



**Utah Supreme Court**  
**Advisory Committee on the Utah Rules of Civil Procedure**  
**Meeting Agenda**  
*Rod Andreason, Chair*

Location: WebEx Meeting: [Link](#)

Date: September 25, 2024

Time: 4:00 – 6:00 p.m.

Welcome and approval of minutes	Tab 1	Rod Andreason
Rules back from public comment - 1, 5, 7A, 60, 81. Public comment only on Rule 5 ( <i>Discussion and motion to approve as final for Supreme Court</i> )	Tab 2	Rod Andreason
Rule 65C - pro bono counsel in post-conviction relief cases ( <i>Return for discussion</i> )	Tab 3	Mark Field
Rule 73 - paragraph (f) default attorney fee schedule ( <i>Discussion</i> )	Tab 4	Mark Olson
Rule 62 -orders to stay distribution pending appeal (Rothwell v. Rothwell) / Language in federal rule 62 re: a stay ( <i>Return for discussion</i> )	Tab 5	Jim Hunnicutt / Leslie Slaugh
Subcommittee List - Records Classification - needs chair - Plain Language - needs chair - Standard POs (Rule 26) - needs chair and requesting members - Rule 42 - requesting members	Tab 6	Rod Andreason

*Reminder:* Check style guide for conformity before rules are sent to the Supreme Court.

Upcoming Items:

- Subcommittees!
- Rules 7A and 64 supplemental proceedings

URCP Committee Website: [Link](#)

Meeting Schedule:

September 25

October 23

November 20

December 18

# Tab 1

# Tab 2

# 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.

[HOME](#)

[LINKS](#)

Posted: July 23, 2024

Utah Courts

Search...

SEARCH

## Rules of Civil Procedure – Comment Period Closed September 6, 2024

**URCP005** AMEND. The proposed amendments to this rule take into account the new filings systems and ways in which service and filing can be accomplished. The major amendments include removing the list from paragraph (a), updating the methods of service found in paragraph (b), and a revised paragraph (d) for certificates of service. Amendments were also made to conform to the rules style guide, format for other rules, and to use plain language.

**URCP 001** AMEND. The proposed amendments to this rule are to conform to the rules style guide. It was reviewed along with Rule 81 after the drafting of the new Rules of Business and Chancery Court Procedure.

**URCP081** AMEND. The proposed amendments to this rule were proposed after the drafting and finalization of the new Rules of Business and Chancery Court Procedure, and to conform to the rules style guide.

**URCP007A** AMEND. The proposed amendments to rules 7A(h) and 37(b) were made to clarify the enforcement mechanisms

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](#)

found in rule 37(b) as opposed to using the motion to enforce order and for sanctions process found in rule 7A. This amendment also includes a proposal to delete subparagraph (b) (6) from Rule 37. The amendments to Rule 37 will be forthcoming as the proposals include additional language changes for subpoenas that are being made in conjunction with several other URCP rules.

**URCP060 AMEND.** The proposed amendments to this rule are to clarify the language found in subparagraph (d) and update the numbering found in subparagraph (b) to conform to the rules style guide.

This entry was posted in [-Rules of Civil Procedure, URCP001, URCP005, URCP007A, URCP060, URCP081.](#)

« [Model Utah Criminal Jury Instructions – Comment Period Ends September 24, 2024](#)

[Rules of Appellate Procedure Comment Period Closed August 25, 2024](#) »

### UTAH COURTS

[View more posts from this author](#)

One thought on “[Rules of Civil Procedure – Comment Period Closed September 6, 2024](#)”

**Leslie Slaugh**  
July 31, 2024 at 10:51 am

Proposed Rule 5:

1. Is a word missing from line 3? Shouldn't it say “Unless otherwise permitted”
2. On lines 55 and 57, consider using “attorney’s most recent filing” rather than “attorney’s pleading.” The pleading may have been months or years earlier.

- [-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](#)
- [CJA01-0302](#)
- [CJA01-0303](#)
- [CJA01-0304](#)
- [CJA01-0305](#)
- [CJA010-01-0404](#)
- [CJA010-1-020](#)
- [CJA02-0101](#)
- [CJA02-0102](#)
- [CJA02-0103](#)
- [CJA02-0104](#)
- [CJA02-0106.01](#)
- [CJA02-0106.02](#)
- [CJA02-0106.03](#)
- [CJA02-0106.04](#)
- [CJA02-0106.05](#)
- [CJA02-0204](#)
- [CJA02-0206](#)
- [CJA02-0208](#)
- [CJA02-0208](#)
- [CJA02-0211](#)
- [CJA02-0212](#)
- [CJA03-0101](#)
- [CJA03-0102](#)
- [CJA03-0103](#)
- [CJA03-0103](#)
- [CJA03-0104](#)
- [CJA03-0105](#)
- [CJA03-0106](#)
- [CJA03-0106](#)
- [CJA03-0107](#)
- [CJA03-0108](#)
- [CJA03-0109](#)
- [CJA03-0111](#)

3. Proposed 5(b)(5) [lines 79-82] is bad policy. If the court signs a document, the court should serve it, even if it was initially prepared by an attorney or party. Relying on the preparing person will result in delays in service.

- CJA03-0111.01
- CJA03-0111.02
- CJA03-0111.03
- CJA03-0111.04
- CJA03-0111.05
- CJA03-0111.06
- CJA03-0112
- CJA03-0113
- CJA03-0114
- CJA03-0115
- CJA03-0116
- CJA03-0117
- CJA03-0201
- CJA03-0201.02
- CJA03-0202
- CJA03-0301
- CJA03-0301.01
- CJA03-0302
- CJA03-0303
- CJA03-0304
- CJA03-0304.01
- CJA03-0305
- CJA03-0306
- CJA03-0306.01
- CJA03-0306.02
- CJA03-0306.03
- CJA03-0306.04
- CJA03-0306.05
- CJA03-0401
- CJA03-0402
- CJA03-0403
- CJA03-0404
- CJA03-0406
- CJA03-0407
- CJA03-0408
- CJA03-0410
- CJA03-0411
- CJA03-0412
- CJA03-0413
- CJA03-0414
- CJA03-0415
- CJA03-0418
- CJA03-0419
- CJA03-0420
- CJA03-0421
- CJA03-0422
- CJA03-0501
- CJA03-0501
- CJA04-0101
- CJA04-0103
- CJA04-0106
- CJA04-0110
- CJA04-0201
- CJA04-0202
- CJA04-0202.01
- CJA04-0202.02
- CJA04-0202.03

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

2 **(a) When service is required.**

3 **(1) ~~Papers~~ Documents that must be served. Unless permitted by statute, rule, or  
4 court order, ~~Except as otherwise provided in these rules or as otherwise directed by~~  
5 ~~the court,~~ the following papers every document filed with the court after the  
6 original complaint must be served by the party filing it on every party to the case. Ex  
7 parte motions may be filed without serving if permitted under Rule 7.:**

8 ~~(A) a judgment;~~

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

10 ~~(C) a pleading after the original complaint;~~

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

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

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

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

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

17 (B) a party in default for any reason other than for failure to file and serve a  
18 responsive pleading or otherwise appear must be served as provided in paragraph

19 (a)(1);

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

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

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



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

30 **(b) How service is made.**

31 **(1) Whom to serve.** If a party is self-represented, service must be made upon the self-  
32 represented party. If a party is represented by an attorney, a ~~paper~~-document served  
33 under this rule must be served upon the attorney unless the court orders service upon  
34 the party. Service must be made upon the attorney and the party if:

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

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

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

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

45 (A) Electronic filing. ~~except~~-Except in the juvenile court, a ~~paper~~-document is  
46 served by submitting it for electronic filing, or the court submitting it to the  
47 electronic filing service provider, if the person being served has an electronic filing  
48 account;

49 (B) Email. If the party serving or being served a document does not have an  
50 electronic filing account, emailing it to:

51 (i) the most recent email address the person being served has provided by  
52 ~~the person~~ to the court ~~and other parties under~~ as provided in Rule 10 or  
53 Rule 76; or

54 (ii) ~~to~~ if service is to an attorney licensed in Utah, to the email address on  
55 the attorney's pleadings and/or on file with the Utah State Bar; or

56 (iii) if service is to an attorney not licensed in ~~outside of~~ Utah, to the email  
57 address on the attorney's pleadings and/or on file with the attorney  
58 licensing entity in the state where the attorney is licensed ~~in~~.

59 (C) Mail and other methods. If the party serving or being served with a  
60 paper document does not have an electronic filing account or email, a paper  
61 document may be served under this paragraph by:

62 (i) mailing it to the most recent address the person being served has provided  
63 to the court ~~under~~ as provided in Rule 10 or Rule 76, or, if none, the person's  
64 last known address;

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

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

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

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

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

74 (5) **Who serves.** Unless otherwise directed by the court or these rules:

75 (A) every ~~paper~~ document required to be served must be served by the party  
76 preparing it, including subsequently signed orders and judgments; and

77 (B) every ~~paper~~ document initially prepared by the court ~~must~~will be served by  
78 the court; ~~and~~.

79 (C) every document signed by the court that was initially prepared and filed by a  
80 self-represented party or attorney but not prepared by the court~~must will~~ be  
81 served on the other parties by the party or attorney who prepared it; and.

82 (D) service under this rule does not alter the effectiveness of the document.

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

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

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

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

91 (4) a copy of the order must be served ~~up~~on the parties.

92 **(d) Certificate of service.** No certificate of service is required when a ~~paper~~ document is  
93 served by filing it with through thean court's electronic filing system~~account under~~  
94 paragraph (b)(3)(A). When a ~~paper~~ document that is required to be served is served by  
95 email, mail, or other ~~means~~ methods of service:

96 (1) if the ~~paper~~ document is filed with the court, a certificate of service showing the  
97 date and ~~manner~~ method of service, including the email or mailing address used,  
98 unless safeguarded, must be filed with it or within a reasonable time after service;  
99 and

100 (2) if the ~~paper~~ document is not filed with the court, a certificate of service need not  
101 be filed unless filing is required by rule or court order.~~A paper required by this rule~~  
102 ~~to be served, including electronically filed papers, must include a signed certificate~~

103 ~~of service showing the name of the document served, the date and manner of service~~  
104 ~~and on whom it was served. Except in the juvenile court, this paragraph does not~~  
105 ~~apply to papers required to be served under paragraph (b)(5)(B) when service to all~~  
106 ~~parties is made under paragraph (b)(3)(A).~~

107 **(e) Filing.** Except as provided in Rule ~~7(j)~~ and Rule ~~26(f)~~, all ~~papers~~ documents after the  
108 complaint that are required to be served must be filed with the court. ~~Parties~~ Attorneys  
109 with an electronic filing account must file a ~~paper~~ document electronically. A self-  
110 represented party who is not an attorney ~~without an electronic filing account~~ may file a  
111 paper document ~~by delivering it to~~ with the court clerk of the court ~~or to a judge of the~~  
112 ~~court.~~ using any of the following methods:

113 (1) email;

114 (2) mail;

115 (3) the court's MyCase interface, where applicable; or

116 (4) in person.

117 Filing is complete upon the earliest of acceptance by the electronic filing system or by ,  
118 the court ~~clerk of court or the judge~~.

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

121 (1) electronically file the original affidavit with a notary acknowledgment as provided  
122 by Utah Code ~~S~~ section 46-1-16(7);

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

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

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

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

131 *Effective May/November 2024*

132 **Advisory Committee Notes**

133 ~~*Note adopted 201520*~~

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

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

1 **Rule 1. General provisions.**

2 *Effective: 11/1/2011*

3 **Scope of rules.** These rules govern the procedure in the courts of the state of Utah in all  
4 actions of a civil nature, whether cognizable at law or in equity, and in all statutory  
5 proceedings, except as governed by other rules promulgated by this court or statutes  
6 enacted by the Legislature, and except as stated in Rule [81](#). They ~~shall~~must be liberally  
7 construed and applied to achieve the just, speedy, and inexpensive determination of  
8 every action. These rules govern all actions brought after they take effect and all further  
9 proceedings in actions then pending. If, in the opinion of the court, applying a rule in an  
10 action pending when the rule takes effect would not be feasible or would be unjust, the  
11 former procedure applies.

12

---

13 **Advisory Committee Notes**

14 These rules apply to court commissioners to the same extent as to judges.

15 A primary purpose of the 2011 amendments is to give effect to the long-standing but  
16 often overlooked directive in Rule 1 that the Rules of Civil Procedure should be  
17 construed and applied to achieve "the just, speedy and inexpensive determination of  
18 every action." The amendments serve this purpose by limiting parties to discovery that  
19 is proportional to the stakes of the litigation, curbing excessive expert discovery, and  
20 requiring the early disclosure of documents, witnesses and evidence that a party  
21 intends to offer in its case-in-chief. The committee's purpose is to restore balance to the  
22 goals of Rule 1, so that a just resolution is not achieved at the expense of speedy and  
23 inexpensive resolutions, and greater access to the justice system can be afforded to all  
24 members of society.

25 Due to the significant changes in the discovery rules, the Supreme Court order adopting  
26 the 2011 amendments makes them effective only as to cases filed on or after the effective

27 date, November 1, 2011, unless otherwise agreed to by the parties or ordered by the  
28 court.

29

1 **Rule 7A. Motion to enforce order and for sanctions.**

2 **(a) Motion.** To enforce a court order or to obtain a sanctions order for violation of an  
3 order, including in supplemental proceedings under Rule 64, a party must file an ex  
4 parte motion to enforce order and for sanctions (if requested), pursuant to this rule  
5 and [Rule 7](#). The motion must be filed in the same case in which that order was entered.  
6 The timeframes set forth in this rule, rather than those set forth in [Rule 7](#), govern  
7 motions to enforce orders and for sanctions.

8 **(b) Affidavit Verification.** The motion must state the title and date of entry of the order  
9 that the moving party seeks to enforce. The motion must be verified, or must be  
10 accompanied by at least one supporting affidavit or declaration that is based on  
11 personal knowledge and shows that the affiant or declarant is competent to testify on  
12 the matters set forth. The verified motion, affidavit, or declaration must set forth facts  
13 that would be admissible in evidence and that would support a finding that the party  
14 has violated the order.

15 **(c) Proposed order.** The motion must be accompanied by a request to submit for  
16 decision and a proposed order to attend hearing, which must:

17 (1) state the title and date of entry of the order that the motion seeks to enforce;

18 (2) state the relief sought in the motion;

19 (3) state whether the motion is requesting that the other party be held in contempt  
20 and, if so, state that the penalties for contempt may include, but are not limited to, a  
21 fine of up to \$1000 and confinement in jail for up to 30 days;

22 (4) order the other party to appear personally or through counsel at a specific place  
23 (the court's address) and date and time (left blank for the court clerk to fill in) to  
24 explain whether the nonmoving party has violated the order; and

25 (5) state that no written response to the motion is required but is permitted if filed  
26 within 14 days of service of the order, unless the court sets a different time, and that  
27 any written response must follow the requirements of [Rule 7](#).

28 **(d) Service of the order.** If the court issues an order to attend a hearing, the moving  
29 party must have the order, motion, and all supporting ~~affidavits~~[documents](#) served on  
30 the nonmoving party at least 28 days before the hearing. Service must be in a manner  
31 provided in Rule 4 if the nonmoving party is not represented by counsel in the case. If  
32 the nonmoving party is represented by counsel in the case, service must be made on the  
33 nonmoving party's counsel of record in a manner provided in [Rule 5](#). For purposes of  
34 this rule, a party is represented by counsel if, within the last 120 days, counsel for that



35 party has served or filed any documents in the case and has not withdrawn. The court  
36 may shorten the 28 day period if:

37 (1) the motion requests an earlier date; and

38 (2) it clearly appears from specific verified facts ~~shown by affidavit~~ that immediate  
39 and irreparable injury, loss, or damage will result to the moving party if the hearing  
40 is not held sooner.

41 **(e) Opposition.** A written opposition is not required, but if filed, must be filed within 14  
42 days of service of the order, unless the court sets a different time, and must follow the  
43 requirements of Rule 7.

44 **(f) Reply.** If the nonmoving party files a written opposition, the moving party may file a  
45 reply within seven<sup>7</sup> days of the filing of the opposition to the motion, unless the court  
46 sets a different time. Any reply must follow the requirements of Rule 7.

47 **(g) Hearing.** At the hearing the court may receive evidence, hear argument, and rule  
48 upon the motion, or may request additional briefing or hearings. The moving party  
49 bears the burden of proof on all claims made in the motion. At the court's discretion, the  
50 court may convene a telephone conference before the hearing to preliminarily address  
51 any issues related to the motion, including whether the court would like to order a  
52 briefing schedule other than as set forth in this rule.

53 **(h) Limitations.**

54 (1) This rule does not apply to:

55 (A) proceedings instituted by the court on its own initiative to enforce an order;

56 (B) ~~This rule does not apply in~~ criminal cases; or

57 (C) motions for sanctions filed under Rule 37(b).

58 (2) Nothing in this rule is intended to limit or alter the inherent power of the court to  
59 initiate order to show cause proceedings to assess whether cases should be dismissed  
60 for failure to prosecute or to otherwise manage the court's docket, or to limit the  
61 authority of the court to hold a party in contempt for failure to appear pursuant to a  
62 court order.

63 **(i) Orders to show cause.** The process set forth in this rule replaces and supersedes the  
64 prior order to show cause procedure. An order to attend hearing serves as an order to  
65 show cause as that term is used in Utah law.

66

67 Effective May 1, 2023

1 **Rule 60. Relief from judgment or order.**

2 *Effective: 5/1/2016*

3 (a) **Clerical mistakes.** The court may correct a clerical mistake or a mistake arising from  
4 oversight or omission whenever one is found in a judgment, order, or other part of the  
5 record. The court may do so on motion or on its own, with or without notice. After a  
6 notice of appeal has been filed and while the appeal is pending, the mistake may be  
7 corrected only with leave of the appellate court.

8 (b) **Mistakes; inadvertence; excusable neglect; newly discovered evidence; fraud,**  
9 **etc.** On motion and upon just terms, the court may relieve a party or its legal  
10 representative from a judgment, order, or proceeding for the following reasons:

11 ~~(b)~~(1) mistake, inadvertence, surprise, or excusable neglect;

12 ~~(b)~~(2) newly discovered evidence which by due diligence could not have been  
13 discovered in time to move for a new trial under Rule 59(b);

14 ~~(b)~~(3) fraud (whether previously called intrinsic or extrinsic), misrepresentation or  
15 other misconduct of an opposing party;

16 ~~(b)~~(4) the judgment is void;

17 ~~(b)~~(5) the judgment has been satisfied, released, or discharged, or a prior judgment  
18 upon which it is based has been reversed or vacated, or it is no longer equitable that  
19 the judgment should have prospective application; or

20 ~~(b)~~(6) any other reason that justifies relief.

21 (c) **Timing and effect of the motion.** A motion under paragraph (b) must be filed  
22 within a reasonable time and for reasons in paragraph (b)(1), (2), or (3), not more than  
23 90 days after entry of the judgment or order or, if there is no judgment or order, from  
24 the date of the proceeding. The motion does not affect the finality of a judgment or  
25 suspend its operation.

26 (d) **Other power to grant relief.** This rule does not limit the power of a court to  
27 entertain an independent action:  
28 [\(1\)](#) to relieve a party from a judgment, order, or proceeding; or  
29 [\(2\)](#) to set aside a judgment for fraud upon the court. ~~The procedure for obtaining any~~  
30 ~~relief from a judgment shall be by motion as prescribed in these rules or by an~~  
31 ~~independent action.~~

---

32

### 33 **Advisory Committee Notes**

34 The 1998 amendment eliminates as grounds for a motion the following: "(4) when, for  
35 any cause, the summons in an action has not been personally served upon the  
36 defendant as required by Rule 4(e) and the defendant has failed to appear in said  
37 action." This basis for a motion is not found in the federal rule. The committee  
38 concluded the clause was ambiguous and possibly in conflict with rule permitting  
39 service by means other than personal service.

40 *[Note adopted \[YEAR\]](#)*

41 2016 amendments

42 The deadlines for a motion are as stated in this rule, but if a motion under paragraph (b)  
43 is filed within 28 days after the judgment, it will have the same effect on the time to  
44 appeal as a motion under Rule [50](#), [52](#), or [59](#). See the 2016 amendments to Rule of  
45 Appellate Procedure [4\(b\)](#).

46 *[Note adopted \[YEAR\]](#)*

47

1 **Rule 81. Applicability of rules in general.**

2 *Effective:*

3 (a) Special statutory proceedings. These rules ~~shall~~ apply to all special statutory  
4 proceedings, except insofar as such rules are by their nature clearly inapplicable. Where  
5 a statute provides for procedure by reference to any part of the former Code of Civil  
6 Procedure, such procedure ~~shall~~ will be in accordance with these rules.

7 (b) Probate and guardianship. These rules ~~shall~~ do not apply to proceedings in  
8 uncontested probate and guardianship matters, but ~~shall~~ apply to all proceedings  
9 subsequent to the joinder of issue therein, including the enforcement of any judgment  
10 or order entered.

11 (c) Application to small claims. These rules ~~shall~~ do not apply to small claims  
12 proceedings except as expressly incorporated in the Small Claims Rules.

13 (d) Application to business and chancery court. These rules apply in the business and  
14 chancery court except where there is a rule of the same number in the Utah Rules of  
15 Business and Chancery Procedure, or where the Utah Rules of Business and Chancery  
16 Procedure exclude application of these rules by specific rule number.

17 ~~(e)~~ Administrative proceedings. On appeal from or review of a ruling or order of an  
18 administrative board or agency. These rules ~~shall~~ apply to the practice and procedure in  
19 appealing from or obtaining a review of any order, ruling or other action of an  
20 administrative board or agency, except insofar as the specific statutory procedure in  
21 connection with any such appeal or review is in conflict or inconsistent with these rules.

22 ~~(f)~~ e Application in criminal proceedings. These rules ~~of procedure shall~~ also govern in  
23 any aspect of criminal proceedings where there is no other applicable statute or rule,  
24 provided, that any rule so applied does not conflict with any statutory or constitutional  
25 requirement.

26

# Tab 3

**Rule 65C. Post-conviction relief.**

*Amendment history and questions from Supreme Court.*

The amendments to this rule started with a request from Mr. Ian Quiel and the Utah Indigent Appellate Defense Division (IADD). The Committee agreed upon proposing the amendments to Rule 65C to the Supreme Court. When this rule was presented to the Supreme Court they had questions about the language used in Lines 102 – 103 and wanted feedback on the practical application from those attorneys working in this area of law. Since that time Mr. Mark Field with the Attorney General’s Office and Mr. David Ferguson have inquired about Rule 65C and another proposal has been received.

Included in the materials are the following:

- Rule 65C – Redline from November 2023
- IADD Letter
- URCP Sept. 2023 Meeting Minutes
- Letter from Mr. Mark Field
- Redline from Mr. Mark Field

1 **Rule 65C. Post-conviction relief.**

2 *Effective: 5/1/2021*

3 **(a) Scope.** This rule governs proceedings in all petitions for post-conviction relief filed under the  
4 Post-Conviction Remedies Act, Utah Code [Title 78B, Chapter 9](#). The Act sets forth the manner  
5 and extent to which a person may challenge the legality of a criminal conviction and sentence  
6 after the conviction and sentence have been affirmed in a direct appeal under [Article I, Section](#)  
7 [12](#) of the Utah Constitution, or the time to file such an appeal has expired.

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

11 | **(c) Commencement and venue.** The proceeding ~~must~~[shall be begin with the commenced by](#)  
12 | filing a petition with the ~~clerk of the~~ district court [clerk](#) in the county in which the judgment of  
13 conviction was entered. The petition should be filed on forms provided by the court. The court  
14 may order a change of venue on its own motion if the petition is filed in the wrong county. The  
15 court may order a change of venue on motion of a party for the convenience of the parties or  
16 witnesses.

17 | **(d) Contents of the petition.** The petition ~~must~~[shall](#) set forth all claims that the petitioner has in  
18 relation to the legality of the conviction or sentence. The petition ~~must~~[shall](#) state:

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

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

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

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

28 (5) whether the legality of the conviction or sentence has been adjudicated in any prior post-  
29 conviction or other civil proceeding, and, if so, the case number and title of those  
30 proceedings, the issues raised in the petition, and the results of the prior proceeding; and

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

34 | **(e) Attachments to the petition.** If available to the petitioner, the petitioner ~~must~~shall attach to  
35 the petition:

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

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

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

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

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

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

48 | **(h) Summary dismissal of claims.**

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



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

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

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

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

62 (3) If a claim is not frivolous on its face but is deficient due to a pleading error or failure to  
63 comply with the requirements of this rule, the court ~~will~~~~shall~~ return a copy of the petition  
64 with leave to amend within 21 days. The court may grant one additional 21-day period to  
65 amend for good cause shown.

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

68 **(i) Service of petitions.** If, on review of the petition, the court concludes that all or part of the  
69 petition should not be summarily dismissed, the court ~~will~~~~shall~~ designate the portions of the  
70 petition that are not dismissed and direct the clerk to serve upon the respondent a copy of the  
71 petition, attachments, memorandum, and an electronic court record of the underlying criminal  
72 case being challenged, including all non-public documents. If an electronic appellate record of  
73 the underlying case has not already been created, the clerk will create the record.

74 (1) If the petition is a challenge to a felony conviction or sentence, the respondent is the state  
75 of Utah represented by the Attorney General. Service on the Attorney General ~~will~~~~shall~~ be by  
76 mail at the following address:

77 Utah Attorney General's Office

78 Criminal Appeals

79 Post-Conviction Section

80 160 East 300 South, 6<sup>th</sup> Floor

81 P.O. Box 140854

82 Salt Lake City, UT 84114-0854

83 (2) In all other cases, the respondent is the governmental entity that prosecuted the petitioner.

84 **(j) Appointment of ~~pro bono~~ counsel.** If any portion of the petition is not summarily dismissed,  
85 the court may, upon the request of an indigent petitioner, appoint counsel on a pro bono basis; or  
86 from the Indigent Appellate Defense Division; to represent the petitioner in the post-conviction  
87 court or on post-conviction appeal. In determining whether to appoint counsel the court shall  
88 consider: ~~whether the petition or the appeal contains factual allegations that will require an~~  
89 ~~evidentiary hearing and whether the petition involves complicated issues of law or fact that~~  
90 ~~require the assistance of counsel for proper adjudication.~~

91 (1) whether the petitioner is incarcerated;

92 (2) the likelihood that an evidentiary hearing will be necessary;

93 (3) the likelihood that an investigation will be necessary;

94 (4) the complexity of the factual and legal issues; and

95 (5) any other factor relevant to the particular case.

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

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

107 (1) consider the formation and simplification of issues;

108 (2) require the parties to identify witnesses and documents; and

109 (3) require the parties to establish the admissibility of evidence expected to be presented at  
110 the evidentiary hearing.

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

117 | **(n) Discovery; records.**

118 | (1) Discovery under Rules [26](#) through [37](#) ~~will~~shall be allowed by the court upon motion of a  
119 | party and a determination that there is good cause to believe that discovery is necessary to  
120 | provide a party with evidence that is likely to be admissible at an evidentiary hearing.

121 | (2) The court may order either the petitioner or the respondent to obtain any relevant  
122 | transcript or court records.

123 | (3) All records in the criminal case under review, including the records in an appeal of that  
124 | conviction, are deemed part of the trial court record in the petition for post-conviction relief.  
125 | A record from the criminal case retains the security classification that it had in the criminal  
126 | case.

127 | **(o) Orders; stay.**

128 | (1) If the court vacates the original conviction or sentence, it ~~will~~shall enter findings of fact  
129 | and conclusions of law and an appropriate order. If the petitioner is serving a sentence for a  
130 | felony conviction, the order ~~will~~shall be stayed for 7 days. Within the stay period, the  
131 | respondent ~~must~~shall give written notice to the court and the petitioner that the respondent  
132 | will pursue a new trial, pursue a new sentence, appeal the order, or take no action. Thereafter  
133 | the stay of the order is governed by these rules and by the [Rules of Appellate Procedure](#).

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

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

140 **(p) Costs.** The court may assign the costs of the proceeding, as allowed under Rule [54\(d\)](#), to any  
141 party as it deems appropriate. If the petitioner is indigent, the court may direct the costs to be  
142 paid by the governmental entity that prosecuted the petitioner. If the petitioner is in the custody  
143 of the Department of Corrections, Utah Code [Title 78A, Chapter 2, Part 3](#) governs the manner  
144 and procedure by which the trial court ~~will~~[shall](#) determine the amount, if any, to charge for fees  
145 and costs.

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

149



**UTAH INDIGENT APPELLATE DEFENSE DIVISION**

370 E SOUTH TEMPLE, SUITE 500

SALT LAKE CITY, UT 84111

IADD@UTAH.GOV

385.270.1650

DEBRA M. NELSON, CHIEF APPELLATE OFFICER

August 25, 2023

Supreme Court Advisory Committee  
Utah Rules of Civil Procedure

ATTN: Lauren DiFrancesco, *Chair*  
[Lauren.DiFrancesco@gtlaw.com](mailto:Lauren.DiFrancesco@gtlaw.com)

CC: Stacy Haacke, *Staff*  
[stacyh@utcourts.gov](mailto:stacyh@utcourts.gov)

**RE: Proposed Amendments to Utah R. Civ. P. 65C(j) – Appointment of Counsel in Postconviction Relief Proceedings**

To the Committee,

My name is Ian L. Quiel, and I am a public defender and the head of the Postconviction Division, of the Utah Indigent Appellate Defense Division (“*IADD*”).<sup>1</sup> With this letter, we wish to bring to the Committee’s attention recent legislative amendments to Utah’s Post-Conviction Remedies Act (“*PCRA*”) regarding the appointment of counsel and to propose corresponding amendments to Rule 65C of the Utah Rules of Civil Procedure. The current version of Rule 65C conflicts with the PCRA, given recent legislative amendments. There are two conflicts in subsection (j) of Rule 65C that the amendments proposed herein address. These proposed amendments are set out in a redlined version of Rule 65C(j), attached to this letter

A copy of proposed amendments to Rule 65C is attached as Addendum A. Copies of statutes relevant to this issue are attached as Addendum B.

**Background**

---

<sup>1</sup> Formed in 2020 by the legislature, IADD is a state agency that provides various public defense services throughout Utah. See Utah Code Ann. § 78B-22-902. IADD provides legal services to indigent individuals in all criminal appeals from third, fourth, fifth, and sixth class counties, in appeals from parental termination actions, and in actions or appeals for postconviction relief under the PCRA. *Id.* § 78B-22-903(1).

Adopted in 1996, the PCRA outlines the grounds and procedures for challenging a defendant’s criminal conviction, post direct appeal.<sup>2</sup> A person convicted of a crime may bring a petition for relief under the PCRA’s various grounds, which include discovery of new evidence, constitutional defects in the conviction, and ineffective assistance of counsel, to name few.<sup>3</sup> A PCRA petition is often a defendant’s last chance in state court to resolve issues or reverse improper convictions. PCRA proceedings are civil in nature, and petitioners have no constitutional right to counsel.

During the General Session of the 2022 Utah Legislature, lawmakers amended Utah’s PCRA statute to give indigent petitioners meaningful access to effective postconviction counsel.<sup>4</sup> The amendments targeted the appointment of counsel in PCRA proceedings, at both the district court and appellate level.<sup>5</sup> With this change, Utah courts may now appoint attorneys from IADD’s Postconviction Division to represent indigent PCRA petitioners.<sup>6</sup>

Prior to 2022, appointment of counsel in PCRA proceedings was extremely limited. Courts could only “appoint counsel on a *pro bono basis* to represent the petitioner” in postconviction claims.<sup>7</sup> The process for identifying and selecting a willing and able pro bono attorney was ill-defined and often incredibly difficult. Given the specialized nature of PCRA proceedings, coupled with the pro bono aspect of the appointment, few members of the bar were available to accept cases. This forced many petitioners to wait months or sometimes years for pro bono counsel or to proceed pro se. The lack of effective and available counsel further discouraged or frustrated otherwise viable claims.

For these reasons, the PCRA was amended during the 2022 General Session. The legislature overwhelmingly passed Senate Bill 210, altering the PCRA to allow for the appointment of “counsel on a pro bono basis *or from the Indigent Appellate Defense Division.*”<sup>8</sup> The Postconviction Division of IADD was since formed to fulfill this important statutory duty.

---

<sup>2</sup> *Id.* § 78B-9-101 *et. seq.*

<sup>3</sup> *Id.* § 78B-9-104(1).

<sup>4</sup> S.B. 210, 2022 Gen. Session (Utah 2022); Utah Code Ann. § 78B-9-109 (2022). The legislature also amended IADD’s enabling statute to reflect the Division’s new statutory obligation to represent indigent petitioners in PCRA proceedings. *Id.* § 78B-22-903(1)(a)(ii).

<sup>5</sup> *See* S.B. 210, 2022 Gen. Session (Utah 2022).

<sup>6</sup> Utah Code Ann. §§ 78B-9-109(1)(a), -22-903(1)(a).

<sup>7</sup> *Id.* § 78B-9-109(1)(a) (2021) (emphasis added).

<sup>8</sup> S.B. 210, 2022 Gen. Session (Utah 2022) (emphasis added); *see also* Utah Code Ann. § 78B-9-109(1)(a) (2022).

The Postconviction Division is now tasked with representing indigent petitioners at any stage of PCRA litigation. Utah law mandates that IADD shall provide defense services “for an action or an appeal for postconviction relief under [the PCRA] if the court appoints the division to represent the indigent individual . . . .”<sup>9</sup> IADD’s mission is to fulfill this mandate by providing zealous, ethical, and professional representation to indigent individuals seeking postconviction relief.

### **Proposed Amendments**

The PCRA is a legislative creation, rooted in the judiciary’s extraordinary writ authority—specifically the writ of habeas corpus.<sup>10</sup> While the legislature may regulate this constitutional writ power through statutes such as the PCRA, the legislature may not diminish the substance of that writ power.<sup>11</sup> In other words, the judiciary’s writ authority supersedes legislative action.

The Utah Supreme Court functionally adopted the PCRA, through the Utah Rules of Civil Procedure, as a reasonable legislative limit on the court’s writ power.<sup>12</sup> Rule 65C “governs proceedings in all petitions for post-conviction relief filed under the [PCRA].”<sup>13</sup> It is the judicially-created rule of procedure that corresponds with the legislatively-enacted PCRA statute. Rule 65C adopted by reference the PCRA’s grounds for relief and outlines its specific procedures.<sup>14</sup>

The proposed amendments seek to ensure that there is no meaningful inconsistency between Rule 65C and § 78B-8-109.

#### **A. Appointment of IADD under § 78B-9-109(1)(a).**

First, the current version of Rule 65C(j) states that if “the petition is not summarily dismissed, the court may, upon the request of an indigent petitioner, appoint counsel on a

---

<sup>9</sup> *Id.* § 78B-22-903(1)(a).

<sup>10</sup> *Patterson v. State*, 2021 UT 52, ¶ 76, 504 P.3d 92 (“[T]he Utah Constitution provides the judicial branch the power to issue writs that challenge the detention of an individual— such writs have traditionally been called writs of habeas corpus.”).

<sup>11</sup> *Id.* ¶ 169.

<sup>12</sup> The judiciary has constitutional authority to promulgate rules of evidence and procedure. Utah Const. art. VIII, § 4.

<sup>13</sup> Utah R. Civ. P. 65C(a).

<sup>14</sup> *See Patterson*, 2021 UT 52, ¶ 183 n. 42 (agreeing that “the PCRA set forth an acceptable manner of regulating the procedure by which [the Court] would hear writ petitions”).

pro bono basis to represent the petitioner”<sup>15</sup> This mirrors the old language of Section 78B-9-109, which prior to 2022, allowed only for pro bono counsel in PCRA cases. The current version of Section 78B-9-109, as discussed above, contemplates the appointment of counsel from IADD.

The new appointment language from Section 78B-9-109(1)(a) needs to be added to Rule 65C(j). This additional language mirrors the PCRA appointment provisions and will inform judges and practitioners about IADD’s ability to take these cases.

**B. Factors relevant to determining whether to appoint counsel under Section 78B-9-109(2).**

Second, Rule 65C(j) currently omits numerous factors that a court should consider when determining whether to appoint counsel. Presently, Rule 65C(j) requires the court to consider only two factors: whether “[1] the petition or the appeal contains factual allegations that will require an evidentiary hearing and [2] whether the petition involves complicated issues of law or fact that require the assistance of counsel for proper adjudication.”<sup>16</sup>

Section 78B-9-109(2), on the other hand, identifies five relevant factors for the court to consider when making this determination:

- (a) whether the petitioner is incarcerated;
- (b) the likelihood that an evidentiary hearing will be necessary;
- (c) the likelihood that an investigation will be necessary;
- (d) the complexity of the factual and legal issues; and
- (e) any other factor relevant to the particular case.<sup>17</sup>

Rule 65C(j) needs to be amended to replace the current two factors with the five statutory factors from the PCRA. The current version is misleading and results in judges misapplying the standard for appointment of counsel.

**Conclusion**

The proposed amendments resolve inconsistencies between the Rules of Civil Procedure and the PCRA. This change is needed to avoid confusion and the misapplication of law. It will also encourage the appointment of counsel on these important matters.

---

<sup>15</sup> Utah R. Civ. P. 65C(j).

<sup>16</sup> *Id.*

<sup>17</sup> Utah Code Ann. § 78B-9-109(2).



The proposed amendments will help IADD further aid clients and improve access to justice for all Utahns. We appreciate the Committee's time and consideration of this important issue. Please feel free to contact IADD with any questions, comments, or concerns, or visit our website: <https://idc.utah.gov/contact>. We welcome an invitation to present this proposal to the Committee or to provide anything else that may aid the Committee in this process.

Respectfully,



Ian L. Quiel  
*Postconviction Division Head*



Postconviction Division  
Indigent Appellate Defense Division  
370 East South Temple, Suite 500  
Salt Lake City, Utah 84111  
[ianquiel@utah.gov](mailto:ianquiel@utah.gov)  
(385) 270-1650

# **Addendum A**

**Proposed Amendments to Rule 65C**

**Rule 65C. Post-conviction relief.**

...

**(j) Appointment of ~~pro-bono~~ counsel.** If any portion of the petition is not summarily dismissed, the court may, upon the request of an indigent petitioner, appoint counsel on a pro bono basis **or from the Indigent Appellate Defense Division, created in Section 78B-22-902**, to represent the petitioner in the post-conviction court or on post-conviction appeal. In determining whether to appoint counsel the court shall consider ~~whether the petition or the appeal contains factual allegations that will require an evidentiary hearing and whether the petition involves complicated issues of law or fact that require the assistance of counsel for proper adjudication~~ **(a) whether the petitioner is incarcerated; (b) the likelihood that an evidentiary hearing will be necessary; (c) the likelihood that an investigation will be necessary; (d) the complexity of the factual and legal issues; and (e) any other factor relevant to the particular case.**

# **Addendum B**

***Effective 5/4/2022***

**78B-9-109 Appointment of pro bono counsel or counsel from Indigent Appellate Defense Division.**

- (1)
  - (a) If any portion of the petition is not summarily dismissed, the court may, upon the request of an indigent petitioner, appoint counsel on a pro bono basis or from the Indigent Appellate Defense Division, created in Section 78B-22-902, to represent the petitioner in the postconviction court or on postconviction appeal.
  - (b) Counsel who represented the petitioner at trial or on the direct appeal may not be appointed to represent the petitioner under this section.
- (2) In determining whether to appoint counsel, the court may consider:
  - (a) whether the petitioner is incarcerated;
  - (b) the likelihood that an evidentiary hearing will be necessary;
  - (c) the likelihood that an investigation will be necessary;
  - (d) the complexity of the factual and legal issues; and
  - (e) any other factor relevant to the particular case.
- (3) An allegation that counsel appointed under this section was ineffective cannot be the basis for relief in any subsequent postconviction petition.

Amended by Chapter 295, 2022 General Session

***Effective 5/4/2023***

**78B-22-903 Powers and duties of the division.**

- (1) The division shall:
  - (a) provide appellate defense services:
    - (i) for an appeal under Section 77-18a-1, in counties of the third, fourth, fifth, and sixth class;
    - (ii) for an action or an appeal for postconviction relief under Chapter 9, Postconviction Remedies Act, if the court appoints the division to represent the indigent individual; and
    - (iii) for an appeal of right from an action for the termination or restoration of parental rights under Chapter 6, Part 1, Utah Adoption Act, Title 80, Chapter 3, Abuse, Neglect, and Dependency Proceedings, or Title 80, Chapter 4, Termination and Restoration of Parental Rights; and
  - (b) provide appellate defense services in accordance with the core principles adopted by the commission under Section 78B-22-404 and any other state and federal standards for appellate defense services.
- (2) Upon consultation with the executive director and the commission, the division shall:
  - (a) adopt a budget for the division;
  - (b) adopt and publish on the commission's website:
    - (i) appellate performance standards;
    - (ii) case weighting standards; and
    - (iii) any other relevant measures or information to assist with appellate defense services; and
  - (c) if requested by the commission, provide a report to the commission on:
    - (i) the provision of appellate defense services by the division;
    - (ii) the caseloads of appellate attorneys; and
    - (iii) any other information relevant to appellate defense services in the state.
- (3) If the division provides appellate defense services to an indigent individual in an indigent defense system, the division shall provide notice to the district court and the indigent defense system that the division intends to be appointed as counsel for the indigent individual.
- (4) The office shall assist with providing training and continual legal education on appellate defense to indigent defense service providers in counties of the third, fourth, fifth, and sixth class.

Amended by Chapter 229, 2023 General Session

**UTAH SUPREME COURT ADVISORY COMMITTEE  
ON RULES OF CIVIL PROCEDURE**

**Summary Minutes – September 27, 2023  
In-Person and via Webex**

**THIS MEETING WAS CONDUCTED ELECTRONICALLY VIA WEBEX**

<b>Committee members</b>	<b>Present</b>	<b>Excused</b>	<b>Guests/Staff Present</b>
Rod N. Andreason, Vice-Chair	<b>X</b>		Bryson King, Staff
Lauren DiFrancesco, Chair	<b>X</b>		Keri Sargent
Judge Kent Holmberg		<b>X</b>	Crystal Powell
James Hunnicutt	<b>X</b>		Rachel Sykes
Trevor Lee	<b>X</b>		
Ash McMurray	<b>X</b>		
Michael Stahler	<b>X</b>		
Timothy Pack		<b>X</b>	
Loni Page	<b>X</b>		
Bryan Pattison	<b>X</b>		
Judge Laura Scott	<b>X</b>		
Judge Clay Stucki		<b>X</b>	
Judge Andrew H. Stone		<b>X</b>	
Justin T. Toth	<b>X</b>		
Susan Vogel	<b>X</b>		
Tonya Wright	<b>X</b>		
Judge Rita Cornish	<b>X</b>		
Commissioner Catherine Conklin	<b>X</b>		
Giovanna Speiss		<b>X</b>	
Jonas Anderson	<b>X</b>		
Heather Lester	<b>X</b>		
Jensie Anderson	<b>X</b>		
Judge Ronald Russell	<b>X</b>		
<i>Emeritus</i> Seats Vacant			

**(1) INTRODUCTIONS**

The meeting started at 4:06 p.m. after forming a quorum. Ms. Lauren DiFrancesco welcomed the Committee and guests. Previous and New Committee members introduced themselves.

**(2) APPROVAL OF MINUTES**

Ms. DiFrancesco asked for approval of the June 2023 Minutes subject to amendments noted by the Minutes subcommittee. Judge Russell moved to adopt the Minutes as amended. Judge Cornish seconded. The Minutes were unanimously approved.

**(3) RULE 104. DIVORCE DECREE UPON AFFIDAVIT**

Ms. Susan Vogel reintroduced the work of the Self-Help Center and presented a brief update on the work done on creating the online assistance program and MyCase as well as how they work. She noted that there are many forms that persons must file on any given issue including with divorce. Specific to Rule 104, Ms. Vogel summarized that the amendments she has been working on will allow the Declaration of Jurisdiction and Grounds to be a part of the final divorce papers rather than a separate document. She noted that this is in keeping with the Center’s mission of trying to make it easier for self-represented persons to understand the necessary documents for divorces and to retire the use of separate declarations of jurisdiction and grounds as it is difficult to understand all the papers to be filed and the order in which to file them. She also summarized the concerns of Judges Cornish and Stone in ensuring the initial petition that was served and the final order are consistent in default divorce cases. The Self-Help team with the input of other stakeholders are continuing to address the Rule and will present a proposed Rule at the October 2023 meeting.

**(4) RULE 101. LANGUAGE CHANGE FROM OSC TO “MOTION TO ENFORCE ORDER AND FOR SANCTIONS”**

Mr. Jim Hunnicutt reported that only one small section is being updated in Rule 101. He explained that beginning at Rule 100, the Rules only deal with family law, and Rule 101 is only about family law where there are domestic commissioners. He noted that a few years ago language was changed in the Rules from “motion for order to show cause” to “motion to enforce order and for sanctions.” The amendment will correct an oversight in the language of Rule 101(k) to match the previous amendments. Judge Cornish moved to approve the amendment. Mr. Michael Stahler seconded. The motion passed unanimously.



**(5) RULE 56. MSJ DEADLINE FEEDBACK FROM UTAH SUPREME COURT**

Ms. Lauren DiFrancesco summarized the issue on Motion for Summary Judgment proposal. The Supreme Court agrees with the proposal, and it has been sent out for public comment but there is a concern that with no procedural deadline, cases might go on indefinitely. The Supreme Court would like to see more comprehensive language or time guides to ensure that cases are moving forward. Specifically, to consider modifying the language of subparagraph (b) to include that judges may set deadlines for motions for summary judgment, certificates of readiness for trial, or any language that would establish a timeline to move the case forward. Ms. DiFrancesco will send the proposal back to the Subcommittee before it is discussed generally.

**(6) RULE 7A AND 37. MOTIONS TO ENFORCE DISCOVERY ORDERS**

Ms. DiFrancesco gave a brief overview on behalf of Mr. Clint Hansen who was unable to attend the meeting. She summarized that the issue Mr. Hansen brought to the Committee is that he has attempted to use Rule 37 to enforce a statement of discovery issues order after the opposing party failed/refused to participate in discovery; but the judge rejected it under Rule 7A noting that the procedure was incorrect. He has experienced this more than once. Ms. DiFrancesco invited discussion from the Committee but noted that ultimately a Subcommittee will be needed to work on the issue.

Mr. Jim Hunnicutt discussed the history of Rule 7A and 37 amendments and volunteered to be on the Subcommittee. He noted that he sees where more clarity would be appropriate. Judge Cornish volunteered to chair the Subcommittee. Judge Russell also volunteered to sit on the Committee.

**(7) RULE 3(a)(2)—PREFILING SERVICE OF COMPLAINT**

Mr. Trevor Lee explained the issue for the new members however no action was taken on this Rule to allow for more stakeholder feedback particularly from debtor representatives. He also expressed that another way forward might be to invite stakeholders to the next meeting.

Ms. Vogel also explained the history of the proposals where Utah has one of the nation's highest level of indebtedness by persons with most of the debt being medical debt. She noted that Utah has a procedure where a complaint can be served without first filing a complaint. Therefore, creditors are serving persons with debt collection complaints and telling them to call the court to see if a case was filed. Many times, the case cannot be found for reasons such as an incorrect spelling of the party's name and the debtor defaults on the suit. She recounted examples of people having default judgments against them when they have made many efforts to find the case against them. Ms. Vogel noted that all the creditors have

attorneys while only about 2% of the debtors have legal representation. The Committee discussed some of the appropriate stakeholders to seek input from such as volunteer Clinics, and pro-bono attorneys that volunteer for the debt collection calendar.

Mr. Michael Stahler questioned what the purpose is for initiating a suit by service whether it was for only debt collection or for other types of cases. He also asked for clarification on the time for response from the time of summons.

#### **(8) REVIEW OF SUBCOMMITTEES**

Ms. Di Francesco explained the general mandate of the various Subcommittees for the new members. Each Subcommittee chair gave an overview of their members and the status of assignments that the Subcommittee has undertaken. The Committee members got the opportunity to discuss the subcommittee memberships and volunteer for Subcommittees.

#### **(9) RULE 65C. APPOINTMENT OF COUNSEL IN POST CONVICTION RELIEF PROCEEDINGS**

Mr. Ian Quiel introduced himself and his organization, the Utah Indigent Postconviction Division (IAPD) to the Committee. He explained that the legislature amended the Post-Conviction Remedies Act last year to create his office and allow the court to appoint IAPD to represent plaintiffs in post-conviction proceedings. He noted that the statute and Rule 65C(j) now conflicts. He suggested adding the appointment language from the statute as well as the factors that a court should look at when appointing counsel. He explained that the Rule lists only two of the five factors listed in the statute that may be considered by the court when deciding whether to appoint counsel and suggested referencing the statute in the Rule.

Ms. DiFrancesco opened the discussion and asked Mr. Quiel whether the reference to the statute is necessary as the Committee generally does not reference specific statutes in the Rules due to the rapid cycle of legislative amendments. Ms. Jensie Anderson expressed that she supports the proposal to make the Rule consistent with the statute. The Committee generally discussed the factors the court should look at when appointing counsel in post-conviction relief cases. Ms. Jensie moved to accept the proposal without the inclusion of the statutory reference. Ms. Susan Vogel seconded the motion. The motion passed unanimously.

#### **(10) DECEMBER MEETING**

Ms. DiFrancesco notified the Committee that the December meeting will be held on December 6, 2023, at 4:00 p.m. There will be no meeting in November.

#### **(11) ADJOURNMENT.**

The meeting was adjourned at 5:47 p.m. The next meeting will be October 25, 2023, at 4:00 p.m.

Mark C. Field  
Assistant Solicitor General  
Criminal Appeals Division  
Utah Attorney General's Office  
160 East 300 South 6th Floor  
PO Box 140854  
Salt Lake City, Utah 84114-0854  
801-366-0180  
markfield@agutah.gov

## Explanations for Proposed Amendments to Utah R. Civ. P. 65C

### 1. **65C(d)(6) – Contents of the petition**

Adds “a posttrial motion” to clarify that a petitioner who raises a claim of newly discovered evidence must explain why the new evidence could not have been discovered in time to raise the claim between the trial and the direct appeal; for example, in a motion for new trial or to arrest judgment.

### 2. **65C(f) – Memorandum of authorities**

Adds two new paragraphs addressing page/ words limits for a postconviction memorandum of authorities that are identical to the page/ word limits in Utah R. Civ. P. 7(q). Also provides that a petitioner may move the district court for permission to file an overlength memorandum based on good cause, consistent with Utah R. Civ. P. 7(o).

The suggested page/ word limits *do not* apply to the postconviction petition itself, only the memorandum setting forth the petitioner’s legal arguments in support of the claims raised.

### 3. **65C(h)(1) – Summary dismissal of claims**

Removes previously adjudicated claims as claims that may be summarily dismissed by the district court. In December 2018, the Utah Court of Appeals held that the PCRA provision

requiring notice when a court raises the procedural bar that a claim for relief has been previously adjudicated is clearly counter to the summary dismissal permitted in rule 65C for the same procedural bar. Accordingly, the statute supercedes this provision of the rule, and the trial court must give the parties notice and an opportunity to be heard.

*Bevan v. State*, 2018 UT App 237, ¶4, 434 P.3d 516.

### 4. **65C(i) – Service of petitions**

Adds language making clear that when an appellate record of the underlying criminal matter has not been created – for example, when the petitioner has not pursued a direct appeal – the court clerk is to create a record consistent with rule 11, Utah Rules of Appellate Procedure.

**5. 65C(j) – Appointment of pro bono counsel**

Adds a second paragraph specifying that when pro bono counsel is appointed, the court clerk – *as a matter of course* – will provide appointed counsel with all the documents in the case, including the record of the underlying criminal matter, and, if the criminal record does not exist, to create the record consistent with rule 11, Utah Rules of Appellate Procedure.

**6. 65C(k) – Answer or other response**

Adds language specifying that the respondent may file a reply in support of a motion to dismiss or for summary judgment, if such a motion is filed. This amendment is consistent with the general practice in postconviction cases since 2016. *See Gordon v. State*, 2016 UT 11, ¶39 n.17, 369 P.3d 1255 (“Civil rule 65C(k) does not expressly call for a reply, but we find such a right incorporated in [Utah R. Civ. P.] 7(e).”).

**7. 65C(n) – Discovery; records**

Clarifies that discovery under rules 26 through 37, Utah Rules of Civil Procedure, is allowed only after the district court orders an evidentiary hearing.

**Rule 65 C. Post-conviction relief**

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

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

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

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

- (1) whether the petitioner is incarcerated and, if so, the place of incarceration;
- (2) the name of the court in which the petitioner was convicted and sentenced and the dates of proceedings in which the conviction was entered, together with the court's case number for those proceedings, if known by the petitioner;
- (3) in plain and concise terms, all of the facts that form the basis of the petitioner's claim to relief;
- (4) whether the judgment of conviction, the sentence, or the commitment for violation of probation has been reviewed on appeal, and, if so, the number and title of the appellate proceeding, the issues raised on appeal, and the results of the appeal;
- (5) whether the legality of the conviction or sentence has been adjudicated in any prior post-conviction or other civil proceeding, and, if so, the case number and title of those proceedings, the issues raised in the petition, and the results of the prior proceeding; and
- (6) if the petitioner claims entitlement to relief due to newly discovered evidence, the reasons why the evidence could not have been discovered in time for the claim to be addressed in the trial, [a posttrial motion](#), the appeal, or any previous post-conviction petition.

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

- (1) affidavits, copies of records and other evidence in support of the allegations;
- (2) a copy of or a citation to any opinion issued by an appellate court regarding the direct appeal of the petitioner's case;

- (3) a copy of the pleadings filed by the petitioner in any prior post-conviction or other civil proceeding that adjudicated the legality of the conviction or sentence; and
- (4) a copy of all relevant orders and memoranda of the court.

**(f) Memorandum of authorities.**

[\(1\) The petitioner shall not set forth argument or citations or discuss authorities in the petition, but these may be set out in a separate memorandum, two copies of which shall be filed with the petition.](#)

[\(2\) Length of the memorandum. The memorandum of authorities must comply with the page limit or the corresponding word limit set forth in Utah Rule of Civil Procedure 7\(q\) for motions and opposition memoranda filed under rules 12\(b\), 12\(c\), and 56. The memorandum of authorities shall be limited to 25 pages or 9,000 words.](#)

[\(3\) The court may permit a party to file an overlength memorandum of authorities upon a showing of good cause. An overlength memorandum must include a table of contents and a table of authorities with page references.](#)

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

**(h) Summary dismissal of claims.**

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

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

- (A) the facts alleged do not support a claim for relief as a matter of law;
- (B) the claim has no arguable basis in fact; or
- (C) the claim challenges the sentence only and the sentence has expired prior to the filing of the petition.

(3) If a claim is not frivolous on its face but is deficient due to a pleading error or failure to comply with the requirements of this rule, the court shall return a copy of the petition with leave to amend within 21 days. The court may grant one additional 21-day period to amend for good cause shown.

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

**(i) Service of petitions.** If, on review of the petition, the court concludes that all or part of the petition should not be summarily dismissed, the court shall designate the portions of the petition that are not dismissed and direct the clerk to serve upon the respondent a

copy of the petition, attachments, memorandum, and an electronic court record of the underlying criminal case being challenged, including all non-public documents. If an electronic appellate record of the underlying case has not already been created, the clerk will create the record [consistent with Utah Rule of Appellate Procedure 11](#).

(1) If the petition is a challenge to a felony conviction or sentence, the respondent is the state of Utah represented by the Attorney General. Service on the Attorney General shall be by mail at the following address:

Utah Attorney General's Office  
Criminal Appeals  
Post-Conviction Section  
160 East 300 South, 6th Floor  
P.O. Box 140854  
Salt Lake City, UT 84114-0854

(2) In all other cases, the respondent is the governmental entity that prosecuted the petitioner.

**(j) Appointment of pro bono counsel.**

(1) If any portion of the petition is not summarily dismissed, the court may, upon the request of an indigent petitioner, appoint counsel on a pro bono basis to represent the petitioner in the post-conviction court or on post-conviction appeal. In determining whether to appoint counsel the court shall consider whether the petition or the appeal contains factual allegations that will require an evidentiary hearing and whether the petition involves complicated issues of law or fact that require the assistance of counsel for proper adjudication.

(2) [If pro bono counsel is appointed, the clerk shall serve upon appointed counsel a copy of the petition, attachments, memorandum, and an electronic record of the underlying criminal case being challenged, including all non-public documents. If an electronic appellate record of the underlying case has not already been created, the clerk will create the record consistent with Utah Rule of Appellate Procedure 11.](#)

Formatted: Space After: 3 pt

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

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

(1) consider the formation and simplification of issues;



- (2) require the parties to identify witnesses and documents; and
- (3) require the parties to establish the admissibility of evidence expected to be presented at the evidentiary hearing.

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

**(n) Discovery; records.**

- (1) [If the court sets the proceeding for an evidentiary hearing](#), ~~Discovery~~ discovery under Rules 26 through 37 shall be allowed by the court upon motion of a party and a determination that there is good cause to believe that discovery is necessary to provide a party with evidence that is likely to be admissible at an evidentiary hearing.
- (2) The court may order either the petitioner or the respondent to obtain any relevant transcript or court records.
- (3) All records in the criminal case under review, including the records in an appeal of that conviction, are deemed part of the trial court record in the petition for post-conviction relief. A record from the criminal case retains the security classification that it had in the criminal case.

**(o) Orders; stay.**

- (1) If the court vacates the original conviction or sentence, it shall enter findings of fact and conclusions of law and an appropriate order. If the petitioner is serving a sentence for a felony conviction, the order shall be stayed for 7 days. Within the stay period, the respondent shall give written notice to the court and the petitioner that the respondent will pursue a new trial, pursue a new sentence, appeal the order, or take no action. Thereafter the stay of the order is governed by these rules and by the Rules of Appellate Procedure.
- (2) If the respondent fails to provide notice or gives notice that no action will be taken, the stay shall expire and the court shall deliver forthwith to the custodian of the petitioner the order to release the petitioner.
- (3) If the respondent gives notice that the petitioner will be retried or resentenced, the trial court may enter any supplementary orders as to arraignment, trial, sentencing, custody, bail, discharge, or other matters that may be necessary and proper.

**(p) Costs.** The court may assign the costs of the proceeding, as allowed under Rule 54(d), to any party as it deems appropriate. If the petitioner is indigent, the court may direct the costs to be paid by the governmental entity that prosecuted the petitioner. If the petitioner is in the custody of the Department of Corrections, Utah Code Title 78A, Chapter 2, Part 3 governs the manner and procedure by which the trial court shall determine the amount, if any, to charge for fees and costs.

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

# Tab 5

## **Rule 62**

In *Rothwell v. Rothwell*, 2023 UT App 51, the Utah Court of Appeals invited this committee to review Rule 62. In this divorce, the husband appealed alimony, attorney fees, and certain aspects regarding how the court valued different marital assets. The court filed a motion with the district court requesting a stay of the property distribution. The court granted his motion, which had the effect of the wife being deprived of the use, possession, and enjoyment of essentially all marital assets. Meanwhile, the husband was barred from disposing of any assets, and had to continue paying over \$22,000/month in alimony.

Footnote 1 of *Rothwell* reads:

1. [Wife] also argues that a stay of property distribution is inappropriate in a divorce action because a divorce judgment differs from an ordinary judgment. She explains that unlike a typical judgment for compensatory damages addressed by rule 62, a divorce judgment awards assets that already belonged to the party before the divorce. She argues that because the “status quo” during marriage was that “each party already legally owned half the assets and could use them as they wished,” staying a property distribution where one party has possession of the majority of the marital assets does not maintain the “status quo” because it “puts at least one party in a worse position than they would otherwise have been” in. While we acknowledge that the impact of staying a divorce decree is somewhat different from the impact of staying a judgment for compensatory damages and recognize the unfortunate impact that a stay in this situation has in delaying at least one of the parties from moving on from the divorce with no—or at least reduced—financial ties to their ex-spouse, there is nothing in the plain language of rule 62 that limits its application to matters involving compensatory damages. In fact, the language suggests that a judgment for compensatory damages is only one of any number of judgments that may be subject to a stay. *See* Utah R. Civ. P. 62(h) (outlining a presumptive formula for determining the amount of a bond for compensatory damages as an exception to the general rule that security should be “in an amount that adequately protects the adverse party against loss or damage occasioned by the stay and assures payment after the stay ends”). Nevertheless, we observe that it may be desirable for the Supreme Court’s Advisory Committee on the Rules of Civil Procedure to consider amending rule 62 to address the unique circumstance of staying a divorce distribution pending appeal and attempt to at least mitigate the potential inequity of such a stay.

In other words, Rule 62 is more suited to money judgments for damages, not matters such as alimony, child support, and division of marital assets.

My proposal is adding a new subsection (j) to Rule 62 along the lines of:

1 (j) **Domestic relations actions.** Notwithstanding the above, nothing in this rule shall be  
2 construed to limit the equitable powers of the courts in domestic relations actions. Courts  
3 should apply equitable principles in establishing fair circumstances for all parties for the  
4 duration of any appeal.

5 (1) Child custody and parent-time orders may not be stayed during an appeal.

6 (2) Ongoing alimony and child support obligations may not be stayed during an  
7 appeal, but alimony and child support arrearages may be stayed provided the  
8 appellant provide a bond or other security.

9 (2) Property distributions in a divorce may only be stayed to the extent necessary to  
10 address those marital assets and debts subject to the appeal. If staying division of  
11 marital wealth, courts may order the transfer of assets between the parties and enjoin  
12 the parties from selling, transferring, collateralizing, or otherwise encumbering any  
13 such assets pending appeal, provided both parties have fair use, possession, and  
14 enjoyment of a fair share of marital assets during the appeal, in addition to requiring  
15 the appellant to provide a bond or other security.

16  
17  
18 For reference, Rule 62 currently reads:

19  
20 **Rule 62. Stay of proceedings to enforce a judgment or order.**

21 (a) **Delay in execution.** No execution or other writ to enforce a judgment or an order to  
22 pay money under Rule 7(j)(8) may issue until the expiration of 28 days after entry of the  
23 judgment or order, unless the court in its discretion otherwise directs.

24 (b) **Stay by bond or other security; duration of stay.** A party may obtain a stay of the  
25 enforcement of a judgment or order to pay money by providing a bond or other security,  
26 unless a stay is otherwise prohibited by law or these rules.

27 (1) The stay takes affect when the court approves the bond or other security and  
28 remains in effect for the time specified in the order that approves the bond or other  
29 security.

30 (2) In its discretion and on such conditions for the security of the adverse party as  
31 are proper, the court may stay:

32 (A) an order that is certified as final under Rule 54(b) until the entry of a final  
33 judgment under Rule 58A;

34 (B) an order to pay money under Rule 7(j)(8) until the entry of a judgment  
35 under Rule 58A;

36 (C) a judgment until resolution of any motion made pursuant to Rule 50(b),  
37 Rule 52(b), Rule 59, Rule 60, or Rule 73; and

38 (D) a judgment until resolution of a motion made under this rule.

39 (c) **Injunction pending appeal.** When a party seeks an appeal from an interlocutory order,  
40 or takes an appeal from a judgment, granting, dissolving, or denying an injunction, the  
41 court in its discretion may suspend, modify, restore, or grant an injunction during the  
42 pendency of appellate proceedings upon such conditions for the security of the rights of  
43 the adverse party as are just.

44 (d) Stay in favor of the United States, the State of Utah, or political subdivision. When an  
45 appeal is taken by the United States, the State of Utah, a political subdivision, or an officer  
46 of agency of any of those entities, or by direction of any department of any of those entities,  
47 and the operation or enforcement of the judgment is stayed, no bond, obligation, or other  
48 security is required from the appellant.

49 (e) Stay in quo warranto proceedings. Where the defendant is adjudged guilty of usurping,  
50 intruding into or unlawfully holding public office, civil or military, within this state, the  
51 execution of the judgment shall not be stayed on an appeal.

52 (f) Power of appellate court not limited. The provisions in this rule do not limit any power  
53 of an appellate court or of a judge or justice of an appellate court.

54 (g) Form of bond; deposit in lieu of bond; stipulation on security; jurisdiction over sureties  
55 to be set forth in undertaking.

56 (1) A bond given under Subdivision (b) may be either a commercial bond having a  
57 surety authorized to transact insurance business under Title 31A, or a personal bond  
58 having one or more sureties who are residents of Utah having a collective net worth  
59 of at least twice the amount of the bond, exclusive of property exempt from  
60 execution. Sureties on personal bonds shall make and file a declaration setting forth  
61 in reasonable detail the assets and liabilities of the surety.

62 (2) The court may permit a deposit of money in court or other security to be given  
63 in lieu of giving a bond.

64 (3) The parties may by written stipulation agree to the form and amount of security.

65 (4) A bond shall provide that each surety submits to the jurisdiction of the court and  
66 irrevocably appoints the clerk of the court as the surety's agent upon whom any  
67 papers affecting the surety's liability on the bond may be served, and that the  
68 surety's liability may be enforced on motion and upon such notice as the court may  
69 require without the necessity of an independent action.

70 **(h) Amount of bond or other security.**

71 (1) Except as provided in subsection (h)(2), a court shall set the bond or other  
72 security in an amount that adequately protects the adverse party against loss or  
73 damage occasioned by the stay and assures payment after the stay ends. In setting  
74 the amount, the court may consider any relevant factor including:

75 (A) the debtor's ability to pay the judgment or order to pay money;

76 (B) the existence and value of other security;

77 (C) the debtor's opportunity to dissipate assets;

78 (D) the debtor's likelihood of success on appeal; and

79 (E) the respective harm to the parties from setting a higher or lower amount.

80 (2) Notwithstanding subsection (h)(1):

81 (A) the presumptive amount of a bond or other security for compensatory  
82 damages is the amount of the compensatory damages plus costs and attorney  
83 fees; as applicable, plus 3 years of interest at the applicable interest rate;

84 (B) the bond or other security for compensatory damages shall not exceed  
85 \$25 million in an action by the plaintiffs certified as a class under Rule 23 or

86 in an action by multiple plaintiffs in which compensatory damages are not  
87 proved for each plaintiff individually; and

88 (C) no bond or other security shall be required for punitive damages.

89 (3) If the court permits a bond or other security that is less than the presumptive  
90 amount in subsection (h)(2)(A), the court may enter such orders as are necessary to  
91 protect the adverse party during the stay.

92 (4) If the court finds that the party seeking the stay has violated an order or has  
93 otherwise dissipated assets, the court may set the amount of the bond or other  
94 security without regard to the presumptive amount under subsection (h)(1) and  
95 limits in subsection (h)(2).

96 (i) **Objecting to sufficiency or amount of security.** Any party whose judgment or order  
97 to pay money is stayed or sought to be stayed pursuant to Subdivision (b) may object to  
98 the sufficiency of the sureties on a bond or the amount thereof, or to the sufficiency of  
99 amount of other security given to stay the judgment by filing and giving notice of such  
100 objection. Either party shall be entitled to a hearing on the objection upon five days notice  
101 or such shorter time as the court may order. The burden of justifying the sufficiency of the  
102 sureties or other security and the amount of the bond or other security, shall be borne by  
103 the party seeking the stay, unless the objecting party seeks a bond or other security in an  
104 amount greater than the presumed amount in subsection (h)(2)(A). The fact that a bond, its  
105 surety or other security is generally permitted under this rule shall not be conclusive as to  
106 its sufficiency or amount.

107

**Rule 62 – Stay of proceedings to enforce a judgment or order**  
**Mr. Leslie Slaugh**

I miss serving on the advisory committee on rules of civil procedure, so I thought I would suggest some work for you who are on the committee.

Rule 62(b) of the Federal Rules of Civil Procedure states, “At any time after judgment is entered, a party may obtain a stay by providing a bond or other security.” I recommend that Utah adopt a similar provision.

The federal rule allows a stay of any judgment at any time. No similar right exists under the Utah rule.

Rule 62(b) allows a stay of a money judgment but has no provision of a stay of a non-money judgment.

Rule 62(c) is limited to injunctions pending appeal and seems to imply that an appeal must have been filed. Especially in cases involving multiple parties where a judgment is not yet final, the stay often needs to be in place before the appeal is filed, to preserve appeal rights and prevent mootness.

The automatic stay of Rule 62(a) is very limited and only prevents execution or other writs. It does not stay a judgment that requires a party to take some action.

I also suggest that Rule 62(c) state the grounds upon which an injunction may issue, and clarify that a party need not show probable success on appeal. Asking a trial judge to rule that the losing party will probably win on appeal is logically impossible. A better, but still too high, standard is, “[i]t will ordinarily be enough that the movant has raised serious legal questions going to the merits, so serious, substantial, difficult as to make them a fair ground of litigation and thus for more deliberative investigation.” *Akiachak Native Cmty. v. Jewell*, 995 F. Supp. 2d 7, 13 (D.D.C. 2014) (citation and brackets omitted). A better standard would be to require that the party have a good faith, non-frivolous basis for the appeal, with discretion for the trial judge to weigh the probable success in considering what security should be required.



THE UTAH COURT OF APPEALS

---

SHAUN ROBERT ROTHWELL,  
Appellee,  
*v.*  
JENEA ROTHWELL,  
Appellant.

---

Opinion  
No. 20210863-CA  
Filed May 11, 2023

---

Fourth District Court, Provo Department  
The Honorable Sean M. Petersen  
No. 184401412

---

Julie J. Nelson, Mitchell J. Olsen Sr., and Mitchell J.  
Olsen Jr., Attorneys for Appellant  
Aaron R. Harris, Thomas J. Burns, and Lacey M.  
Whimpey, Attorneys for Appellee

---

JUDGE MICHELE M. CHRISTIANSEN FORSTER authored this Opinion,  
in which JUDGES RYAN D. TENNEY and JOHN D. LUTHY concurred.

---

CHRISTIANSEN FORSTER, Judge:

¶1 This case arises from the same facts and circumstances outlined in *Rothwell v. Rothwell*, 2023 UT App 50, which also issues today. The sole question for our consideration in this case is whether the district court exceeded its discretion by staying the property distribution in Shaun and Jenea Rothwell’s divorce case pending an appeal. We conclude that the district court did not and, accordingly, affirm the stay.

## BACKGROUND

¶2 The district court entered the parties’ Decree of Divorce on June 17, 2021. The court found that the marital estate had a value of approximately \$28.5 million and divided it equally. Jenea was awarded cash and assets with a total value of \$14,226,979. Shaun was awarded the parties’ marital businesses and other assets and investments. Following the district court’s ruling in the parties’ divorce case, Shaun filed a notice of appeal and moved the district court to stay the distribution of the marital estate pending the appeal. The court granted the stay. Because the parties’ marital businesses, which were awarded to Shaun, comprised the majority of the estate’s value, he has retained the bulk of the parties’ assets while his appeal has been pending. To protect Jenea’s interest in the marital assets, the district court ordered that “no assets, liquid or non-liquid, may be disposed of or otherwise encumbered pending the appeal.” It also required Shaun to deposit a total of \$3.8 million cash with the court—\$2.1 million at the time the stay was entered and additional amounts at the end of 2021, 2022, and 2023—to account for equalization payments he was required to make to Jenea.

## ISSUE AND STANDARD OF REVIEW

¶3 “The decision to stay enforcement of a judgment is within the discretion of the reviewing court,” and we accordingly review its decision “for an abuse of discretion.” *Utah Res. Int’l, Inc. v. Mark Techs. Corp.*, 2014 UT 60, ¶ 11, 342 P.3d 779 (quotation simplified).

## ANALYSIS

¶4 Rule 62 of the Utah Rules of Civil Procedure allows a court to stay enforcement of an order while an appeal is pending if the appellant gives a “bond or other security,” Utah R. Civ. P. 62(b), “in an amount that adequately protects the adverse party against

loss or damage occasioned by the stay and assures payment after the stay ends,” *id.* R. 62(h)(1). The purpose of such security is to “preserve the status quo pending the outcome of the case.” *See Hunsaker v. Kersh*, 1999 UT 106, ¶ 8, 991 P.2d 67 (quotation simplified) (addressing the purpose of injunctions); *see also Diversified Holdings, LC v. Turner*, 2002 UT 129, ¶ 39, 63 P.3d 686 (addressing the purpose of supersedeas bonds). Jenea asserts that the terms of the security the court ordered Shaun to post do not adequately ensure payment and distribution of her half of the marital estate after the stay ends or protect her from loss or damage resulting from the appeal.<sup>1</sup>

---

1. Jenea also argues that a stay of property distribution is inappropriate in a divorce action because a divorce judgment differs from an ordinary judgment. She explains that unlike a typical judgment for compensatory damages addressed by rule 62, a divorce judgment awards assets that already belonged to the party before the divorce. She argues that because the “status quo” during marriage was that “each party already legally owned half the assets and could use them as they wished,” staying a property distribution where one party has possession of the majority of the marital assets does not maintain the “status quo” because it “puts at least one party in a worse position than they would otherwise have been” in.

While we acknowledge that the impact of staying a divorce decree is somewhat different from the impact of staying a judgment for compensatory damages and recognize the unfortunate impact that a stay in this situation has in delaying at least one of the parties from moving on from the divorce with no—or at least reduced—financial ties to their ex-spouse, there is nothing in the plain language of rule 62 that limits its application to matters involving compensatory damages. In fact, the language suggests that a judgment for compensatory damages is only one of any number of judgments that may be subject to a stay. *See Utah*  
(continued...)

¶5 With the exception of one unpreserved argument,<sup>2</sup> none of the arguments Jenea has raised indicate that the terms of the security were inadequate to ensure she would be paid after the stay ends. The court’s injunction prohibited Shaun from disposing of or encumbering any of the marital assets. Given the parties’ large estate, this injunction, coupled with the supersedeas bond, was adequate to ensure that the assets Jenea was awarded would be available to her after the stay.

¶6 Jenea suggests that the court’s injunction was inadequate to protect her interests because the value of the assets could change over time. But that is always true of assets subject to an

---

R. Civ. P. 62(h) (outlining a presumptive formula for determining the amount of a bond for compensatory damages as an exception to the general rule that security should be “in an amount that adequately protects the adverse party against loss or damage occasioned by the stay and assures payment after the stay ends”). Nevertheless, we observe that it may be desirable for the Supreme Court’s Advisory Committee on the Rules of Civil Procedure to consider amending rule 62 to address the unique circumstance of staying a divorce distribution pending appeal and attempt to at least mitigate the potential inequity of such a stay.

2. Jenea points out that the stay order did not include a provision addressing what would happen if Shaun were to die while the appeal is pending. However, Jenea does not appear to have raised this argument below, and even if she had, she does not develop this argument on appeal. We observe that, had Jenea asked for security to protect her against Shaun’s death, the court could have, and likely should have, taken steps to secure Jenea’s interest in the marital estate, such as a lien on the assets that would be enforceable against Shaun’s heirs. *See Wadsworth v. Wadsworth*, 2022 UT App 28, ¶¶ 86–90, 507 P.3d 385, *cert. denied*, 525 P.3d 1259 (Utah 2022). However, Jenea did not ask for such security, and we therefore do not consider this issue further.

injunction, and Jenea has failed to persuade us that the mere possibility that assets may depreciate precludes a court from entering an injunction to secure a party's interest in an asset pending an appeal. She also argues that it was unfair that Shaun had a disproportionate ability to use and enjoy his share of the marital estate. While we are sympathetic to Jenea's situation, we are ultimately not convinced that one party's access to assets during a stay translates to a conclusion that the security provided for the stay is inadequate to protect the other party. Again, that will be the situation any time a stay is granted.

¶7 As to the question of whether the bond and injunction adequately protected Jenea from loss or damage that could result from an appeal, Jenea points to several "losses" she believes the stay has failed to prevent: loss of ability to go forward with her separate life, loss of ownership of assets and monies she was awarded in the divorce, loss of liquidity, loss of enjoyment, and loss of value.

¶8 While one of the goals of a divorce decree should be to allow the parties to go forward with their separate lives, *see Wadsworth v. Wadsworth*, 2022 UT App 28, ¶ 79, 507 P.3d 385, *cert. denied*, 525 P.3d 1259 (Utah 2022), that point does not impact the validity of the stay and the adequacy of the security to protect against loss. As a practical reality, neither party can move forward with their separate life until this matter is fully resolved.

¶9 As to Jenea's alleged loss of ownership, loss of liquidity, and loss of enjoyment, we do not agree that under rule 62, as written, those are losses against which a stay must guard. Any stay will prevent at least one party, and likely both parties, from using or enjoying their property in the way that they would like. Like Jenea, Shaun is unable to sell or encumber the property. And if the court had denied Shaun's request for a stay and required him to transfer property to Jenea pursuant to the terms of the divorce decree, this could have permanently deprived him of

property to which he would be entitled if he prevailed on appeal. This outcome would have been no more equitable than the short-term limitation on Jenea’s ability to sell, invest, encumber, or otherwise use the assets she was awarded. And the losses Jenea identifies are not permanent—to the extent she prevails on appeal, she will eventually regain her ownership, use, and enjoyment of her property. While the value of those assets may be somewhat affected by the passage of time, it is just as likely that they will have appreciated as that they will have depreciated.

¶10 Finally, while a loss of value would certainly indicate that the stay did not adequately protect Jenea, she did not ask the court to include terms in the stay that would protect against such losses. On appeal, Jenea suggests that the district court should have included provisions in its injunction requiring Shaun to protect and maintain her assets and to refrain from “using” them in a manner that accelerates their depreciation. She points out, for example, that there is no requirement that Shaun continue to insure her real property. She also observes that Shaun has been able to use her property in a manner that may damage it or cause wear and tear—for example, by driving the vehicles she was awarded and letting their son and his friends live in a townhouse she owns. However, Jenea has pointed us to nothing indicating that she asked the district court to include restrictions on use either before or after the stay was entered. So while we observe that such provisions would have certainly helped to guard Jenea from losses or damage relating to her property, we cannot say that the district court exceeded its discretion in failing to include them.

#### CONCLUSION

¶11 Having reviewed Jenea’s arguments, we are not convinced that the district court exceeded its discretion in granting the stay on the terms that it did. Accordingly, we affirm.

# Tab 6

<b>Subcommittee/Subject</b>	<b>Members</b>	<b>Rules</b>	<b>Subcommittee Chair</b>	<b>Progress</b>
<b>ACTIVE:</b>				
<b>Probate</b>	Judge Scott, <i>Allison Barger, Brant Christiansen, David Parkinson, Judge Kelly, Kathie Brown Roberts, Keri Sargent, Russ Mitchell, Shonna Thomas, Sarah Box</i>	New rules	Judge Scott	Ongoing work on new set of probate rules
<b>Records Classification</b>	Justin Toth, Jim Hunnicutt, Crystal Powell	New rule	TBD	New rule went to SC once and came back with comments. Continue to pursue?
<b>Plain language/Terminology</b>	Ash McMurray, Trevor Lee, Loni Page, Heather Lester, Giovanna Speiss, Crystal Powell	104 14, 18, 19, 20, 22, 23, 26.1, 38, 46, 49, 53, 67	TBD	Susan indicated this group was ready to return. Need a new chair of this subcommittee and materials.
<b>Rule 5</b>	Loni Page, Tonya Wright, Keri Sargent, Michael Stahler	5	Loni Page	Rule came back from public comment Sept 6 for committee to review
<b>Omnibus</b>	Justin Toth, Tonya Wright, Commissioner Conklin	30, 45, 37, 7	Justin Toth	Rules went to SC in July and came back with a few more comments.
<b>Rule 3(a)(2)</b>	Trevor Lee, Keri Sargeant, Tonya Wright; Heather Lester; Giovanna Speiss; Judge Cornish	3	Trevor Lee	Rule went to SC in July and the judges are going to take time to consider the proposal.
<b>Eviction Expungements</b>	Tonya Wright, Heather Lester; Crystal Powell	?	Heather Lester	Awaiting further update from subcommittee.



<b>Rule 60</b>	Judge Cornish, Justin Toth	60	Judge Cornish	Rule came back from public comment Sept 6 for committee to review
<b>Rule 101</b>	Jim Hunnicutt, Commissioner Conklin, Tonya Wright, Keri Sergeant, <i>Samantha Parmley</i>	101 7 26.1	Jim Hunnicutt	Rule went to SC in July and comments came back that were sent to subcommittee for review.
<b>MSJ Deadline</b>	Michael Stahler, Tonya Wright	56	Michael Stahler	Rule went to SC and came back with comments for the subcommittee to review
<b>Affidavit/Declaration</b>	Ash McMurray, Giovanna Speiss, Bryan Pattison	4, 5, 6, 7A, 7B, 11, 23A, 27, 26.1, 26.2, 43, 45, 47, 54, 55, 56, 58A, 58C, 59, 62, 63, 64, 64A, 64D, 64E, 65A, 65C, 69A, 69C, 73, 83, 101, 102, 104, 105, 108	Ash McMurray	Ash presented on this issue at length and the subcommittee is continuing to work on these rules.
<b>Rule 53A - Special Masters</b>	<i>Brent Salazar-Hall; Nicole Salazar-Hall;</i> Jim Hunnicutt	New rule 53A	Jim Hunnicutt	This rule will return directly to the SC in October as they had specific questions for this group.

<b>Rule 62 (COA opinion)</b>	Jim Hunnicutt, Commissioner Conklin	62	Jim Hunnicutt	On agenda Sept 2024
<b>Standard POs</b>	<i>Judge Oliver</i> , Bryan Pattison	26(g)	TBD	This subcommittee needs additional members and a chair.
<b>Rule 7A v. 37 - Motion for Sanctions</b>	Jim Hunnicutt, Judge Cornish, Judge Russell	7A 37	Judge Cornish	Rules went to SC and were approved. Rule 7A is out for public comment until Sept. 6 and is back for the Committee to consider. Rule 37 is awaiting to go out with omnibus rules.
<b>MyCase Transition</b>		76	<i>Nathanael Player</i>	<i>Nathanael</i> indicated he would take over the issue from Susan and would get back to the committee with an update.
<b>Rule 5(a)(2) and (b)(3)</b>	Judge Cornish, Commissioner Conklin, Judge Scott, Michael Stahler; Laurel Hanks	5	Laurel Hanks	Awaiting update from subcommittee. Questions regarding Standard 16 will go to the RPC Committee and comments will be sent back to this subcommittee.
<b>Rule 74</b>	Michael Stahler, Rachel, Crystal, Keri, Heather, Loni	74	Michael Stahler	Subcommittee continues to work on this rule
<b>Rule 4</b>	Rachel Sykes, Ash McMurray; Tonya Wright	4	Rachel Sykes	Subcommittee continues to work on this rule
<b>Rule 42</b>	Loni Page; Keri Sargent; Judge Scott	42	Loni Page	Awaiting update from subcommittee. This

				group is requesting additional members
<b>New rules 65D &amp; E</b>	Michael Stahler, Loni Page, Brett Chambers, <i>Bret Randall</i>	New	Michael Stahler	Subcommittee continues to work on this rule