr. Slaugh commented that, although Rule 6 doesn't govern appeals, it may trip someone up on filing a notice of appeal—e.g., if a judgment was served by mail, are 3 extra days added for the appeal? The same issue exists for motions for new trial. We need to look at how this might impact other rules. Mr. Shea agreed that the Rule 6 change would have that effect. Judge Pullan noted that people would assume they have 3 extra days when in fact they don't. Mr. Hafen asked Mr. Slaugh whether he thought the cleaner fix is to Rule 7. Mr. Slaugh said yes, it would be cleaner, although distasteful. Judge Pullan asked if there was anything wrong with allowing the 3 days. Mr. Slaugh noted that it is simply trickier to calculate. One party will have one deadline, and another will have a different deadline, depending on the type of service. Mr. Shea commented that responding to a motion is substantively different from filing a motion after the entry of judgment. And he is convinced, based on Mr. Slaugh's comments, that further

amendment to Rule 6 is not the way to go. Mr. Hafen asked whether we have enough time to fix Rule 7 and have it go out for comment with the rest of the rules. Mr. Shea commented that if the general practice is to allow the 3 days, perhaps the committee should leave Rule 7 and amend it in due course. Mr. Hafen proposed looking at the option of Rule 7 or something else in due course.

V. Rule 4. Process. Service on a defendant before trial if at least one defendant is timely served.

Kent Holmberg reported that the Supreme Court had asked the committee to review Rule 4 and the subparagraph providing that, once a plaintiff serves one defendant, the plaintiff may take up until the time of trial to serve any remaining defendants. He, Steve Marsden and Judge Blanch reviewed the issue, and polled surrounding states and federal courts. They could not find any other jurisdiction that puts defendants in two separate classes like this. Idaho is 6 months. Colorado is 62 days. Other states are pretty similar to the federal court, i.e., if you can't serve a defendant, upon motion of any party or the court's own motion, the remaining defendants can be dismissed or extra time to serve or service by publication may be allowed. In terms of practice, if a defendant is brought into a case that has been going on for over a year, you have to decide whether to retake depositions, revisit the schedule, etc. There is prejudice there. If there is no incentive for the plaintiff to move forward, the plaintiff won't. Accordingly, the subcommittee's recommendation is to go to 120 days, similar to what other jurisdictions are doing.

Discussion:

- Mr. Shea asked what the requirement would be. The plaintiff has to serve all defendants within 120 days, file a motion for more time to complete service, or something else? Mr. Holmberg responded that under the existing rule, the court may allow a longer time for service for good cause shown. If service is not timely, the defendant will be dismissed without prejudice. The same language could apply to all defendants instead of just the first defendant. Therefore, he proposes to simply delete that sentence. Mr. Shea asked whether a plaintiff may file a motion for more time to serve after the 120 day deadline. Mr. Holmberg answered yes, so long as there had been no dismissal. Judge Furse commented that she typically looks at Rule 6 and whether excusable neglect has been shown. If the plaintiff can articulate it, more time is given. Before she would dismiss, however, she would typically do an order to show cause. Mr. Shea said that is the practice in the Third District as well.

- Ms. Mettler asked whether the state court system is able to determine if one or more defendants have not been served and kick out a notice to show cause. Mr. Shea responded that he doesn't know whether the system can tie proof of service to a particular defendant. Mr. Holmberg commented that if dismissal is not automatic, the issue of dismissal could still be raised at some point during the litigation. In other states, that is what generally what happens. Judge Furse said that the federal rule requires dismissal unless service is achieved, but it is not followed exactly.

- Judge Pullan asked whether there was any sense in staying with the federal rule of 90 days. Mr. Holmberg responded that Judge Blanch strongly preferred 120 days, as the case load in state court is different. Mr. Slaugh commented that he has seen long periods when defendants are out of the country. Judge Furse said that oftentimes plaintiffs seek to obtain judgment from the first defendant and, if not successful, to go after the others. Judge Toomey said that she believes the plaintiff could come into court with a motion in those situations, but in the average case, she is not sure 120 days is needed. Mr. Hafen asked for a straw poll

on the committee regarding 90 or 120 days, and most preferred 90 days. Mr. Hunnicutt mentioned that in family law cases, divorces cannot be finalized for 90 days after filing. So oftentimes, the other side is not served during those 90 days and the parties work on a settlement. Once a deal is reached, and the 90 day mark passes, the parties can file the settlement and be done, and never worry about actual service. Mr. Davies expressed his concern regarding cases with many defendants, some of whom may be hard to find. Judge Toomey said that the plaintiff could always seek to enlarge the time in those cases. Mr. Shea commented that, other than the federal rule, no one has raised the 120 day issue. The only issue is whether serving someone immediately before trial is okay. Mr. Hafen said that, based on the straw poll, the proposed rule should say 90 days and we'll discuss whether to stay with 90 or go with 120 and await Judge Blanch's input.

VI. Rule 64. Writs in general.

Mr. Shea reported that Mr. Slaugh has convinced him there will never be a circumstance in which two garnishments would be effective simultaneously because the first will always reach the limit. Judge Furse suggested that we ask Angelina Tsu how this may have come about. Mr. Hafen asked whether there was any reason to amend, absent something from Ms. Tsu. Mr. Shea responded no, unless we change "shall" to "must."

VII. Rules 12, 13 and 15.

Mr. Shea reported that Rules 13 and 15 are ready to send out for comment. He did perform some additional research on subsections (i) and (j) per our last meeting. He is reluctant to disturb sleeping ghosts, but these subsections are not used very frequently. With respect to page 31, lines 45-55, no one could think of a purpose for it. The only reason Mr. Shea can think of as to why these subsections should not be removed is that they are old. Mr. Hafen asked why we should have stuff in the rules with no purpose. Judge Furse said it is a headache to leave it in. Mr. Holmberg commented that in the case where the subsections were cited, the judge determined they did not apply. Judge Toomey moved to remove subsections (i) and (j). Ms. Townsend seconded. The motion carried unanimously.

Mr. Shea said that the Rule 15 amendments are largely in response to an opinion by Judge Voros. Other amendments are to adopt the style and grammar changes from the federal rules. He does not believe further amendments were made after the last meeting, but no motion to approve the rule was made. Judge Toomey moved to send Rules 13 and 15 out for comment. Paul Stancil seconded. The motion carried unanimously.

VIII. Review of changes to federal rules of civil procedure.

Paul Stancil reported that the latest federal rule amendments are probably the most controversial since 1993. He quickly gave a summary of the rule amendments, which fall into three categories: (1) case management; (2) discovery process; and (3) cleanup.

With respect to case management and the waiver of service of process, Mr. Stancil explained that the federal rules have moved the form from Rules 5 and 6 into Rule 4. Not much has changed, except that service must be accomplished in 90 days instead of 120. Real estate condemnation actions are exempted. The amendments also eliminate the different forms of scheduling conferences. He believes it was intended that federal judges have these conferences in person, but he does not believe the rule requires that. He expects we will see a wide variation in practice with some judges having conferences

telephonically or otherwise. Judge Furse agrees. Paul said that a big change concerns electronically stored information. There was a deliberate decision to discuss and embrace the preservation of data, not simply for production and the costs and burdens associated with that, but also to expand judges' power to order preservation as part of a scheduling order.

With respect to discovery, Mr. Stancil said the federal rule amendments are adopting the proportionality standard from Utah. Burden-shifting and proportionality become part of what is relevant and not relevant. Mr. Hafen asked how many other states have adopted Utah's approach, and Mr. Stancil said not many. Mr. Hafen said that what we've done has been good for the practice in Utah and he is curious whether it has had any influence nationally. The federal rules seem to suggest that it has, and Judge Pullan has testified to these folks. Judge Pullan commented that Utah gave great comfort to the federal rules committee that this was doable. Denver has a Rule 1 initiative and is keeping track of discovery rule changes in various states. Judge Toomey said that the evaluation we received was positive. Mr. Stancil reported that we will no longer see "reasonably calculated to lead to the discovery of admissible evidence" in the federal rules. We will have to wait and see how that plays out in the case law. Judge Furse said that the magistrates are being taught in trainings that the standard for relevance is narrower.

Mr. Stancil also reported that judges are now expressly allowed to allocate expenses through protective orders, as well as specifying the time, place, and manner of discovery. Early Rule 34 requests have also been adopted; parties may issue Rule 34 requests "more than 21 days after" service of the summons and complaint. Previously, such requests could not be issued until after the attorney conference. Mr. Stancil believes these early requests disfavor defendants because it ratchets up their anxiety. He will be surprised if plaintiffs do not use it for that purpose—it has a disproportionate impact on defendants. Judge Pullan commented that by serving RFPs before the scheduling conference, you might have a better sense of potential preservation issues.

Mr. Stancil said that parties are now required to address issues relating to the preservation of ESI in their discovery plan. Conforming amendments deal with the change to proportionality. He is interested to hear from the committee regarding refusals to produce on proportionality grounds, as he is concerned about objections on that basis. Rule 37(e) implements changes regarding the preservation of ESI. If ESI should have been preserved in anticipation of litigation, and cannot be restored because a party failed to take reasonable steps to preserve, the court may order measures no greater than necessary to cure the prejudice. It limits the district court's ability to issue negative inference instructions to situations where a party acted with intent to deprive the other side of information.

Mr. Stancil said that he doesn't entirely understand the changes to Rule 55, but that the amendments got rid of all forms except Rules 5 and 6.

Mr. Hafen said that he would like to see the subcommittee come back to us and say whether we should consider making some of these same changes to the Utah rules. One of our pillars in rulemaking is that if we can be consistent with what the federal court has done, we should. Mr. Hafen offered the committee's thanks for Paul Stancil and Tim Shea's work in getting the pilot program launched for earlier judicial involvement in Tier 3 cases.

IX. Adjournment.

The meeting adjourned at 6:02 pm. The next meeting will be held on January 27, 2016 at 4:00pm at the Administrative Office of the Courts, Level 3.