Agenda

Advisory Committee on Rules of Civil Procedure

July 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
Comments to draft rules. Final recommendations.	Tim Shea
Rule 45. Subpoena.	Tim Shea
Rule 71B. Proceedings where parties not summoned.	Tim Shea
Rule 6(e)	David Nuffer

Meeting Schedule
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, May 25, 2005
Administrative Office of the Courts

Francis M. Wikstrom, Presiding

PRESENT: Francis M. Wikstrom, Francis J. Carney, Cullen Battle, Glenn C. Hanni, Terrie T. McIntosh, Leslie W. Slaugh, Virginia S. Smith, R. Scott Waterfall, Paula Carr, Honorable Lyle R. Anderson (via telephone), James T. Blanch, Lance Long, Honorable Anthony B. Quinn, Honorable David Nuffer, David W. Scofield, Janet H. Smith, Tom Lee

GUEST: Chief Justice Durham

EXCUSED: Thomas R. Karrenberg, Honorable Anthony W. Schofield, Debora Threedy, Todd M. Shaughnessy, Matty Branch

STAFF: Tim Shea, Trystan Smith

I. CERTIFICATE TO GLENN HANNI.

Chairman Wikstrom called the meeting to order at 4:05 p.m. Chief Justice Durham acknowledged Mr. Hanni and thanked him for his 30 years plus service on the committee. Mr. Hanni received a plaque acknowledging his service.

Mr. Wikstrom acknowledged and welcomed back Tom Lee to the committee. Mr. Lee returned to the committee after a stint at the Department of Justice.

II. APPROVAL OF MINUTES.

Mr. Wikstrom entertained a motion to approve the April 27, 2005 minutes as submitted. Mr. Waterfall moved to approve the minutes. Mr. Hanni seconded the motion, and the motion was approved unanimously.

III. RULE 64C. ATTACHMENTS.

Mr. Shea brought Rule 64C back to the committee. Zachary Shaw attended the meeting from the Utah Attorney General's office. Mr. Shea presented a revised Rule 64C(b)(2) that included the former language: "upon a contract *or a judgment*."

Mr. Wikstrom reiterated the concerns presented in the April 27th meeting that a pre-judgment writ of attachment should not be available for actions on a judgment. The committee

re-expressed its concerns as well. Mr. Scofield stated the Uniform Fraudulent Transfer Act ("FTA") should govern. Mr. Scofield noted a restraining order against further disposition of property would be the proper form of relief. Mr. Shaw stated the FTA allowed for restraining orders, but did not allow for seizure of assets. The committee considered the language of the FTA and reached the opposite conclusion. Mr. Wikstrom suggested an amendment to subsection (b)(2), "upon a contract or *upon a statute*" referencing the FTA. Mr. Shaw mentioned that other states, for example Nevada, have adopted the "upon a contract or upon a statute" language.

Mr. Slaugh questioned why pre-judgment writs were limited to contract actions. Mr. Scofield and Mr. Wikstrom stated the reason is because a contract is for a sum certain. Mr. Slaugh again questioned why the language was so narrow. Mr. Scofield responded that with a contract there is some equity involved because presumably there has been a quid pro quo between the parties. Mr. Long indicated that broadening the rule is problematic when you do not have a sum certain.

Mr. Carney reviewed American Jurisprudence ("Am Jur"). According to Am Jur, pre-judgment writs have not been allowed in actions where the sums are not certain because of the risk that a party could attach more than they were ultimately entitled to. Mr. Shaw told the committee only two or three states have limited pre-judgment writs to contract actions, five states allow for writs in any civil action, and a few states have limited writs to only those actions were there is a sum certain. Mr. Scofield mentioned the committee should not act as a policy-maker, but leave the circumstances in which a party can obtain a pre-judgment writ to the Legislature.

Mr. Scofield suggested the committee adopt the "upon a contract or *a statute that authorizes attachments*" language. Mr. Wikstrom suggested the committee remove "judgment" from the proposed amendment.

Mr. Lee suggested the committee remove the "not a resident of this state" or "a foreign corporation" language. Judge Nuffer noted that removal of this language would prevent a trial court from attaching property based on quasi in rem jurisdiction.

Mr. Scofield moved that the committee amend Rule 64C(b)(2) to state "upon a contract *or upon a statute that authorizes attachments*." Ms. Smith seconded the motion. The committee approved the motion unanimously.

IV. RULE 74. WITHDRAWAL OF ATTORNEY

Mr. Shea presented on Rule 74 in Mr. Shaughnessy's absence.

Ms. Smith asked why would the committee be opposed to allowing a party to object to a withdrawal. Mr. Wikstrom asked for a sense of where the committee members stood regarding the proposed amendment.

Judge Quinn stated stability in the Rules should be encouraged. He noted that with or without the objection language lawyers may abuse the rule. Mr. Long expressed concern about preventing a lawyer from withdrawing when they were not being paid. Mr. Blanch expressed concern about allowing an attorney or party to weigh in on whether opposing counsel may withdraw. He stated the decision to withdraw should be between the lawyer and his client.

Mr. Wikstrom asked the committee if there was any support for the proposed amendment, and seeing no support, no vote was called for.

V. RULE 45. SUBPOENA

Mr. Shea brought back to the committee the proposed amendment allowing for a ten day notice requirement before service of a subpoena. Mr. Shea first asked the committee to consider whether it should do more than just delete the committee note. Mr. Shea mentioned the Supreme Court placed authority over the committee notes under the committee's purview.

Judge Nuffer began the discussion suggesting the ten day notice requirement be adopted. Mr. Hanni agreed a party should give notice before a subpoena issued explaining that notice gives an opposing party a chance to object, or stop production of the documents.

Mr. Wikstrom asked whether the subpoenaed party, instead of the requesting party, should be given the choice to mail documents without attending a records deposition. The committee members expressed concern that leaving the choice with the subpoenaed party would be impractical.

Mr. Battle asked whether the notice requirement would only apply to requests for documents. The committee reiterated the notice requirement would only apply to documents. Mr. Scofield suggested five business day's notice, instead of ten days. Several committee members mentioned that they did not want to allow a party to file an objection and unilaterally stop production of the documents.

Mr. Wikstrom suggested the notice requirement should be tied in with a requirement that the producing party certify the authenticity of the records. Mr. Wikstrom suggested the business records language in Utah Rule of Evidence 902 be included. He suggested the committee prepare a checklist in affidavit form tracking URE 902.

Several committee members expressed concern that some subpoenaed records may not be business records. Judge Quinn suggested it would be better to have the producing party verify that they are complete and accurate. The committee reached a consensus that it should not include the business records language.

Mr. Wikstrom suggested that the last word on line 144 be changed from "subpoena" to demand. Ms. McIntosh suggested lines 85 - 95 (the certification requirements) should be placed

under subsection (d) "Duties in responding to subpoena." Several committee members suggested deleting lines 94 - 98, and moving subsections (a) - (c) and (g) to subsection (d).

Mr. Shea agreed to incorporate the suggested changes and bring the revisions back to committee. Mr. Shea asked the committee to confirm if it wanted the requesting party to decide whether the responding party could copy and mail documents, or produce documents at their offices. The committee agreed to keep the notice requirement at ten days. The committee will revisit the remainder of the proposed revisions at the next meeting.

VI. E-FILING RULES.

Mr. Shea addressed e-filing.

The committee agreed Rule 10(a) should be revised to state "Every pleading and other paper filed with the court . . . ." Several committee members expressed concern that Rule 10(a) as drafted would not require a plaintiff to provide his address, just his name. The committee questioned why and whether names and addresses should be included.

Mr. Carney asked why the opposing party should not served with the cover sheet. The committee asked Mr. Shea to revise Rule 10(a) to allow all parties to receive the cover sheet. Mr. Wikstrom suggested "formatted" be substituted for "created" in Rule 10(d) line 45.

The committee generally revisited the format of e-filed documents: (1) the committee questioned font sizes, (2) suggested one and a half inch spacing, instead of double spacing, and (3) revisited page limits versus a word count. The committee ultimately decided to retain the current "look" of the documents, i.e., to leave the double spacing requirement and the current specifications for margins for e-filing.

Mr. Shea noted the Administrative Office of the Courts is considering whether a party submitting a digitally signed paper should include a "wet" signature (or graphic signature) to prevent fraud. Because of time constraints, the committee decided to revisit e-filing at the next meeting.

VII. ADJOURNMENT.

The meeting adjourned at 6:05 p.m. The next committee meeting will be held on Wednesday, July 27, 2005, at the Administrative Office of the Courts.

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Administrative Office of the Courts

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

Daniel J. Becker
State Court Administrator
Myron K. March
Deputy Court Administrator

MEMORANDUM

To: Civil Procedures Committee
From: Tim Shea
Date: July 19, 2005
Re: Comments to rules. Final recommendations.

The following rules were published for comment. The comment period has closed. We received no comments to the amendments proposed for Rules 47, 62, or 101. My analysis of the comments follows the list of rules. The rules and comments are attached. Rules 9, 26, and 62 were approved as expedited amendments prior to the comment period, but subject to change after the comment period. The rules are ready for your final recommendations to the Supreme Court.

Utah Rules of Civil Procedure

URCP 007. Pleadings allowed; motions, memoranda, hearings, orders, objection to commissioner's order. Prohibits orders embedded in other documents unless permitted by the court.

URCP 009. Pleading special matters. Describes method for identifying persons to whom a defendant wants to assess fault under Utah Code Section 78-27-41.

URCP 026. General provisions governing discovery. Discovery plan should include deadline for identifying non-parties to whom fault will be allocated.

URCP 047. Jurors. Clarifies situations in which multiple parties share peremptory challenges.

URCP 062. Stay of proceedings to enforce a judgment. Amend. Establishes guidelines for determining the amount of a supersedeas bond. Establishes a maximum supersedeas bond. Effective February 4, 2005. Approved as an expedited amendment under Rule 11-101(6)(F). Subject to further change after the comment period.

URCP 101. Motion practice before court commissioners. Establishes procedures for motions to a court commissioner.

URCP 106. Modification of divorce decrees. Describes conditions in which the court may enter a temporary order in an action to modify a divorce decree.

Utah Rules of Small Claims Procedure

URSCP 09. Default judgment. Amend. Specifies that notice of the default judgment must be served immediately.

Rule 7.

The one comment to Rule 7 recommends that the page allowance for memoranda in support or opposition to a motion for summary judgment be increased.

Rules 9 & 26.

The two comments to Rules 9 & 26 agrees with the proposed changes.

Rule 106.

We received three comments to Rule 106. Notes from John Bowen and Randy Hudson indicate that the rule is contrary to 78-45-9.3(4), which states that the modified support order is to be effective on the first day of the month following the order. Proposed Rule 106 allows the court to make the change retroactive to the date of the petition. The comment is well-founded. The following sentence in subsection (b)(1) should be modified:

> The court may make the modification retroactive to the date on which the petition was filed and served.

Mr. Hudson's comment goes on to suggest that the provisions of Rule 106 should apply to all modifications of support, not just divorce decrees. Such a change certainly would be possible. The words "divorce decree" would be replaced with "support order."

Mr. Hudson also says that (b)(1)(A) should be removed because it is contrary to the child support guidelines. He states that the guidelines apply to all child support orders, whether temporary or final, and that modifications should be ordered only if grounds exist under the guidelines. That much is true, but the purpose of (b)(1)(A) is to allow the judge to establish an interim order pending such time when the parties can put on their evidence of grounds for a modification.

A comment was submitted by "Ron." The comment is attached, but I cannot determine what the author proposes. It appears to be a rhetorical question as to whether an order, with which Ron disagrees, can itself be the grounds for modifying the order. The grounds for modifying an order are not the subject of this rule, and Ron should argue his case to the judge.

Rule of Small Claims Procedure 9.

We received only one comment, which was in the nature of a question about how to serve, which is answered in another rule. Service is by first class mail.

Rule 7

I believe that the page limit for summary judgment arguments should be increased again. Many cases are simply too complex to be fully addressed in ten pages. The limit used to be 25 pages; while that may be overly generous, 15-20 pages certainly would not be. We must bear in mind that if we want summary judgment to accomplish its purpose, we cannot create limits to its scope, since it must be able to embrace a case entire rather than merely summarize it. Moreover, requiring another pleading (entailing response and reply as well as possible oral argument) to request further pages is inefficient. I suggest the page limitation on summary judgment motions be raised to 15-20 pages for original memorandum and response, and to 8-10 pages for replies.

Posted by Scott M. Ellsworth May 27, 2005 01:56 PM

Rules 9 & 26.

From: "Robert H. Wilde" <wilderh@qwest.net>
To: <tims@email.utcourts.gov>
Date: 2/7/05 12:22PM
Subject: Changes to Rule 9 & 26 URCP

The proposed changes to Rules 9 & 26 of the Utah Rules of Civil Procedure are excellent amendments to the rules. The Parties should be given sufficient notice to allow them to deal with allocation of fault. These rules allow that to happen in a fair and considered way.
Bob Wilde

I am very pleased with the amendments to the URCP rules 9 and 26. These amendments will streamline pretrial proceedings, particularly after the conclusion of discovery.

Posted by clark newhall md jd February 8, 2005 10:17 AM

Great change to the rules. This change is needed. My only question is the comments to Rule 26 contain a matrix giving suggested cut-offs. I suggest also changing that matrix to suggest a time period for this designation. The cut-off should be early enough that discovery can be held on the new information.

Posted by Nelson Abbott February 4, 2005 03:36 PM

Rule 106

One of the proposed changes to URCP Rule 106 seems to conflict with Utah Code Ann 78-45-9.3(4). The statute provides that the effective date of a child or spousal support modification shall be the month following service on the parent whose support is affected. The proposed change for rule 106 provides that the modification may be made effective to the date the petition is filed.

The statute is based on a legal rationale that an existing child support order stands until a person is put on notice that the order may change. The notice requirement is deemed satisfied once the person has been served with a petition to modify. Since child support accrues on the first day of the month [UCA 78-45-9.3(1)], the month following service is a consistent and obvious starting point for a new support order. It is also consistent with Ball v. Peterson, 1996, 912 P.2d 1006, wherein the court held that a modified child support order could not be retroactively applied beyond the date notice of the petition was given to the adverse party.

The rule would allow a court discretion to make the modification retroactive to the date the petition was filed. This date may differ from a service date by up to 120 days. There may or may not be a basis for allowing other provisions within a modification proceeding to predate by up to four months the date a person is served and thereby put on notice. At the very least, however, the rule should be clarified as to child and spousal support orders and make them effective the month following the date of service so that they do not conflict with the statute or with existing case law.

Posted by John Bowen April 18, 2005 05:09 PM

I see no reason that Rule 106 should be limited to divorce actions alone. Petitions to modify served per Rule 4 should also be required in other custody and support cases, i.e., paternity, custody and parent time proceedings, guardianships, and separate maintenance.

I agree with John Bowen's comment that the rule as written is not consistent with UCA 78-45-9.3. Authorizing modification to time of "filing" the petition also runs contrary to the requirements imposed upon the State of Utah by 42 USC 666(a)(9). Indeed, I think UCA 78-45-9.3 is Utah's response to the requirement of 42 USC 666(a)(9).

I do not understand the reason for including §(b)(1)(A). Is it to suggest that temporary child support orders may be entered without reference to the Utah Child Support Guidelines? If so, I would say that is contrary to UCA 78-45-7.2(1) that provides that the guidelines apply to all child support orders, whether temporary or final. Modifications should only be ordered if grounds exist under the guidelines (or perhaps upon grounds previously recognized by the courts as "material/substantial changes". Further, what is a "temporary modification"? If grounds exist under the child support guidelines to modify a support order, then I suggest there's no need to call it "temporary". All prospective child support obligations are "temporary" in the sense that

they can be changed if appropriate grounds exist to do so. The court is deciding the very issue, at least as to child support, that the Petition to Modify raises, i.e., grounds under the guidelines to modify child support. A change of custody, whether temporary or final, would always seem an adequate basis to establish or modify a child support award if the issue were not already resolved per the terms of UCA 78-45-4.4.

Posted by Randy Hudson June 6, 2005 11:51 AM

I am doing some research on determining Child Support Obligations. More specifically applying imputed income when none of the three criteria were met to legally impute income. Since the order to impute income was temporary and is headed in the same direction for the final divorce decree, can this violation of the law by a judge be one of the conditions to modify the divorce decree and retroactively apply the new child support payment back to the original petition?

Posted by Ron June 5, 2005 12:07 AM

Comments: Utah Rules of Small Claims Procedure

Rule 9.

Please clarify line 7 (c) for small claims. Will the notice of default judgment need to be served by certificate of mailing, certified mail, a process server or by hand?
Thank you.

Posted by james stoker April 25, 2005 04:38 PM

Rule 7. Pleadings allowed; motions, memoranda, hearings, orders, objection to commissioner's order.

(a) Pleadings. There shall be a complaint and an answer; a reply to a counterclaim; an answer to a cross claim, if the answer contains a cross claim; a third party complaint, if a person who was not an original party is summoned under the provisions of Rule 14; and a third party answer, if a third party complaint is served. No other pleading shall be allowed, except that the court may order a reply to an answer or a third party answer.

(b) Motions. An application to the court for an order shall be by motion which, unless made during a hearing or trial or in proceedings before a court commissioner, shall be made in accordance with this rule. A motion shall be in writing and state succinctly and with particularity the relief sought and the grounds for the relief sought.

(c) Memoranda.

(c)(1) Memoranda required, exceptions, filing times. All motions, except uncontested or ex parte motions, shall be accompanied by a supporting memorandum. Within ten days after service of the motion and supporting memorandum, a party opposing the motion shall file a memorandum in opposition. Within five days after service of the memorandum in opposition, the moving party may file a reply memorandum, which shall be limited to rebuttal of matters raised in the memorandum in opposition. No other memoranda will be considered without leave of court. A party may attach a proposed order to its initial memorandum.

(c)(2) Length. Initial memoranda shall not exceed 10 pages of argument without leave of the court. Reply memoranda shall not exceed 5 pages of argument without leave of the court. The court may permit a party to file an over-length memorandum upon ex parte application and a showing of good cause.

(c)(3) Content.

(c)(3)(A) A memorandum supporting a motion for summary judgment shall contain a statement of material facts as to which the moving party contends no genuine issue exists. Each fact shall be separately stated and numbered and supported by citation to relevant materials, such as affidavits or discovery materials. Each fact set forth in the moving party's memorandum is deemed admitted for the purpose of summary judgment unless controverted by the responding party.

(c)(3)(B) A memorandum opposing a motion for summary judgment shall contain a verbatim restatement of each of the moving party's facts that is controverted, and may contain a separate statement of additional facts in dispute. For each of the moving party's facts that is controverted, the opposing party shall provide an explanation of the grounds for any dispute, supported by citation to relevant materials, such as affidavits or discovery materials. For any additional facts set forth in the opposing memorandum, each fact shall be separately stated and numbered and supported by citation to supporting materials, such as affidavits or discovery materials.

(c)(3)(C) A memorandum with more than 10 pages of argument shall contain a table of contents and a table of authorities with page references.

(c)(3)(D) A party may attach as exhibits to a memorandum relevant portions of documents cited in the memorandum, such as affidavits or discovery materials.

(d) Request to submit for decision. When briefing is complete, either party may file a "Request to Submit for Decision." The request to submit for decision shall state the date on which the motion was served, the date the opposing memorandum, if any, was served, the date the reply memorandum, if any, was served, and whether a hearing has been requested. If no party files a request, the motion will not be submitted for decision.

(e) Hearings. The court may hold a hearing on any motion. A party may request a hearing in the motion, in a memorandum or in the request to submit for decision. A request for hearing shall be separately identified in the caption of the document containing the request. The court shall grant a request for a hearing on a motion under Rule 56 or a motion that would dispose of the action or any claim or defense in the action unless the court finds that the motion or opposition to the motion is frivolous or the issue has been authoritatively decided.

(f) Orders.

(f)(1) An order includes every direction of the court, including a minute order entered in writing, not included in a judgment. An order for the payment of money may be enforced in the same manner as if it were a judgment. Except as otherwise provided by these rules, any order made without notice to the adverse party may be vacated or modified by the judge who made it with or without notice. Orders shall state whether they are entered upon trial, stipulation, motion or the court's initiative.

(f)(2) Unless the court approves the proposed order submitted with an initial memorandum, or unless otherwise directed by the court, the prevailing party shall, within fifteen days after the

court's decision, serve upon the other parties a proposed order in conformity with the court's decision. Objections to the proposed order shall be filed within five days after service. The party preparing the order shall file the proposed order upon being served with an objection or upon expiration of the time to object.

(f)(3) Unless otherwise directed by the court, all orders shall be prepared as separate documents and shall not incorporate any matter by reference.

(g) Objection to court commissioner's recommendation. A recommendation of a court commissioner is the order of the court until modified by the court. A party may object to the recommendation by filing an objection in the same manner as filing a motion within ten days after the recommendation is made in open court or, if the court commissioner takes the matter under advisement, ten days after the minute entry of the recommendation is served. A party may respond to the objection in the same manner as responding to a motion.

Rule 9. Pleading special matters.

(a)(1) Capacity. It is not necessary to aver the capacity of a party to sue or be sued or the authority of a party to sue or be sued in a representative capacity or the legal existence of an organized association of persons that is made a party. A party may raise an issue as to the legal existence of any party or the capacity of any party to sue or be sued or the authority of a party to sue or be sued in a representative capacity by specific negative averment, which shall include facts within the pleader's knowledge. If raised as an issue, the party relying on such capacity, authority, or legal existence, shall establish the same on the trial.

(a)(2) Designation of unknown defendant. When a party does not know the name of an adverse party, he may state that fact in the pleadings, and thereupon such adverse party may be designated in any pleading or proceeding by any name; provided, that when the true name of such adverse party is ascertained, the pleading or proceeding must be amended accordingly.

(a)(3) Actions to quiet title; description of interest of unknown parties. In an action to quiet title wherein any of the parties are designated in the caption as "unknown," the pleadings may describe such unknown persons as "all other persons unknown, claiming any right, title, estate or interest in, or lien upon the real property described in the pleading adverse to the complainant's ownership, or clouding his title thereto."

(b) Fraud, mistake, condition of the mind. In all averments of fraud or mistake, the circumstances constituting fraud or mistake shall be stated with particularity. Malice, intent, knowledge, and other condition of mind of a person may be averred generally.

(c) Conditions precedent. In pleading the performance or occurrence of conditions precedent, it is sufficient to aver generally that all conditions precedent have been performed or have occurred. A denial of performance or occurrence shall be made specifically and with particularity, and when so made the party pleading the performance or occurrence shall on the trial establish the facts showing such performance or occurrence.

(d) Official document or act. In pleading an official document or act it is sufficient to aver that the document was issued or the act done in compliance with law.

(e) Judgment. In pleading a judgment or decision of a domestic or foreign court, judicial or quasi judicial tribunal, or of a board or officer, it is sufficient to aver the judgment or decision without setting forth matter showing jurisdiction to render it. A denial of jurisdiction shall be

made specifically and with particularity and when so made the party pleading the judgment or decision shall establish on the trial all controverted jurisdictional facts.

(f) Time and place. For the purpose of testing the sufficiency of a pleading, averments of time and place are material and shall be considered like all other averments of material matter.

(g) Special damage. When items of special damage are claimed, they shall be specifically stated.

(h) Statute of limitations. In pleading the statute of limitations it is not necessary to state the facts showing the defense but it may be alleged generally that the cause of action is barred by the provisions of the statute relied on, referring to or describing such statute specifically and definitely by section number, subsection designation, if any, or otherwise designating the provision relied upon sufficiently clearly to identify it. If such allegation is controverted, the party pleading the statute must establish, on the trial, the facts showing that the cause of action is so barred.

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

(j) Libel and slander.

(j)(1) Pleading defamatory matter. It is not necessary in an action for libel or slander to set forth any intrinsic facts showing the application to the plaintiff of the defamatory matter out of which the action arose; but it is sufficient to state generally that the same was published or spoken concerning the plaintiff. If such allegation is controverted, the party alleging such defamatory matter must establish, on the trial, that it was so published or spoken.

(j)(2) Pleading defense. In his answer to an action for libel or slander, the defendant may allege both the truth of the matter charged as defamatory and any mitigating circumstances to reduce the amount of damages, and, whether he proves the justification or not, he may give in evidence the mitigating circumstances.

(k) Renew judgment. A complaint alleging failure to pay a judgment shall describe the judgment with particularity or attach a copy of the judgment to the complaint.

(l) Allocation of fault.

(l)(1) A party seeking to allocate fault to a non-party under Title 78, Chapter 27 shall file:

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

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

(l)(2) The information specified in subsection (l)(1) must be included in the party's responsive pleading if then known or must be included in a supplemental notice filed within a reasonable time after the party discovers the factual and legal basis on which fault can be allocated but no later than the deadline specified in the discovery plan under Rule 26(f). The court, upon motion and for good cause shown, may permit a party to file the information specified in subsection (l)(1) after the expiration of any period permitted by this rule, but in no event later than 90 days before trial.

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

Rule 26. General provisions governing discovery.

(a) Required disclosures; Discovery methods.

(a)(1) Initial disclosures. Except in cases exempt under subdivision (a)(2) and except as otherwise stipulated or directed by order, a party shall, without awaiting a discovery request, provide to other parties:

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

(a)(1)(B) a copy of, or a description by category and location of, all discoverable documents, data compilations, and tangible things in the possession, custody, or control of the party supporting its claims or defenses, unless solely for impeachment;

(a)(1)(C) a computation of any category of damages claimed by the disclosing party, making available for inspection and copying as under Rule 34 all discoverable documents or other evidentiary material on which such computation is based, including materials bearing on the nature and extent of injuries suffered; and

(a)(1)(D) for inspection and copying as under Rule 34 any insurance agreement under which any person carrying on an insurance business may be liable to satisfy part or all of a judgment which may be entered in the case or to indemnify or reimburse for payments made to satisfy the judgment.

Unless otherwise stipulated by the parties or ordered by the court, the disclosures required by subdivision (a)(1) shall be made within 14 days after the meeting of the parties under subdivision (f). Unless otherwise stipulated by the parties or ordered by the court, a party joined after the meeting of the parties shall make these disclosures within 30 days after being served. A party shall make initial disclosures based on the information then reasonably available and is not excused from making disclosures because the party has not fully completed the investigation of the case or because the party challenges the sufficiency of another party's disclosures or because another party has not made disclosures.

(a)(2) Exemptions.

(a)(2)(A) The requirements of subdivision (a)(1) and subdivision (f) do not apply to actions:

(a)(2)(A)(i) based on contract in which the amount demanded in the pleadings is $20,000 or less;

(a)(2)(A)(ii) for judicial review of adjudicative proceedings or rule making proceedings of an administrative agency;

(a)(2)(A)(iii) governed by Rule 65B or Rule 65C;

(a)(2)(A)(iv) to enforce an arbitration award;

(a)(2)(A)(v) for water rights general adjudication under Title 73, Chapter 4; and

(a)(2)(A)(vi) in which any party not admitted to the practice law in Utah is not represented by counsel.

(a)(2)(B) In an exempt action, the matters subject to disclosure under subpart (a)(1) are subject to discovery under subpart (b).

(a)(3) Disclosure of expert testimony.

(a)(3)(A) A party shall disclose to other parties the identity of any person who may be used at trial to present evidence under Rules 702, 703, or 705 of the Utah Rules of Evidence.

(a)(3)(B) Unless otherwise stipulated by the parties or ordered by the court, this disclosure shall, 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, be accompanied by a written report prepared and signed by the witness or party. The report shall contain the subject matter on which the expert is expected to testify; the substance of the facts and opinions to which the expert is expected to testify; a summary of the grounds for each opinion; the qualifications of the witness, including a list of all publications authored by the witness within the preceding ten years; the compensation to be paid for the study and testimony; and a listing of any other cases in which the witness has testified as an expert at trial or by deposition within the preceding four years.

(a)(3)(C) Unless otherwise stipulated by the parties or ordered by the court, the disclosures required by subdivision (a)(3) shall be made within 30 days after the expiration of fact discovery as provided by subdivision (d) or, if the evidence is intended solely to contradict or rebut evidence on the same subject matter identified by another party under paragraph (3)(B), within 60 days after the disclosure made by the other party.

(a)(4) Pretrial disclosures. A party shall provide to other parties the following information regarding the evidence that it may present at trial other than solely for impeachment:

(a)(4)(A) the name and, if not previously provided, the address and telephone number of each witness, separately identifying witnesses the party expects to present and witnesses the party may call if the need arises;

(a)(4)(B) the designation of witnesses whose testimony is expected to be presented by means of a deposition and, if not taken stenographically, a transcript of the pertinent portions of the deposition testimony; and

(a)(4)(C) an appropriate identification of each document or other exhibit, including summaries of other evidence, separately identifying those which the party expects to offer and those which the party may offer if the need arises.

Unless otherwise stipulated by the parties or ordered by the court, the disclosures required by subdivision (a)(4) shall be made at least 30 days before trial. Within 14 days thereafter, unless a different time is specified by the court, a party may serve and file a list disclosing (i) any objections to the use under Rule 32(a) of a deposition designated by another party under subparagraph (B) and (ii) any objection, together with the grounds therefor, that may be made to the admissibility of materials identified under subparagraph (C). Objections not so disclosed, other than objections under Rules 402 and 403 of the Utah Rules of Evidence, shall be deemed waived unless excused by the court for good cause shown.

(a)(5) Form of disclosures. Unless otherwise stipulated by the parties or ordered by the court, all disclosures under paragraphs (1), (3) and (4) shall be made in writing, signed and served.

(a)(6) Methods to discover additional matter. Parties may obtain discovery by one or more of the following methods: depositions upon oral examination or written questions; written interrogatories; production of documents or things or permission to enter upon land or other property, for inspection and other purposes; physical and mental examinations; and requests for admission.

(b) Discovery scope and limits. Unless otherwise limited by order of the court in accordance with these rules, the scope of discovery is as follows:

(b)(1) In general. Parties may obtain discovery regarding any matter, not privileged, which is relevant to the subject matter involved in the pending action, whether it relates to the claim or defense of the party seeking discovery or to the claim or defense of any other party, including the existence, description, nature, custody, condition, and location of any books, documents, or other tangible things and the identity and location of persons having knowledge of any discoverable

matter. It is not ground for objection that the information sought will be inadmissible at the trial if the information sought appears reasonably calculated to lead to the discovery of admissible evidence.

(b)(2) Limitations. The frequency or extent of use of the discovery methods set forth in Subdivision (a)(6) shall be limited by the court if it determines that: (i) the discovery sought is unreasonably cumulative or duplicative, or is obtainable from some other source that is more convenient, less burdensome, or less expensive; (ii) the party seeking discovery has had ample opportunity by discovery in the action to obtain the information sought; or (iii) the discovery is unduly burdensome or expensive, taking into account the needs of the case, the amount in controversy, limitations on the parties' resources, and the importance of the issues at stake in the litigation. The court may act upon its own initiative after reasonable notice or pursuant to a motion under Subdivision (c).

(b)(3) Trial preparation: Materials. Subject to the provisions of Subdivision (b)(4) of this rule, a party may obtain discovery of documents and tangible things otherwise discoverable under Subdivision (b)(1) of this rule and prepared in anticipation of litigation or for trial by or for another party or by or for that other party's representative (including the party’s attorney, consultant, surety, indemnitor, insurer, or agent) only upon a showing that the party seeking discovery has substantial need of the materials in the preparation of the case and that the party is unable without undue hardship to obtain the substantial equivalent of the materials by other means. In ordering discovery of such materials when the required showing has been made, the court shall protect against disclosure of the mental impressions, conclusions, opinions, or legal theories of an attorney or other representative of a party concerning the litigation.

A party may obtain without the required showing a statement concerning the action or its subject matter previously made by that party. Upon request, a person not a party may obtain without the required showing a statement concerning the action or its subject matter previously made by that person. If the request is refused, the person may move for a court order. The provisions of Rule 37(a)(4) apply to the award of expenses incurred in relation to the motion. For purposes of this paragraph, a statement previously made is (A) a written statement signed or otherwise adopted or approved by the person making it, or (B) a stenographic, mechanical, electrical, or other recording, or a transcription thereof, which is a substantially verbatim recital of an oral statement by the person making it and contemporaneously recorded.

(b)(4) Trial preparation: Experts.

(b)(4)(A) A party may depose any person who has been identified as an expert whose opinions may be presented at trial. If a report is required under subdivision (a)(3)(B), any deposition shall be conducted within 60 days after the report is provided.

(b)(4)(B) A party may discover facts known or opinions held by an expert who has been retained or specially employed by another party in anticipation of litigation or preparation for trial and who is not expected to be called as a witness at trial, only as provided in Rule 35(b) or upon a showing of exceptional circumstances under which it is impracticable for the party seeking discovery to obtain facts or opinions on the same subject by other means.

(b)(4)(C) Unless manifest injustice would result,

(b)(4)(C)(i) The court shall require that the party seeking discovery pay the expert a reasonable fee for time spent in responding to discovery under Subdivision (b)(4) of this rule; and

(b)(4)(C)(ii) With respect to discovery obtained under Subdivision (b)(4)(A) of this rule the court may require, and with respect to discovery obtained under Subdivision (b)(4)(B) of this rule the court shall require, the party seeking discovery to pay the other party a fair portion of the fees and expenses reasonably incurred by the latter party in obtaining facts and opinions from the expert.

(b)(5) Claims of Privilege or Protection of Trial Preparation Materials. When a party withholds information otherwise discoverable under these rules by claiming that it is privileged or subject to protection as trial preparation material, the party shall make the claim expressly and shall describe the nature of the documents, communications, or things not produced or disclosed in a manner that, without revealing information itself privileged or protected, will enable other parties to assess the applicability of the privilege or protection.

(c) Protective orders. Upon motion by a party or by the person from whom discovery is sought, accompanied by a certification that the movant has in good faith conferred or attempted to confer with other affected parties in an effort to resolve the dispute without court action, and for good cause shown, the court in which the action is pending or alternatively, on matters relating to a deposition, the court in the district where the deposition is to be taken may make any order which justice requires to protect a party or person from annoyance, embarrassment, oppression, or undue burden or expense, including one or more of the following:

(c)(1) that the discovery not be had;

(c)(2) that the discovery may be had only on specified terms and conditions, including a designation of the time or place;

(c)(3) that the discovery may be had only by a method of discovery other than that selected by the party seeking discovery;

(c)(4) that certain matters not be inquired into, or that the scope of the discovery be limited to certain matters;

(c)(5) that discovery be conducted with no one present except persons designated by the court;

(c)(6) that a deposition after being sealed be opened only by order of the court;

(c)(7) that a trade secret or other confidential research, development, or commercial information not be disclosed or be disclosed only in a designated way;

(c)(8) that the parties simultaneously file specified documents or information enclosed in sealed envelopes to be opened as directed by the court.

If the motion for a protective order is denied in whole or in part, the court may, on such terms and conditions as are just, order that any party or person provide or permit discovery. The provisions of Rule 37(a)(4) apply to the award of expenses incurred in relation to the motion.

(d) Sequence and timing of discovery. Except for cases exempt under subdivision (a)(2), except as authorized under these rules, or unless otherwise stipulated by the parties or ordered by the court, a party may not seek discovery from any source before the parties have met and conferred as required by subdivision (f). Unless otherwise stipulated by the parties or ordered by the court, fact discovery shall be completed within 240 days after the first answer is filed. Unless the court upon motion, for the convenience of parties and witnesses and in the interests of justice, orders otherwise, methods of discovery may be used in any sequence and the fact that a party is conducting discovery, whether by deposition or otherwise, shall not operate to delay any other party's discovery.

(e) Supplementation of responses. A party who has made a disclosure under subdivision (a) or responded to a request for discovery with a response is under a duty to supplement the disclosure or response to include information thereafter acquired if ordered by the court or in the following circumstances:

(e)(1) A party is under a duty to supplement at appropriate intervals disclosures under subdivision (a) if the party learns that in some material respect the information disclosed is incomplete or incorrect and if the additional or corrective information has not otherwise been made known to the other parties during the discovery process or in writing. With respect to testimony of an expert from whom a report is required under subdivision (a)(3)(B) the duty extends both to information contained in the report and to information provided through a deposition of the expert.

(e)(2) A party is under a duty seasonably to amend a prior response to an interrogatory, request for production, or request for admission if the party learns that the response is in some material respect incomplete or incorrect and if the additional or corrective information has not otherwise been made known to the other parties during the discovery process or in writing.

(f) Discovery and scheduling conference.

The following applies to all cases not exempt under subdivision (a)(2), except as otherwise stipulated or directed by order.

(f)(1) The parties shall, as soon as practicable after commencement of the action, meet in person or by telephone to discuss the nature and basis of their claims and defenses, to discuss the possibilities for settlement of the action, to make or arrange for the disclosures required by subdivision (a)(1), and to develop a stipulated discovery plan. Plaintiff's counsel shall schedule the meeting. The attorneys of record shall be present at the meeting and shall attempt in good faith to agree upon the discovery plan.

(f)(2) The plan shall include:

(f)(2)(A) what changes should be made in the timing, form, or requirement for disclosures under subdivision (a), including a statement as to when disclosures under subdivision (a)(1) were made or will be made;

(f)(2)(B) the subjects on which discovery may be needed, when discovery should be completed, whether discovery should be conducted in phases and whether discovery should be limited to particular issues;

(f)(2)(C) what changes should be made in the limitations on discovery imposed under these rules, and what other limitations should be imposed;

(f)(2)(D) the deadline for filing the description of the factual and legal basis for allocating fault to a non-party and the identity of the non-party; and

~~(f)(2)(D)~~ (f)(2)(E) any other orders that should be entered by the court.

(f)(3) Plaintiff's counsel shall submit to the court within 14 days after the meeting and in any event no more than 60 days after the first answer is filed a proposed form of order in conformity with the parties' stipulated discovery plan. The proposed form of order shall also include each of the subjects listed in Rule 16(b)(1)-(6), except that the date or dates for pretrial conferences, final pretrial conference and trial shall be scheduled with the court or may be deferred until the close of discovery. If the parties are unable to agree to the terms of a discovery plan or any part thereof, the plaintiff shall and any party may move the court for entry of a discovery order on any topic on which the parties are unable to agree. Unless otherwise ordered by the court, the presumptions established by these rules shall govern any subject not included within the parties' stipulated discovery plan.

(f)(4) Any party may request a scheduling and management conference or order under Rule 16(b).

(f)(5) A party joined after the meeting of the parties is bound by the stipulated discovery plan and discovery order, unless the court orders on stipulation or motion a modification of the discovery plan and order. The stipulation or motion shall be filed within a reasonable time after joinder.

(g) Signing of discovery requests, responses, and objections. Every request for discovery or response or objection thereto made by a party shall be signed by at least one attorney of record or by the party if the party is not represented, whose address shall be stated. The signature of the attorney or party constitutes a certification that the person has read the request, response, or objection and that to the best of the person's knowledge, information, and belief formed after reasonable inquiry it is: (1) consistent with these rules and warranted by existing law or a good faith argument for the extension, modification, or reversal of existing law; (2) not interposed for any improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation; and (3) not unreasonable or unduly burdensome or expensive, given the needs of the case, the discovery already had in the case, the amount in controversy, and the importance of the issues at stake in the litigation. If a request, response, or objection is not signed, it shall be stricken unless it is signed promptly after the omission is called to the attention of the party making the request, response, or objection, and a party shall not be obligated to take any action with respect to it until it is signed.

If a certification is made in violation of the rule, the court, upon motion or upon its own initiative, shall impose upon the person who made the certification, the party on whose behalf the request, response, or objection is made, or both, an appropriate sanction, which may include an order to pay the amount of the reasonable expenses incurred because of the violation, including a reasonable attorney fee.

(h) Deposition where action pending in another state. Any party to an action or proceeding in another state may take the deposition of any person within this state, in the same manner and subject to the same conditions and limitations as if such action or proceeding were pending in this state, provided that in order to obtain a subpoena the notice of the taking of such deposition shall be filed with the clerk of the court of the county in which the person whose deposition is to be taken resides or is to be served, and provided further that all matters arising during the taking of such deposition which by the rules are required to be submitted to the court shall be submitted to the court in the county where the deposition is being taken.

(i) Filing.

(i)(1) Unless otherwise ordered by the court, a party shall not file disclosures or requests for discovery with the court, but shall file only the original certificate of service stating that the disclosures or requests for discovery have been served on the other parties and the date of service. Unless otherwise ordered by the court, a party shall not file a response to a request for discovery with the court, but shall file only the original certificate of service stating that the response has been served on the other parties and the date of service. Except as provided in Rule 30(f)(1), Rule 32 or unless otherwise ordered by the court, depositions shall not be filed with the court.

(i)(2) A party filing a motion under subdivision (c) or a motion under Rule 37(a) shall attach to the motion a copy of the request for discovery or the response which is at issue.

Rule 47. Jurors.

(a) Examination of jurors. The court may permit the parties or their attorneys to conduct the examination of prospective jurors or may itself conduct the examination. In the latter event, the court shall permit the parties or their attorneys to supplement the examination by such further inquiry as is material and proper or shall itself submit to the prospective jurors such additional questions of the parties or their attorneys as is material and proper. Prior to examining the jurors, the court may make a preliminary statement of the case. The court may permit the parties or their attorneys to make a preliminary statement of the case, and notify the parties in advance of trial.

(b) Alternate jurors. The court may direct that alternate jurors be impaneled. Alternate jurors, in the order in which they are called, shall replace jurors who, prior to the time the jury retires to consider its verdict, become unable or disqualified to perform their duties. Alternate jurors shall be selected at the same time and in the same manner, shall have the same qualifications, shall be subject to the same examination and challenges, shall take the same oath, and shall have the same functions, powers, and privileges as principal jurors. An alternate juror who does not replace a principal juror shall be discharged when the jury retires to consider its verdict unless the parties stipulate otherwise and the court approves the stipulation. The court may withhold from the jurors the identity of the alternate jurors until the jurors begin deliberations. ~~If one or two alternate jurors are called, each party is entitled to one peremptory challenge in addition to those otherwise allowed~~.

(c) Challenge defined; by whom made. A challenge is an objection made to the trial jurors and may be directed (1) to the panel or (2) to an individual juror. ~~Either party may challenge the jurors, but where there are several parties on either side, they must join in a challenge before it can be made.~~

(d) Challenge to panel; time and manner of taking; proceedings. A challenge to the panel can be founded only on a material departure from the forms prescribed in respect to the drawing and return of the jury, or on the intentional omission of the proper officer to summon one or more of the jurors drawn. It must be taken before a juror is sworn. It must be in writing or be stated on the record, and must specifically set forth the facts constituting the ground of challenge. If the challenge is allowed, the court must discharge the jury so far as the trial in question is concerned.

(e) Challenges to individual jurors; number of peremptory challenges. The challenges to individual jurors are either peremptory or for cause. Each party shall be entitled to three

peremptory challenges, except as provided under Subdivisions (b) and (c) of this rule. Several defendants or several plaintiffs shall be considered as a single party for the purposes of making peremptory challenges unless there is a substantial controversy between them, in which case the court shall allow as many additional peremptory challenges as is just. If one or two alternate jurors are called, each party is entitled to one peremptory challenge in addition to those otherwise allowed.

(f) Challenges for cause. A challenge for cause is an objection to a particular juror and shall be heard and determined by the court. The juror challenged and any other person may be examined as a witness on the hearing of such challenge. A challenge for cause may be taken on one or more of the following grounds. On its own motion the court may remove a juror upon the same grounds.

(f)(1) A want of any of the qualifications prescribed by law to render a person competent as a juror.

(f)(2) Consanguinity or affinity within the fourth degree to either party, or to an officer of a corporation that is a party.

(f)(3) Standing in the relation of debtor and creditor, guardian and ward, master and servant, employer and employee or principal and agent, to either party, or united in business with either party, or being on any bond or obligation for either party; provided, that the relationship of debtor and creditor shall be deemed not to exist between a municipality and a resident thereof indebted to such municipality by reason of a tax, license fee, or service charge for water, power, light or other services rendered to such resident.

(f)(4) Having served as a juror, or having been a witness, on a previous trial between the same parties for the same cause of action, or being then a witness therein.

(f)(5) Pecuniary interest on the part of the juror in the result of the action, or in the main question involved in the action, except interest as a member or citizen of a municipal corporation.

(f)(6) Conduct, responses, state of mind or other circumstances that reasonably lead the court to conclude the juror is not likely to act impartially. No person may serve as a juror, if challenged, unless the judge is convinced the juror can and will act impartially and fairly.

(g) Selection of jury. The judge shall determine the method of selecting the jury and notify the parties at a pretrial conference or otherwise prior to trial. The following methods for selection are not exclusive.

(g)(1) Strike and replace method. The court shall summon the number of jurors that are to try the cause plus such an additional number as will allow for any alternates, for all peremptory challenges permitted, and for all challenges for cause that may be granted. At the direction of the judge, the clerk shall call jurors in random order. The judge may hear and determine challenges for cause during the course of questioning or at the end thereof. The judge may and, at the request of any party, shall hear and determine challenges for cause outside the hearing of the jurors. After each challenge for cause sustained, another juror shall be called to fill the vacancy , and any such new juror may be challenged for cause. When the challenges for cause are completed, the clerk shall provide a list of the jurors remaining, and each side, beginning with the plaintiff, shall indicate thereon its peremptory challenge to one juror at a time in regular turn until all peremptory challenges are exhausted or waived. The clerk shall then call the remaining jurors, or so many of them as shall be necessary to constitute the jury, including any alternate jurors, and the persons whose names are so called shall constitute the jury. If alternate jurors have been selected, the last jurors called shall be the alternates, unless otherwise ordered by the court prior to voir dire.

(g)(2) Struck method. The court shall summon the number of jurors that are to try the cause plus such an additional number as will allow for any alternates, for all peremptory challenges permitted and for all challenges for cause that may be granted. At the direction of the judge, the clerk shall call jurors in random order. The judge may hear and determine challenges for cause during the course of questioning or at the end thereof. The judge may and, at the request of any party, shall hear and determine challenges for cause outside the hearing of the jurors. When the challenges for cause are completed, the clerk shall provide a list of the jurors remaining, and each side, beginning with the plaintiff, shall indicate thereon its peremptory challenge to one juror at a time in regular turn until all peremptory challenges are exhausted or waived. The clerk shall then call the remaining jurors, or so many of them as shall be necessary to constitute the jury, including any alternate jurors, and the persons whose names are so called shall constitute the jury. If alternate jurors have been selected, the last jurors called shall be the alternates, unless otherwise ordered by the court prior to voir dire.

(g)(3) In courts using lists of prospective jurors generated in random order by computer, the clerk may call the jurors in that random order.

(h) Oath of jury. As soon as the jury is selected an oath must be administered to the jurors, in substance, that they and each of them will well and truly try the matter in issue between the parties, and render a true verdict according to the evidence and the instructions of the court.

(i) Proceedings when juror discharged. If, after impaneling the jury and before verdict, a juror becomes unable or disqualified to perform the duties of a juror and there is no alternate juror, the parties may agree to proceed with the other jurors, or to swear a new juror and commence the trial anew. If the parties do not so agree the court shall discharge the jury and the case shall be tried with a new jury.

(j) Questions by jurors. A judge may invite jurors to submit written questions to a witness as provided in this section.

(j)(1) If the judge permits jurors to submit questions, the judge shall control the process to ensure the jury maintains its role as the impartial finder of fact and does not become an investigative body. The judge may disallow any question from a juror and may discontinue questions from jurors at any time.

(j)(2) If the judge permits jurors to submit questions, the judge should advise the jurors that they may write the question as it occurs to them and submit the question to the bailiff for transmittal to the judge. The judge should advise the jurors that some questions might not be allowed.

(j)(3) The judge shall review the question with counsel and unrepresented parties and rule upon any objection to the question. The judge may disallow a question even though no objection is made. The judge shall preserve the written question in the court file. If the question is allowed, the judge shall ask the question or permit counsel or an unrepresented party to ask it. The question may be rephrased into proper form. The judge shall allow counsel and unrepresented parties to examine the witness after the juror's question.

(k) View by jury. When in the opinion of the court it is proper for the jury to have a view of the property which is the subject of litigation, or of the place in which any material fact occurred, it may order them to be conducted in a body under the charge of an officer to the place, which shall be shown to them by some person appointed by the court for that purpose. While the jury

are thus absent no person other than the person so appointed shall speak to them on any subject connected with the trial.

(l) Communication with jurors. There shall be no off-the-record communication between jurors and lawyers, parties, witnesses or persons acting on their behalf. Jurors shall not communicate with any person regarding a subject of the trial. Jurors may communicate with court personnel and among themselves about topics other than a subject of the trial. It is the duty of jurors not to form or express an opinion regarding a subject of the trial except during deliberation. The judge shall so admonish the jury at the beginning of trial and remind them as appropriate.

(m) Deliberation of jury. When the case is finally submitted to the jury they may decide in court or retire for deliberation. If they retire they must be kept together in some convenient place under charge of an officer until they agree upon a verdict or are discharged, unless otherwise ordered by the court. Unless by order of the court, the officer having charge of them must not make or allow to be made any communication to them with respect to the action, except to ask them if they have agreed upon their verdict, and the officer must not, before the verdict is rendered, communicate to any person the state of deliberations or the verdict agreed upon.

(n) Exhibits taken by jury; notes. Upon retiring for deliberation the jury may take with them the instructions of the court and all exhibits which have been received as evidence in the cause, except exhibits that should not, in the opinion of the court, be in the possession of the jury, such as exhibits of unusual size, weapons or contraband. The court shall permit the jury to view exhibits upon request. Jurors are entitled to take notes during the trial and to have those notes with them during deliberations. As necessary, the court shall provide jurors with writing materials and instruct the jury on taking and using notes.

(o) Additional instructions of jury. After the jury have retired for deliberation, if there is a disagreement among them as to any part of the testimony, or if they desire to be informed on any point of law arising in the cause, they may require the officer to conduct them into court. Upon their being brought into court the information required must be given in the presence of, or after notice to, the parties or counsel. Such information must be given in writing or stated on the record.

(p) New trial when no verdict given. If a jury is discharged or prevented from giving a verdict for any reason, the action shall be tried anew.

(q) Court deemed in session pending verdict; verdict may be sealed. While the jury is absent the court may be adjourned from time to time in respect to other business, but it shall be open for every purpose connected with the cause submitted to the jury, until a verdict is rendered or the jury discharged. The court may direct the jury to bring in a sealed verdict at the opening of the court, in case of an agreement during a recess or adjournment for the day.

(r) Declaration of verdict. When the jury or three-fourths of them, or such other number as may have been agreed upon by the parties pursuant to Rule 48, have agreed upon a verdict they must be conducted into court, their names called by the clerk, and the verdict rendered by their foreperson; the verdict must be in writing, signed by the foreperson, and must be read by the clerk to the jury, and the inquiry made whether it is their verdict. Either party may require the jury to be polled, which shall be done by the court or clerk asking each juror if it is the juror's verdict. If, upon such inquiry or polling there is an insufficient number of jurors agreeing therewith, the jury must be sent out again; otherwise the verdict is complete and the jury shall be discharged from the cause.

(s) Correction of verdict. If the verdict rendered is informal or insufficient, it may be corrected by the jury under the advice of the court, or the jury may be sent out again.

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, 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.[1]

(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).

~~(j)~~ (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

[1] Advisory Committee Note. The judge's objective is to protect both a judgment creditor's interest in collecting a judgment affirmed on appeal and to afford a judgment debtor a reasonable opportunity to prosecute an appeal without unduly and unnecessarily affecting the judgment debtor's operations. Among the options the judge might consider are to:

(1) require periodic financial reports;

(2) appoint a receiver or master;

(3) require the debtor to abstract the judgment to all jurisdictions in which the debtor has significant assets;

(4) require the debtor's corporate officers to personally acknowledge receiving the judgment and to consent to personal jurisdiction for the purpose of enforcing the judgment;

(5) limit loans other than in the ordinary course of business;

(6) limit transfer or disposition of assets other than in the ordinary course of business; and

(7) limit payment of dividends.

surety or other security is generally permitted under this rule shall not be conclusive as to its sufficiency or amount.

Rule 101. Motion practice before court commissioners.

(a) Written motion required. An application to a court commissioner for an order shall be by motion which, unless made during a hearing, shall be made in accordance with this rule. A motion shall be in writing and state succinctly and with particularity the relief sought and the grounds for the relief sought.

(b) Time to file and serve. The moving party shall file the motion and attachments with the clerk of the court and obtain a hearing date and time. The moving party shall serve the responding party with the motion and attachments and notice of the hearing at least 14 calendar days before the hearing. The moving party shall serve the other party directly if the other party is unrepresented or if service is more than 90 days after the date of entry of the most recent appealable order.

(c) Response; reply. The responding party shall file and serve the moving party with a response and attachments at least 5 business days before the hearing. The moving party may file and serve the responding party with a reply and attachments at least 3 business days before the hearing. The reply is limited to responding to matters raised in the response.

(d) Attachments; objection to failure to attach.

(d)(1) As used in this rule "attachments" includes all records, forms, information and affidavits necessary to support the party's position. A party may file and serve with the motion a memorandum supporting the motion. A party may file and serve with the response a memorandum opposing the motion. Attachments for motions and responses regarding alimony shall include income verification and financial declaration. Attachments for motions and responses regarding child support and child custody shall include income verification, financial declaration and child support worksheet. A financial declaration shall be verified.

(d)(2) If attachments necessary to support the moving party's position are not served with the motion, the responding party may file and serve an objection to the defect with the response. If attachments necessary to support the responding party's position are not served with the response, the moving party may file and serve an objection to the defect with the reply. The defect shall be cured within 2 business days after notice of the defect or at least 2 business days before the hearing, whichever is earlier.

(e) Courtesy copy. Parties shall deliver to the court commissioner a courtesy copy of all papers filed with the clerk of the court within the time required for filing with the clerk. The

courtesy copy shall state the name of the court commissioner and the date and time of the hearing.

(f) Late filings; sanctions. If a party files or serves papers beyond the time required in subsections (b) or (c), the court commissioner may hold or continue the hearing, reject the papers, impose costs and attorney fees caused by the failure and by the continuance, and impose other sanctions as appropriate.

(g) Counter motion. Opposing a motion is not sufficient to grant relief to the responding party. An application for an order may be raised by counter motion. This rule applies to counter motions except that a counter motion shall be filed and served with the response. The response to the counter motion shall be filed and served with the reply. The reply to the response to the counter motion shall be filed and served at least 2 business days before the hearing.

(h) Limit on hearing. The court commissioner shall not hold a hearing on a motion before the deadline for an appearance by the respondent under Rule 12.

(i) Limit on order to show cause. The court shall issue an order to show cause only upon motion supported by affidavit or other evidence sufficient to show probable cause to believe a party has violated a court order. The court commissioner shall proceed in accordance with Utah Code Title 78, Chapter 32, Contempt.

(j) Motions to judge. The following motions shall be to the judge to whom the case is assigned: motion for alternative service; motion to waive 90-day waiting period; motion to waive divorce education class; motion for entry of default judgment; motion for leave to withdraw after a case has been certified as ready for trial; and motions in limine. A court may provide that other motions be to the judge.

Rule 106. Modification of divorce decrees.

(a) Commencement; service; answer. ~~Proceedings~~ Except as provided in Utah Code Section 30-3-37, proceedings to modify a divorce decree shall be commenced by filing a petition to modify the divorce decree. Service of the petition or motion and summons upon the opposing party shall be in accordance with Rule 4. The responding party shall serve the answer within ~~twenty days after service of the petition~~ the time permitted by Rule 12.

(b) Temporary orders.

(b)(1) The judgment, order or decree sought to be modified remains in effect during the pendency of the petition. The court may make the modification retroactive to the date on which the petition was filed. During the pendency of a petition to modify, the court:

(b)(1)(A) may order a temporary modification of child support as part of a temporary modification of custody or parent-time; and

(b)(1)(B) may order a temporary modification of custody or parent-time to address an immediate and irreparable harm or to ratify changes made by the parties, provided that the modification serves the best interests of the child.

(b)(2) Nothing in this rule limits the court's authority to enter temporary orders under Utah Code Section 30-3-3.

Rule 9. Default judgment.

(a) If defendant fails to appear at the time set for trial, the court may grant plaintiff judgment in an amount not to exceed the amount requested in plaintiff's affidavit.

(b) If defendant has filed a counter affidavit and plaintiff fails to appear at the time set for trial, the court may grant defendant judgment in an amount not to exceed the amount requested in defendant's counter affidavit.

(c) The appearing party shall immediately serve the default judgment on the non-appearing party.

(d) In an interpleader action, if a defendant fails to appear, a default judgment may be entered against the non-appearing defendant.

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

(a)(1)(C)(i) to appear ~~to~~ and give testimony at trial, or at hearing, or at deposition, or

(a)(1)(C)(ii) to appear and 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~~;

(a)(1)(D) if an appearance is required, specify the date, time and place for the appearance; and

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

(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

[1] Changes to the rule may necessitate changes to the form.

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~~ 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 before trial shall be served on each party in the manner prescribed by Rule 5(b) at least ten days before the subpoena is served.

~~(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.~~ [2]

~~(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~~

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

~~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.~~ [3]

(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 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.~~ [4]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 an 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. [5]

~~(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

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[3] Covered by Rule 45(a)(2).
[4] Covered by Rule 34 and Rule 45(c)(2).
[5] This provision should be part of Rule 34 and deleted here.

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. [6]

~~(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~~ may quash or modify the subpoena ~~if it:~~. 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 the appearance or production upon specified conditions. The court may enter an order to protect a person subject to or affected by the subpoena if it:

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

~~(c)(3)(A)(ii) 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)(5)(B) is contrary to this rule;

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

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[6] Is this paragraph still needed if the rule gives the issuing party the decision to require production or copying?

~~(c)(3)(A)(iv)~~ (c)(5)(D) subjects a person to undue burden~~.~~; or

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

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

~~(c)(3)(B)(ii)~~ (c)(5)(E) 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) 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) 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 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:

(d)(1)(A) that the affiant has knowledge of the facts contained in the affidavit;

(d)(1)(B) that the documents or tangible things produced or copied are a full and complete response to the subpoena;

(d)(1)(C) that the documents or tangible things are the originals or that the copy is a true copy of the originals; and

(d)(1)(D) an accounting of the actual cost of producing or copying the documents or tangible things.

~~(d)(1)~~ (d)(2) 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~~ subpoena.

~~(d)(2)~~ (d)(3) 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.

Administrative Office of the Courts

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

Daniel J. Becker
State Court Administrator
Myron K. March
Deputy Court Administrator

MEMORANDUM

To: **Tim Shea, Senior Counsel**

From: **Brent Johnson, General Counsel**

Re: **Rule 71B, Utah Rules of Civil Procedure**

Date: **May 31, 2005**

The Third District Court has recently had an experience with Rule 71B. The rule has created some confusion and it might be helpful if the Civil Procedure Committee were to review this rule and clarify the process to be followed.

Confusion has arisen from the process which seems to combine a summons and an order to show cause. A summons seeks a written response to the allegations, while an order to show cause generally seeks a personal appearance. One the one-hand, the rules seems to contemplate a personal appearance by stating that a person served with a summons is "to appear and show cause why he should be bound by the judgment." At the same time, the rule contemplates that a defendant would be able to answer the summons and have the case proceed the same as any other proceeding. The use of a summons would also suggest that the defendant can be defaulted. However, defaults are unusual for an order to show cause.

I would imagine that there is logic behind the rule, but it will be helpful to court personnel to clarify the process. Please let me know if you have any questions about this.

Rule 71B. Proceedings where parties not summoned.

(a) Effect of failure to serve all defendants. Where the action is against two or more defendants and the summons is served on one or more, but not all of them, the plaintiff may proceed against the defendants served in the same manner as if they were the only defendants.

(b) Proceedings after judgment against parties not originally served. When a judgment has been recovered against one or more, but not all, of several persons jointly indebted upon an obligation, the plaintiff may require any person not originally served with the summons to appear and show cause why he should not be bound by the judgment in the same manner as though he had been originally served with process.

(c) Summons and affidavit; contents and service. The plaintiff shall issue a summons, describing the judgment, and requiring the defendant to appear within the time required for appearance in response to an original summons, and show cause why he should not be bound by such judgment. The summons, together with a copy of an affidavit on behalf of the plaintiff to the effect that the judgment, or some part thereof remains unsatisfied, and specifying the amount actually due thereon, shall be served upon the defendant and returned in the same manner as the original summons.

(d) What constitutes the pleadings. The pleadings shall consist of plaintiff's affidavit, the summons, and the answer of the defendant, if any; provided that if defendant denies his liability on the obligation upon which the judgment was originally recovered, a copy of the original complaint and judgment shall be included.

(e) Hearing; judgment. The matter may be tried as other cases; but if the issues are found against the defendant, the judgment shall not exceed the amount of the original judgment remaining unsatisfied, with interest and costs.

From: <David_Nuffer@utd.uscourts.gov>
To: <tims@email.utcourts.gov>
Date: 6/15/05 12:50PM
Subject: F. R. Civ. P. 6(e)

We may want to consider whether this federal rule amendment, destined to go into effect in December, has any implications for us. The Utah rule is already more clear than the existing federal rule, but we might be able to streamline the first phrases, and probably ought to consider expanding Rule 6 beyond mail service.

EXISTING FEDERAL (e) Additional Time After Service under Rule 5(b)(2)(B), (C), or (D). Whenever a party has the right or is required to do some act or take some proceedings within a prescribed period after the service of a notice or other paper upon the party and the notice or paper is served upon the party under Rule 5(b)(2)(B), (C), or (D), 3 days shall be added to the prescribed period

EXISTING STATE

(e) Additional time after service by mail. Whenever a party has the right or is required to do some act or take some proceedings within a prescribed period after the service of a notice or other paper upon him and the notice or paper is served upon him by mail, 3 days shall be added to the end of the prescribed period as calculated under subsection (a). Saturdays, Sundays and legal holidays shall be included in the computation of any 3-day period under this subsection, except that if the last day of the 3-day period is a Saturday, a Sunday, or a legal holiday, the period shall run until the end of the next day that is not a Saturday, Sunday, or a legal holiday.