Agenda

Advisory Committee on Rules of Civil Procedure

April 27, 2005
4:00 to 6:00 p.m.

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

Approval of minutes.	Fran Wikstrom
Rule 64C. Attachments.	Zachary Shaw
Rule 74. Withdrawal of attorney.	Todd Shaughnessy
Rule 62. Stay of proceedings to enforce a judgment.	Frank Carney
Physician reports.	Frank Carney
Rule 68. Offer of settlement.	Tim Shea
Rule 45. Subpoena.	Tim Shea
E-filing rules.	Tim Shea

Meeting Schedule

May 25, 2005
July 27, 2005
September 28, 2005
October 26, 2005
November 16, 2005

Committee Web Page: http://www.utcourts.gov/committees/civproc/

MINUTES

UTAH SUPREME COURT ADVISORY COMMITTEE ON THE RULES OF CIVIL PROCEDURE

Wednesday, March 23, 2005
Administrative Office of the Courts

Francis M. Wikstrom, Presiding

PRESENT: Francis M. Wikstrom, Francis J. Carney, Cullen Battle, Paula Carr, Terrie T. McIntosh, Leslie W. Slaugh, James T. Blanch, Honorable Anthony B. Quinn, Honorable Lyle R. Anderson (via phone), Honorable David Nuffer, Honorable Anthony W. Schofield, David W. Scofield, Janet H. Smith, Todd M. Shaughnessy

EXCUSED: Glenn C. Hanni, Thomas R. Karrenberg, Virginia S. Smith, Judge R. Scott Waterfall, Lance Long, Debora Threedy

STAFF: Tim Shea, Matty Branch, Trystan Smith

I. APPROVAL OF MINUTES.

Chairman Francis M. Wikstrom called the meeting to order at 4:00 p.m. The minutes of the February 23, 2005 meeting were reviewed, and the members suggested that two changes, and one addition should be made.

Judge Nuffer suggested Section IV-Fax Filing include his comments regarding the difficulty of scanning fax documents because of the poor quality of some facsimiles. Ms. Carr noted the third sentence, second paragraph, of Section IV incorrectly stated "Paula Carr commented that this proposed amendment has been discussed at Inns of Court." She said, "Inns of Court" should be changed to "by the clerks of the court." Mr. Carney suggested a deletion to the last sentence of footnote one contained of Section V-Offer of Judgment. Mr. Carney suggested the last sentence should be amended to read "Leslie Slaugh reported that H.B. 127 has been referred to the "Legislative Interim Committee."

The Committee unanimously approved the February 23, 2005 minutes with the amendments noted above.

II. RULE 74. WITHDRAWAL OF ATTORNEY.

Mr. Shaughnessy introduced a proposed amendment to Rule 74 that would prevent an attorney from withdrawing absent approval from the Court if (1) there is a motion pending, a (2) certificate of readiness for trial has been filed, or (3) if there is any discovery pending.

A number of the members of the Committee expressed concern regarding the proposed amendment. Mr. Blanch, Ms. Smith, and Mr. Slaugh expressed concern that some members of the bar may always consider there to be discovery pending because of the on-going duty to supplement. A number of the Committee members feared that the amendment, as written, would almost always require court approval prior to withdrawal. Judge Quinn expressed concern that the amendment may prevent lawyers from withdrawing when their clients have not been financially responsible.

Mr. Slaugh suggested a change to the amendment that would prevent an attorney from withdrawing if discovery was due within a 20-day period. Mr. Carney suggested a change to Rule 24 to include the language "unless there is an objection" to allow an opposing party to object to the withdrawal of an attorney, if the withdrawal was used in bad faith or as a tactic in litigation. Mr. Slaugh suggested the Committee amend Rule 74 to allow an opposing party to object within ten days after the motion to withdraw is filed. If, however, there was no objection, then the motion would be summarily granted. Mr. Battle suggested that Rule 74 should be amended to allow ten days notice before any withdrawal.

After considerable discussion, Mr. Wikstrom suggested the Committee further consider changes to Rule 74 and readdress the issue at the next meeting. Mr. Wikstrom also asked Mr. Shaughnessy to examine the counterpart to the Federal Rules and report back to the Committee.

III. RULE 45. SUBPOENA.

Mr. Shea introduced a proposed amendment to Rule 45 deleting in its entirety the Advisory Committee note. Mr. Shea indicated the Advisory Committee note was largely unnecessary because it simply mimicked the language contained in the rule. After minimal discussion, Mr. Wikstrom entertained a motion that the Advisory Committee note be deleted. It was moved and seconded and approved unanimously. Mr. Wikstrom asked Ms. Branch to ask the Supreme Court whether the Committee could eliminate the Advisory Committee note without prior Supreme Court approval.

Mr. Shea then discussed an addition to Rule 45(a)(3) which would allow an attorney admitted pro hac vice to issue subpoenas. Ms. Smith suggested that inclusion of the pro hac vice language was redundant. Mr. Wikstrom noted he would rather local counsel issue subpoenas, and recommended that the language not be added. Mr. Wikstrom asked whether there was any support for the inclusion of the pro hac vice language among the Committee members, being none, the Committee unanimously agreed it would not adopt the language.

Finally, Mr. Shea introduced a proposed amendment to Rule 45(c)(2) which would include a subpart (C). The proposed subpart would read "the party who has served a subpoena shall pay the reasonable costs of production and copying, a person who is not a party has no obligation to make copies or to advance costs." Mr. Shea noted that this language was taken from language contained in the Advisory Committee note.

Mr. Carney expressed several concerns regarding the proposed amendment. His main concern dealt with healthcare providers charging excessive amounts for the costs of production and copying. Mr. Carney suggested the Committee obtain more information regarding the subject, and noted that the law firm of Hoole & King filed a lawsuit against a healthcare provider regarding excessive charges. Mr. Carney expressed further concern that healthcare providers sometimes will not produce the entirety of the subpoenaed records. Mr. Carney suggested the Committee consider the model adopted in California requiring a producing party to certify that they have done a complete and thorough search of their records prior to producing the subpoenaed documents. Mr. Carney suggested a certification requirement may be something the Committee should evaluate further.

Mr. Scofield indicated to the Committee members that it should consider whether non-parties should bear the costs of production. Mr. Scofield noted that all citizens play an equal part in the judicial system, and perhaps allowing a non-party to bear some costs, if not all the costs of production, would not be objectionable. After considerable discussion, Mr. Wikstrom suggested the Committee revisit the suggested subpart for further discussion at the next meeting.

IV. E-FILING RULES.

Mr. Shea continued the discussion from the February 23, 2005 meeting regarding the Committee's adoption of e-filing rules. Mr. Shea began the discussion suggesting the Committee continue to use the word "papers," instead of the word "documents" for the sake of uniformity. Mr. Shea expressed concern that if the Committee were to interchange the two words in Rule 5, it would require the Committee to make similar changes throughout the remainder of the rules.

Mr. Shaughnessy suggested the Committee keep the phrase "Every pleading," instead of substituting the word "Papers" under Rule 10(a). Mr. Shaughnessy expressed concern the term "Papers" could be interpreted broadly and lawyers may believe the amendment would require that every page of every document include the name of the party by whom it was filed.

Mr. Shea began the e-filing discussion by addressing three (3) potential models the Committee could adopt for e-filing. The first model would require the attorney to electronically submit the filing to the court, and certify service of the document to the remaining counsel of record. The second model would contemplate that a third-party administrator or service would handle distribution of electronically filed documents. The attorney would serve the document with this third-party administrator, and then the administrator would send the document to the court and to the remaining parties. The third model would require the filing party to e-file the document with the court. The court would then send a notice to all the parties that the pleading had been filed. The court would not send the actual document, however. The parties could access the documents through a link provided by the court. A party would be allowed to download the document once for no charge.

Mr. Shea mentioned to the Committee that the court currently had in place the infrastructure for the third model. Mr. Shea did indicate that several members of the bench expressed concerns regarding the potential risk of the system failing to send timely notices, or other failures. Mr. Shea noted the language for the proposed third model should be contained under Rule 5(b)(1)(A)(VVI) and would state "upon any person with an electronic filing account, who is a party or attorney in the case, by submitting the paper for electronic filing."

The members of the Committee expressed concerns that many law firm's spam blocker programs may screen out notices provided to attorneys under the third model. Judge Nuffer mentioned that under the federal system all notices come from a single account to prevent notices from being screened by spam blockers.

Mr. Carney reiterated his previous concerns regarding pleadings containing lawyers' email addresses. Mr. Carney noted that by including e-mail addresses on pleadings, data-miners and others could have easy access to a lawyer's personal information. As a further to this discussion, Mr. Shea asked the Committee to consider what pleadings should look like in a larger context. The Committee had an extensive discussion regarding identity theft. A number of the members of the Committee were concerned about the inclusion of social security numbers, names, and home addresses in pleadings.

A number of the Committee members pointed out that not only should the Committee be concerned regarding lawyers' email addresses, but also parties' home addresses and other personal information. Ms. Carr indicated that perhaps the concerns regarding redaction of the lawyers' email addresses was unnecessary because lawyers' email addresses are already readily available in other contexts.

Judge Schofield expressed concern about pro se parties having access to e-filing. Mr. Shea indicated that there is nothing in the rules to exclude pro se parties from accessing the system. He further suggested that either a party or counsel can belong to the data registry.

In the context of e-filed documents, Mr. Shea asked the Committee to further consider their format. Mr. Shea raised the issue of whether we should continue to require a two inch text separation for e-filed documents. Mr. Shea suggested the two inch rule was antiquated, and based upon a concern regarding the use of too much paper. Mr. Shea suggested a 1.5 inch separation rule. He asked the Committee to consider the readability of electronic documents and which format, size, and font should be used. After discussing this issue, Judge Nuffer, Mr. Wikstrom, and Judge Schofield suggested that if Committee adjusted the format, that the Committee look at adopting a word count.

After extensive discussion regarding the above issues, Mr. Wikstrom suggested the Committee continue its discussion of these issues at the next meeting.

V. ADJOURNMENT.

The meeting adjourned at 6:00 p.m. The next meeting of the Committee will be held at 4:00 p.m. on Wednesday, April 27, 2005, at the Administrative Office of the Courts.

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STATE OF UTAH

OFFICE OF THE ATTORNEY GENERAL

MARK L. SHURTLEFF
ATTORNEY GENERAL

RAYMOND A. HINTZE
Chief Deputy

Protecting Utah • Protecting You

KIRK TORGENSEN
Chief Deputy

April 13, 2005

Supreme Court Advisory Committee
On the Rules of Civil Procedure
Attn: Francis M. Wikstrom, Chair
450 S. State St., N31
Salt Lake City, UT 84111

Re: Revised Utah Rules of Civil Procedure, Rule 64C

Dear Mr. Wikstrom:

The purpose of this letter is to advise those persons responsible for drafting and implementing the above revised Utah Rule of Civil Procedure of what appears to be an unforeseen consequence of the revised rule, which will have a significant detrimental impact on numerous government agencies, as well as other judgment creditors. Based on this detrimental impact, a request is made to review the issues raised in this letter and to revise the Rule.

Rule 64C relates to prejudgment Writs of Attachment. One of the requirements of this rule is that the underlying action be "upon a contract or . . . against a foreign corporation not qualified to do business in this state. . ." Under the prior version of Rule 64C, a pre-judgment Writ of Attachment required that the underlying action be "upon a judgment, upon any contract express or implied, or in an action against a nonresident of this state. . ." Accordingly, the new Rule 64C no longer allows a pre-judgment writ of attachment in collateral actions to recover a judgment.

This preclusion of pre-judgment writs in actions to recover a judgment is extremely detrimental to government agencies, whose rights against debtors rarely arise from contracts but often arise from judgments. Accordingly, the new Rule 64C does not provide these government agencies security in actions to recover unpaid judgments.

UTAH STATE CAPITOL COMPLEX, EAST OFFICE BLDG., SUITE E320 * P.O. BOX 142320 * SALT LAKE CITY, UTAH 84114-2320
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The minutes of the Utah Supreme Court Advisory Committee on the Rules of Civil Procedure do not indicate the purpose for deleting the provision relating to obtaining pre-judgment writs in actions to recover unpaid judgments. However, it may be that the drafters of the new Rule 64C did not deem this provision necessary because, on the surface, it appears that judgment debtors are already secured, by virtue of the fact that a judgment has been entered, and that a perfected lien is likely in place. Moreover, on the surface it appears that there would be no reason to bring another action to recover that judgment-one would simply need to execute on the existing judgment and lien.

However, there often arises a situation where a judgment creditor must file a new action to recover that judgment, wherein the judgment creditor is not secured, and thus requiring the pre-judgment attachment of property. The situation spoken of is the judgment debtor that fraudulently transfers property to another entity, in order to avoid the judgment creditor's attempts to execute on that property. The judgment creditor must then file a complaint, which essentially attempts to recover the unpaid judgment from the entity to which the debtor's property was fraudulently transferred. In order to fully secure itself as to the fraudulently transferred property, the judgment creditor depends on the pre-judgment writ of attachment remedy, which is no longer available under the new Rule 64C because "actions upon a judgment" are no longer candidates for a pre-judgment writ of attachment.

These actions to recover fraudulently transferred property satisfy the purposes of pre-judgment writs, i.e. to seize property pre-judgment, which is in danger of being disposed of prior to the entry of judgment. However, because these actions are not actions "upon a contract," they are not candidates for a pre-judgment writ of attachment. While it is true that a pre-judgment injunction on the transfer of property is possible, this injunction does not provide the same security as actual seizure of the fraudulently transferred property.[1]

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[1] Under Jensen v. Eames, 519 P.2d 236 (1974), it may also be possible to serve a fraudulent transferee with a Writ of Garnishment or Execution in the original action, but this remedy is more limited and difficult to obtain than the pre-judgment writ of attachment remedy previously available.

Examples of actions by government agencies, which are detrimentally impacted by the new Rule 64C, include the following, to name a few: state tax collection actions, child support enforcement actions, state education collection actions, state hospital collection actions, Medicaid reimbursement actions and criminal enforcement restitution actions. Under the current version of Rule 64C, these agencies are precluded from obtaining pre-judgment writs of attachment, even when they have abundant proof that the judgment debtor has fraudulently transferred assets to another entity in order to avoid the effects of a judgment.

Accordingly, this office requests a review of the revised version of Rule 64C, and that those responsible for drafting and implementing the Rule consider again allowing pre-judgment writs to be issued in actions upon a judgment, in addition to actions upon a contract.

Should you have any questions regarding the issues raised in this letter or any matter related thereto, please do not hesitate to contact me.

Sincerely,

Mark L. Shurtleff
Attorney General

cc: Timothy Shea

ZDS

Rule 64C. Attachment.

(a) When attachment may issue; affidavit. Except as provided in Rule 64A and as authorized and permitted therein, **the plaintiff, at any time after the filing of the complaint, in an action upon a judgment,** upon any contract express or implied, or in an action against a nonresident of this state, may have the property of the defendant, not exempt from execution, attached as security for the satisfaction of any judgment that may be recovered in such action, unless the defendant gives security to pay such judgment as provided in Subdivision (f) of this rule, by filing with the court in which the action is pending an affidavit setting forth the following: That the defendant is indebted to the plaintiff, specifying the amount thereof as near as may be over and above all legal setoffs and the nature of the indebtedness; that the attachment is not sought to hinder, delay or defraud any creditor of the defendant; that the payment of the same has not been secured by any mortgage or lien upon real or personal property, situated or being in this state, or, if originally so secured, that such security has, without any act of the plaintiff or the person to whom the security was given, become impaired; and alleging, but not in the alternative, any one or more of the following causes for attachment:

Rule 64C. Writ of attachment.

(a) Availability. A writ of attachment is available to seize property in the possession or under the control of the defendant.

(b) Grounds. In addition to the grounds required in Rule 64A, the grounds for a writ of attachment require all of the following:

(b)(1) that the defendant is indebted to the plaintiff;

(b)(2) that the action is upon a contract or is against a defendant who is not a resident of this state or is against a foreign corporation not qualified to do business in this state; and

(b)(3) that payment of the claim has not been secured by a lien upon property in this state.

Rule 74. Withdrawal of counsel.

(a) If a motion is not pending and a certificate of readiness for trial has not been filed, an attorney may withdraw from the case by filing with the court and serving on all parties a notice of withdrawal. The notice of withdrawal shall include the address of the attorney's client and a statement that no motion is pending and no certificate of readiness for trial has been filed. The notice authorizes withdrawal of the attorney unless an objection is filed within five days. The party filing the objection must show good cause to oppose withdrawal of the attorney. If an objection is timely filed, the notice will be treated as a motion to withdraw, as provided in subsection (b).

(b) If a motion is pending or a certificate of readiness for trial has been filed, an attorney may not withdraw except upon motion and order of the court. The motion to withdraw shall describe the nature of any pending motion and the date and purpose of any scheduled hearing.

~~(b)~~ (c) If an attorney withdraws, dies, is suspended from the practice of law, is disbarred, or is removed from the case by the court, the opposing party shall serve a Notice to Appear or Appoint Counsel on the unrepresented party, informing the party of the responsibility to appear personally or appoint counsel. A copy of the Notice to Appear or Appoint Counsel must be filed with the court. No further proceedings shall be held in the case until 20 days after filing the Notice to Appear or Appoint Counsel unless the unrepresented party waives the time requirement or unless otherwise ordered by the court.

~~(c)~~ (d) Substitution of counsel. An attorney may replace the counsel of record by filing and serving a notice of substitution of counsel signed by former counsel, new counsel and the client. Court approval is not required if new counsel certifies in the notice of substitution that counsel will comply with the existing hearing schedule and deadlines.

Rule 62. Stay of proceedings to enforce a judgment.

(a) ~~Stay upon entry of judgment. Execution or other proceedings to enforce a judgment may issue immediately upon the entry of the final judgment.~~ Delay in execution. No execution or other writ to enforce a judgment may issue until the expiration of ten days after entry of judgment, unless the court in its discretion and on such conditions for the security of the adverse party as are proper, otherwise directs.

(b) Stay on motion for new trial or for judgment. In its discretion and on such conditions for the security of the adverse party as are proper, the court may stay the execution of, or any proceedings to enforce, a judgment pending the disposition of a motion for a new trial or to alter or amend a judgment made pursuant to Rule 59, or of a motion for relief from a judgment or order made pursuant to Rule 60, or of a motion for judgment in accordance with a motion for a directed verdict made pursuant to Rule 50, or of a motion for amendment to the findings or for additional findings made pursuant to Rule 52(b).

(c) Injunction pending appeal. When an appeal is taken from an interlocutory order or final judgment granting, dissolving, or denying an injunction, the court in its discretion may suspend, modify, restore, or grant an injunction during the pendency of the appeal upon such conditions as it considers proper for the security of the rights of the adverse party.

(d) Stay upon appeal. When an appeal is taken, the appellant by giving a supersedeas bond may obtain a stay, unless such a stay is otherwise prohibited by law or these rules. The bond may be given at or after the time of filing the notice of appeal. The stay is effective when the supersedeas bond is approved by the court.

(e) Stay in favor of the state, or agency thereof. When an appeal is taken by the United States, the state of Utah, or an officer or agency of either, or by direction of any department of either, and the operation or enforcement of the judgment is stayed, no bond, obligation, or other security shall be required from the appellant.

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

(g) Power of appellate court not limited. The provisions in this rule do not limit any power of an appellate court or of a judge or justice thereof to stay proceedings or to suspend, modify, restore, or grant an injunction, or extraordinary relief or to make any order appropriate to preserve the status quo or the effectiveness of the judgment subsequently to be entered.

(h) Stay of judgment upon multiple claims. When a court has ordered a final judgment on some but not all of the claims presented in the action under the conditions stated in Rule 54(b), the court may stay enforcement of that judgment until the entering of a subsequent judgment or judgments and may prescribe such conditions as are necessary to secure the benefit thereof to the party in whose favor the judgment is entered.

(i) Form of supersedeas bond; deposit in lieu of bond; waiver of bond; jurisdiction over sureties to be set forth in undertaking.

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

(i)(2) Upon motion and good cause shown, the court may permit a deposit of money in court or other security to be given in lieu of giving a supersedeas bond under Subdivision (d).

(i)(3) The parties may by written stipulation waive the requirement of giving a supersedeas bond under Subdivision (d) or agree to an alternate form of security.

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

(j) Amount of supersedeas bond.

(j)(1) Except as provided in subsection (j)(2), a court shall set the supersedeas bond in an amount that adequately protects the judgment creditor against loss or damage occasioned by the appeal and assures payment in the event the judgment is affirmed. In setting the amount, the court may consider any relevant factor, including:

(j)(1)(A) the judgment debtor's ability to pay the judgment;

(j)(1)(B) the existence and value of security;

(j)(1)(C) the judgment debtor's opportunity to dissipate assets;

(j)(1)(D) the judgment debtor's likelihood of success on appeal; and

(j)(1)(E) the respective harm to the parties from setting a higher or lower amount.

(j)(2) Notwithstanding subsection (j)(1):

(j)(2)(A) the presumptive amount of a bond for compensatory damages is the amount of the compensatory damages plus costs and attorney fees, as applicable, plus 3 years of interest at the applicable interest rate;

(j)(2)(B) the bond for compensatory damages shall not exceed $25 million in an action by plaintiffs certified as a class under Rule 23 or in an action by multiple plaintiffs in which compensatory damages are not proved for each plaintiff individually; and

(j)(2)(C) no bond shall be required for punitive damages.

(j)(3) If the court permits a bond that is less than the presumptive amount of compensatory damages, the court may also enter such orders as are necessary to protect the judgment creditor during the appeal.

(j)(4) If the court finds that the judgment debtor has violated an order or has otherwise dissipated assets, the court may set the bond under subsection (j)(1) without regard to the limits in subsection (j)(2).

(k) Objecting to sufficiency or amount of security. Any party whose judgment is stayed or sought to be stayed pursuant to Subdivision (d) may object to the sufficiency of the sureties on the supersedeas bond or the amount thereof, or to the sufficiency or amount of other security given to stay the judgment by filing and giving notice of such objection. The party so objecting shall be entitled to a hearing thereon upon five days notice or such shorter time as the court may order. The burden of justifying the sufficiency of the sureties or other security and the amount of the bond or other security, shall be borne by the party seeking the stay, unless the objecting party seeks a bond

greater than the presumed limits of this rule. The fact that a supersedeas bond, its surety or other security is generally permitted under this rule shall not be conclusive as to its sufficiency or amount.

From: "Francis J. Carney" <fcarney@aklawfirm.com>
To: "Fran Wikstrom" <fwikstrom@pblutah.com>, "Tim Shea" <tims@email.utcourts.gov>
Date: 3/30/05 11:08AM
Subject: Expert Reports

Guys:

An unfortunate development that I see now is trial judges requiring expert reports from treating physicians, even though they are not "specially retained experts" under Rule 26. I think we need some clarification in the rule on this, as the local judges are all over the board on this issue. It is chaotic, and requiring reports from everyone testifying as an expert is hugely expensive. Also, reports are something that many treating physicians refuse to provide.

Many people may have special expertise which would assist the trier of fact in the course of deciding a case. A car mechanic, a doctor, an insurance adjuster, all may have special expertise in an area beyond what a lay person may have, and they have involvement with the client outside of an attorney hiring them for legal purposes.

A treating doctor's medical observations, a mechanic's observations or analysis of problems with a car, or an insurance adjuster's claims practice knowledge would depend upon "knowledge, skill, experience, training, or education" which would give them "scientific, technical, or other specialized knowledge" (Rule 702) to which they can give an opinion under Rule 701 and 703. It would seem that a doctor's observations by definition would rely on "specialized knowledge" qualified by "education" to be of any use whatsoever. It seems to me that a great many people may have expertise gained by experience that may aid their mere observations. If a police officer happens to witness an accident, without being hired or doing anything else, he may have training which validates his opinions as to the speed of the vehicles or whether somebody's drunk or whatever.

So-my thought is that many normal witnesses may be "experts" by way of being able to provide opinion testimony under 702, 703, and 705. Rule 26(a)(3)(A) requires a party to "DISCLOSE to other parties THE IDENTITY of any person who may be used at trial to present evidence under Rules 702, 703, and 705 " Ergo-list the names of witnesses who might have special expertise, who might give an opinion, right?

Then Rule 26(a)(3)(B) goes on to require a written REPORT ONLY "with respect to a witness who is retained or specially employed to provide expert testimony in the case or whose duties as an employee of the party regularly involve giving expert testimony." Ergo-unless you hire the guy (or you intend to) you don't need to give a report. BUT you do need to designate / identify the witness, whoever, as an expert, which would give the witness the freedom to testify from the basis of whatever expertise he's got. What happens when a treating provider is paid for his time to attend trial? Does that make him a "specially retained expert"?

I guess what I'm getting at is this: the rules point me to "Identifying" perhaps a raft of people who may have expertise, who may be "experts" under the rules of evidence, but this doesn't make them my "retained experts" or give them or me an obligation to prepare a report thereon. It doesn't make any sense to try to say treating doctors are just fact witnesses -- they are presenting medical observations which would be useless without the lens of medical expertise which they so obviously have. They should be identified as experts under 26(a)(3)(A) so they can use their medical training to provide an opinion under 702, 703, and 705.

But is a report necessary? The federal rules commentary explicitly provides that reports aren't necessary from treating physicians, but still leaves hanging the question of what they'll be allowed to provide a medical opinion upon--just their medical observations (which should include diagnosis and prognosis and recommended future care) or additional medical opinions. The advisory committee notes to the 1993 amendments to Federal Rule of Civil Procedure 26(a)(2) state: "The requirement of a written report in paragraph (2)(B) . . . applies only to those experts who are retained or specially employed to provide such testimony in the case or whose duties as an employee of a party regularly involve the giving of such testimony. A treating physician, for example, can be deposed or called to testify at trial without any requirement for a written report."

But not preparing a report leaves one in the hands of the judge of what he thinks your doctor can testify about. I thought the Utah rule was meant to be more liberal than the federal rule, see Utah R. Civ. P. 26, adv. comm. note on rule 26(a)(3). If so, is there something we can do to clarify what is proving to be a messy and confusing rule in the personal injury area?

Here's an example of what we are facing out there:

> " I took this issue to Judge X last week in the Fourth District. I explained to him that some treating doctors will not cooperate in giving cv's or assisting in preparing the report. Since I didn't get to choose them as my experts, I shouldn't have to provide reports. He told me that if my doctors would testify about diagnosis, treatment and outcome I didn't need reports. If my doctors would testify about whether the injuries were caused by the accident or whether the care they rendered was reasonable and necessary I had to give reports."
>
> "I am involved in a case with Judge Y where he is requiring us to submit expert reports for our treating physicians. He said that the reports will only be required depending on the testimony we are attempting to elicit from the physicians. One of my client's treating physicians (orthopedic surgeon at U of U), wants to charge $150 for a 15 minute phone consult to talk about the case. This works out to $600 per hour, and seems outrageous.

> I haven't agreed to do the consult yet, but I'm not sure I can get the info I need for the expert report without it."
>
> "Judge Z ordered that our treating physicians provide everything that would be required of a "specifically retained" expert (reports, four years of depos and testimony, etc) and ignored my argument that the physicians were retained for medical treatment --- not for litigation."

My own view is that the expert report requirement creates more trouble than assistance in moving litigation along. But I would be interested in others' opinions. This is not a rush issue but a topic for possible future discussion.

Frank

Rule 68. ~~Offer of judgment~~ Settlement offers.

(a) Unless otherwise specified, an offer made under this rule ~~by a party defending against a claim to allow judgment to be entered in accordance with the offer~~ is an offer to resolve all claims between the parties to the date of the offer, including costs, interest and, if attorney fees are permitted by law or contract, attorney fees.

(b) If the adjusted award is not more favorable than the offer, the offeror is not liable for costs, prejudgment interest or attorney fees incurred by the offeree after the offer, and the offeree shall pay the offeror's costs incurred after the offer. The court may suspend the application of this rule to prevent manifest injustice.

(c) An offer made under this rule shall:

(c)(1) be in writing;

(c)(2) expressly refer to this rule;

(c)(3) be made more than 10 days before trial;

(c)(4) remain open for at least 10 days; and

(c)(5) be served on the offeree under Rule 5.

Acceptance of the offer shall be in writing and served on the offeror under Rule 5. Upon acceptance, either party may file the offer and acceptance with a proposed judgment under Rule 58A.

(d) "Adjusted award" means the amount awarded by the finder of fact and, unless excluded by the offer, the offeree's costs and interest incurred before the offer, and, if attorney fees are permitted by law or contract and not excluded by the offer, the offeree's reasonable attorney fees incurred before the offer. If the offeree's attorney fees are subject to a contingency fee agreement, the court shall determine a reasonable attorney fee for the period preceding the offer.

(e) As used in this rule, "costs" means:

(e)(1) the costs permitted under Rule 54;

(e)(2) the reasonably incurred fees and expenses for expert witnesses who are not regular employees of a party for preparation for trial and during trial; and

(e)(3) the reasonably incurred expenses for reporting and recording fees and travel expenses for depositions reasonably taken, whether used at trial or not.

Administrative Office of the Courts

Chief Justice Christine M. Durham
Utah Supreme Court
Chair, Utah Judicial Council

Daniel J. Becker
State Court Administrator
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MEMORANDUM

To: Civil Procedures Committee
From: Tim Shea
Date: April 19, 2005
Re: Rule 45. Subpoenas

At the last meeting, the committee agreed that the advisory committee note should be deleted. To save a few pages, I've simply omitted it.

Beyond that, there was not a lot of direction other than to consider two problems: the person copying the records charging far more than is reasonable; and an incomplete response. It was suggested that we consider a requirement similar to one in California in which the custodian must file an affidavit about the records.

The attached draft would give to the party issuing the subpoena the option to require that the custodian show up at a deposition and bring the originals, which the party could then copy, or to require the custodian to make the copies and mail them to the party. Lines 10-13.

The custodian would have to file an affidavit with the records. Lines 85-100.

The other changes are largely "while-we're-at-it" changes to delete provisions that are governed by other rules or to make the paragraph numbering a little more friendly. More could probably be done in this area if you want.

Ironically, I was able to find in the rule the "missing" provision that started this inquiry. The advisory committee note says that subsection (c)(2)(C) requires the party issuing the subpoena to pay the costs. That provision is actually in subsection (b)(4). Lines 64-66. So we could do nothing more than delete the advisory committee note and call it good.

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Rule 45. Subpoena.

(a) Form; issuance.

(a)(1) Every subpoena shall:

(a)(1)(A) issue from the court in which the action is pending;

(a)(1)(B) state the title of the action, the name of the court from which it is issued, the name and address of the party or attorney serving the subpoena, and its civil action number;

(a)(1)(C) command each person to whom it is directed, at a specified time and place, (a)(1)(C)(i) to appear to give testimony at trial, or at hearing, or at deposition, or

(a)(1)(C)(ii) to produce ~~or to permit~~ for inspection and copying ~~of~~ documents or tangible things in the possession, custody or control of that person, or

(a)(1)(C)(iii) to copy and mail to the party issuing the subpoena documents or tangible things in the possession, custody or control of that person, or

(a)(1)(C)(iv) to permit inspection of premises~~, at a time and place therein specified~~; and

(a)(1)(D) set forth the text of Notice to Persons Served with a Subpoena, in substantially similar form to the subpoena form appended to these rules.

(a)(2) A command to copy and mail documents or tangible things or to produce ~~or to permit~~ for inspection and copying ~~of~~ documents or tangible things, or to permit inspection of premises, may be joined with a command to appear at trial, or at hearing, or at deposition, or may be issued separately.

(a)(3) The clerk shall issue a subpoena, signed but otherwise in blank, to a party requesting it, who shall complete it before service. An attorney admitted to practice in the court in which the action is pending may also issue and sign a subpoena as an officer of the court.

(b) Service; scope.

(b)(1) ~~Generally.~~

~~(b)(1)(A)~~ A subpoena may be served by any person who is not a party and is not less than 18 years of age. Service of a subpoena upon a person named therein shall be made as provided in Rule 4(d) for the service of process and, if the person's appearance is commanded, by tendering to that person the fees for one day's

attendance and the mileage allowed by law. When the subpoena is issued on behalf of the United States, or this state, or any officer or agency of either, fees and mileage need not be tendered. Prior notice of any commanded production or inspection of documents or tangible things or inspection of premises before trial shall be served on each party in the manner prescribed by Rule 5(b).

~~(b)(1)(B) Proof of service when necessary shall be made by filing with the clerk of the court from which the subpoena is issued a statement of the date and manner of service and of the names of the persons served, certified by the person who made the service.~~ [1]

~~(b)(1)(C)~~ (b)(2) Service of a subpoena outside of this state~~, for the taking of a deposition or production or inspection of documents or tangible things or inspection of premises outside this state,~~ shall be made in accordance with the requirements of the jurisdiction in which such service is made.

~~(b)(2) Subpoena for appearance at trial or hearing.~~ A subpoena commanding a witness to appear at a trial or at a hearing pending in this state may be served at any place within the state.

(b)(3) Subpoena for taking deposition.

~~(b)(3)(A)~~ A person who resides in this state may be required to appear at deposition only in the county where the person resides, or is employed, or transacts business in person, or at such other place as the court may order. A person who does not reside in this state may be required to appear at deposition only in the county in this state where the person is served with a subpoena, or at such other place as the court may order.

~~(b)(3)(B) A subpoena commanding the appearance of a witness at a deposition may also command the person to whom it is directed to produce or to permit inspection and copying of documents or tangible things relating to any of the matters within the scope of the examination permitted by Rule 26(b), but in that event the subpoena will be subject to the provisions of Rule 30(b) and paragraph (c) of this rule.~~ [2]

(b)(4) Subpoena for production or inspection of documents or tangible things or inspection of premises. ~~A subpoena to command a person who is not a party to produce~~

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[1] Covered by Rule 4(e) and Rule 5(d).

[2] Covered by Rule 45(a)(2).

~~or to permit inspection and copying of documents or tangible things or to permit inspection of premises may be served at any time after commencement of the action. The scope and procedure shall comply with Rule 34, except that the person must be allowed at least 14 days to comply as stated in subparagraph (c)(2)(A) of this rule.~~ [3]The party serving the subpoena shall pay the reasonable cost of producing or copying the documents or tangible things. Upon the request of any other party and the payment of reasonable costs, the party serving the subpoena shall provide to the requesting party copies of all documents obtained in response to the subpoena.

(c) Protection of persons subject to subpoenas.

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

~~(c)(2)(A)~~ (c)(2) A subpoena served upon a person who is not a party to copy and mail documents or tangible things or to produce ~~or to permit~~ for inspection and copying ~~of~~ documents or tangible things or to permit inspection of premises~~, whether or not joined with a command to appear at trial, or at hearing, or at deposition,~~ must allow the person at least 14 days after service to comply, unless a shorter time has been ordered by the court for good cause shown. [4]

~~(c)(2)(B)~~ (c)(3) A person commanded to copy and mail documents or tangible things or to produce ~~or to permit~~ for inspection and copying ~~of~~ documents or tangible things or to permit inspection of premises need not appear in person at the place of production or inspection unless also commanded to appear at trial, at hearing, or at deposition. A person commanded to copy and mail documents or tangible things or to produce for inspection and copying documents or tangible things shall serve on the party issuing the subpoena an affidavit stating in substance:

(c)(3)(A) that the affiant is a witness qualified to make the affidavit;

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[3] Covered by Rule 34 and Rule 45(c)(2).

[4] This provision should be part of Rule 34 and deleted here.

(c)(3)(B) that the documents or tangible things produced or copied are a full and complete response to the subpoena;

(c)(3)(C) that the documents or tangible things are the originals or that the copy is a true copy of the originals;

(c)(3)(D) the identity of the documents or tangible things;

(c)(3)(E)a description of the method of preparing the documents or tangible things;

(c)(3)(F) that the documents or tangible things were prepared by the personnel of the business in the ordinary course of business at or near the time of the act, condition, or event; and

(c)(3)(G) an accounting of the actual cost of copying the documents or tangible things.

~~(c)(2)(C)~~ (c)(4) A person commanded to copy and mail documents or tangible things or to produce ~~or to permit~~ for inspection and copying ~~of~~ documents or tangible things or inspection of premises may, before the time specified for compliance with the subpoena, serve upon the party or attorney designated in the subpoena written objection to inspection or copying of any or all of the documents or tangible things or inspection of the premises. If objection is made, the party serving the subpoena shall not be entitled to inspect and copy the materials or inspect the premises except pursuant to an order of the court. If objection has been made, the party serving the subpoena may, upon notice to the person commanded to produce, move at any time for an order to compel the production. Such an order to compel production shall protect any person who is not a party or an officer of a party from significant expense resulting from the inspection and copying commanded.

~~(c)(3)(A)~~ (c)(5) On timely motion, the court from which a subpoena was issued shall quash or modify the subpoena if it:

~~(c)(3)(A)(i)~~ (c)(5)(A) fails to allow reasonable time for compliance;

~~(c)(3)(A)(ii)~~ (c)(5)(B) requires a resident of this state who is not a party to appear at deposition in a county in which the resident does not reside, or is not employed, or does not transact business in person; or requires a non-resident of this state to appear at deposition in a county other than the county in which the person was served;

~~(c)(3)(A)(iii)~~ (c)(5)(C) requires disclosure of privileged or other protected matter and no exception or waiver applies;

~~(c)(3)(A)(iv)~~ (c)(4)(D) subjects a person to undue burden.

~~(c)(3)(B)~~ (c)(6) If a subpoena:

~~(c)(3)(B)(i)~~ (c)(5)(A) requires disclosure of a trade secret or other confidential research, development, or commercial information;

~~(c)(3)(B)(ii)~~ (c)(6)(B) requires disclosure of an unretained expert's opinion or information not describing specific events or occurrences in dispute and resulting from the expert's study made not at the request of any party;

~~(c)(3)(B)(iii)~~ (c)(6)(C) requires a resident of this state who is not a party to appear at deposition in a county in which the resident does not reside, or is not employed, or does not transact business in person; or

~~(c)(3)(B)(iv)~~ (c)(6)(D) requires a non-resident of this state who is not a party to appear at deposition in a county other than the county in which the person was served;

the court may, to protect a person subject to or affected by the subpoena, quash or modify the subpoena or, if the party serving the subpoena shows a substantial need for the testimony or material that cannot otherwise be met without undue hardship and assures that the person to whom the subpoena is addressed will be reasonably compensated, the court may order appearance or production only upon specified conditions.

(d) Duties in responding to subpoena.

(d)(1) A person responding to a subpoena to copy and mail documents or tangible things or to produce for inspection and copying documents or tangible things shall copy or produce them as they are kept in the usual course of business or shall organize and label them to correspond with the categories in the demand.

(d)(2) When information subject to a subpoena is withheld on a claim that it is privileged or subject to protection as trial preparation materials, the claim shall be made expressly and shall be supported by a description of the nature of the documents, communications, or things not produced that is sufficient to enable the demanding party to contest the claim.

(e) Contempt. Failure by any person without adequate excuse to obey a subpoena served upon that person may be deemed a contempt of the court ~~from which the subpoena issued~~. An adequate cause for failure to obey exists when a subpoena purports to require a nonparty to appear or produce at a place not within the limits provided by ~~subparagraph (c)(3)(A)(ii)~~ this rule.

(f) Procedure where witness conceals ~~himself~~ or fails to attend. If a witness evades service of a subpoena, or fails to attend after service of a subpoena, the court may issue a warrant to the sheriff of the county to arrest the witness and bring the witness before the court.

(g) Procedure when witness is confined in jail. If the witness is a prisoner ~~confined in a jail or prison within the state,~~ a party may move without notice for an order ~~for examination~~ to examine the witness in the jail; or prison ~~upon deposition~~ or~~, in the discretion of the court, for temporary removal and production~~ to produce the witness before the court or officer for the purpose of being orally examined~~, may be made upon motion, with or without notice, by a justice of the Supreme Court, or by the district court of the county in which the action is pending~~.

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

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

(a) Service: When required.

(a)(1) Except as otherwise provided in these rules or as otherwise directed by the court, every judgment, every order required by its terms to be served, every pleading subsequent to the original complaint, every paper relating to discovery, every written motion other than one heard ex parte, and every written notice, appearance, demand, offer of judgment, and similar paper shall be served upon each of the parties.

(a)(2) No service need be made on parties in default except that:

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

(a)(2)(B) a party in default for any reason other than for failure to appear shall be served with all pleadings and papers;

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

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

(a)(2)(E) pleadings asserting new or additional claims for relief against a party in default for any reason shall be served in the manner provided for service of summons in Rule 4.

(a)(3) In an action begun by seizure of property~~, whether through arrest, attachment, garnishment or similar process,~~ in which no person ~~need be or~~ is named as defendant, any service required to be made prior to ~~the~~ filing ~~of~~ an answer, claim or appearance shall be made upon the person having custody or possession of the property at the time of its seizure.

(b) Service: How made~~ and by whom~~.

(b)(1) ~~Whenever under these rules service is required or permitted to be made upon~~ If a party is represented by an attorney, ~~the~~ service shall be ~~made~~ upon the attorney unless service upon the party is ordered by the court. ~~Service upon the attorney or upon a party shall be made by delivering a copy or by mailing a copy to the last known address or, if no address is known, by leaving it with the clerk of the court.~~

(b)(1)(A) ~~Delivery of a copy within this rule means: Handing~~ The judge may require in a specific case service under this rule by email. A party shall use the method most likely to give actual notice of a hearing scheduled 5 days or less from the date of service. Otherwise, a party shall serve a paper under this rule by:

(b)(1)(A)(i) handing it to the ~~attorney or to the party~~ person; ~~or~~

(b)(1)(A)(ii) leaving it at the person's office with a ~~clerk or~~ person in charge, ~~thereof; or, if there is no one in charge, leaving it~~ in a receptacle intended for receiving deliveries or in a conspicuous place ~~therein~~; ~~or, if the office is closed or the person to be served has no office,~~

(b)(1)(A)(iii) leaving it at the person's dwelling house ~~or usual place of abode~~ with some person of suitable age and discretion ~~then residing therein; or, if consented to in writing by the person to be served, delivering a copy by electronic or other means~~;

(b)(1)(A)(iv) mailing it to the person's last known address;

(b)(1)(A)(v) faxing it to the person's last known fax number if that person has agreed to accept service by fax;

(b)(1)(A)(vi) sending it by email to the person's last known email address if that person has agreed to accept service by email or if that person has an electronic filing account; or

(b)(1)(A)(vii) upon any person with an electronic filing account, who is a party or attorney in the case, by submitting the paper for electronic filing.

(b)(1)(B) Service by mail is complete upon mailing. ~~If the paper served is notice of a hearing and if the hearing is scheduled 5 days or less from the date of service, service shall be by delivery or other method of actual notice. Service by electronic means is complete on transmission if transmission is completed during normal business hours at the place receiving the service; otherwise, service is complete on the next business day~~ Service by mail is complete upon mailing. Service by fax or email is not effective if the party making service learns that the attempted service did not reach the person to be served.

(b)(2) Unless otherwise directed by the court:

(b)(2)(A) an order signed by the court and required by its terms to be served or a judgment signed by the court shall be served by the party preparing it;

(b)(2)(B) every other pleading or paper required by this rule to be served shall be served by the party preparing it; and

(b)(2)(C) an order or judgment prepared by the court shall be served by the court.

(c) Service: Numerous defendants. In any action in which there is an unusually large number of defendants, the court, upon motion or of its own initiative, may order that service of the pleadings of the defendants and replies thereto need not be made as between the defendants and that any cross-claim, counterclaim, or matter constituting an avoidance or affirmative defense contained therein shall be deemed to be denied or avoided by all other parties and that the filing of any such pleading and service thereof upon the plaintiff constitutes ~~due~~ notice of it to the parties. A copy of every such order shall be served upon the parties in such manner and form as the court directs.

(d) Filing. All papers after the complaint required to be served upon a party shall be filed with the court either before or within a reasonable time after service. The papers shall be accompanied by a certificate of service showing the date and manner of service completed by the person effecting service. Rule 26(i) governs the filing of papers related to discovery.

(e) Filing with the court defined. ~~The filing of pleadings and other papers with the court as required by these rules shall be made by filing them with the clerk of the court,~~ A person may file with the court using any means of delivery permitted by the court, including personal, courier, mail, fax or electronic. The judge may require parties to file electronically. Filing is complete upon acceptance by the clerk of court, except that the judge may accept the papers~~, note thereon the filing date~~ and ~~forthwith~~ transmit them to the office of the clerk. The clerk or judge shall note on the paper the date of acceptance.

Rule 10. Form of pleadings and other papers.

(a) Caption; names of parties; other necessary information. All pleadings and other papers filed with the court shall contain a caption setting forth the name of the court, the title of the action, the file number, the name of the pleading or other paper, and the name, if known, of the judge (and commissioner if applicable) to whom the case is assigned. ~~In the complaint, the title of the action shall include the names of all the parties, but other pleadings and papers need only state the name of the first party on each side with an indication that there are other parties. A party whose name is not known shall be designated by any name and the words "whose true name is unknown." In an action in rem, unknown parties shall be designated as "all unknown persons who claim any interest in the subject matter of the action."~~ Every pleading ~~and other paper filed with the court~~ shall ~~also~~ state in the top left hand corner of the first page the name, address, email address, telephone number and bar number of ~~any~~ the attorney representing the party filing the paper~~, which information shall appear in the top left hand corner of the first page~~ and signing the paper under subsection (e). Every pleading shall state in the lower left hand corner of the last page the name ~~and address~~ of the party for whom it is filed~~; this information shall appear in the lower left hand corner of the last page of the pleading~~. In the complaint, the title of the action shall include the names of all the parties, but other papers need only state the name of the first party on each side with an indication that there are other parties. A party whose name is not known shall be designated by any name and the words “whose true name is unknown.” In an action in rem, unknown parties shall be designated as “all unknown persons who claim any interest in the subject matter of the action.” The plaintiff shall file ~~together~~ with the complaint a completed cover sheet substantially similar in form and content to the cover sheet approved by the Judicial Council.

(b) Paragraphs; separate statements. All averments of claim or defense shall be made in numbered paragraphs~~, the contents of each of which~~. Each averment shall be limited as far as practicable to a ~~statement of a~~ single set of circumstances; and a paragraph may be referred to by number in all succeeding pleadings. Each claim founded upon a separate transaction or occurrence and each defense other than

denials shall be stated in a separate count or defense whenever a separation facilitates the clear presentation of the matters set forth.

(c) Adoption by reference; exhibits. Statements in a ~~pleading~~ paper may be adopted by reference in a different part of the same ~~pleading~~ or ~~in~~ another ~~pleading, or in any motion~~ paper. An exhibit to a ~~pleading~~ paper is a part thereof for all purposes.

(d) ~~Paper quality, size, style and printing. All pleadings and other papers filed with the court, except printed documents or other exhibits, shall be typewritten, printed or photocopied in black type on good, white, unglazed paper of letter size (8 1/2" x 11"), with a top margin of not less than 2 inches above any typed material, a left hand margin of not less than 1 inch, a right hand margin of not less than one half inch, and a bottom margin of not less than one half inch. All typing or printing shall be clearly legible, shall be double spaced, except for matters customarily single spaced or indented, and shall not be smaller than 12-point size. Typing or printing shall appear on one side of the page only.~~ Paper format. All pleadings and other papers filed with the court, other than exhibits, shall be created and reproduced with a page format of 8 ½ inches wide x 11 inches long, on white background, with a top margin of not less than 2 inches, all other margins of not less than 1 inch, with text or images only on one side. All text or images shall be clearly legible, shall be double spaced, except for matters customarily single spaced or indented, and shall not be smaller than 12-point size.

(e) Signature line. ~~Names~~ The name of the person signing shall be typed or printed under ~~all~~ that person's signature ~~lines, and all signatures shall be made in permanent black or blue ink~~. If a paper is digitally signed, the paper may contain the typed or printed name of the signer with or without a graphic signature.

(f) Enforcement by clerk; waiver for pro se parties. The clerk of the court shall ~~examine all pleadings and other papers filed with the court. If they are~~ accept for filing papers not prepared in conformity with this rule~~, the clerk shall accept the filing~~ but may require counsel to substitute properly prepared papers for nonconforming papers. The clerk or the court may ~~waive the requirements of this rule for~~ permit parties appearing pro se to file nonconforming papers. For good cause shown, the court may ~~relieve any party of any requirement of this rule~~ permit any party to file nonconforming papers.

(g) Replacing lost ~~pleadings or~~ papers. If an original ~~pleading or~~ paper filed ~~in any action or proceeding~~ with the court is lost or incomplete, the court may, upon motion, with or without notice, authorize a copy thereof to be filed and used in lieu of the original.

(h) Electronic papers.

(h)(1) Any reference in these rules to a writing, recording or image includes the electronic version thereof.

(h)(2) A paper digitally signed and electronically filed is the original.

(h)(3) An electronic copy of a paper, recording or image may be filed as though it were the original. Proof of the original, if necessary, is governed by the Utah Rules of Evidence.

(h)(4) An electronic copy of a paper shall conform to the format of the original.

(h)(5) An electronically filed paper may contain links only to other papers filed simultaneously or already on file with the court.

Rule 11. Signing of pleadings, motions, and other papers; representations to court; sanctions.

(a) Signature.

(a)(1) Every pleading, written motion, and other paper shall be signed by at least one attorney of record ~~in the attorney's individual name~~, or, if the party is not represented ~~by an attorney~~, shall be signed by the party. ~~Each paper shall state the signer's address and telephone number, if any.~~

(a)(2) A person may sign a paper using any form of signature recognized by law as binding.

(a)(3) ~~Except when otherwise specifically provided~~ Unless required by rule or statute, pleadings need not ~~be~~ have a notarized, verified or ~~accompanied by affidavit~~ acknowledged signature. A digital signature is not the equivalent of a notarized, verified or an acknowledged signature, but if a rule or statute requires a notarized, verified or an acknowledged signature, a digital signature satisfies that requirement.

(a)(4) An unsigned paper shall be stricken unless omission of the signature is corrected promptly after being called to the attention of the attorney or party.

(b) Representations to court. By presenting a ~~pleading, written motion, or other~~ paper to the court (whether by signing, filing, submitting, or ~~later~~ advocating), an attorney or unrepresented party is certifying that to the best of the person's knowledge, information, and belief, formed after an inquiry reasonable under the circumstances,

(b)(1) it is not being presented for any improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation;

(b)(2) the claims, defenses, and other legal contentions ~~therein~~ are warranted by existing law or by a nonfrivolous argument for the extension, modification, or reversal of existing law or the establishment of new law;

(b)(3) the ~~allegations and other~~ factual contentions have evidentiary support or, if specifically so identified, are likely to have evidentiary support after a reasonable opportunity for further investigation or discovery; and

(b)(4) the denials of factual contentions are warranted on the evidence or, if specifically so identified, are reasonably based on a lack of information or belief.

(c) Sanctions. If, after notice and a reasonable opportunity to respond, the court determines that subdivision (b) has been violated, the court may, subject to the conditions stated below, impose an appropriate sanction upon the attorneys, law firms, or parties that have violated subdivision (b) or are responsible for the violation.

(c)(1) How initiated.

(c)(1)(A) By motion. A motion for sanctions under this rule shall be made separately from other motions or requests and shall describe the specific conduct alleged to violate subdivision (b). It shall be served as provided in Rule 5, but shall not be filed with or presented to the court unless, within 21 days after service of the motion (or such other period as the court may prescribe), the challenged paper, claim, defense, contention, allegation, or denial is not withdrawn or appropriately corrected. ~~If warranted, the court may award to the party prevailing on the motion the reasonable expenses and attorney fees incurred in presenting or opposing the motion. In appropriate circumstances, a law firm may be held jointly responsible for violations committed by its partners, members, and employees.~~

(c)(1)(B) On court's initiative. On its own initiative, the court may enter an order describing the specific conduct that appears to violate subdivision (b) and directing an attorney, law firm, or party to show cause why it has not violated subdivision (b) ~~with respect thereto~~.

(c)(2) Nature of sanction; limitations. If warranted, the court may award to the party prevailing on the motion the costs and reasonable attorney fees incurred in presenting or opposing the motion. A sanction imposed for violation of this rule shall be limited to what is sufficient to deter repetition ~~of such conduct or comparable conduct by others similarly situated~~. Subject to the limitations in subparagraphs (A) and (B), the sanction may ~~consist of, or~~ include, directives of a nonmonetary nature, an order to pay a penalty into court, or, if imposed on motion and warranted for effective deterrence, an order directing payment to the movant of some or all of the costs and reasonable attorney fees ~~and other expenses~~ incurred as a direct result of the violation. In appropriate circumstances, a law firm may be held jointly responsible for violations committed by its partners, members, and employees.

(c)(2)(A) Monetary sanctions may not be awarded against a represented party for a violation of subdivision (b)(2).

(c)(2)(B) Monetary sanctions may not be awarded on the court's initiative unless the court issues its order to show cause before a voluntary dismissal or settlement of the claims ~~made by or against the party which is, or whose attorneys are, to be sanctioned~~.

(c)(3) Order. When imposing sanctions, the court shall describe the conduct determined to constitute a violation of this rule and explain the basis for the sanction ~~imposed~~.

(d) Inapplicability to discovery. ~~Subdivisions (a) through (c) of this~~ This rule does not apply to disclosures and discovery requests, responses, objections, and motions that are subject to ~~the provisions of~~ Rules 26 through 37.