Agenda

Advisory Committee on Rules of Civil Procedure

February 25, 2015

4:00 to 6:00 p.m.

Scott M. Matheson Courthouse

450 South State Street

Judicial Council Room

Administrative Office of the Courts, Suite N31

Welcome and approval of minutes.	Tab 1	Jonathan Hafen
Conference committee to consider effect of post-trial proceedings on appealability of a judgment.	Tab 2	Jonathan Hafen
Consideration of comments to Rule 7, Rule 54, Rule 56 and Rule 58A.	Tab 3	Tim Shea
Small Claims Rule 14. Settlement offers.	Tab 4	Tim Shea
Rule 5. Service and filing of pleadings and other papers.	Tab 5	Tim Shea
Rule 11. Signing of pleadings, motions, affidavits, and other papers; representations to court; sanctions.	Tab 6	Tim Shea
Rule 43. Evidence.	Tab 7	Tim Shea
Rule 63. Disability or disqualification of a judge.	Tab 8	Tim Shea

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

Meeting Schedule:

March 25, 2015

April 22, 2015

May 27, 2015

September 23, 2015

October 28, 2015

November 18, 2015

Tab 1

Minutes

Advisory Committee on the Rules of Civil Procedure

January 28, 2015

Draft: Subject to change

Present: Rod Andreason, John Baxter, Scott Bell, Lincoln Davies, Jonathan Hafen, Presiding, Steven Marsden, Terrie McIntosh, Amber Mettler, Todd Shaughnessy, Leslie Slaugh, Kate Toomey, Barbara Townsend, Lori Woffinden

Excused: James T. Blanch, Heather M. Sneddon, Trystan B. Smith, Paul Stancil

Staff: Tim Shea

Guests: Lane Gleave, Tyler Gleave, Paula Hannaford-Agor, Cynthia Lee

(1) APPROVAL OF MINUTES.

The minutes of November 19, 2014 were approved as prepared.

(2) ELECTRONIC SERVICE OF SUMMONS AND COMPLAINT

Mr. Lane Gleave of Utah Court Services, LLC, presented his proposal to allow electronic service under Rule 4 for personal jurisdiction. The system is web-based. Mr. Tyler Gleave demonstrated how the defendant would receive a postcard in the mail with the contact information of the process server, the web URL, and a PIN to download the complaint and summons. The defendant enters his or her cell phone (on which to receive a text) and the last 4 digits of his or her Social Security Number (which verifies the defendant's identity). The system sends a text with a second PIN that the defendant then uses to download the complaint and summons.

To download the files, the defendant must check a box agreeing to the process server's terms and conditions and a second box agreeing to be served electronically.

Mr. Gleave said that the system is 256-bit encrypted, so it is secure. Even if someone hacked into the system, the files would not be readable. He said this method of service reduces costs and results in less pollution because fewer miles are driven. If the plaintiff cannot provide Mr. Gleave with the defendant's SSN, this method of service will not work. The system maintains the defendant's SSN and cell phone number even if the defendant does not download the files. The system records the IP address of the computer the defendant uses.

Mr. Slaugh said that he supports electronic service, but does not like the idea of having to provide a cell phone number and truncated SSN. Committee members thought that most people would not trust the security of the website or respond to the postcard. Mr. Gleave said that people sometimes call to verify the legitimacy of the postcard before going to the website. He said that he was using this system to serve defendants until a clerk in West Jordan objected.

Judge Baxter asked what percentage of Mr. Gleave's service is in collections. Mr. Gleave estimated 50% to 75%. Committee members expressed concern that information provided by a defendant to a process server would be turned over to the creditor.

Mr. Andreason expressed concern that the actual defendant may not be the person downloading the files. Mr. Gleave said the system compares the SSN provided by the person responding to the postcard with the SSN provided to Mr. Gleave by the plaintiff. If the numbers do not match, the person will not receive a text with the second PIN and so cannot download the file. The postcard is mailed to the address provided by the plaintiff and will be forwarded by the Post Office.

Mr. Hafen expressed concern that the postcard included a badge and other indicators that it was from a court or a law enforcement agency.

Judge Shaughnessy said that this method of electronic service is very similar to service by mail or commercial courier. The defendant agrees to be served in this manner and provides an electronic signature. Mr. Bell asked if Mr. Gleave had ever served a corporation using this system, and Mr. Gleave responded that he had not. Mr. Slaugh said that a rule would have to be specific enough to ensure security and generic enough not to endorse any particular product.

Mr. Bell said that Mr. Gleave's letter referred to his effort with the Legislature, and asked what efforts he has made. Mr. Gleave said that he had approached Rep. Oda. Rep. Oda said that the Legislature can amend the rules, but that Mr. Gleave should first present the idea to this committee.

Mr. Hafen asked for a sense of the committee. There was consensus that the idea is worth pursuing and that Mr. Shea should draft an amendment to Rule 4 for consideration.

(3) REPORT ON UTAH DISCOVERY REFORMS

Ms. Paula Hannaford-Agor and Ms. Cynthia Lee of the National Center for State Courts reported the results of their research on the civil discovery reforms put in place in 2011.

They examined data from cases filed between January 1 and June 30, 2011—before implementation of the new rules—and between January 1 and June 30, 2012—after implementation. Because there were no tiers during the earlier timeframe, they imputed a tier based on the amount of damages claimed. They confirmed the imputed tier based on judgments in those cases. Their conclusions included:

- The changes did not result in any change in filings, positive or negative. The number of new filings has been declining in Utah since the start of the great recession, but there is no change in that trend after the new rules. Declining caseloads is a national phenomenon.
- Cases are being resolved more quickly. Time-to-disposition improved at a statistically significant level overall and in every tier and in every casetype.
- Discovery disputes have declined in number and are occurring earlier in the case.
- The percentage of self-represented litigants in tier 1 cases declined, and was not affected in tier 2 or 3.
- Compliance with the amount of standard discovery is very high. Many cases have no discovery. Compliance with discovery timelines is very low. The court is not enforcing the deadlines.
- About 75% of cases with expert discovery opted for the expert's report rather than a deposition.
- There is general agreement among lawyers that the opposing side complies with required disclosures and that disclosures and standard discovery are adequate. Favorable opinions increase for Tier 2 over Tier 1 and for Tier 3 over Tier 2.
- Positive and negative opinions about whether discovery was proportional to the case is about evenly distributed.
- There is general agreement among lawyers that discovery was not completed more quickly than under the former rules, that discovery costs were not less, and that the case was not resolved more quickly. The last is contrary to the CORIS data, but the others cannot be confirmed or challenged by CORIS data.
- The expedited discovery dispute process was viewed more favorably when CORIS confirmed that there actually was a dispute.
- There is some evidence of tier inflation, pleading a higher amount to obtain more discovery.

The committee discussed reasons why tier 2 and 3 cases have increased and tier 1 cases have declined. The committee discussed how the district court might better monitor and enforce deadlines.

(4) ADJOURNMENT

The committee deferred the remaining items on the agenda and adjourned at 6:00.

Tab 2

Utah State Courts

Tim Shea <tims@utcourts.gov>

ProMax, Migliore

4 messages

Thomas Lee <trlee@utcourts.gov> Wed, Feb 11, 2015 at 4:49 PM
To: Tim Shea <tims@utcourts.gov>

Tim:

As I mentioned earlier, the court would like to ask our appellate rules and civil rules advisory committees to consider the question whether our Utah rules should incorporate 1993 amendments to federal civil rules 54, 58, and 59 and to federal appellate rule 4 on the finality of a judgment issued while collateral matters like a motion for an award of attorney fees is pending.

Years ago, our court rejected the then-existing federal standard set forth in in *Budinich v. Becton Dickinson & Co.*, 486 U.S. 196 (1988). In *ProMax Development Corp. v. Raile*, 2000 UT 4, 998 P.2d 254, our court held that "in the interest of judicial economy, a trial court must determine the amount of attorney fees awardable to a party before the judgment becomes final for the purposes of an appeal under Utah Rule of Appellate Procedure 3." Yet *ProMax* also has a downside. Under the *ProMax* standard, the right to appeal may be extended for a long time if a collateral fee question is not immediately resolved. And *ProMax* also requires courts to decide what sorts of collateral matters should toll a judgment's finality. We dealt with that question more recently in *Migliore v. Livingston Financial*, 2015 UT 9, ¶ 20 (holding that district court's sua sponte order to show cause why borrower should not be subject to rule 11 sanctions precluded entry of final, appealable judgment on order denying renewed motion to set aside judgment until the court finally resolved the pending order to show cause, abrogating *Clark v. Booth*, 821 P.2d 1146, 1148).

In the course of our deliberations on *Migliore*, we became aware of the fact that the federal standard (set forth in *Budinich*) had been abandoned in 1993, in favor of amendments to federal civil and appellate rules. And we would like our advisory committees to consider whether they would advise us to incorporate similar changes into our rules.

As I understand the 1993 amendments, they adopted a bit of a hybrid approach. The 1993 rules were as follows:

> 1993 amendments to the Civil Rules and Appellate Rules have now caught up the suggestion that when possible, district courts should act to facilitate a single appeal that covers both disposition on the merits and disposition of attorney fee issues. New Civil Rule 54(d)(2) establishes a procedure for moving for attorney fees, and ordinarily requires that the motion be filed and served no later than 14 days after entry of judgment. Civil Rule 58 is amended to provide that if a timely Rule 54(d)(2) motion is made, the district court, “before a notice of appeal has been filed and has become effective,” may order that the attorney fee motion has the same effect on appeal time under Appellate Rule 4(a)(4) as a timely motion under Civil Rule 59. New Appellate Rule 4(a)(4)(D) suspends appeal time if the district court extends the time for appeal under Civil Rule 58. The key to this scheme thus is Civil Rule 58. A notice of appeal filed before the district court order can “become effective” if its effect is not suspended through the other provisions of Appellate Rule 4(a)(4). If the district court acts before then, the Rule 58 order suspends the time for appeal until disposition of the last outstanding motion that Rule 4(a)(4) designates as suspending appeal time. Often the attorney-fee motion will be the last motion decided, since disposition is likely to be affected by disposition of the other motions. Upon disposition of all of the Rule 4(a)(4) motions, earlier-filed notices of appeal become effective. A party who has filed an earlier notice of appeal, however, must amend the notice to support review of disposition of any of the motions—including the attorney-fee motion—or to challenge any alteration of the judgment.

Wright & Miller, Federal Practice & Procedure.

As we discussed, it may make sense for the civil and appellate rules committees to create a conference committee to consider these issues. If changes are to be made, after all, they would need to be in a single package including changes to both sets of rules.

Tab 3

Timothy M. Shea
Appellate Court Administrator

Andrea R. Martinez
Clerk of Court

Supreme Court of Utah
450 South State Street
P.O. Box 140210
Salt Lake City, Utah 84114-0210

Appellate Clerks' Office
Telephone 801-578-3900
Fax 801-578-3999

February 18, 2015

To: Civil Rules Committee
From: Tim Shea
Re: Comments to Rule 7, Rule 54, Rule 56 and Rule 58A

The committee published the attached rules for comment. They are ready for your recommendations to the Supreme Court. The comments also are attached.

The font size in the drafts published for comment was increased, resulting in different line-wraps, so the references in the comments to line numbers will not necessarily correspond to the line numbers in the attached rules. The paragraph references should match. The line references in this memo refer to the attached rules.

In an attempt to save a little time I have already proposed some further changes in response to some comments. I have indicated these by striking through the comment. Some of the further changes are a little more substantive than others.

We received several comments to Rule 101, but I have not attached them or the draft rule. I have asked Commissioner Blomquist and her workgroup to consider the comments and make recommendations.

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

There was universal disagreement with the proposed page limit on motions and memorandums. The committee's approach was to increase the limit and include nearly all parts of a motion or memorandum in calculating that limit. The objective was to impose discipline, but not at the expense of numerous motions for overlength memorandums.

Some commentators suggest text similar to the local federal rule, excluding sections from the count: "All motions that are not listed above must not exceed ten (10) pages, exclusive of any of the following items: face sheet, table of contents, statement of precise relief sought and grounds for relief, concise introduction and/or background section, statements of issues and facts, and exhibits."

Others suggest returning to the current text, expressly including particular sections: "shall not exceed 10 pages of argument" (5 pages of argument for a reply). If a change is needed, I believe this is the simpler approach.

Mr. Sipos claims there is a problem with parties presenting arguments in the non-argument sections. If this is a problem, neither of the suggested alternatives would address it; only limiting the total number of pages as we have suggested would address it.

Paragraph (f). Mr. Pattison and Mr. Whittaker as well as Mr. Havas and Mr. Simmons observe that we included a process for responding to an objection to evidence raised in the reply brief, but we have not included a process for objecting to new evidence raised in the reply brief. Similarly, if there is an objection to evidence in the reply memorandum,

there should be a process for responding to the objection. Mr. Sipos observes that there is no page limit for responses. I have added proposed text to address these points.

Paragraph (g). Mr. Sipos also suggests that there are circumstances in which the request to submit for decision need not be filed by the moving party. It may be a hyper-technical observation, but perhaps the provision should be something closer to:

> When briefing is complete or the time for briefing has expired, either party may file a "Request to Submit for Decision, but, if no party files a request, the motion will not be submitted for decision.

Paragraph (i). Mr. Sipos observes that the rule requires "the response must comply with this paragraph," but the paragraph does not impose requirements that would be relevant to the response. He is probably correct. And no one has raised the point but paragraph (i) requires that the supplemental authority be cited without argument, but then permits the party to state "the reason the authority is relevant," which sounds like making an argument.

Paragraph (l). Mr. Whittaker suggests changing from "ex parte" motions to "a motion to be granted without awaiting the response of other parties." The current rule and so our proposed redraft are expressed as ex parte motions—motions that do not have to be served on the other parties. Mr. Whittaker's language describes a different circumstance—motions that must be served but can be decided without waiting for a response. If the latter circumstance is the committee's target, I recommend a further change.

Paragraph (m). Mr. Pattison observes that the rule prohibits motions to strike evidence from a motion or memorandum, but we have not addressed motions to strike the memorandum itself for a procedural deficiency.

Rule 54. Judgment; costs.

Mr. Whittaker suggests removing the proposed new text "that adjudicates all claims and the rights and liabilities of all parties or any other order" from paragraph (a). He says that it is redundant of lines 14-18 and contradicts line 11. The proposed new text is not redundant of lines 14-15, but rather the obverse, defining what is a judgment rather than what is not. If that were all, it would probably be OK.

However, I believe his observation that the proposed new text is contrary to line 11 has merit. We have proposed an amendment defining "judgment" as any order that adjudicates all claims and the rights and liabilities of all parties. But line 11 says a court can enter judgment for "fewer than all of the claims or parties…." Even though a condition follows—"only if the court expressly determines that there is no just reason for delay"—the court is permitted in line 11 to enter a judgment that does not meet the definition in paragraph (a). The committee's intent in proposing the new text was to try to avoid circular references: "What is a judgment? An order that can be appealed. What can be appealed? A judgment." However, I believe Mr. Whittaker's observation has merit, and I recommend that we not add the proposed new language.

I have already made the other changes that Mr. Whittaker suggests.

I also believe that the comments by Mr. Havas and Mr. Simmons have merit, but I do not know how to address them. The committee decided to delete paragraph (e) because the process described is not being followed. There was no intent to eliminate costs and interest from the judgment.

The issue appears to be how to describe the process by which costs and interest are included in the judgment. The federal rule is no help. It says simply "The clerk may tax

costs on 14 days' notice. On motion served within the next 7 days, the court may review the clerk's action."

Rule 56. Summary judgment.

Mr. Sipos recommends 28 days in which to respond to a motion for summary judgment instead of 14. The time allowed under the current rule is 14 days.

Mr. Sipos recommends that 25 pages be allowed for motions for summary judgment and opposing memorandums. The committee considered such a proposal several years ago, and it was rejected by the Supreme Court at the request of the district court judges. The 15-page limit proposed in Rule 7 might be too restrictive, but the limit for a motion and opposing memorandum under Rule 56 should be the same as for other motions.

In paragraphs (a)(1) and (a)(2), Mr. Sipos recommends replacing the initial words "Instead of" with "In addition to." The purpose of "instead of" is to replace a requirement in Rule 7 for motions generally with a more specific requirement for motions for summary judgment. The suggested change would add requirements.

Paragraph (c)(2) is based on FRCP(c)(2), but if Mr. Sipos' observation has merit, we could add "admissible evidence was not identified in the motion."

Paragraph (f)(2) is the same as FRCP 56(f)(2).

Rule 58A. Entry of judgment; abstract of judgment.

Mr. Whittaker suggests combining paragraphs (a) and (b) and renumbering them (a)(1) and (a)(2). This is a legitimate alternative, but seems not to add substantive value. He also suggests not describing the process for preparing a proposed judgment in so much detail and instead refer to the process for preparing a proposed order established in Rule 7. The processes are essentially the same, but the committee considered both options and decided on the current draft.

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

(a) Pleadings. Only these pleadings are allowed:

(a)(1) a complaint;

(a)(2) an answer to a complaint;

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

(a)(4) an answer to a crossclaim;

(a)(5) a third-party complaint;

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

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

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

(b)(1) A motion made in proceedings before a court commissioner must follow Rule 101.

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

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

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

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

(c) Name and content of motion.

(c)(1) The rules governing captions and other matters of form in pleadings apply to motions and other papers. The moving party must title the motion substantially as: "Motion [short phrase describing the relief requested]." Unless permitted by the court, the motion, which shall include the supporting memorandum, may not exceed 15 pages, not counting the attachments. The motion must include under appropriate headings and in the following order:

(c)(1)(A) a concise statement of the relief requested and the grounds for the relief requested; and

(c)(1)(B) one or more sections that include a concise statement of the relevant facts claimed by the moving party and argument citing authority for the relief requested.

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

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

(d)(1) A nonmoving party may file a memorandum opposing the motion within 14 days after the motion is filed. The nonmoving party must title the memorandum substantially as: "Memorandum opposing motion [short phrase describing the relief requested]." Unless permitted by the court, the

memorandum may not exceed 15 pages, not counting the attachments. The memorandum must include under appropriate headings and in the following order:

(d)(1)(A) a concise statement of the party's preferred disposition of the motion and the grounds supporting that disposition;

(d)(1)(B) one or more sections that include a concise statement of the relevant facts claimed by the nonmoving party and argument citing authority for that disposition; and

(d)(1)(C) objections to evidence in the motion, citing authority for the objection.

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

(e) Name and content of reply memorandum.

(e)(1) Within 7 days after the memorandum opposing the motion is filed, the moving party may file a reply memorandum, which must be limited to rebuttal of new matters raised in the memorandum opposing the motion. The moving party must title the memorandum substantially as "Reply memorandum supporting the motion [short phrase describing the relief requested]." Unless permitted by the court, the memorandum may not exceed 5 pages, not counting the attachments. The memorandum must include under appropriate headings and in the following order:

(e)(1)(A) a concise statement of the new matter raised in the memorandum opposing the motion;

(e)(1)(B) one or more sections that include a concise statement of the relevant facts claimed by the moving party not previously set forth that respond to the opposing party's statement of facts and argument citing authority rebutting the new matter;

(e)(1)(C) objections to evidence in the memorandum opposing the motion, citing authority for the objection; and

(e)(1)(D) response to objections made in the memorandum opposing the motion, citing authority for the response.

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

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

(g) Request to submit for decision. When briefing is complete or the time for briefing has expired, either party may and the moving party must file a "Request to Submit for Decision." The request to submit for decision must 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.

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

(i) Notice of supplemental authority. A party may file notice of citation to significant authority that comes to the party's attention after the party's motion or memorandum has been filed or after oral argument but before decision. The notice must state—without argument—citation to the authority, the page of the motion or memorandum or the point orally argued to which the authority applies, and the reason the authority is relevant. Any other party may promptly file a response, but the court may rule on the motion without a response. The response must comply with this paragraph.

(j) Orders.

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

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

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

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

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

(j)(5)(A) after all other parties have approved the form of the order (The party preparing the proposed order must indicate the means by which approval was received: in person; by telephone; by signature; by email; etc.);

(j)(5)(B) after the time to object to the form of the order has expired (The party preparing the proposed order must also file a certificate of service of the proposed order.); or

(j)(5)(C) within 7 days after a party has objected to the form of the order (The party preparing the proposed order may also file a response to the objection.).

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

(j)(6)(A) a stipulated motion;

(j)(6)(B) an ex parte motion;

(j)(6)(C) an expedited statement of discovery issues under Rule 37(b); and

(j)(6)(D) the request to submit for decision a motion in which a memorandum opposing the motion has not been filed.

(j)(7) Ex parte orders. Except as otherwise provided by these rules, an order made without notice to the other parties can be vacated or modified by the judge who made it with or without notice.

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

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

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

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

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

(k)(4) be accompanied by a proposed order that has been approved by the other parties.

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

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

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

(l)(3) include the statute or rule authorizing the ex parte motion; and

(l)(4) be accompanied by a proposed order.

(m) Motion in opposing memorandum or reply memorandum prohibited. A party may not make a motion in a memorandum opposing a motion or in a reply memorandum. A party who objects to evidence in another party's motion or memorandum may not move to strike that evidence. The proper procedure is to include in the subsequent memorandum an objection to the evidence.

(n) Over-length motion or memorandum. The court may permit a party to file an over-length motion or memorandum upon ex parte motion and a showing of good cause. An over-length motion or memorandum must include a table of contents and a table of authorities with page references.

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

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

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

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

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

(o)(5) motion to substitute parties;

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

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

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

Advisory Committee Notes [Add to existing notes]

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

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

In *Central Utah Water Conservancy District v. King*, 2013 UT 13 ¶27; the Supreme Court directed the committee to address the problem of undue delay when the parties fail to comply with former Rule 7(f)(2). A major objective of the 2015 amendments is to continue the policy of clear expectations of the parties established in:

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

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

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

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

The 2015 amendments continue the policy of a bright-line test for a completed decision but do not rely on conditions that might or might not be met. The one condition that can be counted on is the judge's signature. Under the former rule, a completed decision was imposed by operation of law when the order was prepared in one of the recognized ways. The 2015 rule imposes a completed decision by operation of law when the document memorializing the decision is signed. Under the former rule, the judge's silence meant that something further was required, unless the order was prepared in one of the ways described in Rule 7. The presumption in the 2015 amendments is the opposite: silence means that nothing further is required from the parties. Judges can expressly require an order confirming a decision if one is needed in a particular case.

The committee recognizes the many different forms a judge's decision might take. The committee discussed defining "order," but decided against the attempt. There are too many variations. If written, the document might be titled "order," "ruling," "opinion," "decision," "memorandum decision," etc. The decision might not be written; an oral directive is an order. A clerk's minute entry of an oral decision is, when signed by the judge, treated the same as a written order. The committee decided instead to modify a phrase of long standing from Rule 54(b)—"a decision, however designated"—in this rule and in Rule 58A. In this rule, however a judge's decision may be designated, that decision is complete when the judge signs the document memorializing the decision. Whether there is a right to appeal is determined by whether the decision—or subsequent order confirming the decision—is a judgment. That analysis is governed by Rule 54. When the judgment is entered is governed by Rule 58A. If the order is not a judgment, the time in which to petition for permission to appeal under Rule of Appellate Procedure 5 is calculated from the date on which an order confirming an earlier decision is entered, but only if the judge directs that a confirming order be prepared. If the judge does not direct that a confirming order be prepared, the time is calculated from the date on which the decision, however designated, is entered.

Rule 54. Judgments; costs.

(a) Definition; form. "Judgment" as used in these rules includes a decree ~~and any~~ or order that adjudicates all claims and the rights and liabilities of all parties or any other order from which an appeal of right lies. A judgment ~~need~~ should not contain a recital of pleadings, the report of a master, or the record of prior proceedings. ~~Judgments shall state whether they are entered upon trial, stipulation, motion or the court's initiative; and, unless otherwise directed by the court, a judgment shall not include any matter by reference.~~

(b) Judgment upon multiple claims and/or involving multiple parties. When an action presents more than one claim for relief ~~is presented in an action, —~~whether as a claim, counterclaim, cross claim, or third party claim~~, —~~and/or when multiple parties are involved, the court may ~~direct the entry of a final~~ enter judgment as to one or more but fewer than all of the claims or parties only ~~upon an express determination by~~ if the court expressly determines that there is no just reason for delay ~~and upon an express direction for the entry of judgment. In the absence of such determination and direction.~~ Otherwise, any order or other ~~form of~~ decision, however designated, that adjudicates fewer than all the claims or the rights and liabilities of fewer than all the parties ~~shall not terminate~~ does not end the action as to any of the claims or parties, and ~~the order or other form of decision is subject to revision~~ may be changed at any time before the entry of judgment adjudicating all the claims and the rights and liabilities of all the parties.

(c) Demand for judgment. A default judgment must not differ in kind from, or exceed in amount, what is demanded in the pleadings. Every other judgment should grant the relief to which each party is entitled, even if the party has not demanded that relief in its pleadings.

~~**(c)(1) Generally.** Except as to a party against whom a judgment is entered by default, and except as provided in Rule 8(a), every final judgment shall grant the relief to which the party in whose favor it is rendered is entitled, even if the party has not demanded such relief in his pleadings. It may be given for or against one or more of several claimants; and it may, when the justice of the case requires it, determine the ultimate rights of the parties on each side as between or among themselves.~~

~~**(c)(2) Judgment by default.** A judgment by default shall not be different in kind from, or exceed in amount, that specifically prayed for in the demand for judgment.~~

(d) Costs.

(d)(1) To whom awarded. ~~Except when express provision therefor is made either in a statute of this state or in these rules, costs shall be allowed as of course to the prevailing party unless the court otherwise directs; provided, however, where an appeal or other proceeding for review is taken, costs of the action, other than costs in connection with such appeal or other proceeding for review, shall abide the final determination of the cause.~~ Unless a statute, these rules, or a court order provides otherwise, costs should be allowed to the prevailing party. Costs against the state of Utah, its officers and agencies ~~shall~~ may be imposed only to the extent permitted by law.

(d)(2) How assessed. The party who claims ~~his~~ costs must within 14 days after the entry of judgment file and serve ~~upon the adverse party against whom costs are claimed, a copy of~~ a verified memorandum of ~~the items of his~~ costs ~~and necessary disbursements in the action, and file with the court a like memorandum thereof duly verified stating that to affiant's knowledge the items are correct, and that the disbursements have been necessarily incurred in the action or proceeding~~. A party dissatisfied with the costs claimed may, within 7 days after service of the memorandum of costs, ~~file a motion to have~~ object to the ~~bill of~~ claimed costs ~~taxed by the court~~.

(d)(3) Memorandum filed before judgment. A memorandum of costs served and filed after the verdict, or at the time of or subsequent to the service and filing of the findings of fact and conclusions of law, but before the entry of judgment, ~~shall nevertheless be considered as~~ is deemed served and filed on the date judgment is entered.

~~**(e) Interest and costs to be included in the judgment.** The clerk must include in any judgment signed by him any interest on the verdict or decision from the time it was rendered, and the costs, if the same have been taxed or ascertained. The clerk must, within two days after the costs have been taxed or ascertained, in any case where not included in the judgment, insert the amount thereof in a blank left in the judgment for that purpose, and make a similar notation thereof in the register of actions and in the judgment docket.~~

Advisory Committee Notes

In *Butler v. Corporation of The President of the Church of Jesus Christ of Latter-Day Saints*, 2014 UT 41, the Supreme Court established the requirements of a judgment entered by means of a Rule 54(b) certification:

> First, it must be entered in an action involving multiple claims or multiple parties. Second, it must have been entered on an order that would otherwise be appealable but for the fact that other claims or parties remain in the action. …. Third, the trial court, in its discretion, must make a determination that there is no just reason for delay of the appeal. *Id*. ¶28

To satisfy the second requirement, the Supreme Court in *Butler* included, in addition to the other requirements of appealability, the principle that the order must include one of the three indicia of finality imposed by former Rule 7(f)(2): a proposed order was submitted with the supporting or opposing memorandum; an order was prepared at the direction of the judge; the decision included an express indication that a further order was not required. The 2015 amendments to Rule 7 replace these indicia with the judge's signature. The 2015 amendments of Rule 7, Rule 54 and Rule 58A do not disturb the principles established in Butler; they do make simpler the task of satisfying the requirement that the interlocutory order be complete under Rule 7 before it can be certified under Rule 54.

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 moving party shows that there is no genuine dispute as to any material fact and the moving party 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 must follow Rule 7 as supplemented below.

(a)(1) Instead of a statement of the facts under Rule 7, a motion for summary judgment must contain a statement of material facts claimed not to be genuinely disputed. Each fact must 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 7, a memorandum opposing the motion must include 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 materials in the record under paragraph (c)(1) of this rule. The memorandum may contain a separate statement of additional materials facts in dispute, which must be separately stated in numbered paragraphs and similarly supported.

(a)(3) The motion and the memorandum opposing the motion may contain a concise statement of facts, whether disputed or undisputed, for the limited purpose of providing background and context for the case, dispute, and motion.

(a)(4) Each material fact set forth in the motion or in the memorandum opposing the motion under paragraphs (a)(1) and (a)(2) that is not disputed is deemed admitted for the purposes of the motion.

(b) Time to file a motion. A party seeking to recover upon a claim, counterclaim or cross-claim or to obtain a declaratory judgment may move for summary judgment at any time after service of a motion for summary judgment by the adverse party or after 21 days from the commencement of the action. A party against whom a claim, counterclaim, or cross-claim is asserted or a declaratory judgment is sought may move for summary judgment at any time. Unless the court orders otherwise, a party may file a motion for summary judgment at any time until 28 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.

(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 nonmoving party. If a nonmoving party 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 moving party 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 nonmoving party;

(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. The court may also hold an offending party or attorney in contempt or order other appropriate sanctions.

Advisory Committee Notes

The objective of the 2015 amendments is to adopt the style of Federal Rule of Civil Procedure 56 without changing the substantive Utah law. The 2015 amendments also move 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).

Rule 58A. Entry of judgment; abstract of judgment.

~~**(a) Judgment upon the verdict of a jury.** Unless the court otherwise directs and subject to Rule 54(b), the clerk shall promptly sign and file the judgment upon the verdict of a jury. If there is a special verdict or a general verdict accompanied by answers to interrogatories returned by a jury, the court shall direct the appropriate judgment, which the clerk shall promptly sign and file.~~

~~**(b) Judgment in other cases.** Except as provided in paragraphs (a) and (f) and Rule 55(b)(1), all judgments shall be signed by the judge and filed with the clerk.~~

~~**(c) When judgment entered; recording.** A judgment is complete and shall be deemed entered for all purposes, except the creation of a lien on real property, when it is signed and filed as provided in paragraphs (a) or (b). The clerk shall immediately record the judgment in the register of actions and the register of judgments.~~

(a) Separate document required. Every judgment and amended judgment must be set out in a separate document ordinarily titled "Judgment"—or, as appropriate, "Decree."

(b) Separate document not required. A separate document is not required for an order disposing of a post-judgment motion:

(b)(1) for judgment under Rule 50(b);

(b)(2) to amend or make additional findings under Rule 52(b);

(b)(3) for a new trial, or to alter or amend the judgment, under Rule 59; or

(b)(4) for relief under Rule 60.

(c) Preparing a judgment.

(c)(1) Preparing and serving a proposed judgment. The prevailing party or a party directed by the court must prepare and serve on the other parties a proposed judgment for review and approval as to form. The proposed judgment shall be served within 14 days after the jury verdict or after the court's decision. If the prevailing party or party directed by the court fails to timely serve a proposed judgment, any other party may prepare a proposed judgment and serve it on the other parties for review and approval as to form.

(c)(2) Effect of approval as to form. A party's approval as to form of a proposed judgment certifies that the proposed judgment accurately reflects the verdict or the court's decision. Approval as to form does not waive objections to the substance of the judgment.

(c)(3) Objecting to a proposed judgment. A party may object to the form of the proposed judgment by filing an objection within 7 days after the judgment is served.

(c)(4) Filing proposed judgment. The party preparing a proposed judgment must file it:

(c)(4)(A) after all other parties have approved the form of the judgment; (The party preparing the proposed judgment must indicate the means by which approval was received: in person; by telephone; by signature; by email; etc.)

(c)(4)(B) after the time to object to the form of the judgment has expired; (The party preparing the proposed judgment must also file a certificate of service of the proposed judgment.) or

(c)(4)(C) within 7 days after a party has objected to the form of the judgment. (The party preparing the proposed judgment may also file a response to the objection.)

(d) Judge's signature; judgment filed with the clerk. Except as provided in paragraph (h) and Rule 55(b)(1), all judgments must be signed by the judge and filed with the clerk. The clerk must promptly record all judgments in the docket.

(e) Time of entry of judgment.

(e)(1) If a separate document is not required, a judgment is complete and is entered when it is signed by the judge and recorded in the docket.

(e)(2) If a separate document is required, a judgment is complete and is entered at the earlier of these events:

(e)(2)(A) the judgment is set out in a separate document signed by the judge and recorded in the docket; or

(e)(2)(B) 150 days have run from the clerk recording the decision, however designated, that should have prompted the separate document.

~~**(d)**~~ **(f) Notice of judgment.** The party preparing the judgment shall promptly serve a copy of the signed judgment on the other parties in the manner provided in Rule 5 and promptly file proof of service with the court. Except as provided in Rule of Appellate Procedure 4(g), the time for filing a notice of appeal is not affected by this requirement.

~~**(e)**~~ **(g) Judgment after death of a party.** If a party dies after a verdict or decision upon any issue of fact and before judgment, judgment may nevertheless be entered.

~~**(f)**~~ **(h) Judgment by confession.** If a judgment by confession is authorized by statute, the party seeking the judgment must file with the clerk a statement, verified by the defendant, ~~to the following effect~~ as follows:

~~(f)(1)~~ (h)(1) If the judgment is for money due or to become due, ~~it shall~~ the statement must concisely state the claim and that the specified sum is due or to become due.

~~(f)(2)~~ (h)(2) If the judgment is for the purpose of securing the plaintiff against a contingent liability, ~~it~~ the statement must state concisely the claim and that the specified sum does not exceed the liability.

~~(f)(3) It~~ (h)(3) The statement must authorize the entry of judgment for the specified sum.

The clerk ~~shall~~ must sign ~~and file~~ the judgment for the specified sum~~, with costs of entry, if any, and record it in the register of actions and the register of judgments~~.

~~**(g)**~~ **(i) Abstract of judgment.** The clerk may abstract a judgment by a signed writing under seal of the court that:

~~(g)(1)~~ (i)(1) identifies the court, the case name, the case number, the judge or clerk that signed the judgment, the date the judgment was signed, and the date the judgment was recorded in the registry of actions and the registry of judgments;

~~(g)(2)~~ (i)(2) states whether the time for appeal has passed and whether an appeal has been filed;

~~(g)(3)~~ (i)(3) states whether the judgment has been stayed and when the stay will expire; and

~~(g)(4)~~ (i)(4) if the language of the judgment is known to the clerk, quotes verbatim the operative language of the judgment or attaches a copy of the judgment.

Advisory Committee Note

The 2015 amendments to Rule 58A adopt the requirement, found in Rule 58 of the Federal Rules of Civil Procedure, that a judgment be set out in a separate document. In the past, problems have arisen when the district court entered a decision with dispositive language, but without the other formal elements of a judgment, resulting in uncertainty about whether the decision started the time for appeals. This problem was compounded by uncertainty under Rule 7 about whether the decision was the court's final ruling on the matter or whether the prevailing party was expected to prepare an order confirming the decision.

The 2015 amendments of Rule 7, Rule 54 and Rule 58 are intended to reduce this confusion by requiring "that there be a judgment set out on a separate document—distinct from any opinion or memorandum—which provides the basis for the entry of judgment." See Advisory Committee Notes to 1963 Amendments to Fed. R. Civ. P. 58. Courts and practitioners are encouraged to use appropriate titles with separate documents intended to operate as judgments, such as "Judgment" or "Decree," and to avoid using such titles on documents that are not appealable. The parties should consider the form of judgment included in the Appendix of Forms. On the question of what constitutes a separate document, the Committee refers courts and practitioners to existing case law interpreting Fed. R. Civ. P. 58. For example, *In re Cendant Corp.*, 454 F.3d 235, 242-244 (3d Cir. 2006) offers three criteria:

1) the judgment must be set forth in a document that is independent of the court's opinion or decision;

2) it must contain ordering clauses stating the relief to which the prevailing party is entitled, and not merely refer to orders made in other documents or state that a motion has been granted; and

3) it must substantially omit recitation of facts, procedural history, and the reasons for disposing of the parties' claims.

While "some trivial departures" from these criteria—such as a one-sentence explanation of reasoning, a single citation to authority, or a reference to a separate memorandum decision—"must be tolerated in the name of common sense," any explanation must be "very sparse." *Kidd v. District of Columbia*, 206 F.3d 35, 39 (D.C. Cir. 2000).

The concurrent amendments to Rule 7 remove the separate document requirement formerly applicable to interlocutory orders. Henceforward, the separate document requirement will apply only to judgments, a change that should reduce the tendency to confuse judgments with other orders. Rule 7 has also been amended to modify the process by which orders on motions are prepared. The process for preparing judgments is the same.

Under amended Rule 7(j), a written decision, however designated, is complete—is the judge's last word on the motion—when it is signed, unless the court expressly requests a party to prepare an order confirming the decision. But this should not be confused with the need to prepare a separate judgment

when the decision has the effect of disposing of all clams in the case. If a decision disposes of all claims in the action, a separate judgment is required whether or not the court directs a party to prepare an order confirming the decision.

Rule 58A is similar to Fed. R. Civ. P. 58 in listing the instances where a separate document is not required. The state rule differs from the federal rule regarding an order for attorney fees. Fed. R. Civ. P. 58 includes an order for attorney fees as one of the orders not requiring a separate document. That particular order is omitted from the Utah rule because under Utah law a judgment does not become final for purposes of appeal until the trial court determines attorney fees. See *ProMax Development Corporation v. Raile*, 2000 UT 4, 998 P.2d 254. See also Utah Rule of Appellate Procedure 4, which states that the time in which to appeal post-trial motions is from the disposition of the motion.

State Rule 58A is also similar to Fed. R. Civ. P. 58 in determining the time of entry of judgment when a separate document is required but not prepared. This situation involves the "hanging appeals" problem that the Supreme Court asked this Committee to address in *Central Utah Water Conservancy District v. King*, 2013 UT 13, ¶27. Under the 2015 amendments, if a separate document is required but is not prepared, judgment is deemed to have been entered 150 days from the date the decision—or the order confirming the decision—was entered on the docket.

COMMENTS: RULES OF CIVIL PROCEDURE

(1) RULE 7

~~Line 6: hyphenate "cross-claim"~~

~~Lines 7-8: Hyphenate "third-party"~~

~~Line 7: Missing a semicolon at the end of the line~~

~~Line 9: Change "permitted" to "ordered," as a request to file a reply is nearly always made by the Defendant. See 5 Wright & Miller, Federal Practice & Procedure § 1185 (noting that while "theoretically it is permissible for the plaintiff to request the court for leave to reply on his or her own behalf," it is normally "the defendant who will seek to compel the plaintiff to reply to the answer").~~

~~Lines 10-12: consider deleting the comma between "writing" and "unless" as it divides the first condition in two and isn't necessary to clarify the meaning of the sentence.~~

Line 13: Consider replacing the final period with a colon so that it's clearer that "the following" refers to (b)(1)-(5).

Lines 14-15: It is my understanding that court commissioners currently follow the procedures of UCJA 4-502 rather than Rule 101 with respect to discovery motions. Perhaps this should be made clear either here or in the notes to Rule 37 or 101.

~~Lines 17, 20, & 22: Delete "statement of"~~

Lines 21-22: Delete, as a motion to quash a subpoena is a motion for protective order (as made clear by the notes to Rule 45).

Lines 16-20: Consider consolidating these, for example: "A request under Rule 26 for extraordinary discovery and a request under Rule 37 for a protective order or for an order compelling disclosure or discovery must follow the expedited discovery procedures of Rule 37(a)."

~~Line 24: delete comma between "rule" and "supplemented" and replace with "as."~~

Line 25: replace with "(c) Written motion" or "(c) Briefing of motion" or "(c) Filing of motion."

Lines 26-27: Delete "The rules governing captions and other matters of form in pleadings apply to motions and other papers" as it is redundant with Rule 10(a)(1) ("All pleadings and other papers filed with the court must contain a caption…").

Lines 29-30: delete "which shall include the supporting memorandum" as it is redundant with the requirements of (c)(1)(A)-(B).

Lines 30 & 46: replace "may not" to "must not"

~~Lines 31, 46, 66: Replace "the appendix" with "exhibits"~~ <u>("attachments")</u>

Line 41: replace with "(d) Response"

Lines 42, 60 & 62: replace "memorandum opposing" with "response to"

Line 44: replace with "response substantially as: "Response to motion [short"

Lines 47 & 58: replace "memorandum" with "response"

Line 59: Replace with "(e) Reply."

Lines 61, 64: delete "memorandum"

Lines 65, 66, 79 replace "memorandum" with "reply"

~~Lines 80-83: what about objections to evidence cited in the reply memorandum & responses to those objections? Also, does an objection to evidence in the reply affect the completeness of the briefing for purposes of filing a Request to Submit?~~

Line 84: consider adding “Except for those papers described in (c)-(f) and (i) of this rule, a paper addressing the motion must not be filed unless permitted by the court.” Also consider addressing when briefing is complete.

Lines 91-93: Consider adding “or by filing a written request for hearing within 3 days of filing the request to submit.” Currently, the rule reads as though a separate request for hearing is not allowed.

Line 109: Consider moving “however designated” between “motion” and “is complete”

Line 110: consider adding “it is complete and” between “when” and “recorded” to remove any possible confusion that an unsigned minute entry recorded in the docket is “entered.”

~~Line 112: change “shall” to “must”~~

~~Lines 127, 131, 135: move semicolons and period to end of parentheses—see Chicago Manual of Style 6.103 (advising that an opening parenthesis should be preceded by a semicolon only if it is a number marker such as (a) or (1), and that a period follows the closing parenthesis if the material in parentheses is part of the sentence outside of the parentheses).~~

Lines 138-39: consider deleting “except as follows” and changing “decision. A” to “decision, but a”

Line 146: replace “memorandum opposing” with “response to”

Line 150: consider changing “can be enforced” to “is enforceable”

Line 161-62: consider changing “a motion to be filed without serving the motion on the other parties” to “a motion to be granted without awaiting the response of other parties”

Lines 170-75: consider moving the first sentence into (c)(3) and replace “memorandum opposing a motion or in a reply memorandum” with "response or reply.” Consider moving the second and third sentences to the notes, as the proper procedure is laid out in (d)(1)(C), (e)(1)(C), and (f).

Lines 176-79: Consider setting a number of pages rather than requiring all memoranda—a 10-page reply does not need tables of contents and authorities if a 15-page memorandum in opposition does not. Perhaps insert “exceeding 15 pages” between “memorandum" and “must”

Lines 180-193: consider deleting entirely, as it seems likely that the appropriate amount of detail will be provided in these motions with or without this provision. Alternatively, consider moving into (c) as (c)(3) or (4).

Lines 267-270: I’m not sure this squares with the language of (j)(1)—the rule does not state that the decision is not final if the judge signs a decision that calls for a further order to be prepared. This may lead to confusion as demonstrated by Merchant v. Gray, 2007 WY 208, ¶¶ 5-10, 173 P.3d 410 (Wyo. 2007) (holding that an order that resolved the issues in the case was a final order notwithstanding the judge’s direction in the order for a separate judgment to be prepared). It may be wise to state the exception in (j)(1).

Line 272: Consider adding an explanation to the effect of “if a decision is announced but not signed by the judge and no party is directed to prepare an order, the prevailing party or any party interested in finality may prepare an order.”

Nathan Whittaker

The prohibition in Rule 7(m) against a separate motion to strike evidence does not take into account the fact that frequently supporting affidavits and other evidentiary material are voluminous or otherwise raise numerous issues which require a separate motion to strike to properly address. In such cases, there is simply not enough space in 15 pages to present the facts and procedural history, both argue the facts

and law, and then also argue whether the alleged facts are admissible or otherwise implicate other evidentiary issues.

And I second the comment which stated that the facts section of a memorandum should not be included in the page count --whether that page count be 10 or 15 pages.

We hear the repeated refrain from Utah appellate decisions that a party has waived any objection to an affidavit because no motion to strike was made. So long as the appellate courts are going to deem issues not raised at the trial level waived, prohibiting a separate motion to strike hobbles the ability of a party to effectively address the issues raised by an opponent's evidentiary submissions and effectively invites a party to engage in sandbagging in presenting evidence.

Restated, a party will know that they can through the clever use of evidence supporting a motion put the opposing party in the position of having to argue the facts and the law or argue that the facts are not admissible, and forego any substantial legal argument on the merits. This is not an improvement.

And when considered in light of the 2011 amendments, which severely constrain written discovery in Tier I cases and limit a party to a 3 hour deposition, the concerns recited above about limiting the ability of a party to contest the other party's evidence become even more critical.

Case in Tier II or III will have the luxury of interrogatories, lengthier document requests and much more generous deposition time to inquire into the merits of the other party's evidentiary assertions. But cases in Tier I, which are dominated by working people defending against debt collectors who all too frequently are making unfounded claims, or working people who have been ripped off by a dishonest car dealer, will find it even more difficult to defend or prosecute these cases.

To a person making $12 or $20 or $30 an hour a $10,000 claim can be every bit as life changing as a $500,000 claim can be to a person with an income well into the six figures. We should not move toward the English system where litigation in the courts is (like polo), for the most part, the province of the upper class.

Article I, Section 11 of the Utah Constitution states that the courthouse door is open to be open to everyone. The presumption that in civil cases the dollar value of a claim should be the dominant factor in deciding how much process is due a person runs afoul of the fundamental principles of the Utah Constitution.

In that light, prohibiting separate motions to strike is another step in unduly constraining access to the courthouse by those who are too often the subject of deceptive practices by interests with much greater financial means.

Posted by Ronald Ady January 16, 2015 05:05 PM

~~The page limitations in rule 7 (R. 7(c)(1), (d)(1), & (e)(1)) refer to "the appendix," but nowhere is "the appendix" defined. What is to be included in "the appendix"? any exhibits to the motion or memorandum?~~

The page limitations in the current rule (10 pages for initial memoranda and 5 pages for reply memos) apply only to the argument and not to any introduction, statement of issues, statement of facts, or the conclusion. We would like to see the current page limitations stay the same. The statement of facts can be the longest part of the brief, particularly for summary judgment motions. If the statement of facts exceeds 5 pages (which will often be the case), the party will have less than 10 pages to make its argument and set out the relevant legal authority. This is especially true under the proposed rule because the motion and memorandum, which previously were two separate documents, are now combined, so the motion takes away from the page limit for the memorandum. We think changing the page limitations as proposed will result in many more motions for over-length motions and memos.

~~The provision for reply memoranda says that the reply memo should include "one or more sections that include a concise statement of the relevant facts claimed by the moving party and argument citing authority rebutting the new matter." R. 7(e)(1)(B). The moving party's statement of facts is supposed to be~~

~~included in the moving papers. R. 7(c)(1)(B). We don't see any reason to include it again in the reply memo. Doing so would only reduce further the 5 available pages. We think what was probably intended here was any relevant facts not previously set out, that is, facts that respond to the opposing party's statement of facts. But that is not clear from the way the proposed rule is currently drafted.~~

~~The proposed rule follows the federal local rule by doing away with motions to strike evidence. It allows the opposing party to object to evidence in the moving party's moving papers (R. 7(d)(1)(C)), and allows the moving party to object to evidence in the opposing party's opposition (R. 7(e)(1)(C)). It also allows the nonmoving party to file a response to an objection made in a reply memo. R. 7(f). But there is no provision for the nonmoving party to object to new evidence that the moving party may present for the first time in the reply memo, and proposed rule 7(e)(2) contemplates such evidence. Without such a provision, the moving party can rely on new, inadmissible evidence in its reply memorandum, and there is no way for the nonmovant to challenge the evidence, since proposed rule 7(m) does away with motions to strike evidence in a motion or memorandum.~~

Presumably, objections to evidence in a memorandum are included in the page limit for the memo. If so, that also counsels in favor of more generous page limitations. The whole 5 pages of a reply memo could easily be taken up with objections to the non-moving party's evidence and responses to the non-moving party's objections to the movant's evidence.

Utah Association for Justice

By Edward B. Havas and Paul M. Simmons

Posted by Utah Association for Justice, by Ed Havas and Paul Simmons January 16, 2015 02:03 PM

Rule 7(j)(2):

~~The first sentence says that "a party shall within 14 days prepare a proposed order confirming the court's decision...." As written, it is unclear what the triggering event is for the 14-day deadline. To avoid confusion, we request that the Court amend the Rule to explicitly state the triggering event. For example, if the triggering event is the entry of the court's decision, the Rule would be amended to say that "a party shall within 14 days of the entry of the court's decision prepare a proposed order confirming the decision...."~~

Posted by Victoria Katz January 12, 2015 10:37 AM

Many statutes state a case needs to be filed with a petition. The Rule 7 change seems to mandate only a complaint. Will labeling an initial pleading a Petition be allowed?

Posted by Waine Riches December 17, 2014 03:37 PM

The 15 page limitation should not include the fact section. the current rule only counts the argument section and this should be continued. Often times the fact section takes up a significant number of pages which then hinders the ability to present the argument.

Posted by David A Van Dyke December 11, 2014 09:59 AM

Rule 7 has been changed so that the trigger for the time to reply to a motion is the filing of that motion, rather than the service of the motion. As it stands the court's e-filing system is not programmed to notify the parties of a paper filing at the courthouse from a pro se party. If the pro se party neglects to timely serve a copy of the paper, the other party (whether represented or pro se) may be at a time

disadvantage if/when that party gets notice of the filing. It may be wise to delay this particular change until the courts can resolve this technical issue.

Posted by Chip Shaner December 10, 2014 03:21 PM

Rule 7(j)(5)(A)

It doesn't seem wise to allow approval as to form in person or on the phone as there is nothing in writing to confirm it.

Posted by Justin Caplin December 10, 2014 12:32 PM

Comments to proposed Rule 7:

1. Thank you for combining the motion and memorandum in one document. This change should eliminate waste and streamline the motion process.

2. Rule 7(b) – and by extension Rule 37(a) and Rules of Judicial Administration Rule 4-502. I recommend you include in the 7(b) list a discovery statement pursuant to Rules of Judicial Administration Rule 4-502. Of course, that raises the separate issue of what is a Rule 40592 discovery statement? Is it a motion at all? It is a "request for an order" as referenced in Rule 7(b). Perhaps this might be a good time to also address the difference between a 4-502 discovery statement and a Rule 37 motion.

3. Rule 7(c). I believe it's good to get away from the current rule's "10 pages of argument" formulation, which resulted in sometimes endless amounts of so-called non-argument. But I wonder if the 15 page total swings the pendulum too far the other way. It is a burden on parties and courts to request additional pages and often a court does not rule on the request before the deadline to file the document. Federal local rule DUCivR 7-1(3) allows a bit more flexibility with different types of motions and by excluding certain items from the page count. You may want to consider adopting language from DUCivR 7-1(3). On one hand, it would add complexity to the rule, but on the other, it would help reinforce that motions should follow a distinct pattern of sections. Also, allowing additional pages for Rule 12 and 56 motions should eliminate a foreseeable wave of ex parte motions for over-length briefs under proposed Rule 7(n).

4. Rule 7(e). The 5 page limitation on a reply brief seems excessively tight if a moving party is required to include in those pages a full response to facts contained in the opposition memorandum. I believe the "5 pages of argument" in the reply formulation was more difficult to abuse than the "10 pages of argument" formulation with original memoranda. Please do not require parties to respond to both facts and legal arguments in only 5 pages. Please increase this to 10 pages or exclude from the 5 page limitation a moving party's response to fact sections.

5. Rule 7(f). While you place a 5 page limit on a reply brief, there is apparently no size limitation whatsoever on the non-moving party's response to objections in the reply. Rule 7(f) should adopt the size limitations of Rule 7(e).

6. Rule 7(g). I recommend striking "and the moving party must" from the first sentence. It has always baffled me why the rule requires the moving party to file a request to submit for decision (RTS), even if the non-moving party files an RTS. What if following briefing the moving party elects to no longer pursue the motion? The final sentence of the subsection contemplates non-compliance by stating that "if no party files a request, the motion will not be submitted for decision." If this is the consequence, why even mandate the moving party to file a RTS in the first place? Federal local rule DICivR7-3 has a more rational formulation of the rule that does not mandate either party to file a RTS.

7. Rule 7(i). The last sentence of this rule states that "the response must comply with this paragraph." But what in the paragraph is the response to comply with? The instructions do not have a page limit. Is the response also required to cite to page numbers in the motion or memo? If so, that

seems strange. It seems the response should succinctly address items in the notice of supplemental authority.

8. Rule 7(j)(1). From the Advisory Comm. Notes, I see you contemplated how to address this, but I'm still confused by what it means if a court rules on a motion from the bench but there is no signature. I'm sometimes left wondering what it means to have a signature at all. I've seen decisions recorded in the docket (i.e., visible on XChange) but does that constitute a judge's signature? Is it possible to have a decision that is entered for years without a completed decision? In other words, can the second sentence of this subsection apply independent of the first sentence?

9. Rule 7(j)5)(A). How is the party supposed to indicate the means by which approval was received? Should this be a notation next to an e-signature? Or if another person provides a signature by fax, is the party supposed to interlineate on that document before filing that it was received by fax? I am assuming this refers to the practice of placing information next to an /s/ e-signature. If so, I recommend some guidance in the rules for how authority to sign e-signatures for others should be documented.

10. Rule 7(j)(5)(B). Is the party that circulates the proposed order supposed to file the certificate of service at the time of service, or only in the event that a party objects to the proposed order?

11. Rule 7(j)(6)(c). The current version of Rule 37(b) does not appear to be an expedited statement of discovery issues. Did you describe this citation to 37(b) correctly?

Posted by Victor Sipos December 2, 2014 05:46 PM

~~For Rule 7, line 123, I suggest saying "within 7 days after the PROPOSED order . . . ." That would avoid confusion as to whether the objection deadline extends to after the court signs the order.~~

~~For Rule 7, line 217, there is an extra "of the" that needs to be deleted.~~

Posted by Wayne Klein December 2, 2014 08:28 AM

The language in Rule 7(e)(1) which limits reply memoranda "to rebuttal of new matters raised in the memorandum opposing the motion" is confusing. Presumably a memorandum in opposition will address the arguments presented in an opening memorandum, and a reply is allowed to respond to those arguments. What are "new matters" as contemplated by the Rule? Is the rule meant to limit reply memoranda unless a memorandum in opposition raises some "new" argument not raised in the opening memorandum? If this is the intent of the Rule, and it seems to be, it will eliminate an opportunity for the moving party to distill the issues for the reviewing court, which I think is a bad idea.

Posted by Robert Keller December 1, 2014 11:13 AM

~~It is not clear what the appendix is. Is it the exhibits attached to the motion?~~ Also, the rule allows parties to rebut facts or object to evidence in the motion or opposition. It is unclear to me whether these sections count against the page limit. I don't think it should count against the page limit allowed for argument. If a party has a lengthy statement of facts the entire page limit will be reached just responding to the facts. Or if a party attaches many exhibits, the entire page limit will be reached simply objecting to the evidence. It seems to me there will be a lot of requests for over-length memoranda.

The federal rule (DUCivR 7-1(a)(3)) is more clear on what is counted against the page limit. If the intent is to bring motion practice in conformity with the federal rule, language mirroring that rule regarding page limitations would make more sense to me than a vague reference to "the appendix."

Posted by Daniel Young December 1, 2014 10:30 AM

Page Limitation on Motions: Proposed Rules 7(c), (d).

Changing the page limitation from 10 pages of argument to 15 pages total, "not counting the appendix," is overly restrictive and impairs the ability to effectively present and brief issues to trial courts. I don't know what the appendix is, but from the wording everything counts against the page limitation: including case caption, introduction, fact statement/background, argument, and conclusion. Moreover, now that the motion and memo are collapsed in the same document (an otherwise welcome change) the rule is not leaving enough pages to effectively brief motions to the trial court. This is particularly true for dispositive motions which often require the recitation of numerous facts or allegations, e.g., summary judgment or motions to dismiss.

An additional problem with this change is that evidentiary objections and issues must now be placed in the body of the motion and not a separate motion to strike. See Utah R. Civ. P. 7(d)(1)(C) (proposed). This will restrict the ability to adequately address evidentiary issues and cut into precious space needed for the merits.

It would make more sense to simply follow the local federal rule on motion practice and limit all motions to 10 pages "exclusive of any of the following items: face sheet, table of contents, statement of precise relief sought and grounds for relief, concise introduction and/or background section, statements of issues and facts, and exhibits." DUCivR 7-1(a)(3).

Adopting the rule as proposed will make ex parte applications for over-length memoranda the rule rather than the exception.

Reply Memoranda Page Limitation: Proposed Rule 7(e):

For the same reasons, the 5 page limit for reply memoranda is not sufficient. Many times you are forced to spend several pages of the reply cleaning up inaccuracies and addressing alleged fact disputes put forward by the non-moving party. Counting this against the page limitation would deprive attorneys of the opportunity to set the record straight and reward shotgun oppositions. Additionally, if the opposition memorandum is stuffed with evidentiary problems, it will force attorneys to spend precious space addressing those problems. See Utah R. Civ. P. 7(d)(1)(C) (proposed). Again, I think the answer is to follow the federal local rule for reply memoranda: 5 pages "exclusive of any of the following items: face sheet, table of contents, concise introduction, statements of issues and facts, table of exhibits, and exhibits." DUCivR 7-1(b)(2).

Motions to Strike/Objections: Proposed Rule 7(m)

~~Under proposed Rule 7(m), objections to evidentiary issues may only be raised in a "subsequent memorandum." As a result, there is no procedure for addressing evidentiary issues when you do not get a subsequent memorandum – i.e., you are the opposing party without the last word. For example, on summary judgment a party may put additional facts and evidence in a reply if the new evidence is for rebuttal. See Clegg v. Wasatch County, 2010 UT 5, ¶ 31, 227 P.3d 1243; see also Utah R. Civ. P. 7(e)(2) (proposed) (authorizing submission of discovery materials with a reply memorandum). If this new evidence is not admissible, the rule is unclear on the remedy. There is no subsequent memorandum for the opposing party. Without the availability of a motion to strike, and the "motion" being the only method to get a request in front of the trial court, see Utah R. Civ. P. 7(b) (proposed), it appears that the opposing party is in a no-man's land in getting the issue before the court other than raising it orally for the first time at a hearing – a risky proposition.~~

Also, the rule should be clear that the limitation in Rule 7(m) relates to evidentiary issues and does not prohibit motions to strike for procedural deficiencies. For example, if a party includes in its reply memorandum new arguments, the remedy is a motion to strike the reply. See Stevens v. LaVerkin City, 2008 UT App 129, ¶¶ 30-31, 183 P.3d 1059 (explaining that party should file a motion to strike new argument in a reply); UPC, Inc. v. ROA General, Inc., 1999 UT App 303, ¶ 63, 990 P.2d 945 (affirming trial court's grant of motion to strike reply memorandum containing new argument). I assume the committee did not intend to end this practice. Perhaps clarification somewhere else in the rule would be helpful, for example a sentence after the first sentence in subsection 7(e)(1) that "If the reply raises new arguments and issues the opposing party may move to strike those new arguments and issues."

Bryan J. Pattison | Attorney at Law

Durham Jones & Pinegar, P.C.

(2) RULE 54

Lines 3-4: consider restoring previous changes (except keeping "of right"). The phrase "that adjudicates all claims and the rights and liabilities of all parties" is redundant with lines 17-22 and contradicts lines 10-15.

~~Line 46: replace "shall" with "may"~~

~~Line 56: replace "bill of costs" with "costs claimed"~~

Nathan Whittaker

Proposed rule 54 does away with current rule 54(e), which required that interest and costs be included in the judgment, but interest and costs may still be awarded (and generally will be as a matter of right). It appears that a driving force for the proposed change is greater certainty about when a judgment is final for purposes of appeal, but if a judgment is entered under proposed rule 54 and interest and costs are subsequently awarded, are they added to the judgment? If so, how? It is not entirely clear how interest and costs are to be awarded, and when awarded how they are to be included in the judgment. The total judgment with interest and costs needs to be known for several reasons, including knowing when the judgment is satisfied, the amount of the judgment as a lien, accrual of ongoing interest, etc. It is cumbersome at best to have to seek this information from multiple sources within the docket.

Despite the apparent purpose of greater finality, it is still not clear what effect an award of interest and costs has on the judgment's finality, if any. Is a new or amended judgment entered when interest and/or costs are awarded? If so, does that affect the time to appeal? If they are not part of the judgment, can they be enforced along with the judgment? Do they nevertheless form a part of the judgment? What if the losing party wants to appeal not only on the merits but also from the court's award of interest or costs? Must he file a second notice of appeal from the order granting interest or costs? These questions may be answered elsewhere, but, if so, it would be helpful if the Advisory Committee Note provided some guidance on where to find the answers.

Utah Association for Justice

By Edward B. Havas and Paul M. Simmons

Posted by Utah Association for Justice, by Ed Havas and Paul Simmons January 16, 2015 02:03 PM

(3) Rule 56

1. I recommend that you allow parties more time to respond to a summary judgment motion than to other Rule 7 motions. Federal local rule DUCivR 7-1(b)(3) allows parties 28 days to respond to summary judgment instead of only 14 for most other motions.

2. I recommend you allow parties more than 15 total pages for a summary judgment motion. While the existing formulation of 10 pages of argument is too broad in allowing endless items to be briefed in sections called something other than argument, a good solution is the federal rules' practice of excluding certain sections from the page count. See DUCivR 7-1(a)(3)(A) ("must not exceed twenty-five (25) pages, exclusive of any of the following items: face sheet, table of contents, statement of precise relief sought and grounds for relief, concise introduction and/or background section, statements of issues and facts, statement of elements and undisputed material facts, and exhibits.")

3. Rule 56(a)(1) and (a)(2). Replace the initial words "Instead of" with "In addition to." I think you invite confusion by requiring parties to provide a statement of material facts "instead of" a statement of

facts under rule 7. In MSJ motions, it is important to draw a distinction between material facts critical to deciding the motion and other facts that might be helpful for context but not required for deciding the motion. Although Rule 56(a)(3) allows a "concise statement of facts … for the limited purpose of providing background and context," and seems to be more of a Rule 7 type statement of facts, the proposed rule 56 does not make it clear that the 56(a)(1) and 56(a)(3) fact sections should be different. Instead, the "instead of" language in (a)(1) suggests that they are the same. Instead of leaving parties guessing, I recommend this opportunity be used to draw a clear distinction between sections describing material facts and another for background/context facts. I think the proposed "instead of" language blurs the distinction.

4. Rule 56(a)(2) and (c)(2). Allow a responding party to dispute a moving party's statement of facts by pointing out that the moving party failed to support the fact with admissible evidence IN THE MOTION ITSELF. I have seen moving parties include a material fact without citing to evidence; this rule would then seems to shift the burden on the responding party to refute it with evidence "by citing to materials in the record." Rule 56(c)(2) does not solve this problem because it requires a responding party to object that the cited material "cannot be presented in a form that would be admissible" (i.e., providing something would be impossible in the future) instead of showing that admissible material was not cited in the motion itself. The point here is whether a moving party should be able to use tenuous evidence to support a material fact and then shift the burden on the responding party to prove the fact cannot be presented in a form that would be admissible. Isn't it better to allow the responding party to merely show the fact WAS not already presented in a form that is admissible?

5. Rule 56(f)(2). What is the point of letting the court grant summary judgment based on a ground that was not even raised by a party? Doesn't this give court's too much discretion to grant a motion for any reason, even one not raised by the parties?

Posted by Victor Sipos December 3, 2014 09:46 AM

(4) RULE 58A

Lines 16-25: Consider combining (a) and (b)—title it "separate document—when required" or "When separate document required"; and combine like this: "—or as appropriate, "Decree." But a separate document is not required…"

Lines 26-53: Consider deleting and replacing with a reference to Rule 7(j), such as: "The prevailing party or a party directed by the court must prepare and serve on the other parties a proposed judgment for review and approval as to form. The procedures for preparing, serving, objecting to and filing a proposed order provided in Rule 7(j) apply to preparing, serving, objecting to and filing a proposed judgment."

Nathan Whittaker

Tab 4

Timothy M. Shea
Appellate Court Administrator

Andrea R. Martinez
Clerk of Court

Supreme Court of Utah

450 South State Street
P.O. Box 140210
Salt Lake City, Utah 84114-0210

Appellate Clerks' Office
Telephone 801-578-3900
Fax 801-578-3999

February 18, 2015

To: Civil Rules Committee
From: Tim Shea
Re: Small Claims Rule 14. Offer of judgment.

I have been encouraged to pursue this proposed rule one more time.

Addressing two of the points made at the May meeting. The rule's proponent would not have qualified to receive payment of costs under existing rules because the proponent did not prevail. The proponent's objective is to qualify for payment of costs incurred after an offer if the judgment (adjusted award) is not more favorable than the offer.

In the proponent's particular circumstance, the offeree was a municipality. In URCP 54(d), costs can be imposed on the "state of Utah, its officers and agencies … only to the extent permitted by law." I do not know whether a municipality would be considered an "agency" of the state. Municipalities are "political subdivisions" of the state. Section 10-1-201. The phrase "agency of the state" appears to be critical; governmental units that are not state agencies can be held liable for costs. Lyon v. Burton, 2000 UT 55, 5 P 3rd 616 (Order Modifying Opinion on Denial of Rehearing June 30, 2000).

Because of my uncertainty about whether a municipality is an agency of the state, I do not know whether, under this rule, an offeror's costs incurred after an offer could be imposed on a municipality. As drafted, Rule 14 does not distinguish between government and non-government parties; nor should it. This rule alone may be sufficient to establish the policy being sought. If not, the proponent would have to seek legislation to authorize costs against municipalities and counties.

This draft of the rule has been amended from the previous draft to remove the requirement that the offer be made after the original judgment. That provision was included at the request of the Board of Justice Court Judges, but a qualifying offer after the judgment makes no sense. An offer after the judgment is simply negotiation to satisfy the judgment for less than the full amount.

And I have added a note to the effect that the filing fee for the trial de novo is a cost occurring after the offer, but, to avoid liability for costs, the creditor-offeree's judgment after trial de novo only has to be more favorable than the offer. The creditor does not have to improve upon the original judgment in order to avoid liability for costs. I believe this is the result of the rule itself, but I've included it out of an abundance of caution.

copy: Rick Schwermer

Rule 14. Settlement offers.

(a) Unless otherwise specified, an offer made under this rule is an offer to resolve all claims in the action between the parties to the date of the offer, including costs, interest and, if attorney fees are permitted by law or contract, attorney fees.

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

(c) An offer made under this rule must:

(c)(1) be in writing;

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

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

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

(c)(5) be served on the offeree under Rule 5 of the Rules of Civil Procedure.

(d) Acceptance of the offer must be in writing and served on the offeror under Rule 5 of the Rules of Civil Procedure. Upon acceptance, either party may file the offer and acceptance with a proposed judgment.

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

(f) The offeror’s costs includes the filing fee and other costs for an appeal to a trial de novo.

Advisory Committee Notes

The filing fee for the trial de novo is a cost occurring after the offer, but, to avoid liability for costs, the judgment creditor-offeree’s judgment after trial de novo only has to be more favorable than the offer. The judgment creditor does not have to improve upon the original judgment in order to avoid liability for costs.

Tab 5

Timothy M. Shea
Appellate Court Administrator

Andrea R. Martinez
Clerk of Court

Supreme Court of Utah
450 South State Street
P.O. Box 140210
Salt Lake City, Utah 84114-0210

Appellate Clerks' Office
Telephone 801-578-3900
Fax 801-578-3999

February 18, 2015

To: Civil Rules Committee
From: Tim Shea
Re: Service by email or fax

Introduction

The Supreme Court has asked that we reconsider Rule 5 in light of the comments to our proposal about the methods of service: specifically, service by email or fax. Please refer to paragraph (b)(3) of the attached rule. If our proposal were to be adopted, the paragraph would read:

> (b)(3) Methods of service. A paper is served under this rule by:
>
> (b)(3)(A) submitting it for electronic filing if the person being served has an electronic filing account;
>
> (b)(3)(B) emailing it to the email address provided by the person or to the email address on file with the Utah State Bar, if the person has agreed to accept service by email or has an electronic filing account;
>
> (b)(3)(C) mailing it to the person's last known address;
>
> (b)(3)(D) handing it to the person;
>
> (b)(3)(E) leaving it at the person's office with a person in charge or, if no one is in charge, leaving it in a receptacle intended for receiving deliveries or in a conspicuous place; or
>
> (b)(3)(F) leaving it at the person's dwelling house or usual place of abode with a person of suitable age and discretion who resides there.

The comments to Rule 5 relevant to this issue also are attached. One attorney favors our proposal that documents may be served among lawyers by email without first obtaining the lawyer's agreement. Two attorneys opposed the proposal.

Those opposed are of the opinion that an email might be sent to the wrong address, be caught in a spam filter or otherwise not come to the attention of the person being served. The person known to us only as "Superman" includes some additional reasons. Superman also opposes eliminating service by agreed-upon fax.

After discussing the issues, the committee concluded that email is such a common method of communication that requiring an agreement is out of date. Similarly, since attaching files to an email has become so simple, service by fax also is out of date. Regarding the latter, the committee took the position that, if the parties want to agree to service by fax, they may do so.

Service by fax

In reviewing our recommendations, the Supreme Court noted that there is no provision for service being effective if done by a method agreed to but not authorized. One option is to add a line to the effect: "any other method agreed to in writing by the parties." The agreement would have to be mutual; the receiving party could not impose a method on the sending party. There was some discussion of whether an agreement would bind the parties to only that method of serving papers or whether the agreement simply creates an option that the sender could ignore.

This seems an overly complex method of accommodating a decreasing number of people who want to send or receive papers by fax. The requirement that a person agree in advance was motivated by the fear that fax was too new, too unreliable, did not produce clear copies, might not print because no one refilled the paper, etc. How far we have come. Now the concern is that fax is too old.

If accommodation is needed, then I recommend that we simply continue to include agreed-upon fax as an approved method of service. Probably the number of papers being served by leaving them at the person's usual place of abode with a person of suitable age and discretion or in a receptacle at the office also is decreasing, but the rule continues to recognize those methods as valid. If a person says fax is OK, then no harm is done.

Service by email

The question of whether service by email should require an advance agreement is essentially the same question as with fax, but with a potentially higher price tag. Superman aside, probably most lawyers would agree to service by email because they see the advantage of a reciprocal agreement. But the lawyer who does not agree imposes on the sender the expense of delivery by mail or other courier, which is much more than just the cost of a *Forever* stamp.

The economics of service by fax are different simply because, in all probability, most senders would not chose fax as the preferred delivery method.

The options appear to be opt-in (the current rule) or opt-out (permitted unless the person says "no") or leave the method of delivery to the sender's discretion (the committee's proposal).

I recommend against the middle option. I favor the committee's proposal, but I believe that a rule people are used to is better than changing the rule in a way that does not modernize the process.

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

(a) ~~Service:~~ When service is required.

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

(a)(1)(A) ~~every~~ a judgment~~,~~;

(a)(1)(B) ~~every~~ an order ~~required by its terms to~~ that states it must be served~~,~~;

(a)(1)(C) ~~every~~ a pleading ~~subsequent to~~ after the original complaint~~,~~;

(a)(1)(D) ~~every~~ a paper relating to disclosure or discovery~~,~~;

(a)(1)(E) ~~every written motion~~ a paper filed with the court other than ~~one~~ a motion that may be heard ex parte~~,~~; and

(a)(1)(F) ~~every~~ a written notice, appearance, demand, offer of judgment, ~~and~~ or similar paper ~~shall be served upon each of the parties~~.

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

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

(a)(2)(B) a party in default for any reason other than for failure to appear ~~shall~~ must be served ~~with all pleadings and papers~~ as provided in paragraph (a)(1);

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

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

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

(a)(3) Service in actions begun by seizing property. ~~In~~ If an action is begun by ~~seizure of~~ seizing property~~, in which~~ and no person is or need be named as defendant, any service required ~~to be made prior to~~ before the filing of an answer, claim or appearance ~~shall~~ must be made upon the person ~~having~~ who had custody or possession of the property ~~at the time of its seizure~~ when it was seized.

(b) ~~Service:~~ How service is made.

(b)(1) Whom to serve. If a party is represented by an attorney, ~~service shall be made~~ a paper served under this rule must be served upon the attorney unless the court orders service upon the party ~~is ordered by the court~~. ~~If an attorney has filed a Notice of Limited Appearance under Rule 75 and the papers being served relate to a matter within the scope of the Notice, service shall~~ Service must be made upon the attorney and the party if

(b)(1)(A) an attorney has filed a Notice of Limited Appearance under Rule 75 and the papers being served relate to a matter within the scope of the Notice; or

(b)(1)(B) a final judgment has been entered in the action and more than 90 days has elapsed from the date a paper was last served on the attorney.

~~(b)(1)(A)~~ (b)(2) When to serve. If a hearing is scheduled ~~5~~ 7 days or less from the date of service, ~~the~~ a party ~~shall use the method~~ must serve a paper related to the hearing by the method most likely to ~~give prompt actual notice of the hearing~~ be promptly received. Otherwise, ~~a party shall serve a paper under this rule:~~a paper that is filed with the court must be served before or on the same day that it is filed.

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

~~(b)(1)(A)(i) upon any person with an electronic filing account who is a party or attorney in the case by~~ (b)(3)(A) submitting ~~the paper~~ it for electronic filing if the person being served has an electronic filing account;

~~(b)(1)(A)(ii) by sending it by email to the person's last known email address~~ (b)(3)(B) emailing it to the email address provided by the person or to the email address on file with the Utah State Bar, if ~~that~~ the person has agreed to accept service by email or has an electronic filing account;

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

~~(b)(1)(A)(iv) by~~ (b)(3)(C) mailing it to the person's last known address;

~~(b)(1)(A)(v) by~~ (b)(3)(D) handing it to the person;

~~(b)(1)(A)(vi) by~~ (b)(3)(E) leaving it at the person's office with a person in charge or, if no one is in charge, leaving it in a receptacle intended for receiving deliveries or in a conspicuous place; or

~~(b)(1)(A)(vii) by~~ (b)(3)(F) leaving it at the person's dwelling house or usual place of abode with a person of suitable age and discretion ~~then residing therein~~ who resides there.

~~(b)(1)(B)~~ (b)(4) When service is effective. Service by mail~~, email or fax~~ or electronic means is complete upon sending. ~~Service by electronic means is not effective if the party making service learns that the attempted service did not reach the person to be served.~~

~~(b)(2)~~ (b)(5) Who serves. Unless otherwise directed by the court:

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

~~(b)(2)(B)~~ (b)(5)(A) every ~~other pleading or~~ paper required ~~by this rule~~ to be served ~~shall~~ must be served by the party preparing it; and

~~(b)(2)(C)~~ (b)(5)(B) an order or judgment prepared by the court ~~shall~~ will be served by the court.

(c) ~~Service: N~~ Serving numerous defendants. ~~In any~~ If an action ~~in which there is~~ involves an unusually large number of defendants, the court, upon motion or ~~of~~ its own initiative, may order that:

(c)(1) ~~service of the~~ a defendant's pleadings ~~of the defendants~~ and replies ~~thereto need not be made as between~~ to them do not need to be served on the other defendants; ~~and that~~

(c)(2) any cross-claim, counterclaim~~, or matter constituting an~~ avoidance or affirmative defense ~~contained therein shall be~~ in a defendant's pleadings and replies to them are deemed ~~to be~~ denied or avoided by all other parties; ~~and that the~~

(c)(3) filing ~~of any such~~ a defendant's pleadings and ~~service thereof upon~~ serving them on the plaintiff constitutes notice of ~~it~~ them to ~~the~~ all other parties~~.~~; and

(c)(4) ~~A~~ a copy of ~~every such~~ the order ~~shall~~ must be served upon the parties ~~in such manner and form as the court directs~~.

~~**(d) Filing.** All papers after the complaint required to be served upon a party shall be filed with the court either before or within a reasonable time after service.~~

~~**(e) Filing with the court defined.** A party may file with the clerk of court using any means of delivery permitted by the court. The court may require parties to file electronically with an electronic filing account. Filing is complete upon the earliest of acceptance by the electronic filing system, the clerk of court or the judge. The filing date shall be noted on the paper.~~

~~**(f)**~~ **(d) Certificate of service.** ~~Every pleading, order or~~ A paper required by this rule to be served, including electronically filed papers, ~~shall~~ must include a signed certificate of service showing the name of the document served, the date and manner of service and on whom it was served.

(e) Filing. Except as provided in Rule 7(f) and Rule 26(f), all papers after the complaint that are required to be served must be filed with the court. Parties with an electronic filing account must file a paper electronically. A party without an electronic filing account may file a paper by delivering it to the clerk of the court or to a judge of the court. Filing is complete upon the earliest of acceptance by the electronic filing system, the clerk of court or the judge.

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

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

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

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

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

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

~~(g) **Service by the court.** The court may serve papers by email on a party to the email address provided by the party or on an attorney to the email address on file with the Utah State Bar.~~

Advisory Committee Notes

~~Rule 5(d) is amended to give the trial court the option, either on an ad hoc basis or by local rule, of ordering that discovery papers, depositions, written interrogatories, document requests, requests for~~

~~admission, and answers and responses need not be filed unless required for specific use in the case. The committee is of the view that a local rule of the district courts on the subject should be encouraged.~~

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

2001 amendments

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

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

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

COMMENTS TO RULE 5

The proposed change to URCP 005 is long overdue, especially allowing service by email for all documents where the attorney has an efiling account. This change is strongly supported.

Posted by Michael A. Jensen May 7, 2014 12:42 PM

Some of the proposed changes to RULE 5 are scary at best, and should NOT be changed.

I am against the change in Rule 5 (b)(1)(A)(ii) which allows service upon a person without their consent by email if they have an electronic filing account. It is one thing to have your EFSP send/serve documents to an email address that you have given the EFSP and a completely different thing for an opposing party to send/serve you out of the blue documents directly via an email address, which is believed to be correct. The service of a document by email can only be safely accomplished through receiving the same from the EFSP or when permission is asked from and granted by the receiving party. There are several reasons why. (1) Often the email address that is given by the attorney to the EFSP is different than what is listed with the Bar or known by anyone else. This is because email addresses are subject to being compromised by SPAMMERS after time if the email address is generally given out and used by the public. Often people's email accounts are compromised and all of the email addresses they have stored in their address books are then passed around and used obtained by SPAMMERS or worse virus. So at our office we find that the only way to to combat the spamming problem is to give our EFSP an email address that we do not disclose to anyone else and then every so often we have to change the email addresses we generally give out and use with the public. If someone does not have to ask for permission to serve a document to us via email then they might have an old address they are sending the documents to and we will miss the service (please note that "old" can mean as much as a millisecond). (2) There is no tracking method to determine if the person that was served by email was actually served by email unless the same is done through an EFSP. (3) If the person who is being served was not asked by the servicer if it is okay to be served by email, then that person who is being served would not be aware of such an attempt and would not be looking for the arrival of the email. Conversely, if the person being served was asked if it is okay to serve via email, then if the email does not come then that person has enough awareness of the situation to follow-up on it and ask for it to be resent. That is why the rule that permission be granted existed in the first place, as it provided the necessary checks to insure that service would be received. (4) Updating the email address with the Utah Bar is not an instantaneous event, and takes time (an attorney just the other day told me that he had been trying to get the Bar to update his email address for over 2 weeks now, when explaining to me why the old email address that I had sent an email to had come back to me as being undeliverable). So in the meantime service is going to an old email address, and not being reached by the person, and such could be very costly for the attorney. Even if a change with the bar was instantaneous, there could still be problems. For example, a person looks on the Bar's webpage and sees an email address for an attorney. They then go and insert it into the paperwork they are working on. Meanwhile, unbeknownst to that person, the attorney goes to the Bar's website, and changes his/her email address. The person serving then sends the email out. Service is not received, but yet the Rule would say it was "served". Moreover, there is no way for anyone to know when the email address was changed... there is no tracking log, which also causes problems for everyone.

Bottom line here is that we are setting attorney's up for potential malpractice and at the very least doing a disservice to the people we serve. Service of a document upon another party should be taken VERY, VERY SERIOUSLY and the method employed should have the HIGHEST assurances that it will be received by the intended party. Why would we ever change this or weaken it?

On another note, this change in the rule will place attorneys at a disadvantage to pro se litigants. The pro se person will always be able to serve the attorney via email because the attorney will have an e-filing account, and the attorney will never be able to serve the pro se litigant via email if they don't agree to such. This is especially unfair in the area of discovery, where the documents can be voluminous and the

cost to print can be high. The attorney will have to print the documents that are sent to him/her via email by the opposing party, at the attorney's own cost, and the attorney will also have to print the documents that he or she will be sending out to the pro se person at the attorney's own cost.

Finally, I am against the removal of the ability to serve someone via fax if they agree to such (see Rule 5 [b][1][A][iii]). Why are we messing with this? Someone might not have or want service via email, but they have a fax and are willing to receive it by the same. Why are we taking away options here, especially one that, unlike email (as discussed above), at least has a verifiable confirmation that the document was sent and received by the person at that phone number, on the date and time indicated in the fax confirmation?

Posted by Superman! May 7, 2014 12:30 PM

I don't think it is a good idea to allow people to serve by email without consent. I understand that we must agree to service by email through the electronic filing system, but I prefer to receive discovery materials and other documents through mail, unless I have consented to service by email.

With electronic filing, we are already bombarded with emails and it is too easy for an email to slip through the cracks unless I am expecting, and have agreed, to receive documents through email. I believe the better rule is to still require consent to receive documents through email.

Posted by Daniel Young May 7, 2014 09:25 AM

Tab 6

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

(a) Signature.

(a)(1) Every pleading, written motion, and other paper shall be signed by at least one attorney of record, or, if the party is not represented, by the party.

(a)(2) A person may sign a paper using any form of signature recognized by law as binding. Unless required by statute, a paper need not be accompanied by affidavit or have a notarized, verified or acknowledged signature. If a rule requires an affidavit or a notarized, verified or acknowledged signature, the person may submit a declaration pursuant to Utah Code Section 78B-5-705. If ~~a statute requires~~ an affidavit or a paper with a notarized, verified or acknowledged signature ~~and~~ is filed, the party ~~electronically files the paper, the signature shall be notarized pursuant to Utah Code Section 46-1-16~~ must comply with Rule 5(f).

(a)(3) An unsigned paper shall be stricken unless omission of the signature is corrected promptly after being called to the attention of the attorney or party.

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

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

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

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

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

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

(c)(1) How initiated.

(c)(1)(A) By motion. A motion for sanctions under this rule shall be made separately from other motions or requests and shall describe the specific conduct alleged to violate subdivision (b). It shall be served as provided in Rule 5, but shall not be filed with or presented to the court unless, within 21 days after service of the motion (or such other period as the court may

prescribe), the challenged paper, claim, defense, contention, allegation, or denial is not withdrawn or appropriately corrected. If warranted, the court may award to the party prevailing on the motion the reasonable expenses and attorney fees incurred in presenting or opposing the motion. In appropriate circumstances, a law firm may be held jointly responsible for violations committed by its partners, members, and employees.

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

(c)(2) Nature of sanction; limitations. A sanction imposed for violation of this rule shall be limited to what is sufficient to deter repetition of such conduct or comparable conduct by others similarly situated. Subject to the limitations in subparagraphs (A) and (B), the sanction may consist of, or include, directives of a nonmonetary nature, an order to pay a penalty into court, or, if imposed on motion and warranted for effective deterrence, an order directing payment to the movant of some or all of the reasonable attorney fees and other expenses incurred as a direct result of the violation.

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

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

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

Advisory Committee Notes

Tab 7

Rule 43. Evidence.

(a) Form. In all trials, the testimony of witnesses shall be taken ~~orally~~ in open court, unless otherwise provided by these rules, the Utah Rules of Evidence, or a statute of this state. ~~All evidence shall be admitted which is admissible under the Utah Rules of Evidence or other rules adopted by the Supreme Court.~~ For good cause in compelling circumstances and with appropriate safeguards, the court may permit testimony in open court by contemporaneous transmission from a different location.

(b) Evidence on motions. When a motion is based on facts not ~~appearing of~~ in the record, the court may hear the matter on affidavits, ~~presented by the respective parties, but the court may direct that the matter be heard wholly or partly on~~ declarations, oral testimony or depositions.

Advisory Committee Note

Federal Rule of Civil Procedure 43 has permitted testimony by contemporaneous transmission since 1996. State court judges have been conducting telephone conferences for many decades. These range from simple scheduling conferences to resolution of discovery disputes to status conferences to pretrial conferences. These conferences tend not to involve testimony, although judges sometimes permit testimony by telephone or more recently by Skype with the consent of the parties. The 2015 amendments are part of a coordinated effort by the Supreme Court and the Judicial Council to authorize a convenient practice that is more frequently needed in an increasingly connected society and to bring a level of quality to that practice suitable for a court record.

This rule, which grants the judge the discretion to permit testimony by contemporaneous transmission, must be read in conjunction with Code of Judicial Administration Rule 4-106, which establishes the standards for contemporaneous transmission. That rule is drafted with the principles that all participants, whether in the courtroom or in another location, are able to see and hear each other; the public is able to see and hear all participants; a lawyer and client are able to communicate confidentially; and there is a verbatim record of the hearing. The technology will be digital cameras, high definition monitors and audio distributed through the courtroom public address system. Participants should not have to huddle around a speakerphone or laptop computer.

Rule 43 does not require the judge to permit remote testimony in any circumstance, even if all parties consent, but it does give the judge the authority to permit remote testimony, sometimes even in the face of a party's objection. There are due process limits to remote testimony, and these must be observed in all circumstances. But, absent a due process or other constitutional limit, a reviewing court will generally not find error if remote testimony is within the scope of the rule. See generally, *Constitutional and statutory validity of judicial videoconferencing,* 115 A.L.R.5th 509 (2004) and *Permissibility of testimony by telephone in state trial*, 85 A.L.R.4th 476 (1991).

Testimony by contemporaneous transmission is almost always a second-best option compared to testimony in the courtroom by a witness who is physically present. In that we agree with the 1996 comment to FRCP 43:

> The very ceremony of trial and the presence of the factfinder may exert a powerful force for truthtelling. The opportunity to judge the demeanor of a witness face-to-face is accorded great value in our tradition. Transmission cannot be justified merely by showing that it is inconvenient for the witness to attend the trial.

But we disagree that "ordinarily depositions, including video depositions, provide a superior means of securing the testimony …." Live remote testimony—in which the parties have the opportunity for direct and cross examination and in which the demeanor of a witness is viewed first-hand by the trier of fact—seems far superior to reading or viewing a deposition. We concur instead with the opinion of *Bustillo v. Hilliard*, 16 Fed. Appx. 494 (7th Cir. 2001), in which an inmate was compelled to participate in the trial by videoconference. In the court's words:

> Bustillo participated in the trial; he testified, presented evidence, examined adverse witnesses, looked each juror in the eye, and so on. Jurors saw him (and he, them) in two dimensions rather than three. Nothing in the Constitution or the federal rules gives a prisoner an entitlement to that extra dimension, if for good reasons the district judge concludes that trial can be conducted without it.
>
> Id at 495.

Tab 8

Rule 63. Disability or disqualification of a judge.

(a) **Substitute judge; Prior testimony.** If the judge to whom an action has been assigned is unable to perform the duties required of the court under these rules, then any other judge of that district or any judge assigned pursuant to Judicial Council rule is authorized to perform those duties. The judge to whom the case is assigned may in the exercise of discretion rehear the evidence or some part of it.

(b) **Disqualification.**

(b)(1)(A) A party to any action or the party's attorney may file a motion to disqualify a judge. The motion shall be accompanied by a certificate that the motion is filed in good faith and shall be supported by an affidavit stating facts sufficient to show bias, prejudice or conflict of interest. The motion shall also be accompanied by a request to submit for decision.

(b)(1)(B) The motion shall be filed after commencement of the action, but not later than 21 days after the last of the following:

(b)(1)(B)(i) assignment of the action or hearing to the judge;

(b)(1)(B)(ii) appearance of the party or the party's attorney; or

(b)(1)(B)(iii) the date on which the moving party learns or with the exercise of reasonable diligence should have learned of the grounds upon which the motion is based.

If the last event occurs fewer than 21 days prior to a hearing, the motion shall be filed as soon as practicable.

(b)(1)(C) Signing the motion or affidavit constitutes a certificate under Rule 11 and subjects the party or attorney to the procedures and sanctions of Rule 11. No party may file more than one motion to disqualify in an action, unless the second or subsequent motion is based on circumstances that did not exist at the time of the earlier motion.

(b)(2) The judge against whom the motion and affidavit are directed shall, without further hearing or a response, enter an order granting the motion or certifying the motion and affidavit to a reviewing judge. The judge shall take no further action in the case until the motion is decided. If the judge grants the motion, the order shall direct the presiding judge of the court or, if the court has no presiding judge, the presiding officer of the Judicial Council to assign another judge to the action or hearing. The presiding judge of the court, any judge of the district, any judge of a court of like jurisdiction, or the presiding officer of the Judicial Council may serve as the reviewing judge.

(b)(3)(A) If the reviewing judge finds that the motion and affidavit are timely filed, filed in good faith and legally sufficient, the reviewing judge shall assign another judge to the action or hearing or request the presiding judge or the presiding officer of the Judicial Council to do so.

(b)(3)(B) In determining issues of fact or of law, the reviewing judge may consider any part of the record of the action and may request of the judge who is the subject of the motion ~~and affidavit~~ an affidavit ~~responsive~~ responding to questions posed by the reviewing judge.

(b)(3)(C) The reviewing judge may deny a motion not filed in a timely manner.