Agenda

Advisory Committee on Rules of Civil Procedure

February 28, 2018
4:00 to 6:00 p.m.

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

Welcome and approval of minutes	Tab 1	Jonathan Hafen, Chair
Rule 73. Attorney fees.	Tab 2	Charles Stormont, Mark Olson, Leslie Slaugh
Rule 109. Automatic temporary domestic orders. New.	Tab 3	Commissioner Michelle Blomquist
Rule 5(b)(5)(B). Orders served by the court	Tab 4	Nancy Sylvester and others
Rule 26(a)(5). Pretrial Disclosures.	Tab 5	Judge Kent Holmberg
Rule 9. Pleading Special Matters.	Tab 6	Nancy Sylvester, Jonathan Hafen
Other business		Jonathan Hafen

Committee Webpage: http://www.utcourts.gov/committees/civproc/

Meeting Schedule:

March 28, 2018

April 25, 2018

May 23, 2018

June 27, 2018

September 26, 2018

October 24, 2018

November 28, 2018

Tab 1

UTAH SUPREME COURT ADVISORY COMMITTEE ON RULES OF CIVIL PROCEDURE

Meeting Minutes – January 24, 2018

PRESENT: Chair Jonathan Hafen, Judge Andrew Stone, Judge James Blanch, Judge Kent Holmberg, Judge Laura Scott, Judge Clay Stucki, James Hunnicutt, Rod Andreason, Lauren DiFrancesco, Susan Vogel, Barbara Townsend, Michael Petrogeorge, Leslie Slaugh, Justin Toth, Paul Stancil, Lincoln Davies, Dawn Hautamaki (remote), Judge Kate Toomey (remote), Timothy Pack, Trystan Smith

EXCUSED: Amber Mettler, Heather Sneddon

STAFF: Nancy Sylvester

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(1) WELCOME, APPROVAL OF MINUTES

Jonathan Hafen introduced new recording secretary, Katy Strand, to the committee and had the members introduce themselves. Mr. Hafen then turned to the minutes and requested any edits to them. Ms. Sylvester noted Jim Hunnicutt's edits. Rod Andreason echoed the same edits. Mr. Hunnicutt moved to approved the minutes as amended and Mr. Andreason seconded the motion. The committee unanimously approved the minutes.

(2) LOGUE SUBCOMMITTEE

In *Logue v. Court of Appeal*s, 2016 UT 44, the Utah Supreme Court stated, "It appears that criminal defendants, like Mr. Logue, who discover new evidence more than ninety days after sentencing must await the conclusion of their appeal before attempting to seek relief based on this evidence, even if it would likely entitle them to a new trial." It then directed the appropriate advisory committee on the rules of procedure to consider revising the rules so that they do not act as a categorical bar to motions for new trials. The advisory committees for the rules of civil, criminal, and appellate procedure formed a joint subcommittee to consider revising the rules.

The subcommittee concluded that Rule of Criminal Procedure 24 was the rule at play but modifying it could have significant negative unintended consequences for post-conviction relief. The subcommittee recommended against amending any rules. Leslie Slaugh moved to approve the subcommittee's recommendation and Amber Mettler seconded. The motion passed unanimously.

(3) RULE 5(B)(5)(B). ORDERS PREPARED BY THE COURT.

Ms. Sylvester introduced the topic and Susan Vogel reported that in her experience with the Self-Help Center, pro se litigants are not always getting copies of orders from the court or opposing counsel. She said if an order is e-filed and then signed by the judge it will return to the attorney, but not to the pro se party. She said the clerks assume the attorneys are sending it on to the other party

but in many cases they are not. Ms. Vogel said even when orders are served by opposing counsel, pro se litigants have expressed concerns to the Self-Help Center about their authenticity. Leslie Slaugh and Judge Stone questioned why the court relies on an adversarial party to serve it. Leslie Slaugh argued that the court as a third party should serve it if possible. Rod Andreason observed that we may need a change. He said ideally, the court would serve any order they sign. However, that may be expensive due to mailing costs and time prohibitive. And perhaps some orders, like garnishments, *should* be served by the party requesting them. He proposed that if a party requests and is granted an order, that party should serve it on the other. But if no party requests the order, the court shall serve it. The committee discussed that his solution likely doesn't address Ms. Vogel's concerns about trust and confidence in the courts. Lauren Hosler pointed out that we should put the onus back on the attorney because they have an ethical obligation *not* to fake orders. Even if parties don't trust it they will have to learn to.

Dawn Hautamaki reported that the clerks of the court are under the impression that the clerks should not be serving orders when a party submits a proposed order and the court then signs it. With respect to orders the judge changes, the clerks are not always aware if the judge has changed an order, so the clerks would not know that they should be sending it out since it was not originally prepared by the court. The clerks recognize that there is a problem, but are concerned that in civil cases they may not have the addresses for service purposes. Generally, the clerks believe the attorneys should be responsible for sending orders on. As a group they did not like the plan of requiring the clerks to serve a proposed order after it is signed. The court also "issues" several other things that are not typically served, so by using the word "issues" it may unintentionally create additional, unnecessary requirements and burdens on the court, including financial. Mr. Slaugh opined that unless there is a major fiscal reason, the only fair option is to have the courts do it.

Judge Toomey proposed that all of these issues would be resolved if pro se litigants were given access to Green Filing. Dawn Hautamaki said if orders went through e-filing, they would automatically show up in the person's inbox. Committee members also discussed how accepting papers by email could temporarily solve many of these problems, too. Ms. Strand pointed out that a number of people will still not be able to do this. Judge Stone that we cannot require email at this point, but that it should be possible for the courts to serve all orders and technology will catch up. Mr. Slaugh pointed out that there is an advantage to the court serving an order because, like the federal courts—and unlike attorneys—the court does not go on vacation. Judge Stone reiterated that the burden of serving would no longer be problematic if email were required.

Susan Vogel points out the Rule 5 amendments would exclude anything that has to be served under rule 4 (case initiating documents). Judge Blanch agreed that the court should be sending out the orders they sign excluding things that have to be served under rule 4. Mr. Hunnicutt noted that Rule 58 requires that notice of judgment is to be served by the party preparing it, so it will not be consistent, but there is a good reason for this requirement: the burden to serve is on the person who wants to enforce the order later.

Judge Stone expressed concerned that the rule would require mailing minute entries, which would be impractical. Judge Blanch pointed out that he signs most minute entries. He added that an order is a valid order even if it is not served. The committee observed that it did not intend signed orders

to include every minute entry. Ms. Sylvester pointed out the following language in the committee note to Rule 7:

> The committee recognizes the many different forms a judge's decision might take, and discussed defining "order," but decided against the attempt. There are too many variations. If written, the document might be titled "order," "ruling," "opinion," "decision," "memorandum decision," etc. The decision might not be written; an oral directive is an order. A clerk's minute entry of an oral decision is, when signed by the judge, treated the same as a written order.

She observed that the language in Rule 5 should reflect that only dispositive orders or ones that implicate parties' rights should be served.

Judge Stucki said he didn't feel comfortable adopting the language yet because he said it still may not be clear what an order means as drafted. He and Judge Blanch echoed that the court should not be sending out 200 minute entries since not all orders are equally impactful.

Professor Paul Stancil proposed a study to see empirical data on the current rule prior to a proposal.

Nancy Sylvester proposed working with the Policy and Planning Committee to create a rule requiring email for all litigants.

Ms. Vogel moved to amend the rule to striking "every paper" in paragraph (b)(5)(B) and adding: "Every ruling, decision, or order of the court that is to be served under this rule shall be served by the court on the parties." She also moved to amend paragraph (a)(1)(B) to state "a signed order of the court other than a non-final oral directive memorialized in a minute entry" and striking "an order that states it must be served."

Mr. Slaugh seconded the motion.

Further discussion ensued so no further vote was taken. Mr. Slaugh then moved to table this amendment subject to further vetting by committee members and court staff. Ms. Vogel seconded the motion and it passed unanimously.

(4) OTHER BUSINESS

Mr. Hafen gave an update on the Rule 16 Case Management Pilot Program along with Mr. Stancil. Mr. Stancil observed that in a year to 18 months there will be enough the data to evaluate and determine if the committee wants to make this statewide. No new cases are being initiated into this program for the purposes of study now that the two years of gathering cases have lapsed.

(5) ADJOURNMENT

The remaining matters were deferred, and the committee adjourned at 6:00 pm. The next meeting will be held on February 281, 2018 at 4:00 pm at the Administrative Office of the Courts, Level 3.

Tab 2

Administrative Office of the Courts

Chief Justice Matthew B. Durrant
Utah Supreme Court
Chair, Utah Judicial Council

Richard H. Schwermer
State Court Administrator
Raymond H. Wahl
Deputy Court Administrator

MEMORANDUM

To: Civil Rules Committee
From: Nancy Sylvester
Date: February 22, 2018
Re: Rule 73 and Attorney Fees

At our November meeting, Mark Olson, Charles Stormont, and Brian Rothschild presented competing proposals regarding Rule 73 and attorney fees, with the primary focus on debt collection cases. Since that time, Mark and Charles collaborated on a joint proposal, which Leslie Slaugh assisted in editing. That joint proposal is attached.

A remaining question the committee should work through came from Leslie. He said,

> All three subparagraphs require that the clerk or court "shall" approve or allow the fees. I am concerned that may mandate an award even if there is otherwise no right to attorney fees in the case, or if the fees are obviously unreasonable for the work performed. Wouldn't "may" be a better term? The focus of these subsections is to provide that the party need not provide a supporting affidavit, but using "shall" goes beyond that focus. Is there a concern that judges are routinely disallowing reasonable fee requests?

Charles responded as follows:

> I tend to agree with your concern, but also understand the plaintiff's interest in being able to rely on the amount requested. I'll defer to Mark to expound on that, but I note that there is a requirement that the right to fees be established before the scheduled amounts are permitted, so there is protection against an award where no right to fees exist. I would personally prefer "may" over "shall" as you suggest, but am also willing to concede that issue as along as the right to object remains as it is in (f)(5). Perhaps we could add reference to the court's right to consider the reasonableness generally as well in that section. Mark and I were working

to find middle ground in a few areas, and this was certainly one of them, so some refinement by the committee may be in order.

Mark Olson also responded as follows:

As for the use of shall/may, remember that the original purpose of the rule was to establish a uniform schedule of fees so that defaults in small collection cases would no longer have to be reviewed by judges. The scheduled fees were determined to be de facto reasonable and the resulting sum certain fee requests allowed clerks to enter judgments in accordance with Rule 55.

Collection attorneys have built practices around this rule, which has created efficiency not only for the courts, but for the attorneys as well. I'm concerned about interjecting uncertainty into the process, the result of which could be harmful both to courts and attorneys who utilize the rule.

Are judges routinely disallowing reasonable fee requests now? No, that doesn't happen under the current schedule because the fees are deemed reasonable and the defaults never reach a judge's desk.

Leslie responded:

I concede your point on (f)(2) and (f)(3), and I partially concede the concept for (f)(1).

Subparagraphs (f)(2) and (f)(3) both have a prerequisite that a party has "established its right to attorney fees" (f)(2), or "established its entitlement to attorney fees" (f)(3). Based on that prerequisite, I agree that the amount should be awarded without giving the judge or clerk discretion to reduce the amount.

For subparagraph (f)(1), the rule requires in subparagraph (e) that the complaint "must state the basis for attorney fees." But, the court should not be required to accept the stated basis for attorney fees, even on a default. If the stated basis is not legally sufficient, the court should be able to deny attorney fees. The proposed (f)(1), however, would mandate that the court or clerk award the requested fees.

On subparagraph (f)(1), therefore, I agree that the amount should be not subject to review. The entitlement to fees, however, should be subject to the judge's determination that the complaint has stated a valid basis for attorney fees.

Mark then agreed that there needs to be a mechanism for court review of the basis of the award.

Rule 73. Attorney fees.

(a) Time in which to claim. Attorney fees must be claimed by filing a motion for attorney fees no later than 14 days after the judgment is entered, except as provided in part ~~unless the party claims attorney fees in accordance with th\e schedule in paragraph~~ (f) of this Rule, or in accordance with Utah Code Section 75-3-718, and no objection to the fee has been made.

(b) Content of motion. The motion must:

(b)(1) specify the judgment and the statute, rule, contract, or other basis entitling the party to the award;

(b)(2) disclose, if the court orders, the terms of any agreement about fees for the services for which the claim is made;

(b)(3) specify factors showing the reasonableness of the fees, if applicable;

(b)(4) specify the amount of attorney fees claimed and any amount previously awarded; and

(b)(5) disclose if the attorney fees are for services rendered to an assignee or a debt collector, the terms of any agreement for sharing the fee and a statement that the attorney will not share the fee in violation of Rule of Professional Conduct 5.4.

(c) Supporting affidavit. The motion must be supported by an affidavit or declaration that reasonably describes the time spent and work performed, including for each item of work the name, position (such as attorney, paralegal, administrative assistant, etc.) and hourly rate of the persons who performed the work, and establishes that the claimed fee is reasonable.

(d) Liability for fees. The court may decide issues of liability for fees before receiving submissions on the value of services. If the court has established liability for fees, the party claiming them may file an affidavit and a proposed order. The court will enter an order for the claimed amount unless another party objects within 7 days after the affidavit and proposed order are filed.

(e) Fees claimed in complaint. If a party claims attorney fees under paragraph (f), the complaint must state the basis for attorney fees, state the amount of attorney fees allowed by ~~the schedule~~paragraph (f), cite the law or attach a copy of the contract authorizing the award, and~~, if the attorney fees are for services rendered to an assignee or a debt collector,~~ a statement that the attorney will not share the fee in violation of Rule of Professional Conduct 5.4.

(f) ~~Schedule of f~~Fees. Attorney fees awarded under ~~the schedule~~this Rule may be augmented ~~only for considerable additional efforts in collecting or defending the judgment and only after further order of the court~~upon submission of a motion and supporting affidavit meeting the requirements of paragraphs (b) and (c) of this Rule within a reasonable time after the fees were incurred, except as provided in parts (f)(1), (f)(2) and (f)(3) of this Rule, and only where the augmented fees sought exceed those already awarded.

(f)(1) **Fees upon entry of default judgment.** When judgment is sought pursuant to the provisions of Rule 55(b), whether such default occurs before or after any responsive pleading has been filed under Rule 12, and the party has complied with part (e) of this Rule, the request for judgment may

include a request for attorney fees ~~incurred~~, and the clerk or the court shall allow any amount requested up to $350.00 for such attorney fees request without a supporting affidavit.

(f)(2) **Fees upon entry of judgment after contested proceeding.** When judgment is sought following a motion under Rule 56 or a trial, and such motion or trial was contested and required the presentation of evidence and/or argument, and the party has established its right to attorney fees, then the request for judgment may include a request for attorney fees ~~incurred~~, and the clerk or the court shall allow any amount requested up to ~~and the clerk or the court shall allow~~ $750 for such attorney fees request without a supporting affidavit.

(f)(3) **Post Judgment Collections.** When a party has established its entitlement to attorney fees under any paragraph of this Rule, and subsequently:

(f)(3)(~~a~~A) applies for any writ pursuant to Rules 64, 64A, 64B, 64C, 64D, or 64E; or

(f)(3)(B~~b~~) files a motion pursuant to Rules 64(c)(2) or 58C or pursuant to Utah Code § 35A-4-314,~~.~~ a party may request as part of its application for the writ or motion that its ~~attorney fees~~judgment be augmented according the following schedule, and the clerk or the court shall ~~approve~~allow such augmented attorney fees request without a supporting affidavit if it approves the writ or motion:

~~Amount of Damages, Exclusive of Costs, Attorney Fees and Post-Judgment Interest, Between~~Action	Attorney Fees Allowed
Application for any writ under Rule 64, including 1st application for a writ under Rule 64D	75.00
Any subsequent application for a writ under Rule 64D to the same garnishee	257~~250~~.00
Any motion filed with the court under Rule 64(c)(2), Utah Code Ann 35A-4-314, or Rule 58C	~~3~~375~~75~~.00
Any subsequent motion under Rule 64(c)(2), Utah Code Ann 35A-4-314, or Rule 58C filed within 6 months of the previous motion	25.00
Any subsequent motion under Rule 64(c)2, Utah Code Ann 35A-4-314, or Rule 58(c) filed within 6 months of the previous motion. ~~2,000.01~~	~~400.00~~
~~2,500.01~~	~~475.00~~
~~3,000.01~~	~~550.00~~
~~3,500.01~~	~~625.00~~
~~4,000.01~~	~~700.00~~
~~4,500.01~~	~~775.00~~

(f)(4) **Fees in excess of the schedule.** If a party seeks attorney fees in excess of the amounts set forth in parts (f)(1), (f)(2), or (f)(3) of this Rule, the party shall comply with parts (a) through (c) of this Rule.

(f)(5) **Objections.** Nothing in this paragraph shall be deemed to eliminate any right a party may have to object to any claimed attorney fees.

Advisory Committee Notes.

An overwhelming number of cases filed in the courts, especially debt collection cases, result in the entry of default judgment. The work required in most cases to obtain default is similar irrespective of the amount at issue. As such, the prior schedule of fees based on the amount of damages has been eliminated, and instead replaced by a single fee upon entry of default judgment that is intended to approximate the work required in the typical case. A second amount is provided where the case is contested and fees are allowed, again in an effort to estimate the typical cost of the overwhelming majority of cases before the courts. Where additional work is required to collect on the judgment, the revised rule provides a default amount for writs and certain motions, and eliminates the "considerable additional efforts" limitation of the prior Rule. It also recognizes that defendants often change jobs, and thus provides for such default amounts to vary depending on whether a new garnishee is required to collect on the outstanding amount of the judgment. Thus, the amended Rule attempts to match the scheduled amounts to the work required of attorneys, rather than tying the scheduled amounts solely to the damages claimed. But the Rule remains flexible so that when attorney fees exceed the scheduled amounts, a party remains free to file an affidavit requesting appropriate fees in accordance with the Rule.

Rule 73. Attorney fees.

(a) Time in which to claim. Attorney fees must be claimed by filing a motion for attorney fees no later than 14 days after the judgment is entered, except as provided in part (f) of this Rule, or in accordance with Utah Code Section 75-3-718, and no objection to the fee has been made.

(b) Content of motion. The motion must:

(b)(1) specify the judgment and the statute, rule, contract, or other basis entitling the party to the award;

(b)(2) disclose, if the court orders, the terms of any agreement about fees for the services for which the claim is made;

(b)(3) specify factors showing the reasonableness of the fees, if applicable;

(b)(4) specify the amount of attorney fees claimed and any amount previously awarded; and

(b)(5) disclose if the attorney fees are for services rendered to an assignee or a debt collector, the terms of any agreement for sharing the fee and a statement that the attorney will not share the fee in violation of Rule of Professional Conduct 5.4.

(c) Supporting affidavit. The motion must be supported by an affidavit or declaration that reasonably describes the time spent and work performed, including for each item of work the name, position (such as attorney, paralegal, administrative assistant, etc.) and hourly rate of the persons who performed the work, and establishes that the claimed fee is reasonable.

(d) Liability for fees. The court may decide issues of liability for fees before receiving submissions on the value of services. If the court has established liability for fees, the party claiming them may file an affidavit and a proposed order. The court will enter an order for the claimed amount unless another party objects within 7 days after the affidavit and proposed order are filed.

(e) Fees claimed in complaint. If a party claims attorney fees under paragraph (f), the complaint must state the basis for attorney fees, state the amount of attorney fees allowed by paragraph (f), cite the law or attach a copy of the contract authorizing the award, and a statement that the attorney will not share the fee in violation of Rule of Professional Conduct 5.4.

(f) Fees. Attorney fees awarded under this Rule may be augmented upon submission of a motion and supporting affidavit meeting the requirements of paragraphs (b) and (c) of this Rule within a reasonable time after the fees were incurred, except as provided in parts (f)(1), (f)(2) and (f)(3) of this Rule, and only where the augmented fees sought exceed those already awarded.

(f)(1) **Fees upon entry of default judgment.** When judgment is sought pursuant to the provisions of Rule 55(b), whether such default occurs before or after any responsive pleading has been filed under Rule 12, and the party has complied with part (e) of this Rule, the request for judgment may include a request for attorney fees, and the clerk or the court shall allow any amount requested up to $350.00 for such attorney fees request without a supporting affidavit.

(f)(2) **Fees upon entry of judgment after contested proceeding.** When judgment is sought following a motion under Rule 56 or a trial, and such motion or trial was contested and required the

presentation of evidence and/or argument, and the party has established its right to attorney fees, then the request for judgment may include a request for attorney fees, and the clerk or the court shall allow any amount requested up to $750 for such attorney fees request without a supporting affidavit.

(f)(3) **Post judgment collections.** When a party has established its entitlement to attorney fees under any paragraph of this Rule, and subsequently:

(f)(3)(A) applies for any writ pursuant to Rules 64, 64A, 64B, 64C, 64D, or 64E; or

(f)(3)(B) files a motion pursuant to Rules 64(c)(2) or 58C or pursuant to Utah Code § 35A-4-314, a party may request as part of its application for the writ or motion that its judgment be augmented according the following schedule, and the clerk or the court shall allow such augmented attorney fees request without a supporting affidavit if it approves the writ or motion:

Action	Attorney Fees Allowed
Application for any writ under Rule 64, including 1st application for a writ under Rule 64D	75.00
Any subsequent application for a writ under Rule 64D to the same garnishee	25.00
Any motion filed with the court under Rule 64(c)(2), Utah Code Ann 35A-4-314, or Rule 58C	75.00
Any subsequent motion under Rule 64(c)(2), Utah Code Ann 35A-4-314, or Rule 58C filed within 6 months of the previous motion	25.00

(f)(4) **Fees in excess of the schedule.** If a party seeks attorney fees in excess of the amounts set forth in parts (f)(1), (f)(2), or (f)(3) of this Rule, the party shall comply with parts (a) through (c) of this Rule.

(f)(5) **Objections.** Nothing in this paragraph shall be deemed to eliminate any right a party may have to object to any claimed attorney fees.

Advisory Committee Notes.

An overwhelming number of cases filed in the courts, especially debt collection cases, result in the entry of default judgment. The work required in most cases to obtain default is similar irrespective of the amount at issue. As such, the prior schedule of fees based on the amount of damages has been eliminated, and instead replaced by a single fee upon entry of default judgment that is intended to approximate the work required in the typical case. A second amount is provided where the case is contested and fees are allowed, again in an effort to estimate the typical cost of the overwhelming majority of cases before the courts. Where additional work is required to collect on the judgment, the revised rule provides a default amount for writs and certain motions, and eliminates the “considerable additional efforts” limitation of the prior Rule. It also recognizes that defendants often change jobs, and

thus provides for such default amounts to vary depending on whether a new garnishee is required to collect on the outstanding amount of the judgment. Thus, the amended Rule attempts to match the scheduled amounts to the work required of attorneys, rather than tying the scheduled amounts solely to the damages claimed. But the Rule remains flexible so that when attorney fees exceed the scheduled amounts, a party remains free to file an affidavit requesting appropriate fees in accordance with the Rule.

Tab 3

Administrative Office of the Courts

Chief Justice Matthew B. Durrant
Utah Supreme Court
Chair, Utah Judicial Council

Richard H. Schwermer
State Court Administrator
Raymond H. Wahl
Deputy Court Administrator

MEMORANDUM

To: Civil Rules Committee
From: Nancy Sylvester
Date: February 22, 2018
Re: Rule 109

Rule 109 and its accompanying form have been drafted and vetted by the Judicial Council's Standing Committee on Children and Family Law. Although these went through that process awhile back, the rule was held up due to the Domestic Case Processing Improvements Subcommittee's work. The standing committee has since determined that the rule was unaffected by the subcommittee's recommendations and now asks that it be reviewed by the Civil Rules Committee and then recommended to the Utah Supreme Court. The form will go to the Standing Committee on Court Forms once the rule is finalized.

Rule 109. Automatic domestic injunctions.

(a) In an action for divorce, dissolution of marriage, temporary separation, custody, parent time, support, or paternity the court shall automatically enter a domestic injunction with the following provisions when the petition or motion is filed:

(a)(1) Neither party may transfer, encumber, conceal, or dispose of any property of either party without the consent of the other party or an order of the court, except in the usual course of business or to provide for the necessities of life.

(a)(2) Neither party may molest or disturb the peace of the other party or harass, annoy, or bother the other party.

(a)(3) Neither party may use the other party's name, likeness, image, or identification to obtain credit, open an account for service, or obtain a service.

(a)(4) Neither party may cancel or interfere with phone, utility, or other services used by the other party.

(a)(5) Neither party may cancel, modify, terminate, change the beneficiary, or allow to lapse for voluntary nonpayment of premiums, any policy of health insurance, homeowner's or renter's insurance, automobile insurance, or life insurance.

(a)(6) If there is a minor child named in the petition, neither party may travel with the child without the consent of the other party or an order of the court unless the following information has been provided to the other party:

(a)(6)(A) an itinerary of travel dates and destinations;

(a)(6)(B) how to contact the child or traveling party; and

(a)(6)(C) the name and telephone number of an available third person who will know the child's location.

(a)(7) If there is a minor child named in the petition, neither party may do the following in the presence or hearing of the child:

(a)(7)(A) demean or disparage the other party whether the party believes it to be true or not;

(a)(7)(B) speak about the issues in the petition;

(a)(7)(C) attempt to influence a child's preference regarding custody or parent time; or

(a)(7)(D) say or do anything that would tend to diminish the love and affection of the child for the other party.

(a)(8) If there is a minor child named in the petition, neither party may make parent time arrangements through the child.

(a)(9) If there is a minor child named in the petition, neither party may commit domestic violence or abuse against the other party or the child.

(a)(10) If there is a minor child named in the petition, each party has the duty to use his or her best efforts to prevent third parties from doing what the parties are prohibited from doing under this order or to remove the child from those third parties.

(b) The domestic injunction is binding upon the petitioner upon the filing of a petition initiating the action or of a motion or petition to amend a final order or decree in the action.

(c) The domestic injunction is binding upon the respondent upon service on the respondent of the petition and summons or of the motion or upon waiver of service by the respondent. A copy of the domestic injunction shall be served with the petition and summons or with the motion.

(d) The domestic injunction remains in effect until the final decree is entered, the petition is dismissed, the parties agree otherwise in a writing signed by all parties, or until further order of the court.

(e) A party may move to modify or dissolve the domestic injunction. The court shall hear and determine the motion as expeditiously as possible and not later than 72 hours after the motion is filed. The moving party must serve the nonmoving party at least 48 hours before the hearing.

Proposed Form Order for Rule 109 Automatic temporary domestic orders:

IN THE _____ JUDICIAL DISTRICT COURT IN AND FOR _____ COUNTY [_____ DEPARTMENT], STATE OF UTAH	
_____, Petitioner, vs. _____, Respondent.	TEMPORARY DOMESTIC ORDERS Case No. _____ Judge _____ [Commissioner _____]

PURSUANT TO RULE 109 OF THE UTAH RULES OF CIVIL PROCEDURES:

YOU ARE HEREBY NOTIFIED: An action for divorce, dissolution of marriage, temporary separation, custody, parent time, support, or paternity has been filed and the following temporary orders are now issued:

1. Neither party may transfer, encumber, conceal, or dispose of any property of either party without the consent of the other party or an order of the court, except in the usual course of business or to provide for the necessities of life.
2. Neither party may molest or disturb the peace of the other party or harass, annoy, or bother the other party.
3. Neither party may use the other party's name, likeness, image, or identification to obtain credit, open an account for service, or obtain a service.
4. Neither party may cancel or interfere with phone, utility, or other services used by the other party.
5. Neither party may cancel, modify, terminate, change the beneficiary, or allow to lapse for voluntary nonpayment of premiums, any policy of health insurance, homeowner's or renter's insurance, automobile insurance, or life insurance.

IF THERE ARE MINOR CHILDREN NAMED IN THE PETITION:

1. Neither party may travel with the child without the consent of the other party or an order of the court unless the following information has been provided to the other party: (a) an itinerary of travel dates and destinations; (b) how to contact the child or traveling party; and (c) the name and telephone number of an available third person who will know the child's location.
2. Neither party may do the following in the presence or hearing of the child: (a) demean or disparage the other party whether the party believes it to be true or not; (b) speak about the issues in the petition; (c) attempt to influence a child's preference regarding custody or parent time; or (d) say or do anything that would tend to diminish the love and affection of the child for the other party.
3. Neither party may make parent time arrangements through the child
4. Neither party may commit domestic violence or abuse against the other party or the child.

5. Each party has the duty to use his or her best efforts to prevent third parties from doing what the parties are prohibited from doing under this order or to remove the child from those third parties.

EFFECTIVE DATE OF THESE TEMPORARY ORDERS: These temporary orders are binding upon the petitioner upon the filing of a petition initiating the action or of a motion or petition to amend a final order or decree in the action. These temporary orders are binding upon the respondent upon service on the respondent of the petition and summons or of the motion or upon waiver of service by the respondent. A copy of these temporary orders shall be served with the petition and summons or with the motion. These temporary orders remain in effect until the final decree is entered, the petition is dismissed, the parties agree otherwise in a writing signed by all parties, or until further order of the court.

YOUR RIGHT TO SEEK RELIEF FROM THESE ORDERS AND/OR REQUEST A HEARING: A party may apply for modification of or relief from the automatic temporary order. A party requesting a hearing for relief from the automatic temporary orders must be given a hearing within 3 business days. A party may also apply for relief from the temporary order, apply for further temporary orders, or apply for temporary restraining orders under these rules as appropriate.

THIS ORDER IS THE SIGNED ORDER OF THE COURT WHEN SIGNED ELECTRONICALLY BY THE COURT ON THE FIRST PAGE OF THIS DOCUMENT

Tab 4

Administrative Office of the Courts

Chief Justice Matthew B. Durrant
Utah Supreme Court
Chair, Utah Judicial Council

Richard H. Schwermer
State Court Administrator
Raymond H. Wahl
Deputy Court Administrator

MEMORANDUM

To: Civil Rules Committee
From: Nancy Sylvester
Date: February 22, 2018
Re: Rule 5 and orders served by the court

At our last meeting, the committee made edits to Rule 5, the idea of which is to have the court serve all orders, but not to sweep in too many minute entries or non-substantive or dispositive orders. Jonathan Hafen and I asked the committee to vet the proposed language with the committee's contacts and/or offer other suggestions on language. Dawn Hautamaki vetted the language with the clerks of court and their feedback is attached. Mike Petrogeorge also offered the following perspective:

> I would propose that the court be required to serve every "memorandum decision or order". Sometimes the courts include the order in the memorandum decision but sometimes courts issue a memorandum decision and in that decision require the prevailing party to prepare a separate order. I think all parties should be served with any substantive ruling whether or not it is styled as an order and adding the memorandum decision language would help strike the balance in avoiding minute entry and other mundane rulings.

Additionally, to address the concern of increased workload for court clerks and as a preliminary step before pro se e-filing, the committee proposed adopting a policy of requiring email address for all litigants that would be modeled on our civil e-filing rule. I have drafted some proposed language below.

Rule 4-511. Mandatory email address.

Intent:

To require that all civil litigants provide an email address to the court for service of [court orders] [pleadings and papers filed after the original complaint].

To provide for an exception.

Applicability:

This rule applies in the district, juvenile, and justice courts.

Statement of the Rule:

(1) Except as provided in Paragraph (2), on or after May 1, 2018, all civil litigants shall provide a valid email address to the court for service of [court orders] [pleadings and other papers filed after the original complaint].

(2)(A) A self-represented party who demonstrates inaccessibility to a computer or a telephone with Internet capability is exempt from this requirement. To request an exemption, the party shall submit a written request to the Clerk of Court.

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

(a) When service is required.

(a)(1) Papers that must be served. Except as otherwise provided in these rules or as otherwise directed by the court, the following papers must be served on every party:

(a)(1)(A) a judgment;

(a)(1)(B) ~~a~~an signed order ~~that states it must be served~~of the court other than a non-final oral directive memorialized in a minute entry;

(a)(1)(C) a pleading after the original complaint;

(a)(1)(D) a paper relating to disclosure or discovery;

(a)(1)(E) a paper filed with the court other than a motion that may be heard ex parte; and

(a)(1)(F) a written notice, appearance, demand, offer of judgment, or similar paper.

(a)(2) Serving parties in default. No service is required on a party who is in default except that:

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

(a)(2)(B) a party in default for any reason other than for failure to appear must be served as provided in paragraph (a)(1);

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

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

(a)(2)(E) a party in default for any reason must be served under Rule 4 with pleadings asserting new or additional claims for relief against the party.

(a)(3) Service in actions begun by seizing property. If an action is begun by seizing property and no person is or need be named as defendant, any service required before the filing of an answer, claim or appearance must be made upon the person who had custody or possession of the property when it was seized.

(b) How service is made.

(b)(1) Whom to serve. If a party is represented by an attorney, a paper served under this rule must be served upon the attorney unless the court orders service upon the party. Service must be made upon the attorney and the party if

(b)(1)(A) 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; or

(b)(1)(B) a final judgment has been entered in the action and more than 90 days has elapsed from the date a paper was last served on the attorney.

(b)(2) When to serve. If a hearing is scheduled 7 days or less from the date of service, a party must serve a paper related to the hearing by the method most likely to be promptly received. Otherwise, a paper that is filed with the court must be served before or on the same day that it is filed.

(b)(3) Methods of service. A paper is served under this rule by:

(b)(3)(A) except in the juvenile court, submitting it for electronic filing, or the court submitting it to the electronic filing service provider~~,~~ if the person being served has an electronic filing account;

(b)(3)(B) emailing it to the email address provided by the person or to the email address on file with the Utah State Bar, if the person has agreed to accept service by email or has an electronic filing account;

(b)(3)(C) mailing it to the person's last known address;

(b)(3)(D) handing it to the person;

(b)(3)(E) leaving it at the person's office with a person in charge or, if no one is in charge, leaving it in a receptacle intended for receiving deliveries or in a conspicuous place;

(b)(3)(F) leaving it at the person's dwelling house or usual place of abode with a person of suitable age and discretion who resides there; or

(b)(3)(G) any other method agreed to in writing by the parties.

(b)(4) When service is effective. Service by mail or electronic means is complete upon sending.

(b)(5) Who serves. Unless otherwise directed by the court:

(b)(5)(A) every paper required to be served must be served by the party preparing it; and

(b)(5)(B) every ~~ruling, decision, or~~ order of the court that is to be served under this rule shall be served by the court on the parties.~~every paper prepared by the court will be served by the court.~~

(c) Serving numerous defendants. If an action involves an unusually large number of defendants, the court, upon motion or its own initiative, may order that:

(c)(1) a defendant's pleadings and replies to them do not need to be served on the other defendants;

(c)(2) any cross-claim, counterclaim avoidance or affirmative defense in a defendant's pleadings and replies to them are deemed denied or avoided by all other parties;

(c)(3) filing a defendant's pleadings and serving them on the plaintiff constitutes notice of them to all other parties; and

(c)(4) a copy of the order must be served upon the parties.

(d) Certificate of service. A paper required by this rule to be served, including electronically filed papers, must include a signed certificate of service showing the name of the document served, the date and manner of service and on whom it was served. Except in the juvenile court, this paragraph does not apply to papers required to be served under paragraph (b)(5)(B**)** when service to all parties is made under paragraph (b)(3)(A).

(e) Filing. Except as provided in Rule 7(j) and Rule 26(f), all papers after the complaint that are required to be served must be filed with the court. Parties with an electronic filing account must file a paper electronically. A party without an electronic filing account may file a paper by delivering it to the clerk of the court or to a judge of the court. Filing is complete upon the earliest of acceptance by the electronic filing system, the clerk of court or the judge.

(f) Filing an affidavit or declaration. If a person files an affidavit or declaration, the filer may:

(f)(1) electronically file the original affidavit with a notary acknowledgment as provided by Utah Code Section 46-1-16(7);

(f)(2) electronically file a scanned image of the affidavit or declaration;

(f)(3) electronically file the affidavit or declaration with a conformed signature; or

(f)(4) if the filer does not have an electronic filing account, present the original affidavit or declaration to the clerk of the court, and the clerk will electronically file a scanned image and return the original to the filer.

The filer must keep an original affidavit or declaration of anyone other than the filer safe and available for inspection upon request until the action is concluded, including any appeal or until the time in which to appeal has expired.

Advisory Committee Notes

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Utah State Courts

Nancy Sylvester <nancyjs@utcourts.gov>

Fwd: Rule 5 Proposed Language/Feedback Needed

2 messages

Dawn Hautamaki <dawnh@utcourts.gov>
To: Nancy Sylvester <nancyjs@utcourts.gov>

Hi Nancy,

I did send the info out to the CoCs for comment. I have only received a few comments back. All comments received are included below. Thanks!

Loni Page
to me

I haven't responded because I have nothing new to offer, nor anything particular helpful to say about something that I completely disagree with! You already know my stance on all of that but I'm while to implement though.

Thank you for keeping us in the know on these potential changes.

Mikelle Ostler
to me, Loni, Peggy, Keri, Christine, Tracy, Debbie, Alyson, Brooke, Chris, Gary, Lynn, Kristen, Kristene

Very interesting! Do *your* Judges sign the minutes for Juvenile cases? Our Bench asked us to start adding "Prepared and electronically submitted by the Judicial Assistant without judicial revi

I, for one, am okay with the court serving parties with copies of the orders signed by the Judge. It was a bit of a change of process initially with our child welfare orders but I think it makes sen

Mikelle Ostler
Clerk of Court
Fourth District Juvenile Court
801-318-4026

Ms. Hautamaki,

Thank you for the update and the insight regarding potential changes. Do Judges *sign* minute entries in District Court? I am wondering if that could be the distinction. Judges don't sign the minut has signed it. (Don't get me started.)

08-30-2017	Minutes - Judge: mnoonan - Approved: 09-01-2017	CW - Review: 08-30-2017 11:00 AM	9
08-30-2017	Other Legal	Review Order (Proposed)	9
08-30-2017	School Report	School Credit Report	9
08-24-2017	Court Reports	DCFS Therapist Letter	9

-Mikelle

Tracy Walker
to me

I think the wording changes are better than what we had when it said orders "issued" by the court.

Thanks Dawn!

Tracy J. Walker - Clerk of Court
Silver Summit, Tooele, West Jordan
8080 South Redwood Rd., Suite 1701
West Jordan, UT 84088
801.233.9771
tracyw@utcourts.gov

---------- Forwarded message ----------
From: **Lynn Wiseman** <lynnw@utcourts.gov>
Date: Mon, Feb 5, 2018 at 8:12 AM
Subject: Re: Rule 5 Proposed Language/Feedback Needed
To: Dawn Hautamaki <dawnh@utcourts.gov>

Hi Dawn :)

The only other thing I can think of to set things apart might be to work in (and I am still going to think on this, this is just off the top of my head) the idea that the court be responsible to serve o "initiated" by the parties.

(And now that I re-read that first line, I wonder if my thinking takes this a step backward from where the committee wants to be).

But that is my two cents :)

Lynn Wiseman
Clerk of Court
2nd District Juvenile Court
801-334-4779 (Office)
801-920-3640 (Cell)

lynnw@utcourts.gov

For eFiling questions, please contact vanessat@utcourts.gov and visit the website http://www.utcourts.gov/efiling/juvenile/.

On Mon, Feb 5, 2018 at 7:44 AM, Dawn Hautamaki <dawnh@utcourts.gov> wrote:

At our Rules of Civil Procedure Committee meeting on January 24, 2018 Rule 5 was again the hot topic. Some proposed language has been drafted and I have been asked to run it past the C draft it. The idea is to have the court serve all orders but they don't want to sweep in too many minute entries that don't matter as much as, say, an order on a motion to dismiss. The rule chan

The committee will be taking this up again at our meeting February 25th. **Nancy needs any language edits no later than February 21.**

Judge Stone will also be taking this to the Board of District Court Judges.

In addition, Nancy will be drafting some proposed language for the Policy and Planning Committee regarding requiring email addresses for litigants (or making it a rebuttable presumption?) tha have language suggestions on that, **please send those to me by February 21**.

> **Rule 4-503. Mandatory electronic filing.**
> Intent:
> To require that documents in district court civil cases be filed electronically.
> To provide for exceptions.
> Applicability:
> This rule applies in the district court.
> Statement of the Rule:
> (1) Except as provided in Paragraph (2), pleadings and other papers filed in civil cases in the district court on or after April 1, 2013 shall be electronically filed using the electronic filer's interf
> (2)(A) A self-represented party who is not a lawyer may file pleadings and other papers using any means of delivery permitted by the court.
> (2)(B) A lawyer whose request for a hardship exemption from this rule has been approved by the Judicial Council may file pleadings and other papers using any means of delivery permitted the exemption is necessary to the District Court Administrator.
> (2)(C) Pleadings and other papers in probate cases may be filed using any means of delivery permitted by the court until July 1, 2013, at which time they shall be electronically filed using th
> (3) The electronic filer shall be an attorney of record and shall use a unique and personal identifier that is provided by the filer's service provider.

Thanks! I look forward to your feedback.

--
Dawn Hautamaki
Clerk of Court
8th District & Juvenile Court
920 East Hwy 40
Vernal, UT 84078
(435) 781.9303 / office
(435) 790.0942 / cell

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Dawn Hautamaki
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Nancy Sylvester <nancyjs@utcourts.gov> Wed, Feb 21, 2018 at 2:40 PM
To: Dawn Hautamaki <dawnh@utcourts.gov>

Thanks, Dawn!
[Quoted text hidden]

--
Nancy J. Sylvester
Associate General Counsel
Administrative Office of the Courts
450 South State Street
P.O. Box 140241
Salt Lake City, Utah
84114-0241
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Tab 5

Administrative Office of the Courts

Chief Justice Matthew B. Durrant
Utah Supreme Court
Chair, Utah Judicial Council

Richard H. Schwermer
State Court Administrator
Raymond H. Wahl
Deputy Court Administrator

MEMORANDUM

To: Civil Rules Committee
From: Nancy Sylvester
Date: November 9, 2017
Re: Rule 26

Judge Kent Holmberg contacted me about an issue with Rule 26. He said that Rule 26 has an apparent hole in it with respect to pretrial disclosures and witnesses. He proposed the following language:

(a)(5)Pretrial disclosures.

(a)(5)(A) A party shall, without waiting for a discovery request, serve on the other parties:

(a)(5)(A)(i) the name and, if not previously provided, the address and telephone number of each witness, unless solely for impeachment, separately identifying witnesses the party will call and witnesses the party may call;

(a)(5)(A)(ii) the name of witnesses whose testimony is expected to be presented by transcript of a deposition and a copy of the transcript with the proposed testimony designated; and

(a)(5)(A)(iii) a copy of each exhibit, including charts, summaries and demonstrative exhibits, unless solely for impeachment, separately identifying those which the party will offer and those which the party may offer.

(a)(5)(B) Disclosure required by paragraph (a)(5) shall be served on the other parties at least 28 days before trial. At least 14 days before trial, a party shall serve and file counter designations of deposition testimony, objections and grounds for the objections to the use of a deposition, to witnesses, and to the admissibility of exhibits. Other than objections under Rules 402 and 403 of the Utah Rules of Evidence, objections not listed are waived unless excused by the court for good cause.

450 South State Street / P.O. Box 140241 / Salt Lake City, Utah 84114-0241 / Tel: 801-578-3808 / Fax: 801-578-3843 / email: nancyjs@utcourts.gov

Rule 26. General provisions governing disclosure and discovery.

(a) Disclosure. This rule applies unless changed or supplemented by a rule governing disclosure and discovery in a practice area.

(a)(1) Initial disclosures. Except in cases exempt under paragraph (a)(3), a party shall, without waiting for a discovery request, serve on the other parties:

(a)(1)(A) the name and, if known, the address and telephone number of:

(a)(1)(A)(i) each individual likely to have discoverable information supporting its claims or defenses, unless solely for impeachment, identifying the subjects of the information; and

(a)(1)(A)(ii) each fact witness the party may call in its case-in-chief and, except for an adverse party, a summary of the expected testimony;

(a)(1)(B) a copy of all documents, data compilations, electronically stored information, and tangible things in the possession or control of the party that the party may offer in its case-in-chief, except charts, summaries and demonstrative exhibits that have not yet been prepared and must be disclosed in accordance with paragraph (a)(5);

(a)(1)(C) a computation of any damages claimed and a copy of all discoverable documents or evidentiary material on which such computation is based, including materials about the nature and extent of injuries suffered;

(a)(1)(D) a copy of any agreement under which any person may be liable to satisfy part or all of a judgment or to indemnify or reimburse for payments made to satisfy the judgment; and

(a)(1)(E) a copy of all documents to which a party refers in its pleadings.

(a)(2) Timing of initial disclosures. The disclosures required by paragraph (a)(1) shall be served on the other parties:

(a)(2)(A) by the plaintiff within 14 days after filing of the first answer to the complaint; and

(a)(2)(B) by the defendant within 42 days after filing of the first answer to the complaint or within 28 days after that defendant's appearance, whichever is later.

(a)(3) Exemptions.

(a)(3)(A) Unless otherwise ordered by the court or agreed to by the parties, the requirements of paragraph (a)(1) do not apply to actions:

(a)(3)(A)(i) for judicial review of adjudicative proceedings or rule making proceedings of an administrative agency;

(a)(3)(A)(ii) governed by Rule 65B or Rule 65C;

(a)(3)(A)(iii) to enforce an arbitration award;

(a)(3)(A)(iv) for water rights general adjudication under Title 73, Chapter 4, Determination of Water Rights.

(a)(3)(B) In an exempt action, the matters subject to disclosure under paragraph (a)(1) are subject to discovery under paragraph (b).

(a)(4) Expert testimony.

(a)(4)(A) Disclosure of expert testimony. A party shall, without waiting for a discovery request, serve on the other parties the following information regarding any person who may be used at trial to present evidence under Rule 702 of the Utah Rules of Evidence and who is retained or specially employed to provide expert testimony in the case or whose duties as an employee of the party regularly involve giving expert testimony: (i) the expert's name and

qualifications, including a list of all publications authored within the preceding 10 years, and a list of any other cases in which the expert has testified as an expert at trial or by deposition within the preceding four years, (ii) a brief summary of the opinions to which the witness is expected to testify, (iii) all data and other information that will be relied upon by the witness in forming those opinions, and (iv) the compensation to be paid for the witness's study and testimony.

(a)(4)(B) Limits on expert discovery. Further discovery may be obtained from an expert witness either by deposition or by written report. A deposition shall not exceed four hours and the party taking the deposition shall pay the expert's reasonable hourly fees for attendance at the deposition. A report shall be signed by the expert and shall contain a complete statement of all opinions the expert will offer at trial and the basis and reasons for them. Such an expert may not testify in a party's case-in-chief concerning any matter not fairly disclosed in the report. The party offering the expert shall pay the costs for the report.

(a)(4)(C) Timing for expert discovery.

(a)(4)(C)(i) The party who bears the burden of proof on the issue for which expert testimony is offered shall serve on the other parties the information required by paragraph (a)(4)(A) within seven days after the close of fact discovery. Within seven days thereafter, the party opposing the expert may serve notice electing either a deposition of the expert pursuant to paragraph (a)(4)(B) and Rule 30, or a written report pursuant to paragraph (a)(4)(B). The deposition shall occur, or the report shall be served on the other parties, within 28 days after the election is served on the other parties. If no election is served on the other parties, then no further discovery of the expert shall be permitted.

(a)(4)(C)(ii) The party who does not bear the burden of proof on the issue for which expert testimony is offered shall serve on the other parties the information required by paragraph (a)(4)(A) within seven days after the later of (A) the date on which the election under paragraph (a)(4)(C)(i) is due, or (B) receipt of the written report or the taking of the expert's deposition pursuant to paragraph (a)(4)(C)(i). Within seven days thereafter, the party opposing the expert may serve notice electing either a deposition of the expert pursuant to paragraph (a)(4)(B) and Rule 30, or a written report pursuant to paragraph (a)(4)(B). The deposition shall occur, or the report shall be served on the other parties, within 28 days after the election is served on the other parties. If no election is served on the other parties, then no further discovery of the expert shall be permitted.

(a)(4)(C)(iii) If the party who bears the burden of proof on an issue wants to designate rebuttal expert witnesses it shall serve on the other parties the information required by paragraph (a)(4)(A) within seven days after the later of (A) the date on which the election under paragraph (a)(4)(C)(ii) is due, or (B) receipt of the written report or the taking of the expert's deposition pursuant to paragraph (a)(4)(C)(ii). Within seven days thereafter, the party opposing the expert may serve notice electing either a deposition of the expert pursuant to paragraph (a)(4)(B) and Rule 30, or a written report pursuant to paragraph (a)(4)(B). The deposition shall occur, or the report shall be served on the other parties, within 28 days after the election is served on the other parties. If no election is served on the other parties, then no further discovery of the expert shall be permitted.

(a)(4)(D) Multiparty actions. In multiparty actions, all parties opposing the expert must agree on either a report or a deposition. If all parties opposing the expert do not agree, then further discovery of the expert may be obtained only by deposition pursuant to paragraph (a)(4)(B) and Rule 30.

(a)(4)(E) Summary of non-retained expert testimony. If a party intends to present evidence at trial under Rule 702 of the Utah Rules of Evidence from any person other than an expert witness who is retained or specially employed to provide testimony in the case or a person whose duties as an employee of the party regularly involve giving expert testimony, that party

must serve on the other parties a written summary of the facts and opinions to which the witness is expected to testify in accordance with the deadlines set forth in paragraph (a)(4)(C). A deposition of such a witness may not exceed four hours.

(a)(5) Pretrial disclosures.

(a)(5)(A) A party shall, without waiting for a discovery request, serve on the other parties:

(a)(5)(A)(i) the name and, if not previously provided, the address and telephone number of each witness, unless solely for impeachment, separately identifying witnesses the party will call and witnesses the party may call;

(a)(5)(A)(ii) the name of witnesses whose testimony is expected to be presented by transcript of a deposition and a copy of the transcript with the proposed testimony designated; and

(a)(5)(A)(iii) a copy of each exhibit, including charts, summaries and demonstrative exhibits, unless solely for impeachment, separately identifying those which the party will offer and those which the party may offer.

(a)(5)(B) Disclosure required by paragraph (a)(5) shall be served on the other parties at least 28 days before trial. At least 14 days before trial, a party shall serve and file counter designations of deposition testimony, objections and grounds for the objections to the use of a deposition, to witnesses, and to the admissibility of exhibits. Other than objections under Rules 402 and 403 of the Utah Rules of Evidence, objections not listed are waived unless excused by the court for good cause.

(b) Discovery scope.

(b)(1) In general. Parties may discover any matter, not privileged, which is relevant to the claim or defense of any party if the discovery satisfies the standards of proportionality set forth below. Privileged matters that are not discoverable or admissible in any proceeding of any kind or character include all information in any form provided during and created specifically as part of a request for an investigation, the investigation, findings, or conclusions of peer review, care review, or quality assurance processes of any organization of health care providers as defined in the Utah Health Care Malpractice Act for the purpose of evaluating care provided to reduce morbidity and mortality or to improve the quality of medical care, or for the purpose of peer review of the ethics, competence, or professional conduct of any health care provider.

(b)(2) Proportionality. Discovery and discovery requests are proportional if:

(b)(2)(A) the discovery is reasonable, considering the needs of the case, the amount in controversy, the complexity of the case, the parties' resources, the importance of the issues, and the importance of the discovery in resolving the issues;

(b)(2)(B) the likely benefits of the proposed discovery outweigh the burden or expense;

(b)(2)(C) the discovery is consistent with the overall case management and will further the just, speedy and inexpensive determination of the case;

(b)(2)(D) the discovery is not unreasonably cumulative or duplicative;

(b)(2)(E) the information cannot be obtained from another source that is more convenient, less burdensome or less expensive; and

(b)(2)(F) the party seeking discovery has not had sufficient opportunity to obtain the information by discovery or otherwise, taking into account the parties' relative access to the information.

(b)(3) Burden. The party seeking discovery always has the burden of showing proportionality and relevance. To ensure proportionality, the court may enter orders under Rule 37.

(b)(4) Electronically stored information. A party claiming that electronically stored information is not reasonably accessible because of undue burden or cost shall describe the source of the electronically stored information, the nature and extent of the burden, the nature of the information not provided, and any other information that will enable other parties to evaluate the claim.

(b)(5) Trial preparation materials. A party may obtain otherwise discoverable documents and tangible things prepared in anticipation of litigation or for trial by or for another party or by or for that other party's representative (including the party's attorney, consultant, surety, indemnitor, insurer, or agent) only upon a showing that the party seeking discovery has substantial need of the materials and that the party is unable without undue hardship to obtain substantially equivalent materials by other means. In ordering discovery of such materials, the court shall protect against disclosure of the mental impressions, conclusions, opinions, or legal theories of an attorney or other representative of a party.

(b)(6) Statement previously made about the action. A party may obtain without the showing required in paragraph (b)(5) a statement concerning the action or its subject matter previously made by that party. Upon request, a person not a party may obtain without the required showing a statement about the action or its subject matter previously made by that person. If the request is refused, the person may move for a court order under Rule 37. A statement previously made is (A) a written statement signed or approved by the person making it, or (B) a stenographic, mechanical, electronic, or other recording, or a transcription thereof, which is a substantially verbatim recital of an oral statement by the person making it and contemporaneously recorded.

(b)(7) Trial preparation; experts.

(b)(7)(A) Trial-preparation protection for draft reports or disclosures. Paragraph (b)(5) protects drafts of any report or disclosure required under paragraph (a)(4), regardless of the form in which the draft is recorded.

(b)(7)(B) Trial-preparation protection for communications between a party's attorney and expert witnesses. Paragraph (b)(5) protects communications between the party's attorney and any witness required to provide disclosures under paragraph (a)(4), regardless of the form of the communications, except to the extent that the communications:

(b)(7)(B)(i) relate to compensation for the expert's study or testimony;

(b)(7)(B)(ii) identify facts or data that the party's attorney provided and that the expert considered in forming the opinions to be expressed; or

(b)(7)(B)(iii) identify assumptions that the party's attorney provided and that the expert relied on in forming the opinions to be expressed.

(b)(7)(C) Expert employed only for trial preparation. Ordinarily, a party may not, by interrogatories or otherwise, discover facts known or opinions held by an expert who has been retained or specially employed by another party in anticipation of litigation or to prepare for trial and who is not expected to be called as a witness at trial. A party may do so only:

(b)(7)(C)(i) as provided in Rule 35(b); or

(b)(7)(C)(ii) on showing exceptional circumstances under which it is impracticable for the party to obtain facts or opinions on the same subject by other means.

(b)(8) Claims of privilege or protection of trial preparation materials.

(b)(8)(A) Information withheld. If a party withholds discoverable information by claiming that it is privileged or prepared in anticipation of litigation or for trial, the party shall make the claim expressly and shall describe the nature of the documents, communications, or things not produced in a manner that, without revealing the information itself, will enable other parties to evaluate the claim.

(b)(8)(B) Information produced. If a party produces information that the party claims is privileged or prepared in anticipation of litigation or for trial, the producing party may notify any receiving party of the claim and the basis for it. After being notified, a receiving party must promptly return, sequester, or destroy the specified information and any copies it has and may not use or disclose the information until the claim is resolved. A receiving party may promptly present the information to the court under seal for a determination of the claim. If the receiving party disclosed the information before being notified, it must take reasonable steps to retrieve it. The producing party must preserve the information until the claim is resolved.

(c) Methods, sequence and timing of discovery; tiers; limits on standard discovery; extraordinary discovery.

(c)(1) Methods of discovery. Parties may obtain discovery by one or more of the following methods: depositions upon oral examination or written questions; written interrogatories; production of documents or things or permission to enter upon land or other property, for inspection and other purposes; physical and mental examinations; requests for admission; and subpoenas other than for a court hearing or trial.

(c)(2) Sequence and timing of discovery. Methods of discovery may be used in any sequence, and the fact that a party is conducting discovery shall not delay any other party's discovery. Except for cases exempt under paragraph (a)(3), a party may not seek discovery from any source before that party's initial disclosure obligations are satisfied.

(c)(3) Definition of tiers for standard discovery. Actions claiming $50,000 or less in damages are permitted standard discovery as described for Tier 1. Actions claiming more than $50,000 and less than $300,000 in damages are permitted standard discovery as described for Tier 2. Actions claiming $300,000 or more in damages are permitted standard discovery as described for Tier 3. Absent an accompanying damage claim for more than $300,000, actions claiming non-monetary relief are permitted standard discovery as described for Tier 2.

(c)(4) Definition of damages. For purposes of determining standard discovery, the amount of damages includes the total of all monetary damages sought (without duplication for alternative theories) by all parties in all claims for relief in the original pleadings.

(c)(5) Limits on standard fact discovery. Standard fact discovery per side (plaintiffs collectively, defendants collectively, and third-party defendants collectively) in each tier is as follows. The days to complete standard fact discovery are calculated from the date the first defendant's first disclosure is due and do not include expert discovery under paragraphs(a)(4)(C) and (D).

Tier	Amount of Damages	Total Fact Deposition Hours	Rule 33 Interrogatories including all discrete subparts	Rule 34 Requests for Production	Rule 36 Requests for Admission	Days to Complete Standard Fact Discovery
1	$50,000 or less	3	0	5	5	120
2	More than $50,000 and less than $300,000 or non-monetary relief	15	10	10	10	180

3	$300,000 or more	30	20	20	20	210

(c)(6) Extraordinary discovery. To obtain discovery beyond the limits established in paragraph (c)(5), a party shall file:

(c)(6)(A) before the close of standard discovery and after reaching the limits of standard discovery imposed by these rules, a stipulated statement that extraordinary discovery is necessary and proportional under paragraph (b)(2) and that each party has reviewed and approved a discovery budget; or

(c)(6)(B) before the close of standard discovery and after reaching the limits of standard discovery imposed by these rules, a request for extraordinary discovery under Rule 37(a).

(d) Requirements for disclosure or response; disclosure or response by an organization; failure to disclose; initial and supplemental disclosures and responses.

(d)(1) A party shall make disclosures and responses to discovery based on the information then known or reasonably available to the party.

(d)(2) If the party providing disclosure or responding to discovery is a corporation, partnership, association, or governmental agency, the party shall act through one or more officers, directors, managing agents, or other persons, who shall make disclosures and responses to discovery based on the information then known or reasonably available to the party.

(d)(3) A party is not excused from making disclosures or responses because the party has not completed investigating the case or because the party challenges the sufficiency of another party's disclosures or responses or because another party has not made disclosures or responses.

(d)(4) If a party fails to disclose or to supplement timely a disclosure or response to discovery, that party may not use the undisclosed witness, document or material at any hearing or trial unless the failure is harmless or the party shows good cause for the failure.

(d)(5) If a party learns that a disclosure or response is incomplete or incorrect in some important way, the party must timely serve on the other parties the additional or correct information if it has not been made known to the other parties. The supplemental disclosure or response must state why the additional or correct information was not previously provided.

(e) Signing discovery requests, responses, and objections. Every disclosure, request for discovery, response to a request for discovery and objection to a request for discovery shall be in writing and signed by at least one attorney of record or by the party if the party is not represented. The signature of the attorney or party is a certification under Rule 11. If a request or response is not signed, the receiving party does not need to take any action with respect to it. If a certification is made in violation of the rule, the court, upon motion or upon its own initiative, may take any action authorized by Rule 11 or Rule 37(b).

(f) Filing. Except as required by these rules or ordered by the court, a party shall not file with the court a disclosure, a request for discovery or a response to a request for discovery, but shall file only the certificate of service stating that the disclosure, request for discovery or response has been served on the other parties and the date of service.

Advisory Committee Notes

Legislative Note

Tab 6

Administrative Office of the Courts

Chief Justice Matthew B. Durrant
Utah Supreme Court
Chair, Utah Judicial Council

Richard H. Schwermer
State Court Administrator
Raymond H. Wahl
Deputy Court Administrator

MEMORANDUM

To: Civil Rules Committee
From: Nancy Sylvester
Date: January 21, 2018
Re: Rule 9

Attorney Edward Havas contacted Jonathan Hafen about a potential amendment to Rule 9. He said, "I've experienced occasions in which I thought rule 9 was used in an abusive way by a defendant's counsel to name non-parties at fault on the verdict form late in the litigation, which I think is counter to the intent of the rule, if not its language." He submitted proposed language, which is attached to this memo.

Rule 9. Pleading special matters.

(a) Capacity or Authority to Sue; Legal Existence.

(1) In General. Except when required to show that the court has jurisdiction, a pleading need not allege:

(A) a party's capacity to sue or be sued;

(B) a party's authority to sue or be sued in a representative capacity; or

(C) the legal existence of an organized association of persons that is made a party.

(2) Raising Those Issues. To raise any of those issues, a party must do so by a specific denial, which must state any supporting facts that are peculiarly within the party's knowledge.

(b) Unknown parties.

(b)(1) Designation. When a party does not know the name of an opposing party, it may state that fact in the pleadings, and designate the opposing party in a pleading by any name. When the true name of the opposing party becomes known, the pleading must be amended.

(b)(2) Descriptions of interest in quiet title actions. If one or more parties in an action to quiet title are designated in the caption as “unknown,” the pleadings may describe the unknown persons as “all other persons unknown, claiming any right, title, estate or interest in, or lien upon the real property described in the pleading adverse to the complainant's ownership, or clouding its title.”

(c) Fraud, mistake, condition of the mind. In alleging fraud or mistake, a party must state with particularity the circumstances constituting fraud or mistake. Malice, intent, knowledge, and other conditions of a person’s mind may be alleged generally.

(d) Conditions precedent. In pleading conditions precedent, it is sufficient to allege generally that all conditions precedent have been performed or have occurred. When denying that a condition precedent has been performed or has occurred, a party must do so with particularity.

(e) Official document or act. In pleading an official document or official act it is sufficient to allege that the document was legally issued or the act was legally done.

(f) Judgment. In pleading a judgment or decision of a domestic or foreign court, a judicial or quasi-judicial tribunal, or a board or officer, it is sufficient to plead the judgment or decision without showing jurisdiction to render it.

(g) Time and place. An allegation of time or place is material when testing the sufficiency of a pleading.

(h) Special damage. If an item of special damage is claimed, it must be specifically stated.

(i) Statute of limitations. In pleading the statute of limitations it is not necessary to state the facts showing the defense but it may be alleged generally that the cause of action is barred by the statute, referring to or describing the statute by section number, subsection designation, if any, or designating the provision relied on sufficiently to identify it.

(j) Private statutes; ordinances. In pleading a private statute, an ordinance, or a right derived from a statute or ordinance, it is sufficient to refer to the statute or ordinance by its title and the day of its passage or by its section number or other designation in any official publication of the statute or ordinance. The court will take judicial notice of the statute or ordinance.

(k) Libel and slander.

(k)(1) Pleading defamatory matter. In an action for libel or slander it is sufficient to allege generally that the defamatory matter out of which the action arose was published or spoken

concerning the plaintiff. If the allegation is denied, the party alleging the defamatory matter must establish at trial that it was published or spoken.

(k)(2) Pleading defense. The defendant may allege the truth of the matter charged as defamatory and any mitigating circumstances to reduce the amount of damages. Whether or not justification is proved, the defendant may give evidence of the mitigating circumstances.

(l) Allocation of fault.

(l)(1) A party seeking to allocate fault to a non-party under Title 78B, Chapter 5, Part 8 must file:

(l)(1)(A) a description of the factual and legal basis on which fault can be allocated; and

(l)(1)(B) information known or reasonably available to the party identifying the non-party, including name, address, telephone number and employer. If the identity of the non-party is unknown, the party must so state.

(l)(2) The information specified in paragraph (l)(1) must be included in the party's responsive pleading if then known or must be included in a supplemental notice filed within ~~a reasonable time~~ 60 days after the party discovers or reasonably should have discovered the factual and legal basis on which fault can be allocated. The court, upon motion and for good cause shown, may permit a party to file the information specified in paragraph (l)(1) after the expiration of any period permitted by this rule, but in no event later than 90 days before trial.

(l)(3) A party must not seek to allocate fault to another except by compliance with this rule.

Advisory Committee Notes