Agenda

Advisory Committee on Rules of Civil Procedure

May 27, 2020

4:00 to 6:00 p.m.

Via Webex

Welcome and approval of minutes.	Tab 1	Jonathan Hafen, Chair
Legislative standing agenda item Rule 68 • Discussion of rule and its policy implications • Nevada rule (UAJ) •	Tab 2	Judge Clay Stucki (subcommittee chair), Leslie Slaugh, Rod Andreason, Susan Vogel, Rep. Brady Brammer, Douglas Cannon
Rules 4, 7, 8, 36: • Follow up discussion to April's meeting and discussion with Supreme Court. • Include consequences for failing to include the caution language and bilingual notice. • The caution language and bilingual notice should be required in all cases.	Tab 3	Jonathan Hafen, Nancy Sylvester
Rule 64: • Request from Board of District Court Judges • Final approval of language and send on to Supreme Court	Tab 4	Nancy Sylvester
Rules 5 and 109: • Fix issue of clerks sending the 109 injunction to respondents before they have been served with the petition.	Tab 5	Nancy Sylvester
Rule 42: • Consolidation • Venue Transfer	Tab 6	Tim Pack, Rod Andreason, Judge Kent Holmberg, Lauren DiFrancesco, Trevor Lee, Judge Rich Mrazik
Other business		Jonathan Hafen, Chair

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

2020 Meeting Schedule: May 27, 2020, June 24, 2020, September 23, 2020, October 28, 2020, November 18, 2020

Tab 1

UTAH SUPREME COURT ADVISORY COMMITTEE
ON RULES OF CIVIL PROCEDURE

Summary Minutes – April 22, 2020

DUE TO THE COVID-19 PANDEMIC AND STATE OF EMERGENCY
THIS MEETING WAS CONDUCTED ELECTRONICALLY VIA WEBEX

Committee members & staff	Present	Excused	Appeared by Phone
Jonathan Hafen, Chair	X		
Rod N. Andreason	X		
Judge James T. Blanch	X		
Lauren DiFrancesco	X		
Judge Kent Holmberg	X		
James Hunnicutt		X	
Larissa Lee		X	
Trevor Lee	X		
Judge Amber M. Mettler	X		
Timothy Pack	X		
Bryan Pattison	X		
Michael Petrogeorge	X		
Judge Clay Stucki	X		
Judge Laura Scott	X		
Leslie W. Slaugh	X		
Trystan B. Smith		X	
Heather M. Sneddon		X	
Paul Stancil		X	
Judge Andrew H. Stone	X		
Justin T. Toth		X	
Susan Vogel	X		
Brooke McKnight	X		
Ash McMurray, Recording Secretary	X		
Nancy Sylvester, Staff	X		

(1) WELCOME AND APPROVAL OF MINUTES

Jonathan Hafen welcomed the committee and asked for approval of the minutes as amended. Judge Clay Stucki moved to approve the minutes. Rod Andreason seconded the motion. The minutes were approved unanimously.

(2) RULES 4, 7, 8, 36

Rule 4: The committee considered whether to amend Rule 4 to require the use of the Judicial Council's form summons. Tim Pack raised the issue of what the consequences should be if the applicable form is not used. Leslie Slaugh suggested that the rule should require, not the use of the form itself, but that the summons be substantially similar to the form. The committee discussed whether Mr. Slaugh's proposal would require the summons to be bilingual. In the alternative, Mr. Slaugh suggested that if parties are required to use the Judicial Council's form, then the language in Rule 4 regarding the contents of the summons should be removed; Mr. Hafen commented that doing so may improperly defer the committee's rulemaking authority to the Forms Committee. The committee discussed the purpose of the amendment: to provide actual notice to individuals who do not speak or read English. After further discussion in light of the amendment's purpose, the committee agreed upon a new amendment to Rule 4 requiring the summons to contain the bilingual notice from the Judicial Council's form summons as follows:

> (c)(1) The summons must:
> (c)(1)(A) contain the name and address of the court, the names of the parties to the action, and the county in which it is brought;
> (c)(1)(B) be directed to the defendant;
> (c)(1)(C) state the name, address and telephone number of the plaintiff's attorney, if any, and otherwise the plaintiff's address and telephone number;
> (c)(1)(D) state the time within which the defendant is required to answer the complaint in writing;
> (c)(1)(E) notify the defendant that in case of failure to answer in writing, judgment by default will be entered against the defendant; ~~and~~
> (c)(1)(F) state either that the complaint is on file with the court or that the complaint will be filed with the court within 10 days after service; and
> (c)(1)(G) include the bilingual notice set forth in the form summons approved by the Utah Judicial Council.

Rule 7: The committee discussed at length whether to include consequences for failure to include in a motion the caution language and bilingual notice required by the proposed Rule 7 amendments. Susan Vogel expressed support for including consequences because the caution language and bilingual notice are helpful to pro se litigants. Judge Andrew Stone commented that creating a requirement with strict consequences may create an additional obstacle for pro se litigants who do not use motion forms.

The committee discussed whether the requirement to include the caution language and bilingual notice, if adopted, should apply universally or only in cases involving pro se litigants. Mr. Pack noted that the additional requirements and consequences would create an additional burden on represented parties and suggested that the caution language and bilingual notice be required only in cases involving an unrepresented party. Mr. Slaugh noted that it would be easier administratively to require the caution language and bilingual notice language in all cases and recommended against creating a set of rules specific to cases involving unrepresented parties. Ms. Vogel noted that further clarification may be needed for cases involving limited scope representation and licensed paralegal practitioners.

Judge Kent Holmberg noted that the question of whether the caution language and bilingual notice should be required in all cases is a policy question regarding the extent to which the Rules of Civil Procedure should provide for unrepresented parties and, as such, may require further guidance from the Utah Supreme Court before the committee makes a final decision. Ms. Vogel commented that many individuals do not trust the judicial system because they are not informed of what they need to do, and that the requirement to include the caution language and bilingual notice would help build confidence in the judicial system. Judge Stucki voiced support of Ms. Vogel's comments with regard to the justice court system and agreed with Mr. Slaugh that the requirement, if adopted, should be applied universally despite the additional burden on represented parties. Nancy Sylvester read from a letter from the Utah Supreme Court requesting that the committee help make the judicial system more accessible to unrepresented individuals.

The committee discussed what, if any, consequences should be imposed on a party that fails to include the caution language and bilingual notice on a motion as required. Judge Stucki suggested that judges should have discretion to provide parties with more time to respond. Judge Stone and Trevor Lee expressed concern that represented parties might take advantage of Judge Stucki's proposal for more time. Judge Stucki responded that a judge would have discretion not to give additional time to prevent abuse. Mr. Slaugh noted that allowing additional time would be cumbersome for all parties and would create delay and disruption, especially in cases where the court has already ruled on the motion.

In the alternative, Mr. Slaugh suggested that the time to respond should not begin to run until the motion contains the proper caution language and bilingual notice. Judge Stone commented that doing so would be especially burdensome for judicial assistants and judges who would then be required to enforce compliance. Ms. Vogel commented that the new myCase system, once implemented, could resolve Judge Stone's concern.

Judge Stone proposed a different alternative that failure to include the proper caution language and bilingual notice could be considered as prima facie evidence for excusable neglect under Rule 60(b).

Judge Amber Mettler spoke against including a consequence provision, noting that represented parties could stipulate out of the requirement and that not specifying consequences would give greater discretion to judges to provide consequences as necessary and appropriate under the circumstances. Judge James Blanch commented in support of Judge Mettler's position.

After concluding discussion, the committee conducted a series of informal votes regarding whether consequences should be included in the rule for failure to provide the caution language and bilingual notice on a motion, what the consequences should be, and whether the consequences should be applicable in all cases or only in cases involving an unrepresented party. Finding no clear consensus, Mr. Hafen recommended that the committee seek further direction from the Utah Supreme Court and return to the issue at a later time. Mr. Hafen will request guidance from the Utah Supreme Court on whether to include consequences for failing to include the caution language and bilingual notice and whether the caution language and bilingual notice should be required when all parties are represented.

Rules 8 and 55: The committee discussed proposed amendments to Rule 55 requiring a party to provide no fewer than 14 days' notice to the other party that failure to answer a claim, cross-claim, or counter-claim may result in default judgment being entered against that party. Ms. Sylvester proposed an alternative amendment that would also require conspicuous notice on the first page of the document. The committee discussed whether the rule should apply in all cases or only in cases involving unrepresented parties; whether the 14-day notice requirement is necessary and what effect, if any, it might have on eviction proceedings in light of recent statutory changes; whether Rule 55 is the most appropriate place for the amendment; and what, if any, consequences should apply if the appropriate notice is not given. After the discussion, the committee elected to set aside the proposed changes to Rule 55 in favor of the following amendment to Rule 8(a):

> **(a) Claims for relief.** An original claim, counterclaim, cross-claim or third-party claim must contain a short and plain: (1) statement of the claim showing that the party is entitled to relief; and (2) demand for judgment for specified relief. Relief in the alternative or of several different types may be demanded. A party who claims damages but does not plead an amount must plead that the damages are such as to qualify for a specified tier defined by Rule 26(c)(3). A pleading that qualifies for tier 1 or tier 2 discovery constitutes a waiver of any right to recover damages above the tier limits specified in Rule 26(c)(3), unless the pleading is amended under Rule 15. A pleading requesting relief must include the following language on the top of the first page in bold print:
>
> **If you do not respond to this document within applicable time limits, judgment could be entered [against you] as requested.**

Mr. Hafen called for a vote to propose the amendment to the Utah Supreme Court with a request for further direction on whether to include consequences for failing to include notice and whether the notice should be required when all the parties are represented. Judge Mettler moved to send the language to the Court for additional guidance. Judge Stone seconded the motion. The motion passed with one abstention by Susan Vogel. Ms. Vogel explained that she abstained because

she did not know if the proposed language reflected the intention of the original proposed amendment to Rule 55.

Rule 36: The committee briefly discussed the following proposed amendment to Rule 36, which was discussed at the previous committee meeting in February:

> **(b) Required notice on request for admission.** The following notice is required on all requests for admission. The notice must be on the top of the first page in bold print as follows: **You must respond to these requests for admissions within 28 days. If you do not respond within 28 days, the court will consider you to have admitted these requests as true.**

Ms. Vogel moved to send the proposed amendment to the Utah Supreme Court for additional guidance. Judge Stucki seconded the motion. The motion passed unanimously.

(3) ADJOURNMENT

The remaining items were deferred until May 27, 2020. The meeting adjourned at 6:02 p.m.

Tab 2

Rule 68. Settlement Offers.

(a) Offer. Not less than thirty days before the trial or arbitration begins, any party may serve upon an adverse party that has filed its initial pleading an offer to settle any claim(s) for money or non-monetary relief requested and to enter into an agreement dismissing any claim(s) to allow dismissal to be entered accordingly.

(1) **Apportionment**. An offer need not be apportioned by claim(s) but shall be apportioned to each offeree.

(2) **Multiple Offerors**. Multiple parties may make a joint offer to a single offeree. Such an offer need not be apportioned by offeror.

(3) **Multiple Offerees**. One or more offers may be made to multiple offerees. If a single offer is made to multiple offerees, that offer shall be apportioned to each offeree. If fewer than all offerees accept, the acceptance shall be considered enforceable as to offeror and accepting offeree as long as:

i. the offer is not expressly conditioned upon acceptance by all offerees, and

ii. the offeror or accepting offeree serves a notice of acceptance to all other parties no later than 14 days after the offer expires.

All non-accepting offerees shall be bound by the remainder of this rule, including, but not limited to, the potential sanctions discussed herein.

(4) **Cross Claims and Counterclaims**: For purposes of this rule, cross claimants and counterclaimants that make offers pursuant to this rule to resolve the claim(s) in the cross-claim or counter-claim shall be considered "Plaintiffs" and cross-defendants and counter-defendants that make offers pursuant to this rule to resolve the claim(s) in the cross-claim or counter-claim shall be considered "Defendants." A party with multiple designations seeking to resolve all claim(s) with an adverse party (e.g. defendant and counterclaimant) need not make an offer for each designation but shall specifically identify each designation of both the offeror as well as the offeree in the offer.

(5) **Subsequent Offers**. The fact that an offer is made under this rule but not accepted does not preclude subsequent offers.

(6) **Proof of Service**. A proof of service for any offer filed pursuant to this rule shall be filed with the Court at the time the offer is made. The offer shall not be filed with the Court.

(b) Form of Offer. A valid offer under this rule must be made in writing and shall substantially comply with the following requirements:

(1) the name of the offeror(s);

(2) the name of the offeree(s);

(3) a statement that the offer is made pursuant to Rule 68;

(4) the offer;

(5) one of the following statements:

i. "This offer does not include attorneys fees and costs" if there is no claim to a statutory or contractual right to attorneys fees and costs; or

ii. "This offer includes attorneys fees and costs" if there is a claim to a statutory or contractual right to attorneys fees and costs;

iii. The offerees inclusion or exclusion of any right to attorneys fees and costs shall have no effect on the determination of whether the offeror is entitled to fees under contract or under statute.

(6) a statement that if acceptance of the offer is not made within 14 days of the offer being made, it shall automatically expire;

(7) a place for the offeree(s) to sign indicating acceptance of the offer;

(8) instructions for return of any accepted offer; and

(9) if the offeree is not represented by counsel, the offer shall include instructions for obtaining legal assistance as set forth in the advisory notes to this rule.

(c) Acceptance. If within 14 days after the service of the offer the offeree serves written notice that the offer is accepted, either party may then file with the Court a copy of the offer and notice of acceptance together with a proof of service and a request to submit. The clerk shall designate the offer, notice of acceptance, and settlement as a Private Court Record pursuant to Utah Rules of Judicial Administration 4-202.02(4)(F). Acceptance of an offer pursuant to this rule shall extinguish any contractual or statutory rights to attorney fees and/or costs.

(d) Nonacceptance. An offer not accepted shall be deemed withdrawn and evidence thereof is not admissible into evidence except to determine sanctions or fee shifting under this rule.

(e) Sanctions. In cases where the offeree is not entitled to statutory or contractual awards of attorney fees:

(1) **Defendant's Offer.** if the judgment or arbitration award finally obtained by the plaintiff offeree is not equal to at least 75% of an offer by Defendant, then the plaintiff will not be able to recover post-offer costs and shall pay defendant's post-offer reasonable court costs, reasonable expert witness fees, and reasonable attorneys fees. If defendant is not represented by

counsel the Court shall determine the reasonable equivalent of post-offer attorneys fees.

(2) **Plaintiff's Offer.** If there is a judgment or arbitration award for the plaintiff offeror greater than 125% of an offer by plaintiff, then the defendant shall pay plaintiff's post-post offer reasonable court costs, reasonable expert witness fees, and reasonable attorneys fees. If plaintiff is not represented by counsel the Court shall determine the reasonable equivalent of post-offer attorneys fees.

(3) **Limitations.** Sanctions awarded against a plaintiff in an action seeking personal injury damages shall be limited to an offset against damages awarded to that plaintiff.

(f) Fee Shifting. In cases where the offeree is entitled to a statutory or contractual award of attorneys fees:

(1) **Defendant's Offer.** If a defendant makes an offer which is not accepted by the plaintiff and the judgment or arbitration award finally obtained by the plaintiff is not equal to or better than the offer by defendant, then the plaintiff will not be able to recover post-offer costs and shall pay the reasonable court costs, expert witness fees, and attorneys fees incurred by the defendant after the making of the offer.

(2) **Plaintiff's Offer.** If a plaintiff makes an offer which is not accepted by the defendant and the judgment or arbitration award finally obtained by the plaintiff is not equal to or worse than an offer by plaintiff, then the defendant will not be able to recover post-offer costs and shall pay the reasonable court costs, expert witness fees, and attorneys fees incurred by the defendant after the making of the offer.

(g) Multiple Offers. If multiple offers were made by a single party that meet the criteria for sanctions or fee shifting, the earliest qualifying offer should be used. If both parties made offers that would qualify for sanctions or fee shifting, the earliest offer that would result in sanctions is the offer that will be considered by the court.

(h) Reasonableness. The trial court shall have discretion to modify the application of this rule for purposes of sanctions and fee shifting in the interests of equity. If the trial court exercises this discretion, the trial court shall set forth its reasons for such modification in the form of an order. The trial court may consider but is not required to consider nor is limited to considering, the information known at the time of the offer, the issues contested, the sophistication of the parties, and general public policy.

(i) Offer After Judgment. When the liability of one party to another has been determined by verdict, order, or judgment, but the exact amount or extent of that liability remains to be determined by further proceedings, either party may make an offer of settlement, which shall have the same effect as an offer made before trial or arbitration,

so long as it is served within ten days prior to the commencement of hearings to determine the amount or extent of that liability.

(j) Exceptions. This rule does not apply in class actions, family law and divorce actions, eminent domain actions, or claim(s) involving only injunctive relief.

Nevada: Rule 68 Nevada

Utah is considering adopting a Rule 68 similar to Nevada's Rule 68. To that end, I followed up on Nevada's Rule 68.

Nevada Case Law

The Nevada Court of Appeals in *O'Connell v. Wynn Las Vegas, LLC,* 429 P.2d 664 (Nev. Ct. App. 2018) outlined the following for the award of attorneys' fees under Rule 68:

> The district court must evaluate the *Beattie* factors when deciding whether to award attorney fees pursuant to NRCP 68. *Frazier v. Drake,* 131 Nev. 632, 641-42, 357 P.3d 365, 372 (Ct. App. 2015). Ultimately, the decision to award attorney fees rests within the district court's discretion, and we review such decisions for an abuse of discretion. *Id.* at 642, 357 P.3d at 372. The district court abuses its discretion when "the court's evaluation of the *Beattie* factors is arbitrary or capricious." *Id.*
>
> The *Beattie* factors require the district court to evaluate:
>
> (1) whether the plaintiff's claim was brought in good faith; (2) whether the defendants' offer of judgment was reasonable and in good faith in both its timing and amount; (3) whether the plaintiff's decision to reject the offer and proceed to trail was grossly unreasonable or in bad faith; and (4) whether the fees sought by the offeror are reasonable and justified in amount.

Beattie, 99 Nev. At 588-89, 668 P.2d at 274.

Discussion with Nevada Personal Injury Attorneys

We had a few conversations with Nevada personal injury attorneys. Hence, these discussions are only anecdotal. Most Nevada personal injury attorneys did not see Rule 68 as a big game changer because the court still had discretion whether to award fees or not. In fact, one attorney said Nevada courts rarely award fees.

The President of Nevada's Association for Justice said he had not heard much criticism about Nevada's Rule 68. He did mention it was important that the rule be such that there is no automatic right to fees. He said Nevada's rule allows judges to have discretion whether to award fees or not.

Utah Association for Justice

For the reasons we have set out previously, we are still opposed to a Rule 68 change which awards attorneys' fees to the prevailing party. We believe this restricts access to the courts for those with limited means.

Tab 3

Draft: May 26, 2020

Comparison of all notice language:

Rule 4. Process.

(c) Contents of summons.

(c)(1) The summons must:

(c)(1)(A) contain the name and address of the court, the names of the parties to the action, and the county in which it is brought;

(c)(1)(B) be directed to the defendant;

(c)(1)(C) state the name, address and telephone number of the plaintiff's attorney, if any, and otherwise the plaintiff's address and telephone number;

(c)(1)(D) state the time within which the defendant is required to answer the complaint in writing;

(c)(1)(E) notify the defendant that in case of failure to answer in writing, judgment by default will be entered against the defendant; ~~and~~

(c)(1)(F) state either that the complaint is on file with the court or that the complaint will be filed with the court within 10 days after service; and

(c)(1)(G) include the bilingual notice set forth in the form summons approved by the Utah Judicial Council.

Rule 7. Pleadings allowed; motions, memoranda, hearings, orders.

(c) Name and content of motion.

(c)(1) The rules governing captions and other matters of form in pleadings apply to motions and other papers.

(c)(2) **Caution language.** ~~[Unless all parties are represented,]~~ For all dispositive motions, the motion must include the following language at the top right corner of the first page of the document, in bold type:

This motion requires you to respond. Please see the Notice to Responding Party.

(c)(3) **Bilingual notice.** All motions must include the bilingual Notice to Responding Party approved by the Judicial Council.

[(c)(4) **Failure to include notices**. Failure to include the cautionary language in paragraph (c)(2) and the bilingual notice in paragraph (c)(3) may constitute excusable neglect under Rule 60(b) or may be grounds for other equitable relief, including additional time to respond.]

Comment [NS1]: The Supreme Court would like to see this applied uniformly to lessen confusion.

Comment [NS2]: The Supreme Court would like consequences in the rule, but does not think what we have here is ready.

Rule 8. General rules of pleadings.

(a) Claims for relief. An original claim, counterclaim, cross-claim or third-party claim must contain a short and plain: (1) statement of the claim showing that the party is entitled to relief; and (2) demand for judgment for specified relief. Relief in the alternative or of several different types may be demanded. A party who claims damages but does not plead an amount must plead that the damages are such as to qualify for a specified tier defined by Rule 26(c)(3). A pleading that qualifies for tier 1 or tier 2 discovery

constitutes a waiver of any right to recover damages above the tier limits specified in Rule 26(c)(3), unless the pleading is amended under Rule 15. A pleading requesting relief must include the following language on the top of the first page in bold print:

If you do not respond to this document within applicable time limits, judgment could be entered [against you] as requested.

Rule 36. Request for admission.

(b) Required notice on request for admission. The following notice is required on all requests for admission. The notice must be on the top of the first page in bold print as follows: **You must respond to these requests for admission within 28 days. If you do not respond within 28 days, the court will consider you to have admitted these requests as true.**

Tab 4

Rule 64. Writs in general.

(a) Definitions. As used in Rules 64, 64A, 64B, 64C, 64D, 64E, 69A, 69B and 69C:

(a)(1) "Claim" means a claim, counterclaim, cross claim, third party claim or any other claim.

(a)(2) "Defendant" means the party against whom a claim is filed or against whom judgment has been entered.

(a)(3) "Deliver" means actual delivery or to make the property available for pick up and give to the person entitled to delivery written notice of availability.

(a)(4) "Disposable earnings" means that part of earnings for a pay period remaining after the deduction of all amounts required by law to be withheld.

(a)(5) "Earnings" means compensation, however denominated, paid or payable to an individual for personal services, including periodic payments pursuant to a pension or retirement program. Earnings accrue on the last day of the period in which they were earned.

(a)(6) "Notice of exemptions" means a form that advises the defendant or a third person that certain property is or may be exempt from seizure under state or federal law. The notice shall list examples of exempt property and indicate that other exemptions may be available. The notice shall instruct the defendant of the deadline for filing a reply and request for hearing.

(a)(7) "Officer" means any person designated by the court to whom the writ is issued, including a sheriff, constable, deputy thereof or any person appointed by the officer to hold the property.

(a)(8) "Plaintiff" means the party filing a claim or in whose favor judgment has been entered.

(a)(9) "Property" means the defendant's property of any type not exempt from seizure. Property includes but is not limited to real and personal property, tangible and intangible property, the right to property whether due or to become due, and an obligation of a third person to perform for the defendant.

(a)(10) "Serve" with respect to parties means any method of service authorized by Rule 5, unless otherwise specified in this rule, and with respect to non-parties means any manner of service authorized by Rule 4.

(b) Security.

(b)(1) Amount. When security is required of a party, the party shall provide security in the sum and form the court deems adequate. For security by the plaintiff the amount should be sufficient to reimburse other parties for damages, costs and attorney fees incurred as a result of a writ wrongfully obtained. For security by the defendant, the amount should be equivalent to the amount of the claim or judgment or the value of the defendant's interest in the property. In fixing the amount, the court may consider any relevant factor. The court may relieve a party from the necessity of providing security if it appears that none of the parties will incur damages, costs or attorney fees as a result of a writ wrongfully obtained or if there exists some other substantial reason for dispensing with security. The amount of security does not establish or limit the amount of damages, costs or attorney fees recoverable if the writ is wrongfully obtained.

(b)(2) Jurisdiction over surety. A surety submits to the jurisdiction of the court and irrevocably appoints the clerk of the court as agent upon whom papers affecting the surety's liability may be served. The surety shall file with the clerk of the court the address to which the clerk may mail papers. The surety's liability may be enforced on motion without the necessity of an independent action. If the opposing party recovers judgment or if the writ is wrongfully obtained, the surety will pay the judgment, damages, costs and attorney fees not to exceed the sum specified in the contract. The surety is responsible for return of property ordered returned.

(b)(3) Objection. The court may issue additional writs upon the original security subject to the objection of the opposing party. The opposing party may object to the sufficiency of the security or the sufficiency of the sureties within five days after service of the writ. The burden to show the sufficiency of the security and the sufficiency of the sureties is on the proponent of the security.

(b)(4) Security of governmental entity. No security is required of the United States, the State of Utah, or an officer, agency, or subdivision of either, nor when prohibited by law.

(c) Procedures in aid of writs.

(c)(1) ~~Referee~~Court clerk. In accordance with Rule 4-403 of the Utah Code of Judicial Administration, ~~T~~the court may ~~appoint~~ permit a court clerk ~~a referee~~ to monitor hearings under this ~~subsection~~paragraph.

(c)(2) Hearing; witnesses; discovery. The court may conduct hearings as necessary to identify property and to apply the property toward the satisfaction of the judgment or order. Witnesses may be subpoenaed to appear, testify, and produce records. The notice of hearing must be served under Rule 4. The court may permit discovery.

(c)(3) Restraint. The court may forbid any person from transferring, disposing or interfering with the property.

(c)(4) Enforcement. A request for sanctions for failure to appear or cooperate in proceedings under this rule may only be raised by motion under Rule 7A and may not be heard by a court clerk. All sanctions and remedies for contempt may be considered on such motion, and a bench warrant may issue for failure to appear at the motion hearing.

(d) Issuance of writ; service

(d)(1) Clerk to issue writs. The clerk of the court shall issue writs. A court in which a transcript or abstract of a judgment or order has been filed has the same authority to issue a writ as the court that entered the judgment or order. If the writ directs the seizure of real property, the clerk of the court shall issue the writ to the sheriff of the county in which the real property is located. If the writ directs the seizure of personal property, the clerk of the court may issue the writ to an officer of any county.

(d)(2) Content. The writ may direct the officer to seize the property, to keep the property safe, to deliver the property to the plaintiff, to sell the property, or to take other specified actions. If the writ is to enforce a judgment or order for the payment of money, the writ shall specify the amount ordered to be paid and the amount due.

(d)(2)(A) If the writ is issued ex parte before judgment, the clerk shall attach to the writ plaintiff's affidavit, detailed description of the property, notice of hearing, order authorizing the writ, notice of exemptions and reply form.

(d)(2)(B) If the writ is issued before judgment but after a hearing, the clerk shall attach to the writ plaintiff's affidavit and detailed description of the property.

(d)(2)(C) If the writ is issued after judgment, the clerk shall attach to the writ plaintiff's application, detailed description of the property, the judgment, notice of exemptions and reply form.

(d)(3) Service.

(d)(3)(A) Upon whom; effective date. The officer shall serve the writ and accompanying papers on the defendant, and, as applicable, the garnishee and any person named by the plaintiff as claiming an interest in the property. The officer may simultaneously serve notice of the date, time and place of sale. A writ is effective upon service.

(d)(3)(B) Limits on writs of garnishment.

(d)(3)(B)(i) A writ of garnishment served while a previous writ of garnishment is in effect is effective upon expiration of the previous writ; otherwise, a writ of garnishment is effective upon service.

(d)(3)(B)(ii) Only one writ of garnishment of earnings may be in effect at one time. One additional writ of garnishment of earnings for a subsequent pay period may be served on the garnishee while an earlier writ of continuing garnishment is in effect.

(d)(3)(C) Return; inventory. Within 14 days after service, the officer shall return the writ to the court with proof of service. If property has been seized, the officer shall include an inventory of the property and whether the property is held by the officer or the officer's designee. If a person refuses to give the officer an affidavit describing the property, the officer shall indicate the fact of refusal on the return, and the court may require that person to pay the costs of any proceeding taken for the purpose of obtaining such information.

(d)(3)(D) Service of writ by publication. The court may order service of a writ by publication upon a person entitled to notice in circumstances in which service by publication of a summons and complaint would be appropriate under Rule 4.

(d)(3)(D)(i) If service of a writ is by publication, substantially the following shall be published under the caption of the case:

To _____, [Defendant/Garnishee/Claimant]:

A writ of _____ has been issued in the above-captioned case commanding the officer of _____ County as follows:

[Quoting body of writ]

Your rights may be adversely affected by these proceedings. Property in which you have an interest may be seized to pay a judgment or order. You have the right to claim property

exempt from seizure under statutes of the United States or this state, including Utah Code, Title 78B, Chapter 5, Part 5.

(d)(3)(D)(ii) The notice shall be published in a newspaper of general circulation in each county in which the property is located at least 14 days prior to the due date for the reply or at least 14 days prior to the date of any sale, or as the court orders. The date of publication is the date of service.

(e) Claim to property by third person.

(e)(1) Claimant's rights. Any person claiming an interest in the property has the same rights and obligations as the defendant with respect to the writ and with respect to providing and objecting to security. Any claimant named by the plaintiff and served with the writ and accompanying papers shall exercise those rights and obligations within the same time allowed the defendant. Any claimant not named by the plaintiff and not served with the writ and accompanying papers may exercise those rights and obligations at any time before the property is sold or delivered to the plaintiff.

(e)(2) Join claimant as defendant. The court may order any named claimant joined as a defendant in interpleader. The plaintiff shall serve the order on the claimant. The claimant is thereafter a defendant to the action and shall answer within 14 days, setting forth any claim or defense. The court may enter judgment for or against the claimant to the limit of the claimant's interest in the property.

(e)(3) Plaintiff's security. If the plaintiff requests that an officer seize or sell property claimed by a person other than the defendant, the officer may request that the court require the plaintiff to file security.

(f) Discharge of writ; release of property.

(f)(1) By defendant. At any time before notice of sale of the property or before the property is delivered to the plaintiff, the defendant may file security and a motion to discharge the writ. The plaintiff may object to the sufficiency of the security or the sufficiency of the sureties within 7 days after service of the motion. At any time before notice of sale of the property or before the property is delivered to the plaintiff, the defendant may file a motion to discharge the writ on the ground that the writ was wrongfully obtained. The court shall give the plaintiff reasonable opportunity to correct a defect. The defendant shall serve the order to discharge the writ upon the officer, plaintiff, garnishee and any third person claiming an interest in the property.

(f)(2) By plaintiff. The plaintiff may discharge the writ by filing a release and serving it upon the officer, defendant, garnishee and any third person claiming an interest in the property.

(f)(3) Disposition of property. If the writ is discharged, the court shall order any remaining property and proceeds of sales delivered to the defendant.

(f)(4) Copy filed with county recorder. If an order discharges a writ upon property seized by filing with the county recorder, the officer or a party shall file a certified copy of the order with the county recorder.

(f)(5) Service on officer; disposition of property. If the order discharging the writ is served on the officer:

(f)(5)(A) before the writ is served, the officer shall return the writ to the court;

(f)(5)(B) while the property is in the officer's custody, the officer shall return the property to the defendant; or

(f)(5)(C) after the property is sold, the officer shall deliver any remaining proceeds of the sale to the defendant.

Tab 5

Administrative Office of the Courts

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

Mary T. Noonan
State Court Administrator
Catherine J. Dupont
Deputy Court Administrator

MEMORANDUM

To: Civil Rules Committee
From: Nancy Sylvester
Date: April 22, 2020
Re: Rules 5 and 109

Brent Johnson wrote the following regarding the proposed amendments to Rules 5 and 109.

> I would like to propose a couple of changes to the Rules of Civil Procedure. I know that you are heavily involved in dealing with the rule 109 injunction. In relation to that injunction, the clerks of court have expressed concern about the requirements in rule 5 that they serve documents that are prepared by the court. As it stands, they are required to serve the injunction on both the petitioner and the respondent.
>
> As you know, CORIS has been programmed to automatically generate the 109 injunctions at the time of filing. The clerks of court are concerned that if they send the 109 injunction to respondents, the respondents may be receiving the document before they have been served with the petition. The clerks of court therefore asked me to propose a solution. The solution that I am suggesting involves amendments to rule 5 and rule 109. The amendments to rule 109 would require the petitioner to serve the 109 injunction, and the amendment to rule 5 would add an exception to allow specific rules to state who serves the petition. Perhaps your committee thought of this issue and rejected it. Nevertheless, the clerks are legitimately concerned about respondents receiving injunctions before they even know about the case that has been filed against them.

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 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) an order that states it must be served;

(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(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

(b)(3)(B)(i) the most recent email address provided by the person to the court under Rule 10(a)(3) or Rule 76, or

(b)(3)(B)(ii) to the email address on file with the Utah State Bar;

(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 or these rules:

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

(b)(5)(B) 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

Rule 109. Injunction in certain domestic relations cases.

(a) **Actions in which a domestic injunction enters.** Unless the court orders otherwise, in an action for divorce, annulment, temporary separation, custody, parent time, support, or paternity, the court will enter an injunction when the initial petition is filed. Only the injunction's applicable provisions will govern the parties to the action.

(b) **General provisions.**

(b)(1) If the action concerns the division of property then neither party may transfer, encumber, conceal, or dispose of any property of either party without the written 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.

(b)(2) Neither party may, through electronic or other means, disturb the peace of, harass, or intimidate the other party.

(b)(3) Neither party may commit domestic violence or abuse against the other party or a child.

(b)(4) 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.

(b)(5) Neither party may cancel or interfere with telephone, utility, or other services used by the other party.

(b)(6) 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 without the written consent of the other party or pursuant to further order of the court.

(c) **Provisions regarding a minor child.** The following provisions apply when a minor child is a subject of the petition.

(c)(1) Neither party may engage in non-routine travel with the child without the written consent of the other party or an order of the court unless the following information has been provided to the other party:

(c)(1)(A) an itinerary of travel dates and destinations;

(c)(1)(B) how to contact the child or traveling party; and

(c)(1)(C) the name and telephone number of an available third person who will know the child's location.

(c)(2) Neither party may do the following in the presence or hearing of the child:

(c)(2)(A) demean or disparage the other party;

(c)(2)(B) attempt to influence a child's preference regarding custody or parent time; or

(c)(2)(C) say or do anything that would tend to diminish the love and affection of the child for the other party, or involve the child in the issues of the petition.

(c)(3) Neither party may make parent time arrangements through the child.

(c)(4) When the child is under the party's care, the party has a duty to use best efforts to prevent third parties from doing what the parties are prohibited from doing under this order or the party must remove the child from those third parties.

(d) **Service.** The court will serve the injunction on the petitioner at the time the petition is filed. The petitioner must serve the injunction on the respondent.

(~~d~~e) **When the injunction is binding.** The injunction is binding

(~~d~~e)(1) on the petitioner upon filing the initial petition; and

(~~d~~e)(2) on the respondent after filing of the initial petition and upon receipt of a copy of the injunction as entered by the court.

(~~e~~f) **When the injunction terminates.** The injunction remains in effect until the final decree is entered, the petition is dismissed, the parties otherwise agree in a writing signed by all parties, or further order of the court.

(~~f~~g) **Modifying or dissolving the injunction.** A party may move to modify or dissolve the injunction.

(~~f~~g)(1) Prior to a responsive pleading being filed, the court shall determine a motion to modify or dissolve the injunction as expeditiously as possible. The moving party must serve the nonmoving party at least 48 hours before a hearing.

(~~f~~g)(2) After a responsive pleading is filed, a motion to modify or to dissolve the injunction is governed by Rule 7 or Rule 101, as applicable.

(~~g~~h) **Separate conflicting order.** Any separate order governing the parties or their minor children will control over conflicting provisions of this injunction.

(~~h~~i) **Applicability.** This rule applies to all parties other than the Office of Recovery Services.

Tab 6

Subcommittee Redline Draft URCP 42 (5/15/20)

Rule 42. Consolidation; separate trials; venue transfer.

(a) Consolidation. When actions involving a common question of law or fact or arising from the same transaction or occurrence are pending before the court~~, it~~ in one or more judicial districts, the court may, on motion of any party or on the court's own initiative: order that the actions are consolidated in whole or in part, including for discovery, other pretrial matters, a joint hearing or trial ~~of any~~, or for all ~~the matters in issue in the actions; it may order~~purposes; stay any or all of the proceedings in any action subject to the order; transfer any or all further proceedings in the actions ~~consolidated~~to a location in which any of the actions is pending after consulting with the presiding judge of the transferee court; and ~~it may~~ make other such orders concerning proceedings therein as may tend to avoid unnecessary costs or delay.

(a)(1) In determining whether to order consolidation and the appropriate location for the consolidated proceedings, the court may consider, among other matters: the complexity of the actions; the importance of any common question of fact or law to the determination of the actions; the risk of duplicative or inconsistent rulings, orders, or judgments; the relative procedural postures of the actions; the risk that consolidation may unreasonably delay the progress, increase the expense, or complicate the processing of any action; prejudice to any party that far outweighs the overall benefits of consolidation; the convenience of the parties, witnesses, and counsel; and the efficient utilization of judicial resources and the facilities and personnel of the court.

(a)(2) A motion to consolidate ~~cases shall be~~actions may be filed and opposed by any party to any action that is the subject of the motion. The motion shall be filed in and heard by the judge assigned to the first ~~case filed. Notice of a motion to consolidate cases shall be given to~~action filed and served on all parties in each ~~case. The~~ action pursuant to Rule 5. A notice of the motion shall be filed in each action. The movant shall and any party may file in each action notice of the order denying or granting the motion ~~shall be filed in each case.~~.

(a)(~~2~~3) If ~~a motion to consolidate is granted, the~~the court orders consolidation, a new case number ~~of the first case filed shall~~will be used for all subsequent pleadings and papers ~~and the case shall be heard by the judge assigned to the first case.~~in the consolidated case. The court may direct that specified parties pay the expenses, if any, of consolidation. The presiding judge of the transferee court may assign the consolidated case to another judge for good cause.

(b) Separate trials. The court in furtherance of convenience or to avoid prejudice may order a separate trial of any claim, cross claim, counterclaim, or third party claim, or of any separate issue or of any number of claims, cross claims, counterclaims, third party claims, or issues.

(c) Venue Transfer.

(c)(1) On timely motion of any party, where transfer to a proper venue is available, the court must transfer any action filed in an improper venue.

(c)(2) The court must give substantial deference to a plaintiff's choice of a proper venue. On timely motion of any party, a court may: transfer venue of any action, in whole or in part, to any other venue, including for discovery, other pretrial matters, a joint hearing or trial, or for all purposes; stay any or all of the proceedings in the action; and make other such orders concerning proceedings therein to pursue the interests of justice and avoid unnecessary costs or delay. In determining whether to transfer venue and the appropriate venue for the transferred proceedings, the court may consider, among other factors, whether transfer will: increase the likelihood of a fair and impartial determination in the action; minimize expense or inconvenience to parties, witnesses, or the court; decrease delay; avoid hardship or injustice otherwise caused by venue requirements; and pursue the interests of justice.

(c)(3) The court may direct that specified parties pay the expenses, if any, of transfer.

Note: These changes arise in part due to the Supreme Court's decision in *Davis County v. Purdue Pharma, L.P*, 2020 UT 17.

Subcommittee Clean Draft URCP 42 (5/15/20)

Rule 42. Consolidation; separate trials; venue transfer.

(a) Consolidation. When actions involving a common question of law or fact or arising from the same transaction or occurrence are pending before the court in one or more judicial districts, the court may, on motion of any party or on the court's own initiative: order that the actions are consolidated in whole or in part, including for discovery, other pretrial matters, a joint hearing or trial, or for all purposes; stay any or all of the proceedings in any action subject to the order; transfer any or all further proceedings in the actions to a location in which any of the actions is pending after consulting with the presiding judge of the transferee court; and make other such orders concerning proceedings therein as may tend to avoid unnecessary costs or delay.

(a)(1) In determining whether to order consolidation and the appropriate location for the consolidated proceedings, the court may consider, among other matters: the complexity of the actions; the importance of any common question of fact or law to the determination of the actions; the risk of duplicative or inconsistent rulings, orders, or judgments; the relative procedural postures of the actions; the risk that consolidation may unreasonably delay the progress, increase the expense, or complicate the processing of any action; prejudice to any party that far outweighs the overall benefits of consolidation; the convenience of the parties, witnesses, and counsel; and the efficient utilization of judicial resources and the facilities and personnel of the court.

(a)(2) A motion to consolidate actions may be filed and opposed by any party to any action that is the subject of the motion. The motion shall be filed in and heard by the judge assigned to the first action filed and served on all parties in each action pursuant to Rule 5. A notice of the motion shall be filed in each action. The movant shall and any party may file in each action notice of the order denying or granting the motion.

(a)(3) If the court orders consolidation, a new case number will be used for all subsequent pleadings and papers in the consolidated case. The court may direct that specified parties pay the expenses, if any, of consolidation. The presiding judge of the transferee court may assign the consolidated case to another judge for good cause.

(b) Separate trials. The court in furtherance of convenience or to avoid prejudice may order a separate trial of any claim, cross claim, counterclaim, or third party claim, or of any separate issue or of any number of claims, cross claims, counterclaims, third party claims, or issues.

(c) Venue Transfer.

(c)(1) On timely motion of any party, where transfer to a proper venue is available, the court must transfer any action filed in an improper venue.

(c)(2) The court must give substantial deference to a plaintiff's choice of a proper venue. On timely motion of any party, a court may: transfer venue of any action, in whole or in part, to any other venue, including for discovery, other pretrial matters, a joint hearing or trial, or for all purposes; stay any or all of the proceedings in the action; and make other such orders concerning proceedings therein to pursue the interests of justice and avoid unnecessary costs or delay. In determining whether to transfer venue and the appropriate venue for the transferred proceedings, the court may consider, among other factors, whether transfer will: increase the likelihood of a fair and impartial determination in the action; minimize expense or inconvenience to parties, witnesses, or the court; decrease delay; avoid hardship or injustice otherwise caused by venue requirements; and pursue the interests of justice.

(c)(3) ~~Absent stipulation of all parties, an action may be transferred only to the nearest court where the objection or reason for transfer does not exist.~~ The court may direct that specified parties pay the expenses, if any, of transfer.

Note: These changes arise in part due to the Supreme Court's decision in *Davis County v. Purdue Pharma, L.P*, 2020 UT 17.