Agenda
Advisory Committee on Rules of Civil Procedure

October 23, 2013
4: 00 to 6:00 p.m.

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

Approval of minutes	Tab 1	Jonathan Hafen
Report to the Supreme Court		Jonathan Hafen
Rule 58B. Satisfaction of judgment.	Tab 2	Judge Todd Shaughnessy Nathan Whittaker
Rule making principles	Tab 3	Jonathan Hafen
Prioritize pending issues	Tab 4	Jonathan Hafen
Rule 7. Pleadings allowed. Rule 7A. Motions. Rule 37. Discovery and disclosure motions; Sanctions. Rule 56. Summary judgment.	Tab 5	Tim Shea

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

Meeting Schedule: Matheson Courthouse, Judicial Council Room, 4:00 to 6:00 unless otherwise stated.

November 20, 2013
January 22, 2014
February 26, 2014
March 26, 2014
April 23, 2014
May 28, 2014
September 24, 2014
October 22, 2014
November 19, 2014

Tab 1

MINUTES

UTAH SUPREME COURT ADVISORY COMMITTEE ON THE RULES OF CIVIL PROCEDURE

SEPTEMBER 18, 2013

PRESENT: Jonathan Hafen, Chair, W. Cullen Battle, Scott S. Bell, Hon. James T. Blanch, Frank Carney, Prof. Lincoln Davies, Hon. Evelyn J. Furse, Steven Marsden, Terrie T. McIntosh, Hon. Derek Pullan, Hon. Todd M. Shaughnessy, Leslie W. Slaugh, Lori Woffinden

TELEPHONE: Hon. Lyle R. Anderson, David H. Moore, David W. Scofield

STAFF: Timothy M. Shea, Nathan Whittaker

EXCUSED: Sammi V. Anderson, Hon. John L. Baxter, Trystan B. Smith, Hon. Kate Toomey, Barbara L. Townsend

I. INTRODUCTION AND WELCOME TO NEW MEMBERS

Mr. Hafen called the meeting to order as the new chair of the committee and welcomed Scott S. Bell and Nathan Whittaker to the committee. Mr. Bell is an attorney at the firm of Parsons Behle & Latimer practicing in commercial litigation. Mr. Bell replaces Fran Wiksom. Mr. Whittaker is an attorney at the firm of Day Shell & Liljenquist practicing in civil and appellate litigation, and will be serving as Secretary to the committee. Mr. Whittaker replaces Sammi Anderson, who was appointed to full membership on the committee, replacing Jan Smith. Members of the committee introduced themselves to the new members and look forward to working with them.

II. APPROVAL OF MINUTES

Mr. Hafen entertained comments from the committee concerning the May 22, 2013 minutes. The committee unanimously approved the minutes.

III. PUBLIC COMMENT ON PROPOSED REVISIONS TO RULES

Mr. Shea presented and summarized the public comments to the proposed revisions to Rules 7, 58A, 58B, and 64B, which were published on the Utah

Courts Website for public comment pursuant to UCJA 11-103 on July 11, 2013. The committee proceeded to consider the public comments and to determine whether to recommend each proposed revision to the Supreme Court as published, or whether to hold the proposed revision for further consideration.

A. Rule 7

Discussion. The committee proceeded to consider the proposed revision to Rule 7. Mr. Shea noted that he had made some stylistic changes to the proposed revision published for comment in response to comments made by Mr. Whittaker. These changes did not alter the substance of the proposed revisions. Mr. Shea explained that the bulk of the public comments dealt with the issues of the timeframe and page limits, which the committee has considered and discussed thoroughly before publishing the proposed revision.

Mr. Shea then highlighted a comment made at the recent District Judges' Conference that it would make more sense to incorporate the proposed revision into Rule 37 than in Rule 7. Judge Pullan, who had brought the comment to the committee's attention, agreed with the suggestion and noted that there was an amount of redundancy between the proposed revision and the existing Rule 37. Because of this, it may be more complicated than simply cutting and pasting the proposed revision into the existing rule. As the procedure in the proposed revision is already in effect under UCJA 4-502, Judge Pullan emphasized that there was no hurry to do this and that the committee should take its time and do a careful redrafting.

Judge Pullan's other concern was that the wording of the proposed revision does not make sense with respect to a motion to quash a subpoena or a motion for protective order. The proposed revision would require the moving party to include a statement regarding proportionality under Rule 26(b)(2). However, the point of a motion to quash or motion for protective order is that the discovery sought is not proportional, and the burden of establishing proportionality would be on the non-moving party.

Mr. Slaugh noted that provisions dealing with the form and content of motions were scattered throughout the rules, including Rule 101 for motions before a domestic relations commissioner and Rule 56 for summary judgment motions. He felt there was benefit in consolidating motion-related rules in Rule 7 rather than referring to multiple rules.

Mr. Davies noted that Rule 37 was where they would naturally look first for the rules regarding discovery disputes, and that to the extent that the procedure covered motions provided in Rules 45 and 26, there should be a cross-reference to Rule 37 in those rules.

Several other members felt that the same logic that supports moving the proposed revision to Rule 37 would support moving subparagraphs (A) & (B) of Rule 7(c)(3), which deal with the requirements for the statement of facts in a summary judgment motion, to Rule 56. They felt Rule 7 had become a catchall for anything motion related, and it should be amended so that it addresses pleadings and motions generally, moving requirements for specific motions into the corresponding rules for those motions.

Mr. Hafen then asked the committee whether there were other changes that needed to be made to Rule 7. Judge Blanch conveyed several other judges' observations that litigants have had problems recognizing the importance of requests to submit under Rule 7(d). He suggested that it may be appropriate to intensify the language of 7(d) to emphasize that motions would not be submitted to the judge without filing a request to submit. Several members also raised concerns about submission of proposed orders, the separate motion and memorandum requirement, and the finality requirements.

Judge Furse expressed a concern that combining a motion and memorandum would lead to parties failing to state with particularity the relief requested at the beginning of the motion. Members agreed that the requirement of that statement must be emphasized. Judge Blanch encouraged borrowing from the local rules for the federal district court as much as possible in order to minimize the burden on litigants.

Judge Shaughnessy raised a concern with the filing of orders. In the current e-filing system, judges get orders in their queue without any explanation on whether they are stipulated, uncontested, disputed, *ex parte*, etc. For example, even if the order indicates that it is stipulated, because there is no cross-reference to the stipulation or joint motion, the judge must dig into the file to try to figure out if it was actually stipulated and if it conforms to the stipulation. Judge Pullan agreed, and indicated that the issue was partly an e-filing issue and partly a rules issue. Judges want orders for ex parte motions like granting leave to file an overlength memorandum, but don't want orders to be submitted with substantive motions. Orders that are agreed to or stipulated to should be designated as such and should be

approved as to form. Mr. Shea noted that the committee had agreed in principle to this in a prior meeting, but as the committee was unable to come to consensus on the wording, the proposal was tabled for further consideration.

Mr. Marsden expressed concern that combining the motion and memorandum was clunky, particularly with respect to motions for summary judgment. It was noted that some other courts require separate motions and memoranda for motions brought under Rule 56, and several committee members indicated that the committee should discuss whether to except Rule 56 from the combined motion and memorandum requirement when the draft proposal is next discussed.

Committee Action. It was moved and seconded that further action on the proposed revisions to Rule 7 be tabled and that a draft be prepared for review that incorporates the proposed revisions into Rule 37, eliminates redundancies between the proposed revisions and the existing provisions of Rule 37, includes references to the procedure in Rules 7, 26 and 45, and clarifies that a motion for sanctions for failure to comply with a discovery order would be brought in the form prescribed by Rule 7 and not in the form for other discovery motions. The motion carried unanimously on voice vote.

It was further moved and seconded that the proposals with respect to Rule 7 be taken off the table and that a draft be prepared for review that incorporates the proposal to combine the motion and memorandum, the proposals for submission of orders, the proposal for the request to submit, and other proposals for Rule 7 previously identified. The motion carried unanimously on voice vote.

It was further moved and seconded that a draft be prepared for review that incorporates the existing language of Rule 7(c)(3)(A)–(B) into Rule 56. The motion carried unanimously on voice vote.

B. Rule 58A

Discussion. The committee proceeded to consider the proposed revision to Rule 58A, which was published for comment in tandem with a proposed revision to Rule 4 of the Utah Rules of Appellate Procedure. Mr. Shea noted that Mr. Whittaker had submitted comments to the proposed revision, and asked him to further explain.

Mr. Whittaker first expressed his concern that while the proposed revision would require "the party preparing the judgment" to serve notice of judgment to other parties, it did not address the situation of when the judgment was prepared by a Court. Mr. Battle noted that the intent of the proposed revision was to decouple service of the judgment from the issue of appellate jurisdiction. The question of who should serve a judgment prepared by the court is an altogether different question.

Mr. Whittaker next noted that the proposed revision required a party to "promptly serve" the notice, and expressed the concern that without a definite deadline for service, the question of whether a notice was promptly served so that the deadline for appeal cannot be reset would end up being a question of interpretation. Mr. Shea explained that the term "promptly" was chosen because a definite length of time would encourage the party responsible for serving notice to do so near the end of the allowed time. As the time for appeal runs from the date of judgment, the committee did not want to encourage that sort of gamesmanship.

Committee Action. Mr. Hafen asked for any proposed changes to the proposed revision to the Utah Supreme Court. As no changes were proposed, the proposed revision of Rule 58A as published for public comment was thereby approved for presentation to the Supreme Court pursuant to UCJA 11-105(a) on October 9, 2013.

C. Rule 58B

Discussion. The committee proceeded to consider the proposed revision to Rule 58B. Mr. Shea informed the committee that both comments were from district court clerks recommending that, rather than a judgment owner being required to file a satisfaction upon the request of the judgment debtor, it should be mandatory for the owner to file a satisfaction upon payment. Mr. Shea further noted that this suggestion was discussed in the past but was not adopted. Mr. Carney recalled that the suggestion was rejected because the committee anticipated resistance from the collection bar.

Judge Blanch noted that, while the prior rule did not require a satisfaction to be filed and that this would improve the situation of judgment debtors, the comments indicated that the committee did not do enough. He also expressed his concern that creditors who were previously filing satisfactions as a matter of course may see the proposed revision as a justification to ignore the rule

unless they heard from a debtor. It was also noted that, considering how difficult it is for debtors to get high-volume debt collection agencies to respond to them while their case was pending, it would likely be even more difficult to get in contact with the agency after the debtors have paid the judgment to get them to file a satisfaction. After discussing the issue, it was the sense of the committee that it should be the responsibility of a creditor to file a satisfaction without being requested to do so by the debtor.

Mr. Marsden asked whether the committee had attached an enforcement mechanism to the requirement to file a satisfaction. It was noted that non-compliance with the rule would demonstrate wrongdoing and that the district court would have discretion to consider attorney fees and costs if the debtor was forced to bring a motion to declare the judgment satisfied.

Committee Action. It was moved and seconded that the words "at the request of the judgment debtor" on lines 4-5 and "after the request" on line 6 be deleted from the proposed revision to Rule 58B and resubmit the proposed revision for public comment. The motion carried unanimously on voice vote.

D. Rule 64D

Discussion. The committee proceeded to consider the proposed revision to Rule 64D. Mr. Shea summarized the public comments as encouraging making continuing writs of garnishment effective for even longer, and expressing concerns as to how it affects interest. Mr. Slaugh suggested that the interest issue would be more effectively handled by effective drafting.

Committee Action. Mr. Hafen asked for any proposed changes to the proposed revision to the Utah Supreme Court. As no changes were proposed, the proposed revision of Rule 64B as published for public comment was thereby approved for presentation to the Supreme Court pursuant to UCJA 11-105(a) on October 9, 2013.

IV. HOW THE COMMITTEE SHOULD DO BUSINESS

Mr. Hafen led a discussion on how the committee should proceed with its business. He noted that the committee has done a lot of revisions to the civil procedure rules in the past few years, and there are a lot of proposals that are waiting for the committee's consideration. While there are some changes that are urgent—for example, correcting a mistake in a recent revision that

would lead to unintended consequences—other changes are only in the interest of general improvement. Mr. Hafen asked committee members to answer the question, "What is the role of this committee?"

Mr. Slaugh answered that it is the job of the committee to amend rules to stop gamesmanship and to prevent unintended consequences resulting from poor drafting or changes in circumstances, as well as to make substantive improvements to the rules in order to make procedures that are fairer and more efficient. The latter purpose must be done much more sparingly, however.

Judge Blanch recognized that while there is value in making the rules clearer, fairer, and more efficient, there is a countervailing value in predictability—a practitioner should be able to have a set of rules that are up to date and that they can rely on, and we should allow the appellate courts to give binding interpretations of the rules before changing them. Our desire to make the rules as good as they can possibly be can lead us to disregard that value. Mr. Marsden added that predictability was important with respect to keeping down costs of litigation—having to constantly double-check previous forms and other papers to ensure they are compliant with the current rules costs time and money.

Judge Blanch also recognized the value in having our rules mirror the federal rules, as there is a much greater body of law interpreting federal rules. Utah appellate courts have recognized that decisions interpreting rules that are substantially identical to the Utah rules are strongly persuasive; when we depart from the language of the federal rules, we deny courts and practitioners the benefit of that body of case law. While sometimes there are good reasons for departing from the federal rule, it is not something we should do lightly.

Mr. Carney related his experience with attending a discussion about the Utah Rules of Civil Procedure with a group of Utah lawyers. He indicated that the people he talked to are frustrated at the inconsistency in application of the new rules, and seem to be aggravated at the changes generally. He noted that it was unclear how much of the frustration was based on there being something wrong with the rules, and how much was based on the fact that the rules were a big change and people had not gotten used to them yet. He also noted that people he talked to liked the tier one rule, but they did not like the rest of the changes. He had heard complaints from attorneys that

certain judges were not allowing parties to stipulate around the standard discovery procedures.

Judge Shaughnessy told the committee about two small cases that were before him recently. They exchanged initial disclosures but had done minimal discovery and neither side moved for summary judgment. They each had one- or two-day trials, and he ruled from the bench. He was convinced that the parties spent a lot less money litigating those cases than they would have under the old discovery rules. He also found it odd that people complain about the higher tiers and not tier one, as the procedure in a tier three case is essentially the same as the procedures under the former rules. He also found it hard to believe that a judge would disallow discovery stipulations.

Judge Pullan pointed out that just like practitioners, judges are still learning about the new discovery procedures, and that there is bound to be inconsistencies in application. It is important to talk about these inconsistencies so that judges can be educated.

Mr. Hafen noted that the new discovery rules had been effective for nearly two years, and asked whether anyone in the committee would just go back to the old rules. He talked about how nice it was to have limited deposition time and limits on discovery in his state cases, and how it contrasted with the federal cases where there were no limits. He mentioned how nice it was to be a "trial lawyer" rather than a "discovery lawyer." No one in the committee indicated that he or she would want to go back to the old rules.

Judge Pullan felt that one of the biggest improvements was how the new rules dealt with motions to compel—litigants were no longer tied up for months waiting for the motion to be decided.

Judge Furse related complaints she had heard about the requirement to exhaust discovery before requesting more. Without the guarantee of more discovery, the parties risk misallocating their allowed discovery, and this leads to odd incentives in how parties conduct discovery.

Judge Shaughnessy expressed that one of the things litigants may still not fully appreciate is the presumption that untimely-disclosed evidence is excluded from trial. Mr. Marsden questioned whether the presumption is enforceable with respect to omitting a document or witness from initial disclosures but disclosing it well before the end of discovery. Judge Shaughnessy explained that if the disclosing party did not provide a good

reason for non-disclosure or did not show the other party was not prejudiced, the evidence would be excluded.

Mr. Hafen then asked Mr. Shea whether the committee has been more active in the past four years than it had been previously. Mr. Shea said that while there seems to be a perception that the committee is has been changing the rules more in recent years, the average is over the last ten years is 12 rules changed per year. The average over the last four years has been 9 rules changed. Mr. Shea was quick to note that this statistic did not measure the scope of these changes, just the number of rules that were revised in a given year. Mr. Shea referred the committee to the portion of the Rule Amendment Summary he drafted that lists the pending proposals for amendment, and asked the committee to consider whether they were topics that needed to be considered. He reminded the committee that over the past few years, the committee has been seen as a legitimate avenue for practitioners to address problems with the existing rules. If the committee is no longer responsive to those concerns, they will bring up the problem with the legislature.

Judge Shaughnessy asked if the number of proposals originating from petitions from practitioners (as opposed to proposals originating from the committee) is lower than it used to be. Mr. Shea responded that almost every proposal aside from the 2011 discovery reform has come from outside requests, whether they come from practitioners, judges or administrators.

Judge Pullan pointed out that the 2011 discovery reform was a major shift not only in how law is practiced, but also in how we think about the civil litigation process. In going forward, we need to be sensitive to the "triple-bypass open-heart surgery" that the rules have just gone through. However, we must make sure that there is an open avenue for people to address problems—if we do not act, the legislature will.

Mr. Hafen then asked what the threshold is for taking action on a proposal as a committee—what kind of change is important enough for us to act on it? Judge Pullan replied that the committee must act to fix a rule that seriously prejudices parties due to gamesmanship. Mr. Carney added that the committee should act to fix a rule that is causing continuing conflict and litigation. Judge Blanch suggested that one way of determining the importance of an amendment is to present the proposal to the relevant groups and get feedback at the beginning of the process, rather than waiting until the comment period.

Mr. Davies made the analogy of regulated industries—if the regulators change the rules too much or too quickly, the regulated entities have a hard time keeping up and rule fatigue sets in. In this case, there must be some lag time to allow practitioners to catch up and get used to the changes. One way to allow this lag time is to amend less; another way is to send out rules for comment less frequently.

Mr. Hafen asked the committee how they felt about holding non-urgent proposed revisions so that they were only published for comment once a year. Judge Furse commented that the value of such a system would be diminished if the other committees did not follow suit. There would be value having a predictable time when all of the amendments were published so that interested parties could set aside time to consider them, and it may encourage more people to comment. Judge Shaughnessy expressed his concern that bringing out a whole raft of small changes at once may be more disruptive than introducing those changes a little at a time.

Judge Blanch made the point that it may be wise upon looking at a new proposal to ask whether the change needs to happen at all, or whether the proposal is just not important enough to deal with and should just be thrown away. Mr. Slaugh suggested that rather than throwing the proposal away, an unimportant change could just be held until an actual important change to the rules is considered.

Mr. Carney noted that there were a lot of these fixes that were easy to deal with but would nonetheless be good value—that is, the time it would take to deal with the amendment and the amount of disruption would be small compared to the ambiguity and disputes the amendment would resolve. The committee should not avoid these types of amendments.

Judge Furse pointed out that the process for submitting a proposal for a rule change to the committee was not well publicized. The committee should try to inform practitioners about where to direct their concerns and proposals. More feedback from practitioners would allow the committee to judge what they perceive to be the problems the committee should be dealing with.

Mr. Carney made the point that the law evolves with the times and circumstances—we evolved from code pleading to notice pleading, and we are evolving from unlimited discovery to proportional discovery. The committee needs to keep up with that evolution.

Mr. Hafen summarized the discussion, noting that members seem to be generally satisfied with how the committee is doing business, and that the committee needs to focus on prioritizing issues and asking whether the proposed changes need to be made, and if so, when. He noted that the Supreme Court seems to be satisfied with the committee's work and rate of amendment.

Judge Pullan suggested that there would be merit in identifying questions or standards to judge the priority of proposals against. The questions would be based on the basic values of the committee. For example, does the amendment promote certainty? Other values that were mentioned were efficiency and neutrality. Mr. Hafen agreed with Judge Pullan's suggestion and asked committee members to come up with suggestions for this list of values.

V. ADJOURNMENT.

The meeting adjourned at 5:58 p.m. The next meeting will be held on October 23, 2013 at 4:00 p.m. at the Administrative Office of the Courts.

Tab 2

Emails regarding second and third thoughts about Rule 58B.

From Todd Shaughnessy

Jon and Tim,

I looked again at the change to Rule 58b that we approved at our last meeting and it occurred to me there may be one issue problem. The possible issue is this: I understood the amendment we approved to require a judgment creditor to file a satisfaction of judgment upon full satisfaction of the judgment. I did not understand the amendment to require the judgment creditor to file a partial satisfaction of judgment each time it collected on a portion of the judgment (though the judgment creditor can if it wants). If the judgment creditor were required to file a partial satisfaction of judgment each time it, for example, received any money on a wage garnishment, they would be filing these all the time and for relatively small amounts. Also, in cases where attorneys' fees have been awarded, it would give the judgment creditor grounds to seek to augment the judgment to include the attorneys' fees it incurred in preparing and filing each of these.

The potential problem is that subpart (a) of Rule 58B deals with both partial and complete satisfactions of judgment. I don't have our language in front of me, but when I looked at it again I was concerned it could be read as requiring a filing in both instances. It seems like we should be crystal clear about this and not create a potential issue where one wasn't intended -- particularly if we're going to take heat from the collections bar.

I'm sending this to the two of you and not the whole group because I'm not certain this is really an issue. I leave it to smarter people than me (ie, you) to decide if its an issue and, if so, what to do about it. Seems like we could amend the rule along the lines set forth below, and have the committee vote via email, but what do I know.

Good luck.

Having just said that, take a look at subpart (c) of Rule 58B. This seems to suggest that the judgment creditor must file a partial satisfaction of judgment, at least if they want to have a new writ of garnishment or execution issued. I'm relatively confident that this is a rule that's never followed.

> (c) Effect of satisfaction. Satisfaction of a judgment, whether by acknowledgement or order, shall discharge the judgment, and the judgment shall cease to be a lien as to the debtors named and to the extent of the amount paid. *A writ of execution or a writ of garnishment issued after partial satisfaction shall include the partial satisfaction and shall direct the officer to collect only the balance of the judgment, or to collect only from the judgment debtors remaining liable.*

From Nathan Whittaker

We may want to consider how the proposed revision interacts with the sentence "If the satisfaction is for part of the judgment or for fewer than all of the judgment debtors, it shall state the amount paid or name the debtors who are released." My thought is we may want to change the amendment again to read:

> The owner or the owner's attorney shall file an acknowledgement of satisfaction:
>
> (1) within 28 days after the judgment has been paid in full; or
>
> (2) if more than one debtor is liable on the judgment, within 28 days after each judgment debtor satisfies its liability on the judgment.

Rule 58B. Satisfaction of judgment.

(a) **Satisfaction by acknowledgment.** ~~A judgment may be satisfied by the owner or the owner's attorney by filing an acknowledgment of satisfaction in the court in which the judgment was first entered after payment of the judgment.~~ Within 28 days after full satisfaction of the judgment, the owner or the owner's attorney shall file an acknowledgment of satisfaction in the court in which the judgment was entered. If the owner is not the original judgment creditor, the owner or owner's attorney shall also file proof of ownership. If the satisfaction is for part of the judgment or for fewer than all of the judgment debtors, it shall state the amount paid or name the debtors who are released.

(b) **Satisfaction by order of court.** The court in which the judgment was first entered may, upon motion and satisfactory proof, enter an order declaring the judgment satisfied.

(c) **Effect of satisfaction.** Satisfaction of a judgment, whether by acknowledgement or order, shall discharge the judgment, and the judgment shall cease to be a lien as to the debtors named and to the extent of the amount paid. A writ of execution or a writ of garnishment issued after partial satisfaction shall include the partial satisfaction and shall direct the officer to collect only the balance of the judgment, or to collect only from the judgment debtors remaining liable.

(d) **Filing certificate of satisfaction in other counties.** After satisfaction of a judgment, whether by acknowledgement or order, has been entered in the court in which the judgment was first entered, a certificate by the clerk showing the satisfaction may be filed with the clerk of the district court in any other county where the judgment has been entered.

Tab 3

Seven Pillars of Rulemaking

(1) Certainty

The rules should provide directions to an outcome.

(2) Clarity

The rules should be written using plain language principles, adopting the federal style amendments when appropriate.

(3) Improvement

An amendment should solve an identifiable problem.

(4) Input

Before the 45-day comment period, the committee will try to obtain comments and suggestions from lawyers and judges who might be particularly affected by an amendment.

(5) Priority

The committee will assign a priority—also known as “tiers”—to each request to amend the rules. Requests from the legislature and supreme court will take priority over all tiers. Within a priority level, the committee will consider the requests in the order in which they are made, unless combining requests will better address the matter.

(6) Simplicity

The process established by the rule should reach its outcome as simply as possible while allowing every party an equitable opportunity to investigate and present its case.

(7) Stability

The rules should not be amended unless there is a need.

Tab 4

Topic	Tier	Raised By
Review all rules for conformity with “filing” documents.		Committee
Style amendments		FRCP
Rule 68. HB 235, Offer of judgment in civil cases.		Rep. Ken Ivory
Arbrogast v. River Crossings, 2010 UT 40 Supreme Court suggestion that the Standards of Civility be incorporated in the URCP.		Supreme Court
E-filing. Rule 5. Delete requirement that party has to have agreed to service by email. Paragraph (d) filing/service in light of change to “filing” in other rules.		Committee
E-filing. Rule 5. Certificates of service for e-filed documents		Leslie Slaugh
E-filing. Rule 6. Time. Review all rules for conformity with 7/14/21/28 days service		FRCP
E-filing. Rule 10. No script signature. Margins?		Debra Moore
E-filing. Witness affidavits. E-file copy. Keep original.		Debra Moore
E-filing. Replace judge’s signature block with “end of order.”		Debra Moore
E-filing. Rule 74/75. Permit NOLA and W/D of counsel on the record in open court if approved by the judge. Lawyer-for-the-day programs, such as debt collection calendar and OSC domestic calendar.		Debra Moore Charles Stormont
Rule 7. Finality of orders. Combine memo into motion. Move special SJ provisions to Rule 56. Move special discover provisions to Rule 37.		Committee
Rule 7. Serve motion to renew judgment by personal service.		Judge Lyle Anderson
Rule 7. Attach a proposed pleading to a motion to amend a pleading.		David Mortensen
Rule 26. File all dispositive motions or certificate of readiness for trial within 28 days after close of expert discovery. Include in notice form.		Jon Hafen
Update 26.1(b) to match 26(a)(2)		Nathan Whittaker
Rule 26.1. Amend so that all dates trigger from the first answer, rather than triggering from each step along the way.		Leslie Slaugh

Topic	Tier	Raised By
Rule 26.3 Disclosures in employment actions.		Bob Wilde
Rule 26.4. Special rules for disclosure and discovery in probate cases. Rule 81. Applicability of rules in general.		Mike Jensen
Rule 45. Require notice of third party subpoena duces tecum to include the subpoena.		Ed Havas
Rule 4. Require copy of summons to be filed with proof of summons.		
Delete or amend Rule 12(j). Bonds are permissive for in-state plaintiffs but mandatory for out-of-state plaintiffs (on motion). Whatever justification may have existed for this rule, there is no practical basis for it now. Most banking and other financial institutions are regional or national, and there are very few obstacles to collecting judgments across state lines. Where the plaintiff is located should not matter to whether a cost bond is appropriate.		John Bogart
Rule 13. Counterclaim and cross-claim. Effect on Rule 15?		Nathan Whittaker
Post trial motions. 50, 52, 59, 60.		Frank Carney
Rule 54. Statement of post judgment interest rate in final judgment.		Judge Todd Shaughnessy
Rule 63. Response and request to submit for decision are not proper on a motion to disqualify. Incorporate federal grounds for recusal into URCP. 28 U.S.C. § 455. Disqualification of justice, judge, or magistrate judge		Judicial Conduct Commission David Scofield
Rule 101. Motion practice before court commissioners. Rule 109. Automatic temporary domestic orders		Michele Blomquist (under development)
Rule 106. Modification of final domestic relations order.		Nathan Whittaker

Tab 5

Administrative Office of the Courts

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

Daniel J. Becker
State Court Administrator
Raymond H. Wahl
Deputy Court Administrator

MEMORANDUM

To: Civil Procedures Committee
From: Tim Shea
Date: October 16, 2013
Re: Rules 7, 7A, 37 and 56

Rule 7. It has been suggested that Rule 7 do nothing more than designate the pleadings authorized, similar to the federal rule. FRCP 7 can be limited to that purpose because local rules regulate the details of motion practice. Since we want to avoid local rules, I recommend creating Rule 7A to accomplish this goal.

Rule 7A. A lot of what is proposed for Rule 7A is already part of Rule 7, but much is new as well. It has been suggested that we add the special procedures in Rule 37 and 56 to the existing exceptions. A major objective is to include the facts and argument supporting a motion in the motion itself. It has been suggested that the opposition and reply memorandum refer to the motion by name. It has been suggested that the rule identify when a proposed order may be submitted with a brief. Although not mentioned at any meetings, I have included from the local federal rule: objections to evidence, paragraphs (c)(4), (d)(4) and (e); citation of supplemental authority, paragraph (h); prohibiting burying a motion in an opposing or reply memorandum, paragraph (j); and motions in which a limited statement of facts and authority are permitted, paragraph (l).

If the committee does not want to venture into the finality of orders, even though the supreme court invited us to do so, paragraph (i)(3) and the note should be deleted.

It has been suggested that a motion to renew a judgment should be served by personal service. And it has been requested that a motion to amend a pleading should include a copy of the proposed pleading. Rule 7A is a possible home for these topics, but they have not been included in this draft.

Rule 37. The amendments to Rule 37 were originally published as amendments to Rule 7.

Rule 56. It has been suggested that we move the special requirements for a motion for summary judgment from Rule 7 to Rule 56. There were several emails on whether to make only that amendment or to adopt the federal version of Rule 56. Opinions seemed about evenly split so I have provided two versions. The first version is the existing state

rule with the paragraphs from Rule 7 added. And, my memory may be faulty, but I believe there was a discussion several months ago about including a statement of facts and allegations for background purposes. The second version would do all of that, but use the federal rule as the baseline.

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

~~(a) **Pleadings.** There shall be~~ Only these pleadings are allowed:

(a) a complaint;~~and~~

(b) an answer to a complaint;

(c)~~a reply to a counterclaim~~ an answer to a counterclaim designated as a counterclaim;

(d) an answer to a cross claim, if the answer contains a cross claim;

(e) a third party complaint, if a person who was not an original party is summoned under ~~the provisions of~~ Rule 14;~~and~~

(f) ~~a third party~~ an answer to a third party complaint;~~, if a third party complaint is served~~ and

(g) a reply to an answer if permitted by the court.~~No other pleading shall be allowed, except that the court may order a reply to an answer or a third party answer.~~

~~(b)(1) **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.~~

~~(b)(2) **Limit on order to show cause.** An application to the court for an order to show cause shall be made only for enforcement of an existing order or for sanctions for violating an existing order. An application for an order to show cause must be supported by an affidavit sufficient to show cause to believe a party has violated a court order.~~

~~(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.~~

Advisory Committee Notes

Rule 7A . Motions.

(a) **Procedures and form.**

(a)(1) An application to the court for an order shall be by motion which, except for the following, shall be made in accordance with this rule.

(a)(1)(A) A motion made during a hearing or trial may be made orally.

(a)(1)(B) A motion made in proceedings before a court commissioner shall follow the procedures of Rule 101.

(a)(1)(C) A motion for summary judgment shall follow the procedures of this rule, supplemented by the requirements of Rule 56.

(a)(1)(D) A motion under Rule 45 to quash a subpoena shall follow the procedures of Rule 37(b).

(a)(1)(E) A motion under Rule 26 for extraordinary discovery shall follow the procedures of Rule 37(b).

(a)(1)(F) A motion under Rule 37 for a protective order or for an order compelling disclosure or discovery—but not a motion for sanctions—shall follow the procedures of Rule 37(b).

(a)(2) The rules governing captions and other matters of form in pleadings apply to motions and other papers.

(b) **Motion and memorandum combined; name and content of motion.** The motion and supporting memorandum must be contained in one document. The moving party shall title the motion “Motion to [short phrase describing the relief sought].” The sections of the motion under (b)(1), (b)(2) and (b)(3) shall not exceed 10 pages total. The motion shall contain under appropriate headings and in the following order:

(b)(1) a concise statement of the relief sought and the grounds for the relief sought;

(b)(2) a concise statement of the facts as claimed by the party necessary for a decision;

(b)(3) an argument citing authority for the relief requested; and

(b)(4) relevant portions of documents cited in the motion, such as affidavits or discovery materials or opinions, statutes or rules.

(c) **Name and content of memorandum opposing the motion.** Within 14 days after the motion is filed, a party opposing the motion shall file a memorandum in opposition. The party opposing the motion shall title the memorandum “Memorandum opposing the motion to [short phrase describing the relief sought].” The sections of the memorandum under (c)(1), (c)(2) and (c)(3) shall not exceed 10 pages total. The opposing memorandum shall contain under appropriate headings and in the following order:

(c)(1) a concise statement of the grounds for opposing the relief sought;

(c)(2) a concise statement of the facts as claimed by the party necessary for a decision;

(c)(3) an argument citing authority opposing the relief requested;

(c)(4) objections to evidence included in the motion; and

(c)(5) relevant portions of documents cited in the memorandum, such as affidavits or discovery materials or opinions, statutes or rules.

(d) **Name and content of reply memorandum.** Within 7 days after the memorandum opposing the motion is filed, the moving party may file a reply memorandum, which shall be limited to rebuttal of new matters raised in the memorandum opposing the motion. The reply memorandum shall be titled “Memorandum replying to the memorandum opposing the motion to [short phrase describing the relief sought].” The sections of the memorandum under (d)(1), (d)(2) and (d)(3) shall not exceed 5 pages total. The reply memorandum shall contain under appropriate headings and in the following order:

(d)(1) reply to objections made in the memorandum opposing the motion;

(d)(2) a concise statement of the new matter raised in the memorandum opposing the motion;

(d)(3) an argument citing authority rebutting the new matter raised in the memorandum opposing the motion;

(d)(4) objections to evidence included in the memorandum opposing the motion; and

(d)(5) relevant portions of documents cited in the memorandum, such as affidavits or discovery materials or opinions, statutes or rules.

(e) **Response to objections made in the reply memorandum.** If the reply memorandum includes an objection to evidence included in the memorandum opposing the motion, the non-moving party may file a response to the objection no later than 7 days after the reply memorandum is filed.

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

(g) **Hearing.** 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 that the issue has been authoritatively decided.

(h) **Citation of supplemental authority.** A party may file notice of citations to significant authority that comes to the party’s attention after the party's memorandum has been filed or after oral argument but before decision. The notice must state, without argument, the reason for the citations and the page of the memorandum or the point argued orally to which the citations apply. Any other party may file a response promptly. The response must be similarly limited.

(i) **Orders.**

(i)(1) Unless otherwise directed by the court, within 14 days after the court’s decision the prevailing party shall serve upon the other parties a proposed order in conformity with the court’s decision. The order shall state whether it is entered upon trial, stipulation, motion or the court’s initiative. Unless otherwise directed by the

court, the order shall be prepared as a separate document and shall not incorporate any matter by reference.

(i)(2) The other parties may object to the proposed order by filing an objection within 7 days after the order is served. The party preparing the order shall file the proposed order upon being served with an objection or upon expiration of the time to object.

(i)(3) The order is a final judgment that can be appealed if it satisfies Rule 54(b) and Rule 58A(c).

(i)(4) 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 other parties may be vacated or modified by the judge who made it with or without notice.

(j) **Motion in opposing memorandum or reply memorandum prohibited.** A party shall not make a motion in a memorandum opposing a motion or in a reply memorandum.

(k) **Over-length memorandum.** The court may permit a party to file an over-length memorandum upon ex parte motion and a showing of good cause. A memorandum with more than 10 pages of argument shall contain a table of contents and a table of authorities with page references.

(l) **Limited statement of facts and authority.** No statement of facts and legal authorities beyond the concise statement of the relief sought and the grounds for the relief sought required in (b)(1) is required for the following motions:

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

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

(l)(3) motion to continue a hearing;

(l)(4) motion to appoint a guardian ad litem;

(l)(5) motion to substitute parties;

(l)(6) motion to refer the action to or withdraw it from the court's ADR program;

(l)(7) motion for a settlement conference; and

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

(m) **Proposed orders prohibited; exceptions.** A party shall not attach a proposed order to its motion or memorandum or to the request to submit for decision except a proposed order shall be attached to the following motions:

(m)(1) a motion described in paragraph (l);

(m)(2) an ex parte motion;

(m)(3) a stipulated or unopposed motion; and

(m)(4) a motion under Rule 37(b).

(n) **Limit on order to show cause.** An application to the court for an order to show cause shall be filed only for enforcement of an existing order or for sanctions for violating an existing order. An application for an order to show cause must be supported by an affidavit sufficient to show cause to believe a party has violated a court order.

Advisory Committee Notes

The intent of paragraph (i)(3) is to abandon the holdings in:

Central Utah Water Conservancy District v. King, 2013 UT 13;

Giusti v. Sterling Wentworth Corp., 2009 UT 2; and

Code v. Utah Dept of Health, 2007 UT 43, and return the analysis of whether an appeal from an order is proper to the traditional analysis under Rule 54 and Rule 58A.

Rule 37. Discovery and disclosure motions; Sanctions.

(a) **Motion for order compelling disclosure or discovery; motion for protective order.**

(a)(1) A party may move to compel disclosure or discovery and for appropriate sanctions if another party:

(a)(1)(A) fails to disclose, fails to respond to a discovery request, or makes an evasive or incomplete disclosure or response to a request for discovery;

(a)(1)(B) fails to disclose, fails to respond to a discovery request, fails to supplement a disclosure or response or makes a supplemental disclosure or response without an adequate explanation of why the additional or correct information was not previously provided;

(a)(1)(C) objects to a discovery request ;

(a)(1)(D) impedes, delays, or frustrates the fair examination of a witness; or

(a)(1)(E) otherwise fails to make full and complete disclosure or discovery.

(a)(2) A party or the person from whom disclosure is required or discovery is sought may move for an order of protection.

(a)(3) A motion may be made to the court in which the action is pending, or, on matters relating to a deposition or a document subpoena, to the court in the district where the deposition is being taken or where the subpoena was served. A motion for an order to a nonparty witness shall be made to the court in the district where the deposition is being taken or where the subpoena was served.

~~(a)(3) The moving party must attach a copy of the request for discovery, the disclosure, or the response at issue. The moving party must also attach a certification that the moving party has in good faith conferred or attempted to confer with the other affected parties in an effort to secure the disclosure or discovery without court action and that the discovery being sought is proportional under Rule 26(b)(2).~~

~~(b) **Motion for protective order.**~~

~~(b)(1) A party or the person from whom disclosure is required or discovery is sought may move for an order of protection. The moving party shall attach to the~~

~~motion a copy of the request for discovery or the response at issue. The moving party shall also attach a certification that the moving party has in good faith conferred or attempted to confer with other affected parties to resolve the dispute without court action.~~

~~(b)(2) If the motion raises issues of proportionality under Rule 26(b)(2), the party seeking the discovery has the burden of demonstrating that the information being sought is proportional.~~

(b) **Expedited procedures for discovery motions.** A motion under Rule 26 for extraordinary discovery or a motion under Rule 45 to quash a subpoena shall follow the procedures of this paragraph. A motion under this rule for a protective order or for an order compelling disclosure or discovery—but not a motion for sanctions—shall follow the procedures of this paragraph.

(b)(1) **Motion length and content.** The motion shall be no more than four pages, not including permitted attachments, and shall include in the following order:

(b)(1)(A) the relief sought and the grounds for the relief sought stated succinctly and with particularity;

(b)(1)(B) a certification that the requesting party has in good faith conferred or attempted to confer with the other affected parties in an effort to resolve the dispute without court action;

(b)(1)(C) a statement regarding proportionality under Rule 26(b)(2); and

(b)(1)(D) if the motion is a motion for extraordinary discovery, a statement certifying that the party has reviewed and approved a discovery budget.

(b)(2) **Response length and content.** No more than 7 days after the moving party has filed the motion, the non-moving party may file a response. The response shall be no more than four pages, not including permitted attachments, and shall [address the issues raised in the motion] include in the following order:

(b)(2)(A) a succinct statement regarding the relief sought and the grounds for the relief sought; and

(b)(2)(B) a statement regarding proportionality under Rule 26(b)(2).

(b)(3) **Attachments.** Unless required by law the moving party and responding party shall attach only a copy of the request for discovery, the disclosure, or the response at issue and a proposed order.

(b)(4) **Decision.** Upon filing of the response or expiration of the time to do so, either party may and the moving party shall file a Request to Submit for Decision under Rule 7(d). The court will promptly decide the motion. The court may decide the motion on the pleadings and papers unless the court schedules a hearing. The hearing may be by telephone conference or other electronic communication. The court may order additional briefing and establish a briefing schedule.

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

(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 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;

(c)(9) that a question about a statement or opinion of fact or the application of law to fact not be answered until after designated discovery has been completed or until a pretrial conference or other later time; or

(c)(10) that the costs, expenses and attorney fees of discovery be allocated among the parties as justice requires.

(c)(11) If a protective order terminates a deposition, it shall be resumed only upon the order of the court in which the action is pending.

(d) **Expenses and sanctions for motions.** If the motion to compel or for a protective order is granted or denied, or if a party provides disclosure or discovery or withdraws a disclosure or discovery request after a motion is filed, the court may order the party, witness or attorney to pay the reasonable expenses and attorney fees incurred on account of the motion if the court finds that the party, witness, or attorney did not act in good faith or asserted a position that was not substantially justified. A motion to compel or for a protective order does not suspend or toll the time to complete standard discovery.

(e) **Failure to comply with order.**

(e)(1) Sanctions by court in district where deposition is taken. Failure to follow an order of the court in the district in which the deposition is being taken or where the document subpoena was served is contempt of that court.

(e)(2) Sanctions by court in which action is pending. Unless the court finds that the failure was substantially justified, the court in which the action is pending may impose appropriate sanctions for the failure to follow its orders, including the following:

(e)(2)(A) deem the matter or any other designated facts to be established in accordance with the claim or defense of the party obtaining the order;

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

(e)(2)(C) stay further proceedings until the order is obeyed;

(e)(2)(D) dismiss all or part of the action, strike all or part of the pleadings, or render judgment by default on all or part of the action;

(e)(2)(E) order the party or the attorney to pay the reasonable expenses, including attorney fees, caused by the failure;

(e)(2)(F) treat the failure to obey an order, other than an order to submit to a physical or mental examination, as contempt of court; and

(e)(2)(G) instruct the jury regarding an adverse inference.

(f) **Expenses on failure to admit.** If a party fails to admit the genuineness of any document or the truth of any matter as requested under Rule 36, and if the party requesting the admissions proves the genuineness of the document or the truth of the matter, the party requesting the admissions may apply to the court for an order requiring the other party to pay the reasonable expenses incurred in making that proof, including reasonable attorney fees. The court shall make the order unless it finds that:

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

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

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

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

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

(g) **Failure of party to attend at own deposition.** The court on motion may take any action authorized by paragraph (e)(2) if a party or an officer, director, or managing agent of a party or a person designated under Rule 30(b)(6) or 31(a) to testify on behalf of a party fails to appear before the officer taking the deposition, after proper service of the notice. The failure to act described in this paragraph may not be excused on the ground that the discovery sought is objectionable unless the party failing to act has applied for a protective order under paragraph (b).

(h) **Failure to disclose.** If a party fails to disclose a witness, document or other material, or to amend a prior response to discovery as required by Rule 26(d), that party shall not be permitted to use the witness, document or other material at any hearing unless the failure to disclose is harmless or the party shows good cause for the failure to disclose. In addition to or in lieu of this sanction, the court on motion may take any action authorized by paragraph (e)(2).

(i) **Failure to preserve evidence.** Nothing in this rule limits the inherent power of the court to take any action authorized by paragraph (e)(2) if a party destroys, conceals,

alters, tampers with or fails to preserve a document, tangible item, electronic data or other evidence in violation of a duty. Absent exceptional circumstances, a court may not impose sanctions under these rules on a party for failing to provide electronically stored information lost as a result of the routine, good-faith operation of an electronic information system.

Advisory Committee Notes

Paragraph (c) adopts the expedited procedures for discovery motions formerly approved by the Judicial Council. The expedited procedures are intended to be complete, without the need to refer to the procedures for other motions, unless the judge directs that the other procedures apply.

Rule 56. Summary judgment.

(a) **For claimant.** A party seeking to recover upon a claim, counterclaim or cross-claim or to obtain a declaratory judgment may, at any time after the expiration of ~~20~~ 21 days from the commencement of the action or after service of a motion for summary judgment by the adverse party, move for summary judgment upon all or any part thereof.

(b) **For defending party.** A party against whom a claim, counterclaim, or cross-claim is asserted or a declaratory judgment is sought, may, at any time, move for summary judgment as to all or any part thereof.

(c) **Motion and proceedings ~~thereon~~.** ~~The motion, memoranda and affidavits shall be in accordance with Rule 7.~~ The judgment sought shall be rendered if ~~the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that~~ there is no genuine issue as to any material fact and ~~that~~ the moving party is entitled to a judgment as a matter of law. An interlocutory summary judgment~~, interlocutory in character,~~ may be rendered on the issue of liability ~~alone~~ although there is a genuine issue as to the amount of damages. The motion, memoranda and affidavits shall be in accordance with Rule 7A.

(c)(1) Instead of a statement of the facts under Rule 7A(b)(2), a motion for summary judgment shall contain a statement of material facts claimed not to be genuinely disputed. Each fact shall be separately stated in numbered paragraphs and supported by citing to relevant materials, such as affidavits, declarations, stipulations, admissions, discovery or other materials.

(c)(2) Instead of a statement of the facts under Rule 7A(c)(2), an opposing party shall include in its initial memorandum a verbatim restatement of each of the moving party's facts that is disputed with an explanation of the grounds for the dispute supported by citing to relevant materials, such as affidavits, declarations, stipulations, admissions, discovery or other materials. The opposing party's initial memorandum may contain a separate statement of additional facts in dispute, which shall be separately stated in numbered paragraphs and similarly supported.

(c)(3) The motion and memorandum opposing the motion may contain a concise statement of facts and allegations for the limited purpose of providing background and context for the case, dispute, and motion. The statement of facts or allegations may cite supporting evidence.

(c)(4) Each fact set forth in the motion or memorandum opposing the motion that is not disputed is deemed admitted for the purposes of the motion.

(d) **Case not fully adjudicated on motion.** If on motion under this rule judgment is not rendered upon the whole case or for all the relief asked and a trial is necessary, the court at the hearing of the motion, by examining the pleadings and the evidence before it and by interrogating counsel, shall if practicable ascertain what material facts exist without substantial controversy and what material facts are actually and in good faith controverted. It shall thereupon make an order specifying the facts that appear without substantial controversy, including the extent to which the amount of damages or other relief is not in controversy, and directing such further proceedings in the action as are just. Upon the trial of the action the facts so specified shall be deemed established, and the trial shall be conducted accordingly.

(e) **Form of affidavits; further testimony; defense required.** Supporting and opposing affidavits shall be made on personal knowledge, shall set forth such facts as would be admissible in evidence, and shall show affirmatively that the affiant is competent to testify to the matters stated therein. Sworn or certified copies of all papers or parts thereof referred to in an affidavit shall be attached thereto or served therewith. The court may permit affidavits to be supplemented or opposed by depositions, answers to interrogatories, or further affidavits. When a motion for summary judgment is made and supported as provided in this rule, an adverse party may not rest upon the mere allegations or denials of the pleadings, but the response, by affidavits or as otherwise provided in this rule, must set forthspecific facts showing that there is a genuine issue for trial. Summary judgment, if appropriate, shall be entered against a party failing to file such a response.

(f) **When affidavits are unavailable.** Should it appear from the affidavits of a party opposing the motion that the party cannot for reasons stated present by affidavit facts

essential to justify the party's opposition, the court may refuse the application for judgment or may order a continuance to permit affidavits to be obtained or depositions to be taken or discovery to be had or may make such other order as is just.

(g) **Affidavits made in bad faith.** If any of the affidavits presented pursuant to this rule are presented in bad faith or solely for the purpose of delay, the court shall forthwith order the party presenting them to pay to the other party the amount of the reasonable expenses which the filing of the affidavits caused, including reasonable attorney's fees, and any offending party or attorney may be adjudged guilty of contempt.

Rule 56. Summary judgment.

(a) **Motion for summary judgment or partial summary judgment.** A party may move for summary judgment, identifying each claim or defense—or the part of each claim or defense—on which summary judgment is sought. The court shall grant summary judgment if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law. The court should state on the record the reasons for granting or denying the motion. The motion and memoranda shall be in accordance with Rule 7A.

(a)(1) Instead of a statement of the facts under Rule 7A(b)(2), a motion for summary judgment shall contain a statement of material facts claimed not to be genuinely disputed. Each fact shall be separately stated in numbered paragraphs and supported by citing to materials in the record under paragraph (c)(1) of this rule.

(a)(2) Instead of a statement of the facts under Rule 7A(c)(2), a memorandum opposing the motion shall include a verbatim restatement of each of the movant's facts that is disputed with an explanation of the grounds for the dispute supported by citing to materials in the record under paragraph (c)(1) of this rule. The memorandum may contain a separate statement of additional facts in dispute, which shall be separately stated in numbered paragraphs and similarly supported.

(a)(4) The motion and memorandum opposing the motion may contain a concise statement of facts and allegations for the limited purpose of providing background and context for the case, dispute, and motion. The statement of facts or allegations may cite supporting evidence.

(a)(5) Each fact set forth in the motion or memorandum opposing the motion that is not disputed is deemed admitted for the purposes of the motion.

(b) **Time to file a motion.** A party may file a motion for summary judgment at any time until 30 days after the close of all discovery.

(c) **Procedures.**

(c)(1) **Supporting factual positions**. A party asserting that a fact cannot be genuinely disputed or is genuinely disputed must support the assertion by:

(c)(1)(A) citing to particular parts of materials in the record, including depositions, documents, electronically stored information, affidavits or declarations, stipulations (including those made for purposes of the motion only), admissions, interrogatory answers, or other materials; or

(c)(1)(B) showing that the materials cited do not establish the absence or presence of a genuine dispute, or that an adverse party cannot produce admissible evidence to support the fact.

(c)(2) **Objection that a fact is not supported by admissible evidence**. A party may object that the material cited to support or dispute a fact cannot be presented in a form that would be admissible in evidence.

(c)(3) **Materials not cited**. The court need consider only the cited materials, but it may consider other materials in the record.

(c)(4) **Affidavits or declarations**. An affidavit or declaration used to support or oppose a motion must be made on personal knowledge, must set out facts that would be admissible in evidence, and must show that the affiant or declarant is competent to testify on the matters stated.

(d) **When facts are unavailable to the nonmovant.** If a nonmovant shows by affidavit or declaration that, for specified reasons, it cannot present facts essential to justify its opposition, the court may:

(d)(1) defer considering the motion or deny it;

(d)(2) allow time to obtain affidavits or declarations or to take discovery; or

(d)(3) issue any other appropriate order.

(e) **Failing to properly support or address a fact.** If a party fails to properly support an assertion of fact or fails to properly address another party's assertion of fact as required by Rule 56(c), the court may:

(e)(1) give an opportunity to properly support or address the fact;

(e)(2) consider the fact undisputed for purposes of the motion;

(e)(3) grant summary judgment if the motion and supporting materials—including the facts considered undisputed—show that the movant is entitled to it; or

(e)(4) issue any other appropriate order.

(f) **Judgment independent of the motion.** After giving notice and a reasonable time to respond, the court may:

(f)(1) grant summary judgment for a nonmovant;

(f)(2) grant the motion on grounds not raised by a party; or

(f)(3) consider summary judgment on its own after identifying for the parties material facts that may not be genuinely in dispute.

(g) **Failing to grant all the requested relief.** If the court does not grant all the relief requested by the motion, it may enter an order stating any material fact—including an item of damages or other relief—that is not genuinely in dispute and treating the fact as established in the case.

(h) **Affidavit or declaration submitted in bad faith.** If satisfied that an affidavit or declaration under this rule is submitted in bad faith or solely for delay, the court—after notice and a reasonable time to respond—may order the submitting party to pay the other party the reasonable expenses, including attorney's fees, it incurred as a result. ~~An~~ The court may also hold an offending party or attorney ~~may also be held~~ in contempt or ~~subjected to~~ order other appropriate sanctions.

Advisor Committee Notes

The object of the 2014 amendment is to adopt the style amendments of Federal Rule of Civil Procedure 56 without changing the substantive Utah law. The 2014 amendment also moves to this rule the special briefing requirements of motions for summary judgment formerly found in Rule 7.

Nothing in these changes should be interpreted as changing the line of Utah cases that the party with the burden of proof on an issue must meet its initial burden to present materials in the record establishing that no genuine issue of material fact exists and that the party with the burden of proof is entitled to judgment as a matter of law. Only then must the party without the burden of proof demonstrate that there is a genuine dispute as to a material fact. Orvis v. Johnson, 2008 UT 2, Harline v. Barker, 912 P.2d 433 (Utah 1996), K & T, Inc. v. Koroulis, 888 P.2d 623, (Utah 1994)—contrary to the holding in Celotex Corp. v. Catrett, 477 U.S. 317, 106 S. Ct. 2548, 91 L. Ed. 2d 265 (1986).