Agenda

Advisory Committee on Rules of Civil Procedure

October 28, 2020

4:00 to 6:00 p.m.

Via Webex

Welcome and approval of minutes.	Tab 1	Jonathan Hafen, Chair
Legislative standing agenda item • Expungements: Rule 5 and big picture changes	Tab 2	Jacob Smith, Susan Vogel, Judge Holmberg, Brooke McKnight
Rules amended in response to the pandemic Rules 7, 43, 45, 37, 6: • Review rule amendments from Supreme Court discussion (Rule 43—adding language in oath)	Tab 3	Jonathan Hafen, Nancy Sylvester
Rule 26: • Continue discussion of amendments from previous meetings • New discussion of interplay with CJA Rule 4-206	Tab 4	Rod Andreason, Chris Palmer
Arreguin-Leon v. Hadco Construction, 2020 UT 59 • Discussion of Footnote 5, Rule 50(b), and the advisory committee note.		Jonathan Hafen, Judge James Blanch
Rules back from comment: (i) URCP042. CONSOLIDATION; SEPARATE TRIALS; VENUE TRANSFER. AMEND. (ii) URCP005. SERVICE AND FILING OF PLEADINGS AND OTHER PAPERS. AMEND. (iii) URCP109. INJUNCTION IN CERTAIN DOMESTIC RELATIONS CASES. AMEND. (iv) URCP004. PROCESS. AMEND. (v) URCP007. PLEADINGS ALLOWED; MOTIONS, MEMORANDA, HEARINGS, ORDERS. AMEND. (vi) URCP008. GENERAL RULES OF PLEADINGS. AMEND. (vii) URCP036. REQUEST FOR ADMISSION.	Tab 5	Nancy Sylvester

2020 Meeting Schedule: November 18, 2020

AMEND. (viii) URCP101. MOTION PRACTICE BEFORE COURT COMMISSIONERS. AMEND. (ix) URCP004. PROCESS. AMEND. (x) URCP64. WRITS IN GENERAL. AMEND. (xi) URCP007A. MOTION TO ENFORCE ORDER AND FOR SANCTIONS. NEW. (xii) URCP007B. MOTION TO ENFORCE ORDER AND FOR SANCTIONS IN DOMESTIC LAW MATTERS. NEW. (xiii) URCP007. PLEADINGS ALLOWED; MOTIONS, MEMORANDA, HEARINGS, ORDERS. AMEND. (xiv) URCP083. VEXATIOUS LITIGANTS. AMEND.		
Other business		Jonathan Hafen, Chair
Next month's tentative agenda: • Rule 7 and word limits • Family law rules		---

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

2020 Meeting Schedule: November 18, 2020

Tab 1

UTAH SUPREME COURT ADVISORY COMMITTEE
ON RULES OF CIVIL PROCEDURE

Summary Minutes – September 30, 2020

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

Committee members, staff & guests	Present	Excused	Appeared by Phone
Jonathan Hafen, Chair	X		
Robert Alder		X	
Rod N. Andreason		X	
Judge James T. Blanch	X		
Lauren DiFrancesco	X		
Judge Kent Holmberg	X		
James Hunnicutt	X		
Trevor Lee	X		
Judge Amber M. Mettler	X		
Brooke McKnight	X		
Ash McMurray	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		
Kimberly Neville, Recording Secretary	X		
Nancy Sylvester, Staff	X		
Jojo Liu, Guest	X		
Jacob Smith, Guest	X		
Chris Williams, Guest	X		
Paul Barron, Guest	X		

(1) WELCOME AND APPROVAL OF MINUTES

Jonathan Hafen welcomed the committee and announced that a group of family law attorneys have reached out to the Committee express interest in certain improvements to the rules affecting their area of practice. These representatives will be joining the next meeting to present their proposals. Mr. Hafen asked for approval of the minutes: Susan Vogel moved to approve; Jim Hunnicutt seconded. The minutes were approved unanimously.

(2) LEGISLATIVE STANDING AGENDA ITEM: EXPUNGEMENT

Jojo Liu and Jacob Smith of Salt Lake County addressed the Committee and provided an update regarding recent expungement clinics and legislative developments in expungement law. Ms. Liu stated that the program has helped more than 2000 people, and has legislative plans for further improvements to the process. Mr. Smith gave a brief overview of the expungement process and the challenges faced by individuals during the process. The County has a federal grant that supports some funding; however, the costs to petitioning individuals can still run from $150 to $1000, making it difficult for many individuals to apply for expungement.

The County believes there is a disconnect between petitioners, the prosecutor's office, and the courts regarding service and acceptance of the petition, which has presented a problem for many petitioners. Specifically, there have been inconsistencies among the courts and prosecutors as to which documents need to be filed, whether documents should be filed before / after service, and whether an acceptance of service is required. The expungement statute is silent on this issue. There are also issues with finding old case numbers on Xchange. Although expungement relates to criminal matters, the proceeding itself is considered a civil proceeding and would be governed by the Rules of Civil Procedure. Accordingly, the County is looking for guidance regarding whether they should pursue a statutory change or if this can be addressed through an amendment to the Rules.

Susan Vogel spoke in support of the County's position, stating that this issue is affecting large numbers of people who are proceeding pro se. The self-help center would be interested in any improvements that would streamline the process for pro se petitioners. Nancy Sylvester also spoke in favor of a rule-based change in order to provide guidance for the Justice Courts.

Susan Vogel, Brooke McKnight, and Judge Holmberg volunteered to serve on a subcommittee to propose a rule change. Jake Smith will also serve on the subcommittee as a representative of the County. They will coordinate with the criminal rules committee and make a recommendation.

(3) RULE 43

Nancy Sylvester presented the Supreme Court's changes to the Committee's proposed amendment to Rule 43. The Court has added a subsection entitled "post-testimony remote hearing safeguards," which will require both the witness and counsel for the witness to attest that the witness did not improperly communicate with any third parties, including legal professionals, during the witness' testimony.

Leslie Slaugh suggested that additional language be added to reference the exclusionary rule, and to require attestation that the exclusionary rule has been followed. Judge Blanch commented that the exclusionary rule does not apply automatically; it must be invoked and has several exceptions. Judge Stone suggested that the subsection be revised to apply only if the exclusion rule is invoked. Judge Stone also expressed concern about requiring the court to make an inquiry of every witness, as well as requiring counsel to attest to matters when they are not in the same location as the witness, as these are essentially changes to the oath. Judge Blanch also indicated that the Courts have been in contact with their IT vendors to address the issue through technology, which may render the proposed change unnecessary.

Lauren DiFrancesco suggested that the language of the proposed section include a prohibition "improper influenc[ing]" of a witness.

Further discussion was also held regarding subsections (b)(1) and (2) regarding confidential communications. Trevor Lee suggested that the phrase "a means" be changed to "the ability" to reflect that the court is not providing the technology.

At the conclusion of discussion, Mr. Hafen called for the motion. Ms. DiFrancesco moved to send the proposed amendment to the Supreme Court; Mr. Lee seconded. The motion passed, with Judge Stone, Judge Holmberg, and Judge Blanch voting against the amendment, citing their prior concerns regarding attestation.

The following proposed amendments were sent to the Supreme Court for consideration:

Rule 43. Evidence.
(a) Form. In all trials and evidentiary hearings, the testimony of witnesses shall be taken in open court, unless otherwise provided by these rules, the Utah Rules of Evidence, or a statute of this state. In civil proceedings, the court may, upon request or on its own order, and ~~F~~for good cause and with appropriate safeguards, ~~the court may~~ permit remote testimony in open court. Remote testimony will be conducted via videoconference if reasonably practical, or if not, via telephone or assistive device.
(b) Remote testimony safeguards. Remote testimony safeguards must include:

(1) notice of the date, time, and method of transmission, including instructions for participation, and whom to contact if there are technical difficulties;
(2) the ability for a party and the party's counsel to communicate confidentially;
(3) a means for sharing documents, photos, and other things among the remote participants;
(4) access to the necessary technology to participate, including telephone or assistive device;
(5) an interpreter or assistive device, if needed;
(6) a verbatim record of the testimony;
(7) if the court orders exclusion of witness under Rule 615 of the Utah Rules of Evidence, attestation that the exclusionary rule has been followed;
(8) any other measures the court deems necessary to maintain the integrity of the proceedings.

(c) **Post-testimony remote hearing safeguards.** Following remote testimony, a witness and any counsel for the witness must attest that the witness did not improperly communicate with a third party, including a legal professional, and was not improperly influenced, during the witness's testimony.

Comment [NS1]: Opposed by Judge Stone, Judge Holmberg, Judge Blanch

(~~b~~d) Evidence on motions. When a motion is based on facts not in the record, the court may hear the matter on affidavits, declarations, oral testimony, or depositions.

~~Advisory Committee Note~~

~~Federal Rule of Civil Procedure 43 has permitted testimony by contemporaneous transmission since 1996. State court judges have been conducting telephone conferences for many decades. These range from simple scheduling conferences to resolution of discovery disputes to status conferences to pretrial conferences. These conferences tend not to involve testimony, although judges sometimes permit testimony by telephone or more recently by video conference with the consent of the parties. The 2016 amendments are part of a coordinated effort by the Supreme Court and the Judicial Council to authorize a convenient practice that is more frequently needed in an increasingly connected society and to bring a level of quality to that practice suitable for a court record. As technology evolves the methods of contemporaneous transmission will change.~~

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(4) RULE 37

Lauren DiFrancesco presented a proposed change to Rule 37 to remove the preference for telephonic hearings for discovery disputes. Judge Stone moved to send the proposed amendment to the Supreme Court; Justin Toth seconded. The motion passed unanimously.

The following proposed amendments will be sent to the Supreme Court for consideration:

Rule 37. Statement of discovery issues; Sanctions; Failure to admit, to attend deposition or to preserve evidence.

(a) Statement of discovery issues.

(a)(1) A party or the person from whom discovery is sought may request that the judge enter an order regarding any discovery issue, including:

(a)(1)(A) failure to disclose under Rule 26;

(a)(1)(B) extraordinary discovery under Rule 26;

(a)(1)(C) a subpoena under Rule 45;

(a)(1)(D) protection from discovery; or

(a)(1)(E) compelling discovery from a party who fails to make full and complete discovery.

(a)(2) Statement of discovery issues length and content. The statement of discovery issues must be no more than 4 pages, not including permitted attachments, and must include in the following order:

(a)(2)(A) the relief sought and the grounds for the relief sought stated succinctly and with particularity;

(a)(2)(B) a certification that the requesting party has in good faith conferred or attempted to confer with the other affected parties in person or by telephone in an effort to resolve the dispute without court action;

(a)(2)(C) a statement regarding proportionality under Rule 26(b)(2); and

(a)(2)(D) if the statement requests extraordinary discovery, a statement certifying that the party has reviewed and approved a discovery budget.

(a)(3) Objection length and content. No more than 7 days after the statement is filed, any other party may file an objection to the statement of discovery issues. The objection must be no more than 4 pages, not including permitted attachments, and must address the issues raised in the statement.

(a)(4) Permitted attachments. The party filing the statement must attach to the statement only a copy of the disclosure, request for discovery or the response at issue.

(a)(5) Proposed order. Each party must file a proposed order concurrently with its statement or objection.

(a)(6) Decision. Upon filing of the objection or expiration of the time to do so, either party may and the party filing the statement must file a Request to Submit for Decision under Rule 7(g). The court will promptly:

(a)(6)(A) decide the issues on the pleadings and papers;

(a)(6)(B) conduct a hearing, preferably remotely and if remotely, then consistent with the safeguards in Rule 43(b); or

(a)(6)(C) order additional briefing and establish a briefing schedule.

(5) RULES 5 AND 6

Ms. DiFrancesco also presented the proposed change to Rules 5 and 6 to address service issues brought about by the pandemic. The proposed changes would require email service if available and change the time added for mailing days from 3 days to 5 days to allow for delays in mailing.

Susan Vogel spoke in support of the rule change, indicating that pro se litigants are experiencing significant delays in receiving mail and have missed hearings or had other rights affected by delays in mailing. Ms. Vogel also indicated that the number of people needing help and technological assistance has increased substantially during the pandemic. She suggested that the proposed rule be revised to allow 7 days for service by mail.

Judge Holmberg suggested that rule be amended to use email as a default form of service if the email address is used on the first responsive pleading or identified as the preferred method of service. The language of proposed 5(b)(3)(C) was revised to clarify that email is the preferred form of service for papers that that are not served via electronic filing. Other methods were identified in the subsection that follows in the event an email address is not valid or was not provided to the court.

Judge Scott suggested that Rule 5 clearly state that the email address must be provided "to the court," as opposed to having been provided in other documents exchanged between parties (such as in debt collection or landlord-tenant matters).

Judge Mettler inquired as whether the proposed amendment applied to individuals who do not have the ability to serve via email. The proposed rule would appear to apply in that manner. However, the benefits of email service would be expected to outweigh any adverse impact.

Ash McMurray also suggested that the word "papers" be changed to "documents" to conform to the Style Guide.

After discussion, Mr. Hafen called for the motion. Judge Stone moved to send the proposed amendments to the Supreme Court; Ms. Vogel seconded. The motion passed unanimously.

The following proposed amendments will be sent to the Supreme Court for consideration:

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

…

(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) for papers not electronically served under paragraph (b)(3)(A), emailing it to the most recent email address provided by the person to the court and other parties under Rule 10(a)(3), Rule 76, or by other notice, or to the email address on file with the Utah State Bar.

(b)(3)(C) If a person's email address is not valid or has not been provided to the court and other parties, a paper may be served under this rule by:

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

(b)(3)(C)(ii) handing it to the person;

(b)(3)(C)(iii) 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.

Rule 6. Time.

...

(c) Additional time after service by mail. When a party may or must act within a specified time after service and service is made by mail under Rule 5(b)(3)(C)(i), ~~3~~ 7 days are added after the period would otherwise expire under paragraph (a).

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(6) ADJOURNMENT

The remaining items were deferred until October 30, 2020. The meeting adjourned at 5:45p.m.

Tab 2

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

(a) When service is required.

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

(A) a judgment;

(B) an order that states it must be served;

(C) a pleading after the original complaint;

(D) a ~~paper~~document relating to disclosure or discovery;

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

Comment [SV1]: Could "heard" be "decided"?

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

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

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

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

(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;

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

(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.

(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.

(4) Service in expungement actions. Service of a Petition for Expungement may be made by petitioner filing with the court a Petition for Expungement, BCI Certificate, and proposed Order with the caption only filled out, along with a Certificate of Service stating they are serving, under this rule, the prosecutor's office with a copy of the Petition and the BCI Certificate. If the Petitioner is unable to locate a current prosecutor's office, the court shall assist the Petitioner in serving the required papers upon such office.

Comment [SV2]: This section is per Jake Smith and my collaboration. It might go a bit out of bounds but it reflects our vision for an easier and more uniform process.

(b) How service is made.

(1) Whom to serve. If a party is represented by an attorney, a ~~paper~~document 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:

(A) an attorney has filed a Notice of Limited Appearance under Rule 75 and the ~~papers~~ documents being served relate to a matter within the scope of the Notice; or

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

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

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

(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) for papers not electronically served under paragraph (b)(3)(A), emailing it to

~~(i)~~ the most recent email address provided by the person (party?) to the court and other parties under Rule 10(a)(3) or Rule 76, or by other notice, or

~~(ii)~~ to the email address on file with the Utah State Bar;

(C) if a person's email address is not valid or has not been provided to the court and other parties, or if the person required to serve the document does not have the ability to email, a document may be served under this rule by:

(i) mailing it to the person's ~~last known address;~~most recent email address provided by the person (party?) to the court and other parties under Rule 10(a)(3) or Rule 76,

~~(D)~~(ii) handing it to the person;

~~(E)~~(iii) 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;

~~(F)~~(iv) 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

~~(G)~~(v) any other method agreed to in writing by the parties.

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

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

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

(B) every ~~paper~~document 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:

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

(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;

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Comment [SV3]: Nathanael asked if this should be party

Comment [SV4]: This is not perfect and I don't know how to perfect it without changing court practices

Comment [NS5]: Added after the 9-30 mtg in response to SHC concerns.

Comment [SV6]: This too, re person v party. Should we add "or by other notice" here too?

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

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

(d) Certificate of service. A ~~paper~~document required by this rule to be served, including electronically filed ~~papers~~documents, 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 ~~paper~~documents 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~~ documents 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~~document electronically. A party without an electronic filing account may file a ~~paper~~document 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:

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

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

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

(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 5(d) is amended to give the trial court the option, either on an ad hoc basis or by local rule, of ordering that discovery papers, depositions, written interrogatories, document requests, requests for admission, and answers and responses need not be filed unless required for specific use in the case. The committee is of the view that a local rule of the district courts on the subject should be encouraged.~~

~~The 1999 amendment to subdivision (b)(1)(B) does not authorize the court to conduct a hearing with less than 5 days notice, but rather specifies the manner of service of the notice when the court otherwise has that authority.~~

~~2001 amendments~~

~~Paragraph (b)(1)(A) has been changed to allow service by means other than U.S. Mail and hand delivery if consented to in writing by the person to be served, i.e. the attorney of the party. Electronic means include facsimile transmission, e-mail and other possible electronic means.~~

~~While it is not necessary to file the written consent with the court, it would be advisable to have the consent in the form of a stipulation suitable for filing and to file it with the court.~~

~~Paragraph (b)(1)(B) establishes when service by electronic means, if consented to in writing, is complete. The term "normal business hours" is intended to mean 8:00 a.m. to 5:00 p.m. Monday through Friday, excluding legal holidays. If a fax or e-mail is received after 5:00 p.m., the service is deemed complete on the next business day.~~

2015 amendments

~~Since the Rules of Juvenile Procedure do not have a rule on serving papers, this rule applies in juvenile court proceedings under Rule 1, Rule 81(a) and Rule of Juvenile Procedure 2.~~

Under paragraph (b)(3)(A), electronically filing a document has the effect of serving the document on lawyers who have an e filing account. (Lawyers representing parties in the district court are required to have an account and electronically file documents. Code of Judicial Administration Rule 4 503.) The 2015 amendment excepts from this provision documents electronically filed in juvenile court.

Although electronic filing in the juvenile court presents to the parties the documents that have been filed, the juvenile court e filing application (CARE), unlike that in the district court, does not deliver an email alerting the party to that fact. The Board of Juvenile Court Judges and the Advisory Committee on the Rules of Juvenile Procedure believe this difference renders electronic filing alone insufficient notice of a document having been filed. So in the juvenile court, a party electronically filing a document must serve that document by one of the other permitted methods.

[*Comment regarding advisory committee note: The Civil Rules Committee thought this procedure should go into a juvenile rule. The Juvenile Rules Committee respectfully requested that the Civil Rules Committee retain all of the 2015 amendments with the exception of the first sentence, which is no longer accurate. This is the sentence that reads "Since the Rules of Juvenile Procedure do not have a rule on serving papers, this rule applies in juvenile court proceedings under Rule 1, Rule 81(a) and Rule of Juvenile Procedure 2."*

The Juvenile Rules Committee stressed the importance of leaving the remainder of the 2015 amendments in Rule 5 to instruct practitioners and pro se parties on the differences between practice in juvenile and district court. While these distinctions are included in the body of Juvenile Rule 18, the committee expressed the desire to have the differences spelled out in both rules, since those new to juvenile court practice may not realize the necessity of reviewing service requirements in both the juvenile and civil rules.]

Tab 3

Rule 43. Evidence.

(a) Form. In all trials and evidentiary hearings, the testimony of witnesses shall be taken in open court, unless otherwise provided by these rules, the Utah Rules of Evidence, or a statute of this state. In civil proceedings, the court may, upon request or on its own order, and ~~F~~for good cause and with appropriate safeguards, ~~the court may~~ permit remote testimony in open court. Remote testimony will be presented via videoconference if reasonably practical, or if not, via telephone or assistive device.

(b) Remote testimony safeguards. Remote testimony safeguards must include:

(1) notice of the date, time, and method of transmission, including instructions for participation, and whom to contact if there are technical difficulties;

(2) the ability for a party and the party's counsel to communicate confidentially;

(3) a means for sharing documents, photos, and other things among the remote participants;

(4) access to the necessary technology to participate, including telephone or assistive device;

(5) an interpreter or assistive device, if needed;

(6) a verbatim record of the testimony;

(7) if the court orders exclusion of witness under Rule 615 of the Utah Rules of Evidence, attestation that the exclusionary rule has been followed;

Comment [NS1]: Consider taking this one out. The lawyers are usually the ones making sure the witnesses aren't watching when live.

(8) any other measures the court deems necessary to maintain the integrity of the proceedings.

(c) **Remote hearing oath.** The following oath must be used prior to any remote testimony: "You do solemnly swear (or affirm) that the evidence you shall give in this issue (or matter) pending between ____ and ____ shall be the truth, the whole truth and nothing but the truth, and that you will not communicate with a third party nor receive

third party communications during your testimony, so help you God (or, under the pains and penalties of perjury)."

(~~b~~d) Evidence on motions. When a motion is based on facts not in the record, the court may hear the matter on affidavits, declarations, oral testimony, or depositions.

~~**Advisory Committee Note**~~

~~Federal Rule of Civil Procedure 43 has permitted testimony by contemporaneous transmission since 1996. State court judges have been conducting telephone conferences for many decades. These range from simple scheduling conferences to resolution of discovery disputes to status conferences to pretrial conferences. These conferences tend not to involve testimony, although judges sometimes permit testimony by telephone or more recently by video conference with the consent of the parties. The 2016 amendments are part of a coordinated effort by the Supreme Court and the Judicial Council to authorize a convenient practice that is more frequently needed in an increasingly connected society and to bring a level of quality to that practice suitable for a court record. As technology evolves the methods of contemporaneous transmission will change.~~

Rule 45. Subpoena.

(a) Form; issuance.

(1) Every subpoena shall:

(A) issue from the court in which the action is pending;

(B) state the title and case number of the action, the name of the court from which it is issued, and the name and address of the party or attorney responsible for issuing the subpoena;

(C) command each person to whom it is directed

(i) to appear and give testimony at a trial, hearing or deposition, or

(ii) to appear and produce for inspection, copying, testing or sampling documents, electronically stored information or tangible things in the possession, custody or control of that person, or

(iii) to copy documents or electronically stored information in the possession, custody or control of that person and mail or deliver the copies to the party or attorney responsible for issuing the subpoena before a date certain, or

(iv) to appear and to permit inspection of premises;

(D) if an appearance is required, ~~specify~~ notice of the date, time, and place for the appearance and, if remote transmission is requested, instructions for participation and whom to contact if there are technical difficulties; and

(E) include a notice to persons served with a subpoena in a form substantially similar to the approved subpoena form. A subpoena may specify the form or forms in which electronically stored information is to be produced.

(2) The clerk shall issue a subpoena, signed but otherwise in blank, to a party requesting it, who shall complete it before service. An attorney admitted to practice in Utah may issue and sign a subpoena as an officer of the court.

(b) **Service; fees; prior notice.**

(1) A subpoena may be served by any person who is at least 18 years of age and not a party to the case. Service of a subpoena upon the person to whom it is directed shall be made as provided in Rule 4(d).

(2) If the subpoena commands a person's appearance, the party or attorney responsible for issuing the subpoena shall tender with the subpoena the fees for one day's attendance and the mileage allowed by law. When the subpoena is issued on behalf of the United States, or this state, or any officer or agency of either, fees and mileage need not be tendered.

(3) If the subpoena commands a person to copy and mail or deliver documents or electronically stored information, to produce documents, electronically stored information or tangible things for inspection, copying, testing or sampling or to permit inspection of premises, the party or attorney responsible for issuing the subpoena shall serve each party with the subpoena by delivery or other method of actual notice before serving the subpoena.

(c) **Appearance; resident; non-resident.**

(1) A person who resides in this state may be required to appear:

(A) at a trial or hearing in the county in which the case is pending; and

(B) at a deposition, or to produce documents, electronically stored information or tangible things, or to permit inspection of premises only in the county in which the person resides, is employed, or transacts business in person, or at such other place as the court may order.

(2) A person who does not reside in this state but who is served within this state may be required to appear:

(A) at a trial or hearing in the county in which the case is pending; and

(B) at a deposition, or to produce documents, electronically stored information or tangible things, or to permit inspection of premises only in the county in which the person is served or at such other place as the court may order.

(d) Payment of production or copying costs. The party or attorney responsible for issuing the subpoena shall pay the reasonable cost of producing or copying documents, electronically stored information, or tangible things. Upon the request of any other party and the payment of reasonable costs, the party or attorney responsible for issuing the subpoena shall provide to the requesting party copies of all documents, electronically stored information or tangible things obtained in response to the subpoena or shall make the tangible things available for inspection.

(e) **Protection of persons subject to subpoenas; objection.**

(1) The party or attorney responsible for issuing a subpoena shall take reasonable steps to avoid imposing an undue burden or expense on the person subject to the subpoena. The court shall enforce this duty and impose upon the party or attorney in breach of this duty an appropriate sanction, which may include, but is not limited to, lost earnings and a reasonable attorney fee.

(2) A subpoena to copy and mail or deliver documents or electronically stored information, to produce documents, electronically stored information or tangible things, or to permit inspection of premises shall comply with Rule 34(a) and (b)(1), except that the person subject to the subpoena must be allowed at least 14 days after service to comply.

(3) The person subject to the subpoena or a non-party affected by the subpoena may object under Rule 37 if the subpoena:

(A) fails to allow reasonable time for compliance;

(B) requires a resident of this state to appear at other than a trial or hearing in a county in which the person does not reside, is not employed, or does not transact business in person;

(C) requires a non-resident of this state to appear at other than a trial or hearing in a county other than the county in which the person was served;

(D) requires the person to disclose privileged or other protected matter and no exception or waiver applies;

(E) requires the person to disclose a trade secret or other confidential research, development, or commercial information;

(F) subjects the person to an undue burden or cost;

(G) requires the person to produce electronically stored information in a form or forms to which the person objects;

(H) requires the person to provide electronically stored information from sources that the person identifies as not reasonably accessible because of undue burden or cost; or

(I) requires the person to disclose an unretained expert's opinion or information not describing specific events or occurrences in dispute and resulting from the expert's study that was not made at the request of a party.

(4) T**iming and form of objections.**

(A) If the person subject to the subpoena or a non-party affected by the subpoena objects, the objection must be made before the date for compliance.

(B) The objection shall be stated in a concise, non-conclusory manner.

(C) If the objection is that the information commanded by the subpoena is privileged or protected and no exception or waiver applies, or requires the person to disclose a trade secret or other confidential research, development, or commercial information, the objection shall sufficiently describe the nature of the documents, communications, or things not produced to enable the party or attorney responsible for issuing the subpoena to contest the objection.

(D) If the objection is that the electronically stored information is from sources that are not reasonably accessible because of undue burden or cost, the person from whom discovery is sought must show that the information sought is not reasonably accessible because of undue burden or cost.

(E) The objection shall be served on the party or attorney responsible for issuing the subpoena. The party or attorney responsible for issuing the subpoena shall serve a copy of the objection on the other parties.

(5) If objection is made, or if a party requests a protective order, the party or attorney responsible for issuing the subpoena is not entitled to compliance but may request an order to compel compliance under Rule 37(a). The objection or request shall be served on the other parties and on the person subject to the subpoena. An order compelling compliance shall protect the person subject to or affected by the subpoena from significant expense or harm. The court may quash or modify the subpoena. If the party or attorney responsible for issuing the subpoena shows a substantial need for the information that cannot be met without undue hardship, the court may order compliance upon specified conditions.

(f) **Duties in responding to subpoena.**

(1) A person commanded to copy and mail or deliver documents or electronically stored information or to produce documents, electronically stored information or tangible things shall serve on the party or attorney responsible for issuing the subpoena a declaration under penalty of law stating in substance:

(A) that the declarant has knowledge of the facts contained in the declaration;

(B) that the documents, electronically stored information or tangible things copied or produced are a full and complete response to the subpoena;

(C) that the documents, electronically stored information or tangible things are the originals or that a copy is a true copy of the original; and

(D) the reasonable cost of copying or producing the documents, electronically stored information or tangible things.

(2) A person commanded to copy and mail or deliver documents or electronically stored information or to produce documents, electronically stored information or tangible things shall copy or produce them as they are kept in the usual course of business or shall organize and label them to correspond with the categories in the subpoena.

(3) If a subpoena does not specify the form or forms for producing electronically stored information, a person responding to a subpoena must produce the information in the form or forms in which the person ordinarily maintains it or in a form or forms that are reasonably usable.

(4) If the information produced in response to a subpoena is subject to a claim of privilege or of protection as trial-preparation material, the person making the claim may notify any party who received the information of the claim and the basis for it. After being notified, the party must promptly return, sequester, or destroy the specified information and any copies of it 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 the information. The person who produced the information must preserve the information until the claim is resolved.

(g) **Contempt.** Failure by any person without adequate excuse to obey a subpoena served upon that person is punishable as contempt of court.

(h) **Procedure when witness evades service or fails to attend.** If a witness evades service of a subpoena or fails to attend after service of a subpoena, the court may issue a warrant to the sheriff of the county to arrest the witness and bring the witness before the court.

(i) **Procedure when witness is an inmate.** If the witness is an inmate as defined in Rule 6(e)(1), a party may move for an order to examine the witness in the institution or to produce the witness before the court or officer for the purpose of being orally examined.

(j) **Subpoena unnecessary.** A person present in court or before a judicial officer may be required to testify in the same manner as if the person were in attendance upon a subpoena.

~~Advisory Committee Notes~~

~~The process to request a protective order is governed by Rule 37(a), Statement of discovery issues.~~

~~The form subpoena formerly part of the Appendix of Forms described in Rule 81 has been replaced by forms approved by the Board of District Court Judges found on the court website at http://www.utcourts.gov/resources/forms/subpoena/. The website includes information and forms for domestic subpoenas and subpoenas from other states. Utah has adopted the Uniform Interstate Depositions and Discovery Act, and the act differentiates between the requirements for a subpoena issued by a state that also has adopted the uniform act and the requirements for a subpoena issued by a state that has not.~~

Rule 6. Time.

(a) Computing time. The following rules apply in computing any time period specified in these rules, any local rule or court order, or in any statute that does not specify a method of computing time.

(1) When the period is stated in days or a longer unit of time:

(A) exclude the day of the event that triggers the period;

(B) count every day, including intermediate Saturdays, Sundays, and legal holidays; and

(C) include the last day of the period, but if the last day is a Saturday, Sunday, or legal holiday, the period continues to run until the end of the next day that is not a Saturday, Sunday or legal holiday.

(2) When the period is stated in hours:

(A) begin counting immediately on the occurrence of the event that triggers the period;

(B) count every hour, including hours during intermediate Saturdays, Sundays, and legal holidays; and

(C) if the period would end on a Saturday, Sunday, or legal holiday, the period continues to run until the same time on the next day that is not a Saturday, Sunday, or legal holiday.

(3) Unless the court orders otherwise, if the clerk's office is inaccessible:

(A) on the last day for filing under Rule 6(a)(1), then the time for filing is extended to the first accessible day that is not a Saturday, Sunday or legal holiday; or

(B) during the last hour for filing under Rule 6(a)(2), then the time for filing is extended to the same time on the first accessible day that is not a Saturday, Sunday, or legal holiday.

(4) Unless a different time is set by a statute or court order, filing on the last day means:

(A) for electronic filing, before midnight; and

(B) for filing by other means, the filing must be made before the clerk's office is scheduled to close.

(5) The "next day" is determined by continuing to count forward when the period is measured after an event and backward when measured before an event.

(6) "Legal holiday" means the day for observing:

(A) New Year's Day;

(B) Dr. Martin Luther King, Jr. Day;

(C) Washington and Lincoln Day;

(D) Memorial Day;

(E) Independence Day;

(F) Pioneer Day;

(G) Labor Day;

(H) Columbus Day;

(I) Veterans' Day;

(J) Thanksgiving Day;

(K) Christmas; and

(L) any day designated by the Governor or Legislature as a state holiday.

(b) Extending time.

(1) When an act may or must be done within a specified time, the court may, for good cause, extend the time:

(A) with or without motion or notice if the court acts, or if a request is made, before the original time or its extension expires; or

(B) on motion made after the time has expired if the party failed to act because of excusable neglect.

(2) A court must not extend the time to act under Rules 50(b) and (d), 52(b), 59(b), (d) and (e), and 60(c).

(c) Additional time after service by mail. When a party may or must act within a specified time after service and service is made by mail under Rule 5(b)(3)(C), ~~3~~ 7 days are added after the period would otherwise expire under paragraph (a).

(d) Response time for an unrepresented party. When a party is not represented by an attorney, does not have an electronic filing account, and may or must act within a specified time after the filing of a paper, the period of time within which the party may or must act is counted from the service date and not the filing date of the paper.

(e) Filing or service by inmate.

(1) For purposes of Rule 45(i) and this paragraph (e), an inmate is a person confined to an institution or committed to a place of legal confinement.

(2) Papers filed or served by an inmate are timely filed or served if they are deposited in the institution's internal mail system on or before the last day for filing or service. Timely filing or service may be shown by a contemporaneously filed notarized statement or written declaration setting forth the date of deposit and stating that first-class postage has been, or is being, prepaid, or that the inmate has complied with any applicable requirements for legal mail set by the institution. Response time will be calculated from the date the papers are received by the court, or for papers served on parties that do not need to be filed with the court, the postmark date the papers were deposited in U.S. mail.

(3) The provisions of paragraph (e)(2) do not apply to service of process, which is governed by Rule 4.

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

(a) Pleadings. Only these pleadings are allowed:

(1) a complaint;

(2) an answer to a complaint;

(3) an answer to a counterclaim designated as a counterclaim;

(4) an answer to a crossclaim;

(5) a third-party complaint;

(6) an answer to a third-party complaint; and

(7) a reply to an answer if ordered by the court.

(b) Motions. A request for an order must be made by motion. The motion must be in writing unless made during a hearing or trial, must state the relief requested, and must state the grounds for the relief requested. Except for the following, a motion must be made in accordance with this rule.

(1) A motion, other than a motion described in paragraphs (b)(2), (b)(3) or (b)(4), made in proceedings before a court commissioner must follow Rule 101.

(2) A request under Rule 26 for extraordinary discovery must follow Rule 37(a).

(3) A request under Rule 37 for a protective order or for an order compelling disclosure or discovery—but not a motion for sanctions—must follow Rule 37(a).

(4) A request under Rule 45 to quash a subpoena must follow Rule 37(a).

(5) A motion for summary judgment must follow the procedures of this rule as supplemented by the requirements of Rule 56.

(c) Name and content of motion.

(1) The rules governing captions and other matters of form in pleadings apply to motions and other papers. The moving party must title the motion substantially as: "Motion [short phrase describing the relief requested]." The motion must include

the supporting memorandum. The motion must include under appropriate headings and in the following order:

(A) a concise statement of the relief requested and the grounds for the relief requested; and

(B) one or more sections that include a concise statement of the relevant facts claimed by the moving party and argument citing authority for the relief requested.

(2) If the moving party cites documents, interrogatory answers, deposition testimony, or other discovery materials, relevant portions of those materials must be attached to or submitted with the motion.

(3) If the motion is for relief authorized by Rule 12(b) or 12(c), Rule 56 or Rule 65A, the motion may not exceed 25 pages, not counting the attachments, unless a longer motion is permitted by the court. Other motions may not exceed 15 pages, not counting the attachments, unless a longer motion is permitted by the court.

(d) Name and content of memorandum opposing the motion.

(1) A nonmoving party may file a memorandum opposing the motion within 14 days after the motion is filed. The nonmoving party must title the memorandum substantially as: "Memorandum opposing motion [short phrase describing the relief requested]." The memorandum must include under appropriate headings and in the following order:

(A) a concise statement of the party's preferred disposition of the motion and the grounds supporting that disposition;

(B) one or more sections that include a concise statement of the relevant facts claimed by the nonmoving party and argument citing authority for that disposition; and

(C) objections to evidence in the motion, citing authority for the objection.

(2) If the non-moving party cites documents, interrogatory answers, deposition testimony, or other discovery materials, relevant portions of those materials must be attached to or submitted with the memorandum.

(3) If the motion is for relief authorized by Rule 12(b) or 12(c), Rule 56 or Rule 65A, the memorandum opposing the motion may not exceed 25 pages, not counting the attachments, unless a longer memorandum is permitted by the court. Other opposing memoranda may not exceed 15 pages, not counting the attachments, unless a longer memorandum is permitted by the court.

(e) Name and content of reply memorandum.

(1) Within 7 days after the memorandum opposing the motion is filed, the moving party may file a reply memorandum, which must be limited to rebuttal of new matters raised in the memorandum opposing the motion. The moving party must title the memorandum substantially as "Reply memorandum supporting motion [short phrase describing the relief requested]." The memorandum must include under appropriate headings and in the following order:

(A) a concise statement of the new matter raised in the memorandum opposing the motion;

(B) one or more sections that include a concise statement of the relevant facts claimed by the moving party not previously set forth that respond to the opposing party's statement of facts and argument citing authority rebutting the new matter;

(C) objections to evidence in the memorandum opposing the motion, citing authority for the objection; and

(D) response to objections made in the memorandum opposing the motion, citing authority for the response.

(2) If the moving party cites documents, interrogatory answers, deposition testimony, or other discovery materials, relevant portions of those materials must be attached to or submitted with the memorandum.

(3) If the motion is for relief authorized by Rule 12(b) or 12(c), Rule 56 or Rule 65A, the reply memorandum may not exceed 15 pages, not counting the attachments, unless a longer memorandum is permitted by the court. Other reply memoranda may not exceed 10 pages, not counting the attachments, unless a longer memorandum is permitted by the court.

(f) Objection to evidence in the reply memorandum; response. If the reply memorandum includes an objection to evidence, the nonmoving party may file a response to the objection no later than 7 days after the reply memorandum is filed. If the reply memorandum includes evidence not previously set forth, the nonmoving party may file an objection to the evidence no later than 7 days after the reply memorandum is filed, and the moving party may file a response to the objection no later than 7 days after the objection is filed. The objection or response may not be more than 3 pages.

(g) Request to submit for decision. When briefing is complete or the time for briefing has expired, either party may file a "Request to Submit for Decision," but, if no party files a request, the motion will not be submitted for decision. The request to submit for decision must state whether a hearing has been requested and the dates on which the following documents were filed:

(1) the motion;

(2) the memorandum opposing the motion, if any;

(3) the reply memorandum, if any; and

(4) the response to objections in the reply memorandum, if any.

(h) Hearings. The court may hold a hearing on any motion. A party may request a hearing in the motion, in a memorandum or in the request to submit for decision. A

request for hearing must be separately identified in the caption of the document containing the request. The court must grant a request for a hearing on a motion under Rule 56 or a motion that would dispose of the action or any claim or defense in the action unless the court finds that the motion or opposition to the motion is frivolous or the issue has been authoritatively decided. Motion hearings may be held remotely, consistent with the safeguards in Rule 43(b).

(i) Notice of supplemental authority. A party may file notice of citation to significant authority that comes to the party's attention after the party's motion or memorandum has been filed or after oral argument but before decision. The notice may not exceed 2 pages. The notice must state the citation to the authority, the page of the motion or memorandum or the point orally argued to which the authority applies, and the reason the authority is relevant. Any other party may promptly file a response, but the court may act on the motion without waiting for a response. The response may not exceed 2 pages.

(j) Orders.

(1) Decision complete when signed; entered when recorded. However designated, the court's decision on a motion is complete when signed by the judge. The decision is entered when recorded in the docket.

(2) Preparing and serving a proposed order. Within 14 days of being directed by the court to prepare a proposed order confirming the court's decision, a party must serve the proposed order on the other parties for review and approval as to form. If the party directed to prepare a proposed order fails to timely serve the order, any other party may prepare a proposed order confirming the court's decision and serve the proposed order on the other parties for review and approval as to form.

(3) Effect of approval as to form. A party's approval as to form of a proposed order certifies that the proposed order accurately reflects the court's decision. Approval as to form does not waive objections to the substance of the order.

(4) Objecting to a proposed order. A party may object to the form of the proposed order by filing an objection within 7 days after the order is served.

(5) Filing proposed order. The party preparing a proposed order must file it:

(A) after all other parties have approved the form of the order (The party preparing the proposed order must indicate the means by which approval was received: in person; by telephone; by signature; by email; etc.);

(B) after the time to object to the form of the order has expired (The party preparing the proposed order must also file a certificate of service of the proposed order.); or

(C) within 7 days after a party has objected to the form of the order (The party preparing the proposed order may also file a response to the objection.).

(6) Proposed order before decision prohibited; exceptions. A party may not file a proposed order concurrently with a motion or a memorandum or a request to submit for decision, but a proposed order must be filed with:

(A) a stipulated motion;

(B) a motion that can be acted on without waiting for a response;

(C) an ex parte motion;

(D) a statement of discovery issues under Rule 37(a); and

(E) the request to submit for decision a motion in which a memorandum opposing the motion has not been filed.

(7) Orders entered without a response; ex parte orders. An order entered on a motion under paragraph (l) or (m) can be vacated or modified by the judge who made it with or without notice.

(8) Order to pay money. An order to pay money can be enforced in the same manner as if it were a judgment.

(k) Stipulated motions. A party seeking relief that has been agreed to by the other parties may file a stipulated motion which must:

(1) be titled substantially as: "Stipulated motion [short phrase describing the relief requested]";

(2) include a concise statement of the relief requested and the grounds for the relief requested;

(3) include a signed stipulation in or attached to the motion and;

(4) be accompanied by a request to submit for decision and a proposed order that has been approved by the other parties.

(l) Motions that may be acted on without waiting for a response.

(1) The court may act on the following motions without waiting for a response:

(A) motion to permit an over-length motion or memorandum;

(B) motion for an extension of time if filed before the expiration of time;

(C) motion to appear pro hac vice; and

(D) other similar motions.

(2) A motion that can be acted on without waiting for a response must:

(A) be titled as a regular motion;

(B) include a concise statement of the relief requested and the grounds for the relief requested;

(C) cite the statute or rule authorizing the motion to be acted on without waiting for a response; and

(D) be accompanied by a request to submit for decision and a proposed order.

(m) Ex parte motions. If a statute or rule permits a motion to be filed without serving the motion on the other parties, the party seeking relief may file an ex parte motion which must:

(1) be titled substantially as: "Ex parte motion [short phrase describing the relief requested]";

(2) include a concise statement of the relief requested and the grounds for the relief requested;

(3) cite the statute or rule authorizing the ex parte motion;

(4) be accompanied by a request to submit for decision and a proposed order.

(n) Motion in opposing memorandum or reply memorandum prohibited. A party may not make a motion in a memorandum opposing a motion or in a reply memorandum. A party who objects to evidence in another party's motion or memorandum may not move to strike that evidence. Instead, the party must include in the subsequent memorandum an objection to the evidence.

(o) Overlength motion or memorandum. The court may permit a party to file an overlength motion or memorandum upon a showing of good cause. An overlength motion or memorandum must include a table of contents and a table of authorities with page references.

(p) Limited statement of facts and authority. No statement of facts and legal authorities beyond the concise statement of the relief requested and the grounds for the relief requested required in paragraph (c) is required for the following motions:

(1) motion to allow an over-length motion or memorandum;

(2) motion to extend the time to perform an act, if the motion is filed before the time to perform the act has expired;

(3) motion to continue a hearing;

(4) motion to appoint a guardian ad litem;

(5) motion to substitute parties;

(6) motion to refer the action to or withdraw it from alternative dispute resolution under Rule 4-510.05;

(7) motion for a conference under Rule 16; and

(8) motion to approve a stipulation of the parties.

(q) Limit on order to show cause. An application to the court for an order to show cause shall be made only for enforcement of an existing order or for sanctions for violating an existing order. An application for an order to show cause must be supported by an affidavit sufficient to show cause to believe a party has violated a court order. Nothing in this rule is intended to limit or alter the inherent power of the court to initiate order to show cause proceedings to assess whether cases should be dismissed for failure to prosecute or to otherwise manage the court's docket.

Advisory Committee Notes

~~The 2015 changes to Rule 7 repeal and reenact the rule. Many of the provisions from the former Rule 7 are preserved in the 2015 version, but there are many changes as well. The committee's intent is to bring more regularity to motion practice. Some of these features are found in Rule 7-1 of the U.S. District Court for the District of Utah:~~

- ~~integrate the memorandum supporting a motion with the motion itself;~~
- ~~describe more uniform motion titles;~~
- ~~describe more uniform content in the memoranda;~~
- ~~regulate the process for citing supplemental authority;~~
- ~~prohibit proposed orders before a decision, except for specified motions;~~
- ~~move the special requirements for a motion for summary judgment to Rule 56;~~
- ~~allow a limited statement of facts for specified motions;~~
- ~~require an objection to evidence, rather than a motion to strike evidence; and~~
- ~~require a counter-motion rather than a motion in the opposing memorandum.~~

~~The 2015 amendments in this rule, as well as in Rule 54 and Rule 58A, respond to the Supreme Court's directive to the committee in Central Utah Water Conservancy District v. King, 2013 UT 13 ¶27. In that case the Supreme Court directed the committee~~

~~to address the problem of undue delay when the parties fail to comply with former Rule 7(f)(2). A major objective of the 2015 amendments is to continue the policy of clear expectations of the parties established in:~~

- ~~Butler v. Corporation of The President of The Church of Jesus Christ of Latter-Day Saints, 2014 UT 41~~
- ~~Central Utah Water Conservancy District v. King, 2013 UT 13;~~
- ~~Giusti v. Sterling Wentworth Corp., 2009 UT 2;~~
- ~~Houghton v. Dep't of Health, 2008 UT 86; and~~
- ~~Code v. Dep't of Health, 2007 UT 43.~~

~~However, the 2015 amendments do so in a manner simpler than the "magic words" required under the former Rule 7(f)(2).~~

~~In these cases, the Supreme Court established a policy favoring a clear indication of whether a further document would be required from the parties after a judge's decision. The parties should not be required to guess what, if anything, should come next.~~

~~There were three ways to meet the test: a proposed order was submitted with the supporting or opposing memorandum; an order was prepared at the direction of the judge; the decision included an express indication that a further order was not required. The 2015 amendments remove a proposed order from the process in most circumstances. The trend under the former rule was to include in every order an indication that nothing further was required, sometimes even when the order expressly directed a party to prepare a further order. In other cases orders were prepared in some manner other than as described in the rule, yet the order did not expressly state that nothing further was required. The order technically was not complete, but everyone proceeded as if it were.~~

~~The 2015 amendments continue the policy of a bright-line test for a completed decision but do not rely on conditions that might or might not be met. The one~~

~~condition that can be counted on is the judge's signature. Under the former rule, a completed decision was imposed by operation of law when the order was prepared in one of the recognized ways. The 2015 rule imposes a completed decision by operation of law when the document memorializing the decision is signed. Under the former rule, the judge's silence meant that something further was required, unless the order was prepared in one of the ways described in Rule 7. The presumption in the 2015 amendments is the opposite: silence means that nothing further is required from the parties. Judges can expressly require an order confirming a decision if one is needed in a particular case.~~

~~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. The committee decided instead to modify a phrase of long standing from Rule 54(b) – "a decision, however designated" – in this rule and in Rule 58A. In this rule, however a judge's decision may be designated, that decision is complete when the judge signs the document memorializing the decision. Whether there is a right to appeal is determined by whether the decision – or subsequent order confirming the decision – is a judgment. That analysis is governed by Rule 54. When the judgment is entered is governed by Rule 58A. If the order is not a judgment, the time in which to petition for permission to appeal under Rule of Appellate Procedure 5 is calculated from the date on which an order confirming an earlier decision is entered, but only if the judge directs that a confirming order be prepared. If the judge does not direct that a confirming order be prepared, the time is calculated from the date on which the decision, however designated, is entered.~~

~~The 2017 amendments to Rule 7 return pre-2015 paragraph (b)(2) language addressing limits on orders to show cause to new paragraph (q) and also clarify the~~

~~discretion the court retains to manage its docket. Paragraph (q) is directed only at limitations on order to show cause proceedings initiated by parties.~~

Rule 37. Statement of discovery issues; Sanctions; Failure to admit, to attend deposition or to preserve evidence.

(a) Statement of discovery issues.

(1) A party or the person from whom discovery is sought may request that the judge enter an order regarding any discovery issue, including:

(A) failure to disclose under Rule 26;

(B) extraordinary discovery under Rule 26;

(C) a subpoena under Rule 45;

(D) protection from discovery; or

(E) compelling discovery from a party who fails to make full and complete discovery.

(2) Statement of discovery issues length and content. The statement of discovery issues must be no more than 4 pages, not including permitted attachments, and must include in the following order:

(A) the relief sought and the grounds for the relief sought stated succinctly and with particularity;

(B) a certification that the requesting party has in good faith conferred or attempted to confer with the other affected parties in person or by telephone in an effort to resolve the dispute without court action;

(C) a statement regarding proportionality under Rule 26(b)(2); and

(D) if the statement requests extraordinary discovery, a statement certifying that the party has reviewed and approved a discovery budget.

(3) Objection length and content. No more than 7 days after the statement is filed, any other party may file an objection to the statement of discovery issues. The

objection must be no more than 4 pages, not including permitted attachments, and must address the issues raised in the statement.

(4) Permitted attachments. The party filing the statement must attach to the statement only a copy of the disclosure, request for discovery or the response at issue.

(5) Proposed order. Each party must file a proposed order concurrently with its statement or objection.

(6) Decision. Upon filing of the objection or expiration of the time to do so, either party may and the party filing the statement must file a Request to Submit for Decision under Rule 7(g). The court will promptly:

(A) decide the issues on the pleadings and papers;

(B) conduct a hearing, preferably remotely and if remotely, then consistent with the safeguards in Rule 43(b) ~~by telephone conference or other electronic communication~~; or

(C) order additional briefing and establish a briefing schedule.

(7) Orders. The court may enter orders regarding disclosure or discovery or to protect a party or person from discovery being conducted in bad faith or from annoyance, embarrassment, oppression, or undue burden or expense, or to achieve proportionality under Rule 26(b)(2), including one or more of the following:

(A) that the discovery not be had or that additional discovery be had;

(B) that the discovery may be had only on specified terms and conditions, including a designation of the time or place;

(C) that the discovery may be had only by a method of discovery other than that selected by the party seeking discovery;

(D) that certain matters not be inquired into, or that the scope of the discovery be limited to certain matters;

(E) that discovery be conducted with no one present except persons designated by the court;

(F) that a deposition after being sealed be opened only by order of the court;

(G) that a trade secret or other confidential information not be disclosed or be disclosed only in a designated way;

(H) that the parties simultaneously deliver specified documents or information enclosed in sealed envelopes to be opened as directed by the court;

(I) that a question about a statement or opinion of fact or the application of law to fact not be answered until after designated discovery has been completed or until a pretrial conference or other later time;

(J) that the costs, expenses and attorney fees of discovery be allocated among the parties as justice requires; or

(K) that a party pay the reasonable costs, expenses and attorney fees incurred on account of the statement of discovery issues if the relief requested is granted or denied, or if a party provides discovery or withdraws a discovery request after a statement of discovery issues is filed and if the court finds that the party, witness, or attorney did not act in good faith or asserted a position that was not substantially justified.

(8) Request for sanctions prohibited. A statement of discovery issues or an objection may include a request for costs, expenses and attorney fees but not a request for sanctions.

(9) Statement of discovery issues does not toll discovery time. A statement of discovery issues does not suspend or toll the time to complete standard discovery.

(b) Motion for sanctions. Unless the court finds that the failure was substantially justified, the court, upon motion, may impose appropriate sanctions for the failure to follow its orders, including the following:

(1) deem the matter or any other designated facts to be established in accordance with the claim or defense of the party obtaining the order;

(2) prohibit the disobedient party from supporting or opposing designated claims or defenses or from introducing designated matters into evidence;

(3) stay further proceedings until the order is obeyed;

(4) dismiss all or part of the action, strike all or part of the pleadings, or render judgment by default on all or part of the action;

(5) order the party or the attorney to pay the reasonable costs, expenses, and attorney fees, caused by the failure;

(6) treat the failure to obey an order, other than an order to submit to a physical or mental examination, as contempt of court; and

(7) instruct the jury regarding an adverse inference.

(c) Motion for costs, expenses and attorney fees on failure to admit. If a party fails to admit the genuineness of a document or the truth of a matter as requested under Rule 36, and if the party requesting the admissions proves the genuineness of the document or the truth of the matter, the party requesting the admissions may file a motion for an order requiring the other party to pay the reasonable costs, expenses and attorney fees incurred in making that proof. The court must enter the order unless it finds that:

(1) the request was held objectionable pursuant to Rule 36(a);

(2) the admission sought was of no substantial importance;

(3) there were reasonable grounds to believe that the party failing to admit might prevail on the matter;

(4) that the request was not proportional under Rule 26(b)(2); or

(5) there were other good reasons for the failure to admit.

(d) Motion for sanctions for failure of party to attend deposition. If a party or an officer, director, or managing agent of a party or a person designated under Rule 30(b)(6) to testify on behalf of a party fails to appear before the officer taking the deposition after service of the notice, any other party may file a motion for sanctions under paragraph (b). The failure to appear may not be excused on the ground that the discovery sought is objectionable unless the party failing to appear has filed a statement of discovery issues under paragraph (a).

(e) Failure to preserve evidence. Nothing in this rule limits the inherent power of the court to take any action authorized by paragraph (b) if a party destroys, conceals, alters, tampers with or fails to preserve a document, tangible item, electronic data or other evidence in violation of a duty. Absent exceptional circumstances, a court may not impose sanctions under these rules on a party for failing to provide electronically stored information lost as a result of the routine, good-faith operation of an electronic information system.

Advisory Committee Notes

The 2011 amendments to Rule 37 make two principal changes. First, the amended Rule 37 consolidates provisions for motions for a protective order (formerly set forth in Rule 26(c)) with provisions for motions to compel. ~~By consolidating the standards for these two motions in a single rule, the Advisory Committee sought to highlight some of the parallels and distinctions between the two types of motions and to present them in a single rule.~~

Second, the amended Rule 37 incorporates the new Rule 26 standard of "proportionality" as a principal criterion on which motions to compel or for a protective order should be evaluated. ~~As to motions to compel, Rule 37(a)(3) requires that a party moving to compel discovery certify to the court "that the discovery being sought is proportional under Rule 26(b)(2)." Rule 37(b) makes clear that a lack of proportionality~~

~~may be raised as ground for seeking a protective order, indicating that "the party seeking the discovery has the burden of demonstrating that the information being sought is proportional."~~

~~Paragraph (h) and its predecessors have long authorized the court to take the drastic steps authorized by paragraph (e)(2) for failure to disclose as required by the rules or for failure to amend a response to discovery. The federal counterpart to this provision is similar. Yet the courts historically have limited those more drastic sanctions to circumstances in which a party fails to comply with a court order, persists in dilatory conduct, or acts in bad faith.~~

~~The 2011 amendments have brought new attention to paragraph (h). Those amendments, which emphasized greater and earlier disclosure, also emphasized the enforcement of that requirement by prohibiting the party from using the undisclosed information as evidence at a hearing. The committee intends that courts should impose sanctions under (e)(2) for failure to disclose in only the most egregious circumstances. In most circumstances exclusion of the evidence seems an adequate sanction for failure to disclose or failure to amend discovery.~~

~~2015 Amendments.~~

Paragraph (a) adopts the expedited procedures for statements of discovery issues formerly found in Rule 4-502 of the Code of Judicial Administration. Statements of discovery issues replace discovery motions, and paragraph (a) governs unless the judge orders otherwise.

~~Former paragraph (a)(2), which directed a motion for a discovery order against a nonparty witness to be filed in the judicial district where the subpoena was served or deposition was to be taken, has been deleted. A statement of discovery issues related to a nonparty must be filed in the court in which the action is pending.~~

~~Former paragraph (h), which prohibited a party from using at a hearing information not disclosed as required, was deleted because the effect of non-disclosure is adequately~~

~~governed by Rule 26(d). See also The Townhomes At Pointe Meadows Owners Association v. Pointe Meadows Townhomes, LLC, 2014 UT App 52 ¶14. The process for resolving disclosure issues is included in paragraph (a).~~

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Tab 4

We have two tasks on Rule 26:
(1) Finalizing the edits the committee began making last year; and
(2) Coordinating amendments with Rule 4-206.

Regarding (1), I have attached the relevant portions of the February 2019 minutes to these materials, which was the last month we addressed Rule 26.

Regarding (2), Chris Palmer, Court Security Director, heads a work group that is addressing an audit of the courts' evidence storage procedures. The work group amended Code of Judicial Administration Rule 4-206 (repeal and replace). Policy and Planning reviewed the amended rule and noted that it may conflict with the Rules of Civil Procedure. My observation is that paragraph (1)(b) of Rule 4-206 should probably be moved to Rule 26 of the Rules of Civil Procedure, while leaving behind a coordinating reference to Rule 26. That rule is attached.

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~~ a plaintiff within 14 days after the filing of the first answer to ~~the~~ that plaintiff's complaint; and

(a)(2)(B) by ~~the~~ a defendant within 42 days after the filing of ~~the~~ that defendant's 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 retained 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

Comment [RNA1]: Reason: There may be multiple plaintiffs, some of who may join the case at a later date.

Comment [RNA2]: Reason: There may be multiple defendants; some of them may seek to file a motion to dismiss or similar motion after appearance that is not an answer, and such should not have to provide initial disclosures before such motion is resolved.

Comment [RNA3]: Reason: Clarity; this paragraph only pertains to this type of expert witness.

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~~ the facts and data and other information specific to the case 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~~ 14 days after the close of fact discovery. Within ~~seven~~ 14 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~~ 42 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 14 ~~seven~~ days after the later of (A) the date on which the ~~election~~ disclosure under paragraph (a)(4)(C)(i) is due, or (B) ~~receipt~~ service of the written report or the taking of the expert's deposition pursuant to paragraph (a)(4)(C)(i). Within ~~seven~~ 14 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~~ 42 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 14 ~~seven~~ days after the later of (A) the date on which the election under paragraph (a)(4)(C)(ii) is due~~,~~ or (B) ~~receipt~~ service of the written report or the taking of the expert's deposition pursuant to paragraph (a)(4)(C)(ii). Within ~~seven~~ 14 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~~ 42 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. An expert disclosed only as a rebuttal witness cannot be used in the case in chief.

(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

Comment [RNA4]: Reason: Practitioners reportedly need more time.

Comment [RNA5]: Reason: Practitioners reportedly need more time.

Comment [RNA6]: Reason: Practitioners reportedly need more time.

Comment [RNA7]: Reason: When the party bearing the burden fails to disclose an expert, the party who does not bear the burden currently has no triggering event for providing its expert disclosure.

Comment [RNA8]: Reason: Practitioners reportedly need more time.

Comment [RNA9]: Reason: Practitioners reportedly need more time.

Comment [RNA10]: Reason: Practitioners reportedly need more time.

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). Such a witness cannot be required to provide a report pursuant to paragraph (a)(4)(B). A deposition of such a witness may not exceed four hours and the party taking the deposition shall pay the expert's reasonable hourly fees for attendance at the deposition..

Comment [NS11]: From HJR023 3/5/2020

(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)(A) shall be served on the other parties at least 28 days before trial. Disclosures required by paragraph (a)(5)(A)(i) and (a)(5)(A)(ii) shall also be filed. At least 14 days before trial, a party shall serve and file any counter designations of deposition testimony~~,~~ and any objections and grounds for the objections to the use of any deposition, witness, ~~and~~ or ~~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.

Comment [RNA12]: Reason: Judges reportedly want to see these items, although not all of the proposed trial exhibits (need judges' input/confirmation).

Comment [RNA13]: Reason: Need parallel reference to objections to witnesses as well as other disclosures. Although many objections to witnesses, as well as exhibits, must be considered within the scope of their offering at trial, this funnels down the scope of such potential objections. (If this is too demanding as to witnesses, it is likely too demanding for exhibits as well, requiring both to be removed).

(a)(6) Form of disclosure and discovery production. Rule 34 governs the form of producing all documents, data compilations, electronically stored information, tangible things, and evidentiary material pursuant to this Rule.

Comment [RNA14]: Reason: ensure compliance with URCP 34 in initial disclosure document production.

(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	$300,00 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, for each party represented by an attorney, a statement that the attorney ~~that each party has reviewed and approved a discovery budget~~consulted with the client about the request for extraordinary discovery; 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).

Comment [RNA15]: Reason: The current requirement has been universally ignored and may be too onerous and expensive relative to its desired goal: ensuring that parties know that extraordinary discovery will result in additional expense.

(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

Rule 4-206. Exhibits.

(1) Prior to Trial.

(1)(A) **Marking Exhibits.** Each party must mark all the exhibits it intends to introduce during trial by utilizing exhibit labels in the format prescribed by the clerk of court. Each party must use a label or tag which shall contain, at a minimum, a case number and exhibit number/letter. Parties may use electronic labels that conform to the minimum standards of case number and exhibit number/letter. Each party must designate the source of the exhibit with an appropriate party designation. The court may prescribe an alternate marking system.

(1)(B) **Preparation for Trial.** After completion of discovery and prior to trial, each party shall (i) prepare and serve on opposing party a list that identifies and briefly describes all marked exhibits the party will offer at trial; and (ii) afford opposing party an opportunity to examine the listed exhibits. Exhibits are part of the public record and personal information shall be redacted in accordance with Rule 4-202.09(10).

Comment [JCP1]: Possible Rule of Civil Procedure conflict? – Please Review

Comment [NS2]: I think this should go in Civil Rule 26 and then this paragraph can contain a reference to Rule 26. I.e. "Exhibit preparation for trial shall be in accordance with Rule 26 of the Utah Rules of Civil Procedure. "

(2) During Trial.

(2b) During Trial.

(2)(A) Custody of the Court. Exhibits that are received into evidence during trial and that are suitable for filing and transmission to the appellate courts, as a part of the record on appeal, must be placed in the custody of the clerk of court or designee. The clerk of court or designee must list exhibits in the exhibit list. The exhibit list means either the court's designated case management system or a form approved by the Judicial Council. The exhibit list shall be made part of the case record.

(2)(B) Custody of the Parties. Exhibits other than those described in paragraph (2)(A), that are received into evidence during trial, will be retained in the custody of the party offering the exhibit. Such exhibits will include, but not be limited to, items requiring law enforcement chain of custody, the following types of bulky or sensitive exhibits or evidence: biohazard, controlled substances, firearms, ammunition, explosive devices, pornographic materials, jewelry, poisonous or dangerous chemicals, intoxicating liquors, money or articles of high monetary value, counterfeit money, original digital storage media and documents or physical exhibits of unusual bulk or weight. With approval of the court, a printed photograph may be offered by the submitting party as a representation of the original exhibit. The clerk of court or designee must list these exhibits in the exhibit list and note that the original exhibit is in the custody of the party.

(2)(C) **Exhibit Custody.** Upon daily adjournment, the clerk of court or designee must compare the exhibit list with the exhibits received that day. The exhibits received, under subsection (2)(A) must be stored in an envelope or container, marked with the case number, and placed into a secured storage location that meets the requirements outlined in subsection (~~2~~3)(~~E~~ii).

The clerk of court or designee may store exhibits in a temporary secured location for recesses lasting less than 72 hours. The temporary location must be sufficient to prevent access by unauthorized persons and secured via key lock, with the clerk of court, judge or designee maintaining sole access. The clerk must note in the record the date and time the exhibit was transferred to or from a temporary location or secured storage.

Comment [JCP3]: The purpose is to allow the judge to store the exhibits in their chambers so long as they have sole access which can be done by judicial order on the door.

(3) After Trial.

(3)(A) **Exhibits in the Custody of the Court.** When the court takes custody of exhibits under subsection (2)(A) of this rule, those exhibits may not be taken from the custody of the clerk of court or designee until final disposition of the matter, except upon order of the court and execution of a receipt that identifies the material taken, which receipt will be filed in the case.

(3)(i) **Exhibit Manager.** The clerk of court shall appoint an exhibit manager with responsibility for the security, maintenance, documentation of chain of custody, and disposition of exhibits. The clerk of court may also appoint a person to act as exhibit manager during periods when the primary exhibit manager is absent. Unaccompanied access to the exhibit storage area by anyone other than the exhibit manager, acting exhibit manager, or the clerk of court is prohibited without a court order.

(3)(ii) **Secured Storage Location.** Each court must provide a secured location within their facility for storing exhibits retained by the court under subsection (2)(A). The secured location must be sufficient to prevent access from unauthorized persons through key, combination lock, or electronic access. The facility must also protect exhibits from theft or damage. The secured storage location shall be certified by the Court Security Director through a written request fully describing the secured storage location, local access procedures, and security controls. Any changes to the location, access procedures, or security controls will require recertification by the Court Security Director.

(3)(B) **Removal of Exhibits.** Parties shall remove all exhibits in the custody of the court after the time for appeal has expired or after all appeals are resolved.

(3)(C) **Exhibits in the Custody of the Parties.** Unless the court orders otherwise, the party offering exhibits of the kind described in subsection (2)(B) of this rule will retain custody of the exhibits and be responsible to the court for preserving them in the same condition as the time of admission, until the time for appeal has expired or after all appeals are resolved. The party is also responsible for retaining exhibits ~~that may be~~ needed for any post-conviction proceedings.

(3)(D) **Access to Exhibits by Parties.** In case of an appeal, the appellate court or any party, may file a written request for access to an exhibit admitted in the trial court. The party with custody of the exhibits, will promptly make available any or all original exhibits in its possession, or true copies of the exhibit.

(3)(E) **Exhibits in Appeals.** Upon request of the appellate court, each party will prepare and submit to the clerk of the appropriate appellate court a list that designates which exhibits are necessary for the determination of the appeal and in whose custody they remain. Parties who have custody of exhibits are charged with the responsibility for their safekeeping and transportation, if required, to the appellate courts. All other exhibits that are not necessary for the determination of the appeal, and are not in the custody of the clerk of the appellate court, will remain in the custody of the respective party.

(3)(F) **Disposal of exhibits.** After sixty days have expired from final disposition, the time for appeal has expired, ~~or~~ after all appeals are resolved, or the statute of limitations for ~~timelensess related to~~ post-conviction relief has expired, the exhibit manager shall dispose of any exhibits in the court's possession as follows:

(3)(F)(i) Property having no monetary value shall be destroyed by the exhibit manager. The exhibit manager shall create a certificate of destruction which includes a description, case number, and exhibit number. The certificate of destruction is to be maintained in the record.

(3)(F)(ii) Property having monetary value shall be returned to its owner or, if unclaimed, shall be given to the sheriff of the county or other law enforcement agency to be sold in accordance with Utah Code Section 24-3-103. The agency receiving the property shall furnish the court with a receipt to be maintained in the record.

Comment [JCP4]: Feedback was given to include any post convition relief. Unsure how to structure the paragraph.

Comment [NS5]: The post-conviction piece is a tricky one because it's such a moving target. See below. It can go on forever, which makes it challenging for the courts to know when to destroy or return exhibits. It may make sense to set a limit, like 5 years. But I'd want to get feedback on this from the Rocky Mountain Innocence Center and the AG's office.

78B-9-107. Statute of limitations for postconviction relief.

(1) A petitioner is entitled to relief only if the petition is filed within one year after the cause of action has accrued.

(2) For purposes of this section, the cause of action accrues on the latest of the following dates:

(a) the last day for filing an appeal from the entry of the final judgment of conviction, if no appeal is taken;

(b) the entry of the decision of the appellate court which has jurisdiction over the case, if an appeal is taken;

(c) the last day for filing a petition for writ of certiorari in the Utah Supreme Court or the United States Supreme Court, if no petition for writ of certiorari is filed;

(d) the entry of the denial of the petition for writ of certiorari or the entry of the decision on the petition for certiorari review, if a petition for writ of certiorari is filed;

(e) the date on which petitioner knew or should have known, in the exercise of reasonable diligence, of evidentiary facts on which the petition is based; or

(f) the date on which the new rule described in Subsection 78B-9-104(1)(f) is established.

(3) The limitations period is tolled for any period during which the petitioner was prevented from filing a petition due to state action in violation of the United States Constitution, due to physical or mental incapacity, or for claims arising under Subsection 78B-9-104(1)(g), due to force, fraud, or coercion as defined in Section 76-5-308. The petitioner has the burden of proving by a preponderance of the evidence that the petitioner is entitled to relief under this Subsection (3).

(4) The statute of limitations is tolled during the pendency of the outcome of a petition asserting:

(a) exoneration through DNA testing under Section 78B-9-303; or

(b) factual innocence under Section 78B-9-401.

(5) Sections 77-19-8, 78B-2-104, and 78B-2-111 do not extend the limitations period established in this section.

UTAH SUPREME COURT ADVISORY COMMITTEE ON RULES OF CIVIL PROCEDURE

Meeting Minutes – February 27, 2019

(4) RULE 26. GENERAL PROVISIONS GOVERNING DISCLOSURE AND DISCOVERY (MULTIPLE REQUESTS FOR RULE AMENDMENTS): CONTINUE PRIOR DISCUSSION AT PARAGRAPH (a)(4)(A)

Rod Andreason noted that the committee was discussing what Rule 26 should say about expert disclosures. The committee was attempting to make this rule narrow enough to allow for the disclosures to be specific to the case, but also broad enough that all items reasonably relied upon were included. Paul Stancil argued it was odd to ask for what was going to be relied upon. Ms. DiFrancesco pointed out that the expert would not yet have relied upon anything.

Judge Scott asked if the rule was intending to limit these disclosures to only those things used for the specific case. Judge Stone agreed that this was the purpose. He said he wondered about the proprietary tools that may not be specific to the case. In such situations the other party should be able to see them, and they must be disclosed since they are not public documents. Judge Stucki questioned where you draw the line; there could be unfair surprise by relying upon an article that is not specific to the case, but might be outside a normal expert's knowledge. Judge Stone argued that most science relies upon knowledge any expert should have. If the information is not available in the literature, it must be disclosed. The Utah standard for experts is a generous standard, and so the disclosures are needed. Mr. Slaugh argued that the report must disclose further documents. Judge Stucki responded that the rule cannot avoid all arguments and judgment calls.

Ms. DiFrancesco proposed moving lines 21 and 22 to paragraph (a)(6) to clarify that the all experts are subject to Rule 34.

Mr. Hafen questioned the language on non-retained experts, which appears to narrow the discovery on this topic. Mr. Andreason answered that the discovery from non-retained experts should be limited to a deposition. Judge Mettler questioned if the fact witness who was also a non-retained expert could be deposed twice. Mr. Andreason answered that the rule was intended to allow an expert deposition. Mr. Sneddon proposed adding that no further expert discovery was allowed, aside from the 4 hour deposition.

Mr. Hunnicutt questioned if this would require any subpoenas of files to occur before fact discovery closed. Mr. Andreason agreed that such a subpoena would be fact discovery. Ms. DiFrancesco asked what additional discovery was possible. Mr. Andreason answered that the rule addressed any discovery beyond the deposition. Mr. Pack noted that the rule does not allow for the subpoena of a retained expert either. Mr. Hunnicutt pointed out that the added line just makes non-retained experts the same as retained experts. Ms. DiFrancesco was troubled by the fact that the parties could not get the file of a non-retained expert, as that may not be practical to get in fact discovery.

Mr. Pack proposed adding a reference to Rule 45 regarding subpoenas. Ms. DiFrancesco and Mr. Toth proposed that retained experts files should also be able to be subpoenaed. Mr. Toth believed that the subpoena for the deposition already allowed the requirement for the file to be produced. Trevor Lee questioned if the language limiting the additional discovery was necessary. Mr. Toth proposed adding that the expert could be subpoenaed under Rule 45 to a deposition, as well as for documents. Mr. Pack proposed adding this to retained experts as well. Ms. Sneddon questioned if the language needed to be more specific to allow for document subpoenas. Mr. Andreason proposed eliminating the no further discovery language so that rule 45 is not excluded. Ms. Sneddon asked if this meant that the same line should be removed from the section on retained experts. Others responded that this restriction was for timing, and should remain.

Ms. Slaugh questioned if the deadlines on lines 71 and 81 should be changed from receipt to service, as most deadlines are not based upon receipt.

Mr. Andreason reported that the remaining changes related to changes to deadlines. Mr. Hunnicutt questioned why some of the deadlines were not extended. Mr. Pack stated that there were some decisions for which one should not need that time to decide. Mr. Hunnicutt believed that the multiple timelines were problematic for solo practitioners as they may not have help keeping track of all deadlines. Mr. Slaugh proposed making the rules all 14 days instead of 7.

Mr. Toth asked if there was no election for a report or deposition, what the deadline would be for an expert's designation. In particular, this may be difficult if the expert was on a different topic, not a rebuttal expert. Mr. Slaugh argued that the deadline would remain 14 days after the election deadline. Mr. Toth agreed. Mr. Pack stated this was 28 days after fact discovery ended. The remaining committee members thought that this issue was clear. No amendments were made.

Ms. DiFrancesco asked, if the party bearing the burden of proof wanted to have a rebuttal expert, but did not disclose an original expert, would that rebuttal expert be barred? Mr. Toth believed that the rule was intended to avoid this. Judge Stone had ruled on similar case that the expert cannot be called in the case in chief, but only on rebuttal. Mr. Hafen pointed out that not all judges rule that way. Mr. Slaugh stated that the judges should make this determination, as some situations would require different rulings. Mr. Hafen questioned if this issue was already addressed. Mr. Pack believed that there should be language clarifying this. Mr. Slaugh believed a rebuttal expert could clearly only be for rebuttal, however others believed this was not so clear. Mr. Slaugh then proposed that under rebuttal experts there be added language stating that an expert disclosed only as a rebuttal expert cannot be used in the case in chief.

The remainder of this rule was tabled.

Tab 5

UTAH COURT RULES – PUBLISHED FOR COMMENT

The Supreme Court and Judicial Council invite comments about amending these rules. To view the proposed amendment, click on the rule number.

To submit a comment or view the comments of others, click on "Continue Reading." To submit a comment, scroll down to the "Leave a Reply" section, and type your comment in the "Comment" field. Type your name and email address in the designated fields and click "Post Comment."

Comments cannot be acknowledged, but all will be considered. Comments are saved to a buffer for review before publication.

Posted: August 17, 2020

Utah Courts

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Rules of Civil Procedure – Comment period closes October 1, 2020

Consolidation and Venue Transfer Amendments

URCP042. Consolidation; separate trials; venue transfer. AMEND.

The amendments to Rule 42 involve two issues: consolidation and venue transfer. The amendments clarify the powers of the district court to 1) consolidate two or more cases from any district in the state, 2) transfer a case from any court to any other court in the state, or 3) take either action as to just a portion of two or more cases. The amendments further mandate that cases filed in an improper venue be transferred to a proper venue when such is available. The venue amendments address the Supreme Court's invitation in Footnote 4 of *Davis County v. Purdue Pharma, L.P.*, 2020 UT 17.

Domestic Injunction Amendments

URCP005. Service and filing of pleadings and other papers. AMEND.

To view all comments submitted during a particular comment period, click on the comment deadline date. To view all comments to an amendment, click on the rule number.

CATEGORIES

- -Alternate Dispute Resolution
- -Code of Judicial Administration
- -Code of Judicial Conduct
- -Fourth District Court Local Rules
- -Licensed Paralegal Practitioners Rules of Professional Conduct
- -Rules Governing Licensed Paralegal Practitioner
- -Rules Governing the State Bar

URCP109. Injunction in certain domestic relations cases. AMEND.

The proposed amendments to Rules 5 and 109 address conflicting provisions between the two rules. The amendments to Rule 5 add an exception to allow specific rules to state who serves the petition. The amendments to Rule 109 require the petitioner, rather than the court, to provide a copy of the injunction to the respondent.

Notice Amendments

As a whole, the proposed amendments to Rules 4, 7, 8, 36, and 101 would require more notice to parties of their rights and obligations. An example of a document containing the Judicial Council-approved bilingual notice of rights may be found here.

URCP004. Process. AMEND.

The proposed notice amendments to Rule 4(c)(1) would require that the Judicial Council-approved bilingual notice of rights be included with the summons.

URCP007. Pleadings allowed; motions, memoranda, hearings, orders. AMEND.

The proposed notice amendments to Rule 7(c) would require caution language on the first page of all dispositive motions. It also requires the inclusion of the Judicial Council-approved bilingual notice of rights and provides consequences for failing to include them.

URCP008. General rules of pleadings. AMEND.

The proposed notice amendments to Rule 8(a) would require caution language on the first page of all pleadings requesting relief and provides consequences for failing to do so.

URCP036. Request for admission. AMEND.

The proposed notice amendments to Rule 36(b) would require caution language on the first page of all requests for admission and provides consequences for failing to do so.

URCP101.Motion practice before court commissioners. AMEND.

- -Rules of Appellate Procedure
- -Rules of Civil Procedure
- -Rules of Criminal Procedure
- -Rules of Evidence
- -Rules of Juvenile Procedure
- -Rules of Professional Conduct
- -Rules of Professional Practice
- -Rules of Small Claims Procedure
- ADR101
- ADR103
- Appendix B
- Appendix F
- CJA Appendix F
- CJA01-0201
- CJA01-0204
- CJA01-0205
- CJA01-0205
- CJA01-0303
- CJA01-0304
- CJA01-0305
- CJA010-01-0404
- CJA010-1-020
- CJA02-0103
- CJA02-0104
- CJA02-0106.01
- CJA02-0106.02
- CJA02-0106.03
- CJA02-0106.04
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- CJA03-0106
- CJA03-0107
- CJA03-0109
- CJA03-0111
- CJA03-0111.01
- CJA03-0111.02
- CJA03-0111.03
- CJA03-0111.04
- CJA03-0111.05

The proposed notice amendments to Rule 101(a) would require caution language on the first page of all motions to court commissioners. It would also require the inclusion of the Judicial Council-approved bilingual notice of rights and provides consequences for failing to include them.

Service of Process Amendments

URCP004. Process. AMEND.

The proposed service of process amendments to Rule 4 address service on minors in paragraph (d)(1)(B) and outline the requirements for electronic acceptance of service in paragraph (d)(3)(B).

Supplemental Proceedings Amendments

URCP64.Writs in general. AMEND.

The proposed amendments to Rule 64 would require that 1) enforcement proceedings be initiated by motion under new Rule 7A, and 2) that the party against whom enforcement proceedings are initiated be served with the notice of hearing under Rule 4. Under the proposed amendments, If the party did not appear at the enforcement proceedings hearing, only then could a bench warrant issue. The term "referee" in paragraph (c) has also been replaced with "clerk of court."

URCP007A. Motion to enforce order and for sanctions. NEW.

URCP007B. Motion to enforce order and for sanctions in domestic law matters. NEW.

URCP007. Pleadings allowed; motions, memoranda, hearings, orders. AMEND.

New Rule 7A, which circulated once already for comment, has been split into two rules, 7A and 7B, in response to comments made during the comment period last year. Rules 7A and 7B would create a new, uniform process for enforcing court orders through regular motion practice. They would replace the current order to show cause process found in Rule 7(q) and in local court rules. During the comment period, several practitioners noted that the order to show cause process in the domestic arena differed from the process in other civil cases

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- CJA03-0201.02
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- CJA03-0301
- CJA03-0301.01
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- CJA04-0401.01

and should be separated out. Rule 7B would now address the domestic law order to show cause process. As previously noted, this would result in the repeal of Rule 7(q) because the provisions addressing the court's inherent power to initiate order to show cause proceedings would now be found in Rules 7A(h) and 7B(h).

Vexatious Litigant Amendments

URCP083. Vexatious litigants. AMEND.

The proposed amendments would bring represented parties into the rule's purview. They would also permit any court to rely on another court's vexatious litigant findings and order their own restrictions.

EDIT PAGE

This entry was posted in -Rules of Civil Procedure, URCP004, URCP007, URCP007A, URCP007B, URCP008, URCP036, URCP042, URCP064, URCP083, URCP101, URCP109.

« Code of Judicial Administration – Comment Period Closed October 8, 2020

Rules Governing the State Bar – Comment Period Closed September 26, 2020 »

UTAH COURTS

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- CJA04-0401.02
- CJA04-0401.03
- CJA04-0402
- CJA04-0403
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Bart Kunz
August 17, 2020 at 10:08 pm Edit

Proposed URCP 7, 8, and 36: I suggest limiting the cautionary language and bilingual notice to situations where the party intended to receive the notice is unrepresented.

I'm in favor of improving notice to promote fairness, but this change shouldn't be necessary in situations where the parties are represented by counsel. The benefit this change contemplates can be achieved without unnecessarily adding to counsel's growing task list in cases where the relevant parties are represented.

I realize represented parties can opt out (at least under the proposed rule 7), but I don't understand why they would need to take that additional step. Why is the caution/notice the default approach? I suspect that in many, many cases, these requirements will be surplusage. And they likely will expand the potential bases for counsel to seek delay or set aside.

Accordingly, I recommend the following revisions:
Proposed URCP 7(c)(2), line 25, insert after "For all dispositive motions": "where the nonmoving party is unrepresented."
Proposed URCP 7(c)(3), line 28, insert after "All motions": "directed to unrepresented parties."
Proposed URCP 8(a), line 10, insert after "pleading requesting relief": "against an unrepresented party or a party whose representation is unknown."
Proposed URCP 36(b)(1), line 11: insert after "All requests for admission": "directed to an unrepresented party." (I realize this proposal goes beyond the rule's current iteration, but I think this revision is consistent with my proposal.)

Reply

J. Bogart
August 19, 2020 at 7:11 am Edit

URCP4:

4(3) Acceptance of Service:
(B)(i) and (ii) are particularly good changes.

URCP 7:
7(c)(2): I suppose this is intended to aid pro se litigants. Could a lawyer come into court and obtain relief under (4) because the notice was absent? I wonder why the amendment does not say it is limited to cases with a pro se litigant?
Why would anyone opt out of the Notice? What benefit is there to opting out?

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- CJA07-0307
- CJA07-0308
- CJA09-0101
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- CJA09-0107
- CJA09-0108
- CJA09-0109
- CJA09-0301
- CJA09-0302
- CJA09-109
- CJA10-1-203
- CJA10-1-602
- CJA11-0101
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- CJA14-0721
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- CJC02
- CJC02.11
- CJC03
- CJC03.7
- CJC04
- CJC05
- CJCApplicability
- Fourth District Local Rule 10-1-407
- LPP1.00
- LPP1.01
- LPP1.010
- LPP1.011
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- LPP1.014
- LPP1.015
- LPP1.016
- LPP1.017
- LPP1.018
- LPP1.02
- LPP1.03

Is the Notice to Responding Party the Bilingual Notice of subsection (3)? Why is there no reference to where the Notice to Responding Party is found? It looks like it is part of Rule 7(a), but it is not certain. Why not be specific about location, or label the language in 7 as Notice to Responding Party?

7(c)(3): The Bilingual Notice is not available, so it is hard to know just what this section means. How is the language of the Bilingual Notice determined? Does the Judicial Council have some standard for which languages qualify for the Bilingual Notice? Why is there only one second language for Bilingual Notice? I would think that the languages ought to be tied to those spoken or read by the parties.

Are the Notice to Responding Party and Bilingual Notice substantively identical? How are they related to the notice in Rule 8? Is it 2 notices or 3 that are required? Or is (c)(2) language something other than a Notice to Responding Party? You should set out clearly, in one place, what is what and what is required when.

URCP 8:
(a) How does this fit with 7(c)? What is the difference (if there is one) between "caution language" and "Notice to Responding Party"?

URCP 36
Same as 7(c).

URCP 64
(c)(1): This is a good change.
(c)(2): Why use the more onerous Rule 4? Rule 5 would seem sufficient, as Notice of Hearing goes to the parties to the case. Making judgments harder to collect seems to me the wrong idea.

URCP 7A:
(a) What do you mean by an "ex parte" motion? If filed electronically, there is notice to all counsel at least, which means it is not ex parte. Who is the motion not served on? If it is just to signal that different timelines apply, then ex parte is not necessary and does no work. It would be clearer to jst say that no response is required (or permitted, or whatever), particularly as the Committee is making the Rules more accessible to pro se litigants.
(b) To beat a horse that should be dead but seems resurrected once again, this subsection is in conflict with statute (78B-18a-104). The statute says one can use a declaration in lieu of an affidavit. The Rules of Civil Procedure do not outrank statutes, and there is no exception in the statute for this Rule. The text should say "affidavit or declaration" and "affiant or declarant." Using just "affidavit" etc., invites motions and argument, and encourages confusion. And for pro se litigants it encourages a waste of time and money in finding a notary.

URCP 83:
Good changes.
A couple of questions: a represented party may be found a

- LPP1.04
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vexatious litigant. Assuming the attorney filed the offending papers, there is no sanction against the attorney? Is that to be pursued under some other rule? It seems odd that an attorney gets off free while the client gets sanctioned when the conduct was also by the attorney, and the attorney has a positive obligation not to engage in the sanctioned conduct.
The relationship of the courts in (b) and (e) is a little unclear. "Any court" encompasses all courts, not just all Utah state courts. How does the consultation of of (e) work if the other court is a US District Court? Or is there none and the vexatious litigant order is ineffective except as to Utah courts?

Reply

Eric K. Johnson
August 20, 2020 at 8:07 am Edit

Why require bilingual notices for everyone? If the party/attorney knows the person to be served speaks English, then there is no need for a bilingual notice. If the party/attorney knows the person to be served speaks Spanish, then there is no need for a bilingual notice. If the party/attorney knows the person to be served speaks Marshallese, then there is no need for a bilingual notice either because the party/attorney can and should have the summons translated into Marshallese.

A lingua franca is necessary for an ordered society. If I moved to a country that did not speak my native tongue (English), I'd work hard to learn the local language. For my sake and for my family's. I'd ensure my children learned it too. For my and for their benefit. Not to penalize them. Not to burden them (even though learning a new language does take time and effort–it's well worth it). The last thing we should be doing in the legal profession is providing fewer incentives for people to learn and speak English. An immigrant who learns English benefits in every way here. People who don't learn English are at a disadvantage. Don't make it harder for them to succeed by making it easy not to learn and work within society in English.

Reply

Michael A Jensen
August 26, 2020 at 9:44 am Edit

I concur with most of the above comments. In particular, the bilingual requirement should only be applicable for cases when the attorney filing pleadings, motions and other papers reasonably knows or should know that the opposing party or parties are not reasonably fluent in the English language. In the past 25 years, having filed hundreds of cases, I have never experienced a case where the other parties were not reasonably

- LPP15.0513
- LPP15.0514
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- LPP15.0522
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- LPP15.0530
- LPP15.0531
- LPP15.0532
- LPP15.0533
- LPP15.0601
- LPP15.0602
- LPP15.0603
- LPP15.0604
- LPP15.0605
- LPP15.0606
- LPP15.0607
- LPP15.0901
- LPP15.0901
- LPP15.0902
- LPP15.0903
- LPP15.0904
- LPP15.0904
- LPP15.0905
- LPP15.0906
- LPP15.0908
- LPP15.0909
- LPP15.0910
- LPP15.0911
- LPP15.0912
- LPP15.0913
- LPP15.0914
- LPP15.0915
- LPP15.0916
- LPP2.01
- LPP2.03
- LPP3.01
- LPP3.03
- LPP3.04
- LPP3.05
- LPP4.01
- LPP4.02
- LPP4.03
- LPP5.01
- LPP5.02
- LPP5.03
- LPP5.04
- LPP5.05

fluent in the English language. Imposing such a bilingual requirement is draconian and unnecessarily burdensome in 99.999% of the cases.

Reply

Guy Galli
August 26, 2020 at 3:54 pm Edit

The proposal to have the "warning language" in the top right-hand corner (several of the rules, esp Rule 5) will/may interfere with the Judge's Electronic Signature in that same location.

Reply

J. Duke Edwards
August 31, 2020 at 3:53 pm Edit

I agree with Eric's and Michael's comments above.
(1) I think that the nation's language should be required in legal proceedings, in promotion of cultural and national unity, rather than encouraging accommodation of multiple languages.
(2) The proposed 3-page Ten Day Summons is 2 pages too long, discouraging reading.
(3) !Auda! !Audame! I'm unable to print Arabic and Vietnamese characters, as on the suggested form, and Spanish only with difficulty.

Reply

Michael Menssen
September 4, 2020 at 12:16 pm Edit

I have a comment about the proposed amendment to Rule 42, specifically the second sentence of Rule 42(a)(2). The proposed amendment is written like this: "A motion to consolidate may be filed or opposed by any party. 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."

It is unclear to me whether the second sentence is saying (a) the motion must be filed and heard in the first action where a complaint has been filed and service has been effectuated on all parties, or (b) the motion must be filed and heard in the first action where a complaint is filed, and then that motion must be served on all parties in each action.

Option (a) could be problematic for a few reasons, including that parties might not be completely identical in actions that otherwise qualify for consolidation. Option (b) makes sense and does not appear problematic. Assuming option (b) is the intended interpretation, I recommend the sentence be modified to eliminate the ambiguity in this way: "The motion shall be filed in and heard by the judge assigned to the first action filed and MUST BE served on all parties in each action pursuant to Rule 5." (proposed addition in CAPS.)

Reply

Jenny Gnagey
September 12, 2020 at 2:16 pm Edit

I want to comment in support of the bilingual notice requirements and, generally, in support of more notice to parties of their rights and obligations. I am not a lawyer, but my understanding is that, within the US judicial system, all people (regardless of language spoken) have a right to due process, and that two important components of due process are notice and a hearing. I think the judicial system has a responsibility to do its best to ensure due process for everyone, including those who may not speak English, and I think these proposed rule changes are a good step toward fulfilling this responsibility.

A number of earlier comments support the proposed changes only for notices directed to unrepresented parties or parties where representation is unknown. First, from my experience working with and advocating for low income tenants, I think it is important to point out that according to the Utah Bar Foundation's "The Justice Gap" report (2020) over 80%* of defendants in civil cases in Utah were not represented by an attorney in fiscal year 2019. So unrepresented parties constitute a significant percentage of all parties in civil cases.

Second, I worry that narrowing these requirements to apply only to unrepresented parties would result in mistakes at best, and abuse at worst. If someone fails (whether by mistake or malice) to serve an unrepresented non-English-speaking party with a bilingual notice, it is unlikely they will be aware of, and able to assert, their right to a bilingual notice. If bilingual notice is required in all cases, failure to serve a bilingual notice to someone who needs it will be reduced. Overall, I think there is justification for making the new notice requirements apply universally for all civil cases.

*my own calculation based on The Justice Gap (2020) Figure 4
Debt Collection: 62% of total civil cases; 98% of defendants unrepresented
Divorce/annulment: 14% of total civil cases; 81% of defendants unrepresented
Eviction: 6% of total civil cases; 95% of defendants unrepresented

- RPC01.09
- RPC01.10
- RPC01.11
- RPC01.12
- RPC01.13
- RPC01.14
- RPC01.15
- RPC01.16
- RPC01.17
- RPC01.18
- RPC02.01
- RPC02.02
- RPC02.03
- RPC02.04
- RPC03.01
- RPC03.02
- RPC03.03
- RPC03.04
- RPC03.05
- RPC03.06
- RPC03.07
- RPC03.08
- RPC03.09
- RPC04.01
- RPC04.02
- RPC04.03
- RPC04.04
- RPC05.01
- RPC05.02
- RPC05.03
- RPC05.04
- RPC05.04A
- RPC05.04B
- RPC05.05
- RPC05.06
- RPC05.07
- RPC06.01
- RPC06.02
- RPC06.03
- RPC06.04
- RPC06.05
- RPC07.01
- RPC07.02
- RPC07.02A
- RPC07.02B
- RPC07.03
- RPC07.04
- RPC07.05
- RPC08.01
- RPC08.02
- RPC08.03
- RPC08.04
- RPC08.05
- RPP014.515
- Standing Order 15
- StandingOrder08
- Uncategorized

Protective orders: 5% of total civil cases; 70% of defendants unrepresented
(0.62*0.98) + (0.14*0.81) + (0.06*0.95) + (0.05*0.70) = 0.813 or 81.3%

Reply

Russell Mitchell
September 14, 2020 at 4:13 pm Edit

Rule 4(c)(e) already requires that the Summons must "notify the defendant that in case of failure to answer in writing, judgment by default will be entered against the defendant" So this notice is already contained in the Summons from the existing Rule. The required form of the "dual language" "10-day" summons that was provided in the link with the Utah Court Notices email regarding all of these amendments now has a special "Deadline" section.

Now, if I read it correctly, Rule 8 is amended to require "A pleading requesting relief must include the following caution language at the top right 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. Failure to include the caution language may provide the responding party with a basis under Rule 60(b) for excusable neglect to set aside any resulting judgment or order." With this Notice language in a special location at the top of the page, of the Complaint, and in bold.

However, the Complaint must be served with a Summons. Going back to the required form of the "dual language" "10-day" summons already mentioned above, it does not show this Notice in the upper part of page one (that is required for the Complaint), but has it only in the body of the document under "Deadline" – which makes it confusing as to just what format we are to follow with these proposed amendments.

The Summons is giving the deadline more than the Complaint is but the Complaint needs a special "page one" Notice. In addition, the amendment to the Rule 36 Request for Admission also requires the special "page one" Notice similar to that of the Complaint, but the Summons does not have a "page one" Notice but a special "Deadline" section within the body of the document.

On top of this, any Motion seeking relief needs its own "page one" Notice, which Notice is to be stated differently (different word combination) than what is required on a Complaint or Request for Admission.

These seem to be on a track to create confusion.

While I am guessing that attorneys can just change their basic formats for pleadings, discovery, motions, etc., it would appear

- URAP 21A
- URAP001
- URAP002
- URAP003
- URAP004
- URAP005
- URAP008
- URAP008A
- URAP009
- URAP010
- URAP011
- URAP012
- URAP013
- URAP014
- URAP015
- URAP016
- URAP019
- URAP020
- URAP021
- URAP022
- URAP023
- URAP023B
- URAP023C
- URAP024
- URAP024A
- URAP025
- URAP025A
- URAP026
- URAP027
- URAP028A
- URAP029
- URAP030
- URAP033
- URAP034
- URAP035
- URAP036
- URAP037
- URAP038
- URAP038A
- URAP038B
- URAP039
- URAP040
- URAP041
- URAP042
- URAP043
- URAP044
- URAP045
- URAP046
- URAP047
- URAP048
- URAP049
- URAP050
- URAP051
- URAP052
- URAP053
- URAP054
- URAP055

that this is convoluting the process for pro se litigants, thus making it more difficult for people to access the judicial/legal system at a time we are trying to come up with ways to make the justice/legal system less costly and burdensome to the every-day person. These changes do not seem to be geared toward this more recent goal, unless that goal is not meant to apply to those petitioner/plaintiff pro se litigants and only geared to defendant pro se litigants.

As these rules appear to apply regardless of whether the parties have legal counsel, it does not seem geared to keep the cost down for those who already have, or routinely use litigation counsel, or make the practice of law run more smoothly or less expensively in any but the few of a certain group of potential defendants: in debt collection matters (already governed by the FDCPA on giving notice about an attempt to collect a debt); and residential landlord/tenant matters where pro se litigants are generally a high percentage (assuming the "Justice Gap" article in the Sep/Oct 2020 Bar Journal is accurate).

I can't get my head around just what the real goal/purpose is for these broad changes the way they are presented. Perhaps a different approach would be better? One tailored to these particular areas of litigation?

Reply

Kirk Cullimore
September 23, 2020 at 11:49 am Edit

As to the proposed changes of URCP004, URCP007, URCP008, URCP036 and URCP101: directions are already pretty explicit on each of the pleadings already. Additional language will only appear more boilerplate and will not futher help direct pro se litigants. Also, the additional language requirements is unduly burdensome. If the courts want to help litigants that are either pro se or have a different native language then the courts can more effectively take that on without shifting the burden. More appropriate then addtional language might be reference to a self-help website administered by the courts. Each pleading or notice can direct the litigant to a website address. That link can then provide explanations for various types of summons, motions, discovery requests,etc. The website can also provide phone numbers, translations, or links for resources to help litigants that primarily speak a different language. An option like that can help address access to justice issues while not displacing additional burdens on the parties already trying to seek legal redress of grievances. It will also be a more succinct option that may be more effective than further complicating notices and pleadings with additional language.

(URCP64) Requiring motions and additional hearings in post-judgment remedies is a waste of judicial resources and prejudicial to prevailing parties. When a judgment has already

- URAP056
- URAP057
- URAP058
- URAP059
- URAP060
- URCP001
- URCP004
- URCP005
- URCP006
- URCP007
- URCP007A
- URCP007B
- URCP008
- URCP009
- URCP010
- URCP011
- URCP013
- URCP015
- URCP016
- URCP017
- URCP023A
- URCP024
- URCP025
- URCP026
- URCP026.01
- URCP026.02
- URCP026.03
- URCP026.04
- URCP029
- URCP030
- URCP031
- URCP032
- URCP033
- URCP034
- URCP035
- URCP036
- URCP037
- URCP040
- URCP041
- URCP042
- URCP043
- URCP045
- URCP047
- URCP050
- URCP051
- URCP052
- URCP054
- URCP055
- URCP056
- URCP058A
- URCP058B
- URCP058C
- URCP059
- URCP060
- URCP062
- URCP063
- URCP063A

entered, it is not uncommon for the party against whom a judgment was entered to either avoid enforcement or to cause additional delays. The proposed rule which would require motion practice in post-judgment remedies just gives those parties a new avenue to continue litigation (which is already resolved) and avoid the consequences of a judgment. Objections and hearings are already available to parties with a judgment. But, to require motions and hearings needlessly increases costs of collection, enforcement, and causes potentially more litigation on already resolved matters. With that said, it is already the usual practice of most courts to require personal service for a supplemental proceedings before issuing a bench warrant for failure to appear. Clarifying that usual practice in rule may be appropriate, but I am concerned about the precedent this rule may set for other post-judgment remedies like writs of garnishments, writs of execution, etc. Requiring personal service of post-judgment remedies is unduly burdensome, costly and prejudicial as well. If a party is already subject to a judgment then you can expect they will avoid service even more intentionally. This increases costs for parties that have already been adjudged to have been legally damaged. This also potentially decreases an aggrieved party's ability to effectively collect on a judgment if collection can be delayed by avoiding service in a matter where service was already effectuated.

I would strongly urge the rules committee to further consider notice requirements and other alternatives before implementing the above proposed rule changes. I would also strongly urge the rules committee to consider a revised, more narrow adoption of the proposed changes to Rule 64.

Reply

Nicholas Lloyd
September 29, 2020 at 3:52 pm Edit

In regards to the proposed bilingual notice amendments: the difficult thing about including different languages is that the proposed rule would only include English and Spanish. Utah has a number of litigants, particularly refugees, who speak neither English nor Spanish. Parties who speak neither English nor Spanish are often the ones who are the most unfamiliar with our court system, and need the most help in interacting with the courts. But there would be obvious difficulties in requiring pleadings to be in every language. It would make more sense to provide a website URL on pleadings where parties could go to seek language assistance, rather than requiring Spanish explanations.

In regards to the caution language: the proposed amendments seem duplicative, burdensome, and potentially would be better served by pointing a party to where they can find help. The rule 7 amendment would say "this motion requires you to respond"

- URCP064
- URCP064A
- URCP064B
- URCP064C
- URCP064D
- URCP064E
- URCP064F
- URCP065C
- URCP066
- URCP068
- URCP069
- URCP069A
- URCP069B
- URCP069C
- URCP071
- URCP073
- URCP074
- URCP075
- URCP076
- URCP083
- URCP084
- URCP086
- URCP100
- URCP101
- URCP103
- URCP105
- URCP106
- URCP108
- URCP109
- URCrP002
- URCrP004
- URCrP004A
- URCrP004B
- URCrP005
- URCrP006
- URCrP007
- URCrP007A
- URCrP007B
- URCrP007C
- URCrP008
- URCrP009
- URCrP009A
- URCrP010
- URCrP011
- URCrP012
- URCrP013
- URCrP014
- URCrP015.5
- URCrP015A
- URCrP016
- URCrP017
- URCrP017.5
- URCrP018
- URCrP021A
- URCrP022
- URCrP024
- URCrP026

but it doesn't say how to respond, when to respond, or what in the motion the respondent should focus on. Similar things could be said about the notices outlined in the amendments to Rules 8, 36, and 101. It wouldn't be practicable to include a statement telling the party the precise way that they should litigate their case – because each motion/situation is unique that's what an attorney is for. It would be a better use of resources to point parties to pro se assistance (such as the eviction and collection assistance that is already provided by the Utah Bar) rather than simply telling the party that they have to respond without informing them how/what/when they have to respond.

Reply

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POST COMMENT

- URCrP027
- URCrP027A
- URCrP027B
- URCrP028
- URCrP029
- URCrP029A
- URCrP033
- URCrP036
- URCrP038
- URCrP040
- URCrP041
- URE Restyled
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- URE0407
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- URE0702
- URE0703
- URE0803
- URE0804
- URE0807
- URE0902
- URE1101
- URE1102
- URJP002
- URJP003
- URJP004
- URJP005
- URJP007
- URJP007A
- URJP008
- URJP009
- URJP011
- URJP014
- URJP015
- URJP016
- URJP017
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