Agenda

Advisory Committee on Rules of Civil Procedure

November 18, 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
Rule 26.3. Disclosure in forcible entry and detainer actions.	Tab 2	Martin Blaustein, Hollee Peterson, Jacob Kent
Rule 4. Process. Service on a defendant before trial if at least one defendant is timely served.	Tab 3	Steve Marsden, James Blanch, Kent Holmgren
Report on action by the appellate rules committee. Rule 54. Judgment; costs. Rule 58A. Entry of judgment; abstract of judgment. Rule 60. Relief from judgment or order.	Tab 4	Tim Shea
Rule 13. Counterclaim and crossclaim. Rule 15. Amended and supplemental pleadings.	Tab 5	Tim Shea
Rule 12. Defenses and objections.	Tab 6	Tim Shea

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

Meeting Schedule:

December 16, 2015
January 27, 2016
February 24, 2016
March 23, 2016
April 27, 2016
May 25, 2016
June 22, 2016
September 28, 2016
October 26, 2016
November 16, 2016

Tab 1

UTAH SUPREME COURT ADVISORY COMMITTEE ON RULES OF CIVIL PROCEDURE

Meeting Minutes – October 28, 2015

Present:	Rod Andreason, Barbara Townsend, Terri McIntosh, Kent Holmberg, Jonathan Hafen, Amber Mettler, Leslie Slaugh, Judge Toomey, Judge Blanch, Steve Marsden, Lincoln Davies, Sammi Anderson, Judge Anderson
Telephone:	Trystan Smith, Lori Woffinden, Paul Stancil
Staff:	Timothy M. Shea, Heather M. Sneddon
Not Present:	Mag. Judge Furse, Judge Baxter, James Hunnicutt

I. Welcome and approval of minutes. [Tab 1] – Jonathan Hafen.

Jonathan Hafen welcomed the committee and invited a motion to approve the minutes. Judge Toomey so moved, and Terri McIntosh and Amber Mettler seconded. The minutes were approved unanimously.

II. Consideration of comments to Rule 43 (Evidence); and Rule 55 (Default). [Tab 2] – Tim Shea.

Tim Shea reported that Rule 43 was published for comment in the last batch. No comments were received, but comments on its juvenile counterpart were submitted that expressed the preference for continuing to allow telephone hearings, which are a common feature in juvenile court. The Code of Judicial Administration requirement for advanced audio-video conference are being eliminated. Courtrooms are still being retrofitted with the technology, but there is a concern that if the rule describes specific technology, judges may not be able to use anything else even if a telephone conference would be sufficient. Mr. Shea has modified lines 19-24 of the committee note accordingly.

Discussion:

- Leslie Slaugh suggested that paragraph 2 be omitted, as the rest of the note explains the preference for live testimony. Paragraph 2 will be out of date very soon. Judge Toomey supported the paragraph's deletion. Mr. Hafen suggested that paragraph 2 be less specific to say, e.g., as technology evolves, needs may change. Just because certain technology isn't available doesn't mean you can't testify remotely. Mr. Slaugh and Barbara Townsend agreed. Mr. Slaugh commented that lines 20-21 express worthy goals, and although they will not be achieved through telephone conferences, at least all participants can be heard. Mr. Shea will amend the note to be less specific. James Hunnicutt suggested that citations be included, which Mr. Shea will add. Judge Toomey moved to send Rule 43 to the Supreme Court with the revisions discussed by the committee, and Mr. Townsend seconded. All approved.

Mr. Shea informed the committee that Rule 55 was adopted by the Supreme Court on an expedited basis and therefore, is currently in effect. The issue was that clerks were entering default judgments without sufficient evidence of a "sum certain." The new rule requires a verified petition or an affidavit to support a claim of damages at the default stage. Mr. Shea provided a summary of the comments and his recommendations.

Discussion:

- Leslie Slaugh asked whether the new rule requires that affidavits meet Rule 56(e) standards. As written, it appears to be enough for a party to declare entitlement to a sum certain with no supporting evidence. Mr. Shea was not involved in the development of the new rule, but indicated that the Supreme Court wants clerks to be able to enter as many default judgments as legally permitted provided there is sufficient proof of the claim for damages. When a party defaults, liability is automatically established but damages are not.

- Judge Blanch commented that he believes the new rule strikes the right balance of requiring verification concerning damages without asking the court or the plaintiff's lawyer to do more on the defendant's behalf than the defendant did. Steve Marsden said that, in his experience, it is not that difficult to get default judgments set aside and he questioned whether it will be more difficult with the new rule. Mr. Slaugh said that there may be additional grounds to set aside if the affiant doesn't have adequate facts to establish the amount of the claim.

- The committee agreed that the rule should include declarations as well as affidavits. Rod Andreason suggested that "under penalty" be removed and the statute be cited. Mr. Marsden so moved and Sammi Anderson seconded. All approved.

III. Rule 9 (Pleading special matters); Rule 26.02 (Disclosures in personal injury actions); and Rule 58C (Motion to renew judgment). [Tab 3] – Tim Shea

Mr. Shea reported that the primary purpose of the Rule 9 changes is to delete paragraph k. The remaining revisions are largely in conformity with Fed. R. Civ. P. 9's effort to simplify language. There are a couple of state provisions, however, for which there is no federal counterpart. Rule 26.2 contains a conforming amendment on line 42. The committee's requested changes to Rule 58C have been made. Mr. Shea believes these rules are ready to send out for comment.

Discussion:

- Mr. Slaugh suggested that line 20 of Rule 9 be changed to "must state with particularity." Judge Toomey moved to send all rules out for comment with Mr. Slaugh's suggested change to Rule 9. Kent Holmberg and Ms. Townsend seconded. All approved. Mr. Shea noted that the blue underlined language in the rules will be active links when posted on the court website.

IV. Report of joint committee on the effect of post-judgment proceedings on time to appeal. [Tab 4] – Rod Andreason, Amber Mettler.

Mr. Andreason reported that the committee met 2-3 times to discuss. Ms. Mettler commented that Mr. Shea's memo is very comprehensive. What started as a narrow assignment from the Supreme Court to evaluate whether certain post-trial motions should toll the time to appeal evolved to include many other things, including the timing for filing motions for fees, etc. The committee discussed what made sense from a policy perspective. The committee decided to adopt the federal rule that motions for fees do not toll the time for appeal, and added language to Rule 74 on the timing for filing fee motions.

Discussion:

- Mr. Slaugh said that the new rule may avoid the dismissal of premature appeals, but results in a default situation of two appeals: one on the merits and one on attorneys' fees. Many court decisions emphasize that the appellate court does not want piecemeal appeals. Mr. Shea said in that circumstance, the appellate court would likely consolidate the appeals. Ms. Mettler commented that the committee decided to include a time limitation on filing motions for fees to help assuage that issue. Mr. Shea said that the Supreme Court has made clear that it does not have a preferred outcome on this issue; it wanted a group to independently examine the state and federal systems and to make a recommendation. The work committee has concluded that the federal system is an improvement.

- Mr. Slaugh expressed his concern that the amended rule introduces a new level of uncertainty regarding how a judge will exercise his or her discretion in determining whether to keep the attorneys' fees component with the main case. Mr. Shea explained that a party files its appeal within 30 days of the original judgment. If the trial judge will not extend the time to appeal to address a motion for attorneys' fees, then the party files a notice of appeal. If the trial judge extends the time, then under operation of Utah R. App. P. 4, the notice becomes effective when the judgment on attorneys' fees is entered. Ms. Mettler also commented that the discretion is the same under the federal system. Mr. Slaugh responded that the new rule will require payment to file the notice of appeal that often would not be needed. The committee discussed piecemeal appeals on substantive issues versus attorneys' fees, whether the new rule may expedite lower court decisions on motions for fees, and whether the new rule virtually mandates attorneys to pay for and file notices of appeal in the absence of a court order extending the time to appeal to address a motion for fees.

- Judge Anderson commented that he would not want parties to file a notice of appeal; he would prefer to address the motion for fees first. Committee members discussed whether the rule should presume that the attorneys' fees issue will stay with the main case, or whether awaiting a decision on a motion for fees works to delay appeals on liability.

- Mr. Shea acknowledged the committee's competing views on the rule. Before it can be sent out for comment, we need the concurrence of two advisory committees and the appellate rules committee has not yet discussed it. Several committee members expressed their view that the rule is the result of hard work and should be sent out for comment.

- Mr. Slaugh commented that the new rule will delay appeals upon the filing of certain Rule 60 motions, which would now be permitted up until 28 days after the judgment was entered. Mr. Slaugh also raised the issue that under the current rule, attorneys' fees sanctions are appealable only at the end of the case. He believes the new rule retains that, but there is a gap in the rules as to whether those are immediately enforceable. Normal interlocutory judgments are not. He suggested that the committee may want to address that issue. Mr. Marsden suggested that the issue be carefully considered; from a judge's perspective, he or she may be trying to compel some behavior through a monetary sanction, but if it can't be enforced prior to appeal, it has no compulsive power. Ms. Mettler said that nothing the work committee did would change that—it has not been addressed.

- Judge Blanch presented the following scenario: He is sued and loses, and appeals under the new rule. While the appeal is pending, attorneys' fees are assessed against him. He doesn't appeal the fees decision. Then he wins on his appeal of the main case. Does he have to pay

the attorneys' fees judgment because he didn't appeal that portion, or is that taken care of? Intuitively he thinks it should be taken care of, but how so under the rules? Ms. Mettler responded that the process for getting a fee award to be enforceable is to amend the judgment. At some point, there is only one viable judgment, which is amended when fees and costs are added. The entitlement to fees is based on the validity of the first judgment. Judge Blanch said that he is unsure of the answer, but if parties have to file a second appeal, are we achieving efficiency? Judge Toomey commented that there should be an automatic basis for vacation of the fee award in that instance. Mr. Marsden said that in his experience, fees awards are always an amendment to the judgment. If it is all part of one judgment and that judgment is vacated on appeal, great. But if a second appeal of the fees award is required, then this rule doesn't provide a benefit. Ms. Anderson commented that the practical effect will be that everyone will file a notice of appeal on the fees award. Fees and costs should be added after the fees motion is decided, but there is still the question of whether the original notice of appeal should be amended or a second notice of appeal should be filed. Mr. Hafen asked whether the existing proposal needs to be clarified to deal with this scenario, and whether Rule 54(e) sufficiently addresses it. The committee discussed whether a note should be added to make it clear.

- The committee discussed publishing as a package Utah R. App. P. 4, and Utah R. Civ. P. 54, 58A and 73. With respect to Rule 73, Ms. Anderson commented that she likes the imposition of a deadline for filing motions for attorneys' fees, but wonders whether 14 days is too tight. Lincoln Davies raised Judge Blanch's concerns on how to address an attorneys' fees award after a notice of appeal has already been filed and whether an advisory committee note on that issue is in order. Utah R. App. P. 4(b)(2) includes attorneys' fees, so it appears that you would have to amend your notice of appeal. Mr. Slaugh agreed.

- Mr. Davies moved that the rules be sent out for comment with a note added, as discussed. Judge Toomey seconded. Given the importance of the note, Mr. Shea asked whether the committee would like to review a draft. Mr. Marsden said that we have to wait for the appellate rules committee to address Utah R. App. P. 4 anyway. Mr. Shea will draft a note for consideration at the next meeting. All approved the pending motion to send the rule out for comment with the note, in concept.

V. Rule 55 (Default). [Tab 5] – Tim Shea

Mr. Shea told the committee that a majority of the Supreme Court justices would favor an amendment to the rules to incorporate Standard 16 of the Standards of Professionalism and Civility encouraging notice of impending default judgments before seeking the entry of a default judgment. The topic was on the agenda 5 years ago, but the committee did not reach it and has not returned to it. If the committee is in favor of an amendment, Mr. Shea recommends against treating represented parties better than self-represented parties.

- Judge Anderson commented that when you have a lawyer on the other side, you know that you have someone who cares enough to do something about a default judgment. If you don't, you may just have a defendant sitting there who won't do anything. He would not favor imposing another step to give notice after service that in fact the defendant must do something to avoid default.

- Mr. Slaugh questioned whether notice should be given in the summons that a default will be requested if no response is filed. He has seen cases where the parties discuss the case after

service, the defendant believes it is resolved and the plaintiff obtains a default judgment. He can see the point of requiring further notice in that situation, but it would be difficult to implement. Judge Anderson responded that it is one more fact the court has to decide. On a motion to set aside, if there was a conversation and the judge believed there was any chance of miscommunication, the judgment would be set aside. Mr. Slaugh said that sometimes the situation arises after 3 months have passed.

- Judge Blanch said that this is a situation where an easy case makes a bad rule. Ninety percent of these cases are collection cases with no representation. He does not see how this rule is workable given how things actually run at the trial court level. Mr. Shea responded that perhaps it's not workable, but if it becomes a rule, he recommends against making a distinction between lawyers and parties because it puts the Court in a bad light. Judge Blanch recommends against the rule. No one hires a lawyer to get defaulted. In the garden variety default case the defendant has rolled over, and imposing additional rules requires too much of plaintiffs. Judge Toomey agreed. Judge Anderson commented that the rule requires you to call lawyers but not unrepresented parties, which looks bad. Judge Blanch said it belongs in the Standards of Professional Conduct.

- Mr. Marsden asked what the practical effect would be of making it a rule. Mr. Shea said we would have to assume that the Court anticipated a separate communication other than paragraph 3 of the summons. Mr. Hafen said that it doesn't feel like a rule; it feels more like practice pointers and acting in good faith. Mr. Davies commented that it is analogous to a Rule 11 requirement, and the same as the Rule 37 requirement to confer in good faith. Mr. Marsden said that it is just another box to check in collection cases.

- Mr. Hafen suggested that we raise the issue with the Court to determine if it is still interested in amending the rules in this fashion. Judge Toomey recommended that we inform the Court that the general sense of the committee is that it is not a good idea. Mr. Andreason said that the exceptions could drown the rule. Mr. Hafen will communicate the committees concerns about the rule to the Court.

VI. Rules 15 and 13. [Tab 60] – Tim Shea

Mr. Shea reported that, in a concurring opinion by Justice Voros, he requested that the committee amend Rule 15 to incorporate the provisions of Fed. R. Civ. P. 15(c) regarding the relation-back of an amended pleading when the amended pleading adds a new party. Mr. Shea has drafted an amendment. The main amendment to Rule 13 deletes the paragraph regarding omitted counterclaims. In that circumstance, the party would seek leave to add a counterclaim under Rule 15. All other amendments adopt the simplified text of the federal rules.

Discussion:

- Mr. Hafen commented that he thinks these make sense for Rule 15. Mr. Davies asked whether there are Utah cases dealing with adding parties and relation-back. Mr. Slaugh said that the problem with the cases is that they rely on a decision under the Judicial Code of Administration that has since been repealed. Mr. Davies likes the idea of the Rule 15 amendment. The federal rule is clear and there are federal cases on it.

- Mr. Slaugh commented that Rule 15(a)(1)(A), lines 6-9, make a substantive change to the rule. Under the old rule, you can't amend after the other party has responded; under the new rule, you can. Mr. Shea said the change makes it parallel the federal rule.

- Kent Holmberg commented that line 47 regarding notice to the attorney general may present some issues that he needs to explore. Lines 49 and 50 discuss where process is to be delivered, but there are specific state statutes addressing that. Mr. Shea said this simply replaces the Utah counterpart to the U.S. attorney. On the relation-back issue, Mr. Holmberg said the main difference between the federal and state systems is that in the federal system, the question becomes how related the new party and the served party are. Utah courts look at whether they have the same legal interest. Mr. Davies said that under the federal system, the new party must have known of the lawsuit within the summons period and must have known that they would have been named unless there was a mistake by the plaintiff. It is narrower; it forces the plaintiff to figure out who they need to sue and to sue them. Mr. Hafen commented that it is important to consider relation-back in the context of Rule 1 and trying to move cases along. Mr. Shea said that if he understands Justice Voros correctly, Voros believes the federal policy is a better policy, not just that they have it codified.

- Hearing a general consensus, Mr. Shea suggested that Rule 15 be sent out for public comment and that Rule 13 be addressed next time. Mr. Marsden so moved and Judge Blanch seconded. Mr. Holmberg said that he may have some suggested changes regarding the notice to the attorney general provision. Mr. Hafen requested that Mr. Holmberg provide any suggested changes and that that piece be taken up by the committee in the next meeting with Rule 13. All were in favor of the motion.

VII. Adjournment.

The meeting adjourned at 5:35 pm. The next meeting will be held on November 18, 2015 at 4:00pm at the Administrative Office of the Courts.

Tab 2

A PROPOSAL FOR URCP RULE 26.3, DISCOVERY IN UNLAWFUL DETAINER CASES

I. INTRODUCTION

Unlawful Detainer is a summary proceeding, expediting nearly all of the normal civil procedures including motion consideration and court orders. Current practice in Utah treats Unlawful Detainer cases as exempt from discovery, including initial disclosures, though they are not listed as exempt under Utah Rules of Civil Procedure, Rule 26, or exempted by statute. URCP 26(a)(2). The Utah Courts' Cover Sheet for Civil Actions indicates that Forcible Entry/Unlawful Detainer cases are exempt from Rule 26 discovery. *See* "Cover Sheet for Civil Actions," www.utcourts.gov/resources/forms/civil/Civil_Filing_Cover_Sheet.pdf, revised December 1, 2013. Even if they were not treated as exempt, eviction cases are statutorily expedited and are incompatible with the current Rule 26 timeline. The practical effect of these two realities creates an imbalanced procedure in which Defendants must defend themselves with little or no access to otherwise discoverable information regarding the nature of claims against them. Facing such mandatory penalties as forfeiture of the property, treble damages, and attorney fees often within two weeks after the filing of the complaint, Defendants must be allowed timely access to potential evidence in the eviction proceeding. *See* Utah Code Ann. § 78B-6-811(3). URCP 26 should be amended to require initial discovery in the notice for eviction and in the complaint in order to give tenants a fair opportunity understand and present defenses to each specific claim.

II. BACKGROUND

Utah Code § 78B-6-810 requires that all issues of eviction be expedited. Accordingly, trials must occur within 60 days of service of a complaint, and an evidentiary and occupancy hearing ("10-Day Hearing") must be held upon the request of either party within 10 days after the Defendant files an answer in nonpayment circumstances. Utah Code Ann. § 78B-6-810(2). A 10-Day Hearing must be held within 10 days of the filing of the complaint if the Plaintiff alleges criminal nuisance. Utah Code Ann. § 78B-6-810(3). This summary proceeding also generally requires the expedited resolution of all motions and orders in all forcible entry/unlawful detainer cases. As a summary proceeding, all eviction cases proceed on a far shorter timeline than other civil actions.

At the 10-Day Hearing, generally around two weeks following the filing of the complaint, the court will examine the evidence presented by both sides and decide whether or not the tenant will vacate the property as the case proceeds. Utah Code Ann. § 78B-6-810(2)(b). If the court determines based on the evidence at that hearing that "all issues between the parties can be adjudicated without further proceedings," then it must enter a judgment on the merits. *Id.* If the court decides against the tenant, an order of restitution is also entered returning possession of the property to the plaintiff. Utah Code Ann. § 78B-6-811(3).

By statute, the order of restitution issued against a tenant for unlawful detainer must include: forfeiture of the property, forfeiture of the lease, payment of any rent due, treble damages, and payment of all reasonable attorney fees incurred by the other party. *Id.* These penalties are strictly enforced irrespective of the tenant's employment status, ability to find another place to live, etc. For certain tenants living in subsidized housing, such a court finding also puts at risk their government aid and may lead to homelessness. Because of the inconsistent

application of discovery under the current practice and the real potential for unfair prejudice, tenants may suffer substantial hardships without ever knowing the exact nature of the claims against them or having a chance to properly prepare a defense against those claims.

III. DEFENSE WITHOUT DISCOVERY

Under rule 26(a)(1) of the Utah Rules of Civil Procedure ("URCP"), parties in civil cases are required to make certain disclosures to one another without any formal requests. These disclosures include (in brief): potential witness information; copies of discoverable documents and data; a computation of any category of damages claimed by the pleading party; and any insurance agreement under which a party may be liable to satisfy any part of the judgment. Plaintiff must deliver the above listed materials, the initial disclosures, within 14 days of the filing of the first answer to the complaint. Utah R. Civ. P. Rule 26(a)(1). The Defendant must provide initial disclosures within the later of 42 days after filing the first answer or 28 days following appearing in the case.

URCP 26 subsection (a)(3) exempts certain actions from initial disclosures, including actions: of judicial review of an administrative agency's adjudicative proceedings; governed by Rule 65B or 65C; to enforce arbitration award; the enforcement of water rights under Title 73, Ch. 4. Utah R. Civ. P. 26 (the former Rule 26, superseded November 2011, exempted actions based on a contract in which the amount demanded in the pleadings is $20,000 or less).

Eviction cases are not included in any of the sub-categories for exemption listed in Rule 26 and initial discovery must apply unless exempted by another rule. Proceedings may be exempt under Rule 81, which states that the rules of civil procedure in general do not apply to certain statutory proceedings that "are by their nature clearly inapplicable." Utah R. Civ. P. Rule

81(a). Though the statutory eviction proceedings vary in timing from other civil cases, the courts consistently apply and enforce the Utah Rules of Civil Procedure and the rules are clearly applicable. The statute does not create an eviction process clearly outside the purview of the URCP and thus the rules should apply.

Despite not being excluded by rule, eviction cases are denoted as exempt from discovery on the cover sheet distributed by the court for civil proceedings. The confusion caused by the contradiction results in a general practice that treats eviction cases as exempt from discovery. As a result, much of the pertinent information required under Rule 26 never reaches tenants before the court's critical possession decision at the 10-day Immediate Occupancy Hearing. Even absent this confusion, the discovery timeline set forth in URCP 26 does not fit with the eviction proceeding timeline. Initial disclosures provided no later than 14 days from the filing of the first answer do not help a Defendant who is in court arguing the evidence within 10 days of the answer. Most eviction cases mandate an evidentiary and occupancy hearing within 10 days of the Defendant's answer and it is likely that the important information that must be disclosed in initial discovery would not be provided to the tenant before the hearing. This means that the tenant has no opportunity, prior to potential final judgment, to review, object to, and prepare for potential evidence including witnesses, ledgers, and other records. The tenant under these circumstances is disadvantaged because even if the court enforced the initial disclosures requirement, the eviction timeline requires that the tenant argue blindly against the landlord's claims.

Because the tenant risks losing the case at such an early stage, landlords are not required and are simply unmotivated to disclose information before the 10-Day Hearing. In fact, the Plaintiff landlord has every incentive to withhold information until the hearing and surprise the

Defendant. With the court's finding of a likely unlawful detainer, the landlord gets possession of the property back, and may at this early stage also get past-due rent, treble damages, and attorney fees. A landlord could hold all initial discovery information until after the 10-day Immediate Occupancy Hearing and present a surprise, one-sided argument to try and convince the court of their claim. This situation is unfair and inconsistent with tenets of the adversarial system, where the party with the most to gain is given much more deference than the party with the most to lose. This also may not comport with the goal of expediting eviction hearings as a full and fair hearing on the evidence would likely lead to better-supported and earlier adjudications or resolutions. The current practice in unlawful detainer cases and the application of mandatory penalties against tenants, requires fair discovery and an opportunity to develop and present a defense.

IV. EXAMPLES OF TENANT DISADVANTAGES

The following are examples of how tenants are disadvantaged in eviction cases when they do not receive initial discovery prior to the 10-day Hearing.

1. Eviction for failure to pay rent:

A tenant receives a three-day notice to pay or vacate that states that he owes $1,240 in back rent for the month of March 2014. If he cannot pay the full amount within three days then he must leave the apartment. If he does not leave the apartment, then the landlord may bring a suit against him for ejectment under the unlawful detainer statute. Utah Code Ann. § 78B-6-801 *et seq.* If a court determines that the tenant is in detainer, the court will sign an order of restitution demanding that the tenant vacate the property, forfeit the lease, and making the tenant liable for rent, treble damages, and attorney's fees. Utah Code Ann. 78B-6-811.

The tenant's lease contract states a rent payment of $750 due on the first day of each month. It also states that the tenant will be assessed a $10 *per diem* late fee for ever day his payment is delinquent after the fifth of the month. If the tenant failed to pay rent for a month then the total due should be $750 plus $10 a day for every day past the fifth – at most $260 for any given month. The maximum total that could be due from the rent plus the *per diem* fee for March is $1,010, yet the notice requires payment of $1,240 "past due rent." Where did the $230 discrepancy come from?

Because current practice treats eviction cases as exempt from initial discovery the tenant may never know how the landlord came to the number on the notice. However, even if the practice is changed and initial discovery is applied, the guidelines of Rule 26 still create a loophole to allow landlords to avoid disclosing information. Under the current timeline of Rule 26 the landlord is not mandated to provide a computation of the charges with the service of the claim. She is not required to provide that information before the 10-Day Hearing. The only requirement is that she provide that information within 14 days of a discovery hearing. Therefore, even if that hearing occurred the day that the tenant filed his answer, the landlord could still withhold information about how she calculated the amount on the notice until after the hearing with no repercussions.

As a result, the Defendant is in the dark as to exactly what they are disputing. Because of the vague notice, the tenant could not resolve the dispute within the 3-day window, practically ensuring a hearing in court where he is unable still to prepare a dispute of the landlords' computations. Nonetheless, he faces the prospect of automatic eviction, treble damages, attorney fees, and potential collateral losses (such as the loss of housing subsidy), if the court decides in favor of the landlord at the 10-Day Hearing.

2. Eviction for Criminal Nuisance

Similar issues occur in cases where a tenant receives a notice of eviction for a criminal nuisance claim. For example, if a tenant receives a notice to vacate based on "illegal activity on the premises," a valid notice under Utah law, without initial discovery the landlord is not required to disclose what the illegal activity is or when exactly it occurred. Although such information must generally be disclosed under Rule 26, the practice of treating eviction cases as exempt from initial discovery protects the landlord from divulging specifics before the 10-Day Hearing. As discussed above, even if Rule 26 were enforced, the landlord could still simply withhold the facts until after the hearing. The tenant is faced with the daunting prospect of attempting a defense in court as she is being presented with the evidence for the first time. She is without the important facts that would allow her to gather evidence, find witnesses to establish an alibi, or even discredit witnesses and save her lease.

Because the court is encouraged to adjudicate the claim at the 10-Day Hearing, if possible, the tenant faces eviction, treble damages, and paying the other party's attorney fees, all without any knowledge of what she did specifically to warrant the eviction and without a fair chance to prepare and present a defense against those claims.

V. PROPOSAL

Both of the above examples illustrate the need to adjust the application of Rule 26 to eviction cases. As it currently stands, the practice of not applying initial discovery greatly favors landlords. The landlord is not required to provide any information beyond a general statement of the premise for eviction in the notice or in pleadings. In fact, no justification for their claim is

required before the 10-Day Hearing unless the court mandates such a disclosure. Even if Rule 26 does apply to eviction cases, the landlord is still advantaged in that the timeline for delivering initial discovery information extends beyond the 10 days for the required hearing. Landlords have a strong incentive to wait until after the hearing to provide discovery because they could win without the necessity of providing this discovery: (1) by default if the tenant does not appear at the 10-Day Hearing, or (2) on the merits at the 10-Day Hearing. Both of these outcomes are more likely if the tenant remains in the dark as to the evidence of the landlord's claims. An adjustment is necessary in order for initial discovery to function properly in eviction cases.

A Rule 26.3, discovery specific to unlawful detainer actions, should provide that the information required in initial disclosures be given in both the pre-suit eviction notice and the summons and complaint for eviction cases. The information included should constitute all of the required disclosures listed under URCP 26(1). Such an amendment is proper, because Utah disfavors forfeiture and this change would help, not hinder, the goal of expediting eviction cases. See *Cache Cnty. v. Beus*, 978 P.2d 1043 (Utah Ct. of App 1999).

Current practice in Utah detainer cases gives great deference to landlords. As such current rules lean toward forfeiture by creating situations where tenants are asked to formulate a defense without equal access to critical information, but still face statutorily-imposed, severe consequences. Adjusting initial discovery would allow tenants to mount the best possible defense and, thus, prevent defaults and give them a reasonable chance to save their leases. Id. The amendment would not burden landlords, but would only require them to justify their claims.

Furthermore, requiring initial discovery information to be included in the notice and complaint would aid the goal of expediting unlawful detainer cases. Courts are required to rule on the merits of eviction cases at the 10-Day Hearing if it is clear that further proceedings would

be unnecessary. Utah Code Ann. § 78B-6-811. If tenants are provided with the discovery information, then they would better be able to present their defense at that hearing and would be better prepared to negotiate resolutions. With a more complete showing of each side's case, courts would also be able to rule on more cases at that initial hearing and save the need for further proceedings.

VI. CONCLUSION

Current practice in unlawful detainer cases treats eviction cases as exempt from initial discovery despite the lack of any exception. This practice does not fit with Utah's disfavoring of forfeitures or the state's desire to expedite such cases. A simple declaration that eviction cases are not exempt, however, does not solve the problem because hearings occur before the required disclosures under Rule 26. This creates a perverse incentive to withhold information and potential evidence in eviction cases, even when the tenant faces very real eviction and strict-liability damages. Therefore, the rule must be amended.

A new Rule 26.3, mandating that initial discovery information be included in both the pre-suit notice and the complaint, would bring eviction cases more in line with public policy and state goals. This change would also create a more balanced and fair process and would lead to better-supported decisions based on improved and more fully argued positions. As such, the amendment must be adopted.

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Rule 26.3. Disclosures in forcible entry and detainer actions.

(a) Scope. This rule applies to all actions seeking eviction or damages arising out an unlawful detainer under Title 78B, Chapter 6, Part 8, Forcible Entry and Detainer or Title 57, Chapter 16, Mobile Home Park Residency Act.

(b) Plaintiff's disclosures. The plaintiff must serve the disclosures required by Rule 26(a)(1) with the summons and complaint.

(c) Defendant's disclosures. The defendant must serve the disclosures required by Rule 26(a)(1) with the answer.

UTAH COURTS

Español

Eviction

This page includes information about residential leases, not commercial leases.

The court eviction process happens quickly. Do not ignore notices that have been served on you.

When calculating the time in which to do something after service of notice, the day on which service occurs is day 0, the day after service is day 1, and so on. Time stated as "calendar days" includes Saturday, Sunday and holidays in the calculation. Time stated as "business days" does not. Whatever is required to be done must be done on or before the last day. See also URCP 6.

Communicate in writing with your landlord or tenant. If your landlord or tenant agrees to something, get it in writing and signed.

Keep a copy of everything for your records, including all notices and court papers.

A tenant may evict a subtenant for the same reasons and using the same procedures as described on this page. Utah Code Section 78B-6-804.

A tenant includes a subtenant, a guest or a relative, even if not paying rent.

Utah Legal Services (utahlegalservices.org) also has information and forms for the tenant and landlord.

Talk to an attorney

The information on this page is not a substitute for legal advice. You are not required to hire an attorney, but legal matters can be complicated. Consider talking to an attorney to go over your options.

See our Finding Legal Help page for information about ways to get legal help. One way to talk to an attorney is to visit a free legal clinic. Clinics provide general legal information and give brief legal advice. You might also hire an attorney for just part of your case or to do one particular thing, rather than represent you for the whole case. Legal help is also available at discounted rates for people with modest incomes.

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ADR—Mediation

Court evictions and other disputes between landlords and tenants can be costly and frustrating. A tenant who is properly evicted could be liable for three times the money owed to the landlord for rent and other things, such as damage to the property. To try to avoid expensive litigation, consider one of the free or low-cost mediation services available in your area. For more information, see our page on Alternative Dispute Resolution (ADR).

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Eviction without a court order is against the law

It is against the law for a landlord to evict a tenant without a court order. Utah Code Section 78B-6-814. Utah Legal Services (utahlegalservices.org) has information that may help a tenant who has been illegally locked out.

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Summary of Eviction Procedures

This is a description of the most common procedures for getting a court order, but some procedures may vary from court to court. And the judge may require procedures not described here based on the circumstances of your case.

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Unlawful detainer; Notice to vacate

"Unlawful detainer" means remaining in possession of premises after receiving and failing to comply with notice to vacate. So the first step in the eviction process is for the landlord to serve the tenant with a notice to vacate. The required type of notice to vacate depends on the tenant's circumstances and is governed by Utah Code Section 78B-6-802.

The notice must be in writing, and it must strictly follow the statutory requirements.

3-day notice to pay or vacate

This notice is used if the tenant owes rent or other money. This notice tells the tenant s/he has **3 calendar days** to pay the money or move out. It must give the tenant the option to pay the money. If the tenant pays the money, then the tenant can remain on the premises. If the tenant does neither within **3 calendar days** after notice, the tenant is "unlawfully detaining" the premises.

3-day notice to comply with rental agreement or vacate

This notice is used if the tenant has violated a term of the rental agreement that can be corrected. This notice tells the tenant s/he has **3 calendar days** to comply with the agreement or move out. If the tenant complies with the agreement, then the tenant can remain on the premises. If the tenant does neither within **3 calendar days** after notice, the tenant is "unlawfully detaining" the premises.

3-day notice to vacate for nuisance

This notice is used if the tenant is creating a nuisance. A nuisance is not just any bad act. A nuisance is something that injures health, is indecent, offensive to the senses, or interferes with someone's free use of their premises. This notice orders the tenant to move out within **3 calendar days**. It does not have to give the tenant any other options. If the tenant does not move out within **3 calendar days** after notice, the tenant is "unlawfully detaining" the premises.

3-day notice to vacate

This notice may be used only if a tenant:

- has assigned or sublet the premises contrary to the rental agreement;
- is damaging the landlord's premises;
- conducts an unlawful business on the premises;
- has violated a term of the rental agreement that cannot be corrected; or
- commits a criminal act on the premises.

This notice orders the tenant to move out within **3 calendar days**. It does not have to give the tenant any other options. If the tenant does not move out within **3 calendar days** after notice, the tenant is "unlawfully detaining" the premises.

15-day notice to vacate

This notice can be used if the tenant is renting the premises from month to month (or some other period), and the landlord wants the tenant to move out at the end of the month. The landlord does not have to have a reason for wanting the tenant to vacate. The notice must be served at least **15 calendar days** before the end of the month. Otherwise, the tenant can stay until the end of the next month. If the rental agreement requires that more than 15 days notice be given, the landlord must give the longer notice required by the agreement.

This notice orders the tenant to move out within **15 calendar days**. It does

not have to give any other options. If the tenant does not move out within **15 calendar days** after notice, the tenant is "unlawfully detaining" the premises.

5-day notice to vacate to tenant at will

This notice can be used only if there is no rental agreement, oral or written. This situation may occur if:

- a guest refuses to leave;
- the rental agreement has expired and the landlord has told the tenant that the contract will not be renewed;
- a new owner has purchased the premises through bankruptcy, foreclosure, or sheriff's sale and has received a title terminating all rental contracts. (If the new owner is evicting a tenant after purchasing the premises in a regular sale and the tenant is on a month-to-month tenancy, the new owner must serve the tenant with a 15-day notice. Otherwise, the tenant has a right to live in the home until the rental agreement expires.)

This notice orders the tenant to move out within **5 calendar days**. It does not have to give the tenant any other options. If the tenant does not move out within **5 calendar days** after notice, the tenant is "unlawfully detaining" the premises.

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How to serve the notice to vacate; Utah Code Section 78B-6-805.

The notice to vacate must be served on the tenant as required by Section 78B-6-805. The notice to vacate may be served by any person, including the landlord:

- by delivering it to the tenant personally;
- by mailing it registered or certified mail to the tenant at the tenant's residence;
- if the tenant is absent from the residence, by leaving it with a person of suitable age and discretion and also mailing it to the tenant at the tenant's residence; or
- if a person of suitable age or discretion cannot be found at the tenant's residence, by affixing it in a conspicuous place on the premises.

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Saving the lease from forfeiture; Utah Code Section 78B-6-802.

Some of the notice types require that the tenant be given the option to move out or to pay the rent (or to perform a requirement of the rental agreement). If the tenant pays the rent or does whatever else is required to be done, then the tenant is not "unlawfully detaining" the premises and cannot be evicted. This is called "saving the lease from forfeiture."

A landlord can accept payment for part of the rent and then serve another 3-day notice to pay or vacate. Or the landlord and tenant can agree about when the remaining rent will be paid.

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Court proceedings

If the tenant is "unlawfully detaining" the premises—that is, has failed to comply with proper notice properly served—the tenant can be evicted by court order. For court forms see our OCAP page.

Complaint; Utah Code Section 78B-6-807.

The complaint to evict must describe the facts that constitute unlawful detainer—essentially that the tenant has been properly served with notice to vacate that is appropriate for the circumstances, has failed to comply with the notice, and remains in possession of the premises. The complaint may also allege any fraud, force, or violence on the part of the tenant, and may claim damages and compensation for the occupation of the premises. If the eviction is for failure to pay rent, the complaint must state the amount of rent due.

Summons; Utah Code Section 78B-6-807.

A landlord may not personally issue a summons. The landlord's lawyer or the court must issue the summons.

The summons in an eviction is similar to the summons in any civil case. It states the time in which the tenant is required to answer or face judgment by default. And it must contain the other information required by URCP 4. However, the time to answer is very short: usually only **3 business days** from the date of service, unless the tenant objects and the court allows more time.

Serving the complaint and summons

Serving the complaint and summons on the tenant is governed by URCP 4 and Utah Code Section 78B-6-807. The complaint and summons may be served by any person over 18 who is not a party to the case or a party's lawyer. This means that the landlord may not personally serve the summons. For more information and forms, see our page on Serving Papers. The landlord is responsible for filing proof of service with the court.

The court can authorize service by alternative means if the tenant's identity or whereabouts are unknown and cannot reasonably be learned, where service upon all of the tenants is impractical, or where the tenant is avoiding service. For more information and forms, see our page on Alternative Service.

Who is the plaintiff?

A complaint to evict the tenant must name the property owner as plaintiff. See Utah Code Section 78B-6-801 and URCP 17.

Who is the defendant? Utah Code Section 78B-6-806.

The tenant and anyone who has signed the lease can be named as defendants. If there is a subtenant occupying the premises, the subtenant also can be named as a defendant. The landlord may, but does not have to, sue all of them. But the landlord can obtain a judgment only against those who are served with process or appear in the proceedings.

Answering the complaint

Once the complaint and summons are served on the tenant, the tenant may file a written answer with the court within the time stated in the summons. The tenant must serve a copy of the answer on the landlord by one of the methods described in URCP 5. For more information and forms for filing an answer, see our page on Answering a Complaint or Petition. Tenants can find information about answering a complaint (utahlegalservices.org) and possible legal defenses, including habitability problems (utahlegalservices.org), through Utah Legal Services.

Tenant fails to answer

If the tenant does not file an answer to the complaint and summons within the time frame ordered by the court, the landlord may file for a default judgment and ask the court to issue an order of restitution of the premises.

Criminal nuisance

If the complaint alleges an offense designated by Section 78B-6-810 as a criminal nuisance, the court will hold an evidentiary hearing within 10 days after the day on which the complaint is filed to determine whether the alleged act occurred. The hearing will be set when the complaint is filed and notice of the hearing must be served upon the tenant with the summons at least **3 calendar days** before the scheduled time of the hearing.

Occupancy hearing; Utah Code Section 78B-6-810.

The judge will hold a hearing within 10 days after the day on which the tenant files an answer if:

- the complaint to evict claims failure to pay rent; or
- the new owner of the premises is evicting the former owner after a forced sale.

At the hearing the judge will determine who has the right to occupy the premises while the case moves forward. If the tenant fails to appear at the hearing after having received notice of it, the judge will issue an order for restitution of the premises directing the sheriff or constable to return possession of the premises to the landlord.

If the judge finds that all of the issues can be decided without further proceedings, the judge will decide those issues and enter judgment on the merits. If the judge decides there is a need for further proceedings and the tenant remains in possession of the premises, the judge will begin the trial within 60 days after the day on which the complaint was served unless the parties agree otherwise.

Trial

If an answer is filed, then all parties must follow the Rules of Civil Procedure governing discovery and disclosure. For more information, see our page on Discovery and Disclosure. Because evictions occur quickly, there may be court hearings scheduled before either party needs to make initial disclosures. For more information about civil procedures, see our page on Summary of Civil Procedures.

Judgment for restitution, damages and rent; Utah Code Section 78B-6-811.

If the judge enters judgment for the landlord—whether after trial or after the occupancy hearing; whether by deciding the merits of the claims or after the tenant's default—the judgment will include an order for restitution of the premises directing the sheriff or constable to return possession of the premises to the landlord.

If the complaint to evict claims failure to pay rent or failure to perform a requirement of the rental agreement, the judgment will also end the rental agreement, but the tenant still owes the rent for the remainder of the agreement, limited by the landlord's duty to reduce damages, usually by renting the premises to someone else.

The judgment may also award to the landlord the rent for the time the tenant lawfully possessed the premises and three times the actual damages from:

- rent and other money due under the contract for the time the tenant unlawfully detained the premises;
- forcible entry;
- forcible or unlawful detainer;
- waste of the premises; and
- the abatement of the nuisance by eviction.

The judgment may also include the landlord's reasonable attorney fees, and this amount is not tripled. The landlord must prove all of these damages and the rent and the attorney fees, and this is often done by the landlord filing an

affidavit describing these items.

Even if the tenant defaults (does not answer the complaint), the landlord must serve the tenant with the affidavit of damages and notice of any hearing to determine damages. URCP 5.

Order for restitution of the premises; Utah Code Section 78B-6-812.

The restitution order:

- directs the tenant to vacate the premises, remove the tenant's personal property, and restore possession of the premises to the landlord, or be forcibly removed by a sheriff or constable;
- advises the tenant of deadline to vacate the premises, which is usually **3 calendar days** following service of the order, but it might be less; and
- advises the tenant of the tenant's right to a hearing to contest the manner in which the order is enforced.

The restitution order and a form for the tenant to request a hearing must be served on the tenant by a peace officer, a sheriff or constable, or a private investigator. The restitution order and form must be served by one of the methods for serving notice to vacate, unless those methods are impossible or impracticable. If those methods are impossible or impracticable, service may be made by mailing the order and form by first class mail to the tenant's last-known address and posting them at a conspicuous place on the premises.

The date of service, the name, title, signature, and telephone number of the person serving the order and the form must be legibly written on the order and form served on the tenant. The person serving the order and form must file proof of service under URCP 4. For more information and forms, see our page on Proof of Service.

Hearing on the order for restitution of the premises; Utah Code Section Section 78B-6-812.

The tenant may request a hearing to contest the manner in which the order for restitution of the premises is enforced. The tenant must nevertheless obey the order and vacate the premises unless the court stays the order after the tenant files a bond. The bond must be in an amount sufficient to pay the landlord's probable costs, attorney fees and damages if the court awards judgment for the landlord and against the tenant. Any prepaid rent is a portion of the tenant's bond.

The court will set the hearing within **10 calendar days** from the filing of the request for hearing or as soon as possible after that.

Forced eviction; Removal of tenant's personal property; Utah Code Section Section 78B-6-812.

If the tenant fails to comply with the order for restitution of the premises, a sheriff or constable may enter the premises by force using the least destructive means possible to remove the tenant.

The sheriff or constable may remove the tenant's personal property and store it. The tenant may not recover the property until the moving and storage costs have been paid. However, the tenant must be provided reasonable access within 5 business days to retrieve:

- clothing;
- identification;
- financial documents, including all those related to the tenant's immigration status or employment status;
- documents about the receipt of public services; and
- medical information, prescription medications, and any medical equipment required for maintenance of medical needs.

If the tenant does not pay the moving and storage costs and recover the personal property within **15 calendar days**, the property is considered abandoned and may be sold or donated. For more information, see our page on Tenant's Personal Property.

Appeal

Except for a complaint for eviction claiming nuisance, a party may appeal within **10 business days** after the judgment is entered. In a nuisance action, a party may appeal within **3 business days** after the judgment is entered. Utah Code Section 78B-6-813 and URCP 6.

Possession bond; Utah Code Section 78B-6-808

The purpose of a possession bond to allow the landlord to take possession of the premises while the eviction case moves forward, and, at the same time, to have money to pay the tenant's damages if, in the end, the landlord is not entitled to possession. But a possession bond may not be needed. Eviction cases are designed to conclude quickly. The landlord may prefer simply to wait to take possession, since resolving disputes about the possession bond does take time.

If the landlord wants to take possession of the premises before the occupancy hearing or before the trial, the landlord can file a possession bond. The judge must approve the amount of the bond. The amount must be sufficient to pay the tenant's probable costs and damages if the court awards judgment for the tenant and against the landlord. The bond may be a corporate or cash bond or certified funds. A cash bond is money deposited with the court. The court will hold the money in trust until the case is finished. If the landlord wins, the court will return the money to the landlord upon request.

The bond may be a property bond executed by two persons who own real property in the state and who are not parties to the action. A property bond must meet the requirements of URCP 72.

The landlord must notify the tenant that the possession bond has been filed. This notice must be served in the same manner as service of summons. For more information, see the section of this page titled Serving the complaint and summons. The notice must inform the tenant of all of the remedies and procedures available to the tenant under Utah Code Section 78B-6-808(4).

Remedies and procedures available to tenant after landlord's possession bond

The tenant has the following remedies and procedures available after landlord's possession bond:

- Within **3 business days** after being served with notice of the bond, the tenant may demand a hearing, which must be held within **3 business days** after the tenant's demand.
- If the eviction is based solely upon failure to pay rent or other money due, the rental agreement will remain in force and the complaint will be dismissed if the tenant, within **3 calendar days** after service of the notice of the possession bond, pays accrued rent, all other money due, and other costs, including attorney fees, as provided in the rental agreement.
- For any eviction, the tenant may remain in possession of the premises by filing a counter bond. The counter bond must meet the same requirements as the original possession bond. Any prepaid rent is a portion of the tenant's counter bond.
- The tenant must file the counter bond within **3 business days** after service of notice of the landlord's possession bond or within **24 hours** after the court sets the amount of the counter bond, whichever is later, unless the court allows additional time.

If the tenant does not comply with any of the remedies and procedures, the

court will enter an order for restitution of the premises directing the sheriff or constable to return possession of the premises to the landlord.

Hearing demanded by the tenant

If the court rules after the hearing demanded by the tenant that the landlord is entitled to possession of the premises, the court will enter an order for restitution of the premises directing the sheriff or constable to return possession of the premises to the landlord. If the court allows the tenant to remain in possession and if further issues must be decided, the court will require the tenant to post a counter bond. The court will expedite the remaining proceedings. If the court rules that all issues between the parties can be decided without further proceedings, the court will decide who wins.

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Damages

If there is no unlawful detainer or the landlord or tenant wants only to sue for damages, the landlord or tenant can file a small claims case or a civil case depending on the amount of damages claimed.

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Refunding deposits

The landlord must deliver to the tenant the balance of a refundable deposit and any pre-paid rent with a written itemization of any deductions, such as payment of accrued rent, damages to the premises beyond reasonable wear and tear, other costs provided for in the contract and cleaning the premises. Utah Code Section 57-17-1.

If any part of the deposit is non-refundable, the rental agreement must say that. This must be stated in writing to the tenant when the deposit is taken by the landlord. Utah Code Section 57-17-2.

Upon termination of the tenancy, the landlord may apply deposits toward the payment of rent, damages to the premises beyond reasonable wear and tear, other costs and fees provided for in the rental or lease agreement, or cleaning of the premises. Utah Code Section 57-17-3(1).

No later than 30 days after the day the tenant vacates and returns possession of the rental property to the landlord, the landlord must deliver to the tenant at the tenant's last known address the balance of any deposit, the balance of any prepaid rent, and a written notice itemizing and explaining any reason for any deduction the landlord made from the deposit or prepaid rent. Utah Code Section 57-17-3(2).

If the landlord fails to follow the requirements of Utah Code Section 57-17-3(2), the tenant may serve the landlord or the landlord's agent a notice that states the names of the parties to the rental agreement, the day the tenant vacated the rental property, that the landlord failed to comply with Utah Code Section 57-17-3(2), and the address where the landlord may send the deposit or remaining deposit funds. For a sample notice, see the forms section below.

- The tenant may recover from the landlord, if the tenant has served the required notice:
- The full deposit if the landlord fails to timely return the balance of the tenant's deposit;
- The full amount of prepaid rent if the landlord fails to timely return the balance of the tenant's prepaid rent; and
- A civil penalty of $100.

The tenant may file an action in district court to enforce the landlord to comply with the requirements of Utah Code Sections 57-17-1 through 5

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Subsidized housing

Under Code of Federal Regulations Title 24, Subtitle B, Chapter VIII (law.cornell.edu) landlords must take special steps to evict a tenant from government subsidized housing. Tenants should promptly contact Utah Legal Services (utahlegalservices.org) for information and assistance. More information is available in the Utah Legal Services' Renter's Handbook (utahlegalservices.org). See the sections on "Section 8 Problems" and "Subsidized Housing." Landlords may also want to contact the Utah Apartment Association (uaahq.org).

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Tenants of foreclosed properties

If you are renting premises being foreclosed, the Helping Families Save Their Homes Act of 2009 gives some tenants the right to stay in a foreclosed property up to 90 days after the date of foreclosure or through the end of their lease, depending on whether the property will be used as a primary residence by the new owner. The tenant must continue to pay rent to the new owner, but identifying the owner may be difficult. Contact an attorney who handles foreclosure or housing cases to see if this law applies to your situation.

The former owner of premises that are foreclosed can be evicted by the new owner using regular eviction procedures. Utah Code Section Section 78B-6-802.5.

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Tenants in Mobile Home Parks

If a tenant rents a mobile home, the landlord can evict the tenant from the mobile home using the procedures on this page. However, eviction of an owner-resident of a mobile home follows different procedures governed by Utah Code Title 57, Chapter 16, Mobile Home Park Residency Act. The Utah Legal Services (utahlegalservices.org) website may provide useful information.

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Forms

Forms for the landlord

Use OCAP to

- prepare the initial notice to the tenant required before a court case can be filed (three, five or 15 day notice)
- prepare eviction documents to be filed in court (including complaint, summons and order of restitution)
- prepare possession bond documents to be filed in court
- prepare judgment for damages to be filed in court

Forms for the tenant

Use OCAP to

- prepare an answer to the complaint
- prepare a response to a possession bond

Utah Legal Services eviction forms

- Basic guide to answering an eviction complaint (utahlegalservices.org) - PDF
- Request for Hearing on Order of Restitution (utahlegalservices.org)

- PDF
- Request for Return of Personal Property (utahlegalservices.org) - PDF
- Setting Aside a Default Judgment (utahlegalservices.org) - PDF

Forms and other information for landlords and tenants

- Tenant's Notice to Provide Deposit Disposition - PDF | Word
- Utah Legal Services (utahlegalservices.org)
- Utah Apartment Association Good Landlord Program (uaahq.org)

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Resources for Evicted Tenants

- 211 (uwsl.bowmansystems.com)
- Homeless Shelters (uwsl.bowmansystems.com)
- Utah Housing Authorities (utahhousingcorp.org)
- Utah Legal Services Renters' Handbook (utahlegalservices.org)

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Tab 3

Rule 4. Process.

(a) Signing of summons. The summons ~~shall~~ must be signed and issued by the plaintiff or the plaintiff's attorney. Separate summonses may be signed and ~~served~~ issued.

(b)(i) Time of service. ~~In~~ Unless the summons and complaint are accepted, the summons and complaint in an action commenced under Rule 3(a)(1)~~, the summons together with a copy of the complaint shall~~ must be served no later than 120 days after ~~the filing of~~ the complaint is filed. ~~unless the~~ The court may allow~~s~~ a longer period of time for good cause shown. If the summons and complaint are not timely served, the action ~~shall~~ will be dismissed~~,~~ without prejudice on ~~application~~ motion of any party or upon the court's own initiative.

(b)(ii) In any action ~~brought~~ against two or more defendants on which service has been timely obtained upon one of them,

(b)(ii)(A) the plaintiff may proceed against those served, and

(b)(ii)(B) the others may be served or appear at any time ~~prior to~~ before trial.

(c) Contents of summons.

(c)(1) The summons ~~shall~~ must:

(c)(1)(A) contain the name and address of the court, ~~the address of the court,~~ the names of the parties to the action, and the county in which it is brought~~. It shall~~;

(c)(1)(B) be directed to the defendant~~,~~;

(c)(1)(C) state the name, address and telephone number of the plaintiff's attorney, if any, and otherwise the plaintiff's address and telephone number~~. It shall~~;

(c)(1)(D) state the time within which the defendant is required to answer the complaint in writing~~, and shall~~;

(c)(1)(E) notify the defendant that in case of failure to ~~do so~~ answer in writing, judgment by default will be ~~rendered~~ entered against the defendant~~. It shall~~; and

(c)(1)(F) state either that the complaint is on file with the court or that the complaint will be filed with the court within ~~ten~~ 10 days ~~of~~ after service.

(c)(2) If the action is commenced under Rule 3(a)(2), the summons ~~shall~~ must also:

(c)(2)(A) state that the defendant need not answer if the complaint is not filed within 10 days after service; and ~~shall~~

(c)(2)(B) state the telephone number of the clerk of the court where the defendant may call at least 14 days after service to determine if the complaint has been filed.

(c)(3) If service is ~~made~~ by publication, the summons ~~shall~~ must also briefly state the subject matter and the sum of money or other relief demanded, and that the complaint is on file with the court.

(d) Acceptance of the summons and complaint.

(d)(1) Duty to avoid expenses. All parties have a duty to avoid unnecessary expenses of serving the summons and complaint.

(d)(2) Request to accept the summons and complaint. Unless the person to be served is a minor under 14 years old or an individual judicially declared to be incapacitated, of unsound mind, or incapable of conducting the individual's own affairs, the plaintiff may notify the person to be served that an action has been commenced and request that the person accept the summons and complaint. The notice and request must:

(d)(2)(A) be in writing and sent to the individual defendant or to the defendant's authorized agent;

(d)(2)(B) be accompanied by:

(d)(2)(B)(i) the complaint and summons;

(d)(2)(B)(ii) the "Notice of Lawsuit and Request to Accept the Summons and Complaint" in the Appendix of Forms attached to these rules;

(d)(2)(B)(iii) the "Agreement to Accept the Summons and Complaint" in the Appendix of Forms attached to these rules; and

(d)(2)(B)(iv) a prepaid means for returning the Agreement to Accept the Summons and Complaint;

(d)(2)(C) state the date when the request is sent; and

(d)(2)(D) be sent by email, first-class mail or other reliable means.

(d)(3) Time to return agreement; time to answer after acceptance. To accept the summons and complaint, the person to be served must complete, sign and return the agreement to the plaintiff no later than 21 days after the request is sent. The time to answer the complaint begins on the date the person indicates signature, but only if the plaintiff files the agreement.

(d)(4) Effect of acceptance, failure to accept. A person who accepts the summons and complaint retains all defenses and objections. If a person fails, without good cause, to complete, sign and return acceptance of the summons and complain, the court must award to the plaintiff the expenses later incurred in making service and the reasonable expenses, including attorney's fees, of any motion required to collect those service expenses.

(d)(5) Proof of acceptance. The plaintiff must promptly file the agreement and a copy of the summons.

~~**(d)**~~ **(e) Method of service.** The summons and complaint may be served in any state or judicial district of the United States. Unless ~~waived in writing~~ service is accepted, service of the summons and complaint ~~shall~~ must be by one of the following methods:

~~**(d)(1)**~~ **(e)(1) Personal service.** The summons and complaint may be served ~~in any state or judicial district of the United States by the sheriff or constable or by the deputy of either, by a United States Marshal or by the marshal's deputy, or~~ by any ~~other~~ person 18 years of age or older at the time of service and not a party to the action or a party's attorney. If the person to be served refuses to accept ~~a copy of the process~~ the summons and complaint, service ~~shall be~~ is sufficient if the person

serving them ~~same shall~~ states the name of the process and offers to deliver ~~a copy thereof~~ them. Personal service ~~shall~~ must be made as follows:

~~(d)(1)(A)~~ (e)(1)(A) Upon any individual other than one covered by ~~sub~~paragraphs (e)(1)(B), (e)(1)(C) or (e)(1)(D) ~~below~~, by delivering ~~a copy of~~ the summons and ~~the~~ complaint to the individual personally, or by leaving ~~a copy~~ them at the individual's dwelling house or usual place of abode with ~~some~~ a person of suitable age and discretion who resides there ~~residing~~, or by delivering ~~a copy of the summons and the complaint~~ them to an agent authorized by appointment or by law to receive ~~service of~~ process;

~~(d)(1)(B)~~ (e)(1)(B) Upon ~~an infant (being a person~~ a minor under 14 years~~)~~ old by delivering ~~a copy of~~ the summons and ~~the~~ complaint to the ~~infant~~ minor and also to the ~~infant's~~ minor's father, mother, or guardian or, if none can be found within the state, then to any person having the care and control of the ~~infant~~ minor, or with whom the ~~infant~~ minor resides, or ~~in whose service~~ by whom the ~~infant~~ minor is employed;

~~(d)(1)(C)~~ (e)(1)(C) Upon an individual judicially declared to be incapacitated, of unsound mind, or incapable of conducting the ~~person's~~ individual's own affairs, by delivering ~~a copy of~~ the summons and ~~the~~ complaint to the ~~person~~ individual and to the guardian or conservator of the individual if one has been appointed; the ~~person's~~ individual's legal representative if one has been appointed, and, in the absence of ~~such~~ a guardian, conservator, or legal representative, to the ~~individual~~ person, if any, who has care, custody, or control of the ~~person~~ individual;

~~(d)(1)(D)~~ (e)(1)(D) Upon an individual incarcerated or committed at a facility operated by the state or any of its political subdivisions, by delivering ~~a copy of~~ the summons and ~~the~~ complaint to the person who has the care, custody, or control of the individual ~~to be served~~, or to that person's designee or to the guardian or conservator of the individual ~~to be served~~ if one has been appointed., ~~who shall, in any case,~~ The person to whom the summons and complaint are delivered must promptly deliver them ~~process~~ to the individual ~~served~~;

~~(d)(1)(E)~~ (e)(1)(E) Upon ~~any~~ a corporation not ~~herein~~ otherwise provided for in this rule, ~~upon~~ a limited liability company, a partnership, or ~~upon~~ an unincorporated association ~~which is~~ subject to suit under a common name, by delivering ~~a copy of~~ the summons and ~~the~~ complaint to an officer, a managing or general agent, or other agent authorized by appointment or ~~by~~ law to receive ~~service of~~ process and~~, if the agent is one authorized by statute to receive service and the statute so requires,~~ by also mailing ~~a copy of~~ the summons and ~~the~~ complaint to the defendant, if the agent is one authorized by statute to receive process and the statute so requires. If no ~~such~~ officer or agent can be found within the state, and the defendant has, or advertises or holds itself out as having, ~~an office or~~ a place of business within the state or elsewhere, or does business within this state or elsewhere, then upon the person in charge of ~~such office or~~ the place of business;

~~(d)(1)(F)~~ (e)(1)(F) Upon an incorporated city or town, by delivering ~~a copy of~~ the summons and ~~the~~ complaint to the recorder;

~~(d)(1)(G)~~ (e)(1)(G) Upon a county, by delivering ~~a copy of~~ the summons and ~~the~~ complaint to the county clerk ~~of such county~~;

~~(d)(1)(H)~~ (e)(1)(H) Upon a school district or board of education, by delivering ~~a copy of~~ the summons and ~~the~~ complaint to the superintendent or ~~business~~ administrator of the board;

~~(d)(1)(I)~~ (e)(2)(I) Upon an irrigation or drainage district, by delivering ~~a copy of~~ the summons and ~~the~~ complaint to the president or secretary of its board;

~~(d)(1)(J)~~ (e)(1)(J) Upon the state of Utah~~, in such cases as by law are authorized to be brought against the state,~~ by delivering ~~a copy of~~ the summons and ~~the~~ complaint to the attorney general and any other person or agency required by statute to be served; and

~~(d)(1)(K)~~ (e)(1)(K) Upon a department or agency of the state of Utah, or upon ~~any~~ a public board, commission or body~~, subject to suit,~~ by delivering ~~a copy of~~ the summons and ~~the~~ complaint to any member of its governing board, or to its executive employee or secretary.

~~**(d)(2) Service by mail or commercial courier service.**~~

~~(d)(2)(A) The summons and complaint may be served upon an individual other than one covered by paragraphs (d)(1)(B) or (d)(1)(C) by mail or commercial courier service in any state or judicial district of the United States provided the defendant signs a document indicating receipt.~~

~~(d)(2)(B) The summons and complaint may be served upon an entity covered by paragraphs (d)(1)(E) through (d)(1)(I) by mail or commercial courier service in any state or judicial district of the United States provided defendant's agent authorized by appointment or by law to receive service of process signs a document indicating receipt.~~

~~(d)(2)(C) Service by mail or commercial courier service shall be complete on the date the receipt is signed as provided by this rule.~~

~~(d)(3)~~ (e)(2) Service in a foreign country. Service in a foreign country ~~shall~~ must be made as follows:

~~(d)(3)(A)~~ (e)(2)(A) by any internationally agreed means reasonably calculated to give notice, such as those means authorized by the Hague Convention on the Service Abroad of Judicial and Extrajudicial Documents;

~~(d)(3)(B)~~ (e)(2)(B) if there is no internationally agreed means of service or the applicable international agreement allows other means of service, provided that service is reasonably calculated to give notice:

~~(d)(3)(B)(i)~~ (e)(2)(B)(i) in the manner prescribed by the law of the foreign country for service in that country in an action in any of its courts of general jurisdiction;

~~(d)(3)(B)(ii)~~ (e)(2)(B)(ii) as directed by the foreign authority in response to ~~a letter rogatory or~~ letter of request issued by the court; or

~~(d)(3)(B)(iii)~~ (e)(2)(B)(iii) unless prohibited by the law of the foreign country, by ~~delivery to the individual personally of a copy of~~ delivering the summons and ~~the~~ complaint to the individual personally or by any form of mail requiring a signed receipt, ~~to be~~ addressed and dispatched by the clerk of the court to the party to be served; or

~~(d)(3)(C)~~ (e)(2)(C) by other means not prohibited by international agreement as may be directed by the court.

~~(d)(4)~~ (e)(3) Other service.

~~(d)(4)(A) Where~~ (e)(3)(A) If the identity or whereabouts of the person to be served are unknown and cannot be ascertained through reasonable diligence, ~~where~~ if service upon all of the individual parties is impracticable under the circumstances, or ~~where~~ if there ~~exists~~ is good cause to believe that the person to be served is avoiding service ~~of process~~, the party seeking service ~~of process~~ may file a motion ~~supported by affidavit requesting an order allowing~~ to allow service ~~by publication or~~ by some other means. ~~The~~ An affidavit or declaration supporting ~~affidavit shall~~ the motion must set forth the efforts made to identify, locate, ~~or~~ and serve the party ~~to be served~~, or the circumstances ~~which~~ that make it impracticable to serve all of the individual parties.

~~(d)(4)(B)~~ (e)(3)(B) If the motion is granted, the court ~~shall~~ will order service of ~~process~~ the complaint and summons by means reasonably calculated, under all the circumstances, to apprise the ~~interested~~ named parties ~~of the pendency~~ of the action ~~to the extent reasonably possible or practicable~~. The court's order ~~shall also~~ must specify the content of the process to be served and the event ~~or events as of which service shall be deemed complete~~ upon which service is complete. Unless service is by publication, a copy of the court's order ~~shall~~ must be served ~~upon the defendant~~ with the process specified by the court.

~~(d)(4)(C) In any proceeding where~~ (e)(3)(C) If the summons is required to be published, the court ~~shall~~, upon the request of the party applying for ~~publication~~ service by other means, must designate ~~the newspaper in which publication shall be made. The newspaper selected shall be~~ a newspaper of general circulation in the county ~~where such~~ in which publication is required ~~to be made~~.

~~(e)~~ (f) Proof of service.

~~(e)(1) If service is not waived, the~~ (f)(1) The person effecting service ~~shall~~ must file proof ~~with the court. The proof of service must state~~ of service stating the date, place, and manner of service, including a copy of the summons. ~~Proof of service made pursuant to paragraph (d)(2) shall include a receipt signed by the defendant or defendant's agent authorized by appointment or by law to receive service of process.~~ If service is made by a person other than by an attorney, ~~the~~ sheriff, ~~or~~ constable, ~~or by the deputy of either, by a~~ United States Marshal, or by the sheriff's, constable's or marshal's deputy, the proof of service ~~shall~~ must be ~~made~~ by affidavit or declaration under penalty of Utah Code Section 78B-5-705.

~~(e)(2)~~ (f)(2) Proof of service in a foreign country ~~shall~~ must be made as prescribed in these rules for service within this state, or by the law of the foreign country, or by order of the court. When service is made pursuant to paragraph ~~(d)(3)(C)~~ (e)(2)(C), proof of service ~~shall~~ must include a receipt signed by the addressee or other evidence of delivery to the addressee satisfactory to the court.

~~(e)(3)~~ (f)(3) Failure to ~~make~~ file proof of service does not affect the validity of the service. The court may allow proof of service to be amended.

~~**(f) Waiver of service; Payment of costs for refusing to waive.**~~

~~(f)(1) A plaintiff may request a defendant subject to service under paragraph (d) to waive service of a summons. The request shall be mailed or delivered to the person upon whom service is authorized under paragraph (d). It shall include a copy of the complaint, shall allow the defendant at least 21 days from the date on which the request is sent to return the waiver, or 30 days if addressed to a defendant outside of the United States, and shall be substantially in the form of the Notice of Lawsuit and Request for Waiver of Service of Summons set forth in the Appendix of Forms attached to these rules.~~

~~(f)(2) A defendant who timely returns a waiver is not required to respond to the complaint until 45 days after the date on which the request for waiver of service was mailed or delivered to the defendant, or 60 days after that date if addressed to a defendant outside of the United States.~~

~~(f)(3) A defendant who waives service of a summons does not thereby waive any objection to venue or to the jurisdiction of the court over the defendant.~~

~~(f)(4) If a defendant refuses a request for waiver of service submitted in accordance with this rule, the court shall impose upon the defendant the costs subsequently incurred in effecting service.~~

Advisory Committee Notes

Tab 4

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November 13, 2015

To: Civil Rules Committee
From: Tim Shea
Re: Appeal of judgment with attorney fees pending; action by appellate rules committee

The appellate rules committee approved amendments to appellate Rule 4, which was their part of the re-examination of the policies in *ProMax Development Corp. v. Raile*, 2000 UT 4, 998 P.2d 254. But they did so in a way that will require further changes in the rules of civil procedure.

The proposal of the joint subcommittee was to follow the federal model. After a lengthy discussion, the appellate rules committee approved for comment the attached Rule 4, which treats a motion for attorney fees the same as a motion under civil rule 50, 52 or 59: the time to appeal automatically runs from the order disposing of the motion. The federal model and the joint subcommittee's proposal is that the trial court judge would have to provide for that effect. The appellate rules committee decided that the effect should be automatic.

Also, the appellate rules committee opposed treating costs in the same manner as attorney fees.

This new approach means that proposed Rule 58A(f) should be deleted or modified. I recommend the latter. In the draft that you approved for comment, paragraph (f) provided:

> Ordinarily the time for filing a notice of appeal is not extended by a determination of costs or attorney fees, but the court may order that the time to appeal runs from entry of the order resolving a claim for costs or attorney fees. To accomplish this result, the court must act before a notice of appeal has been filed and becomes effective.

Given the new approach in appellate Rule 4, this would be incorrect. A motion for attorney fees automatically extends the time to appeal. However, paragraph (f) is the vehicle that we were using to convey the

express message that the amendment was intended to overturn *ProMax*. I recommend replacing the original proposal with a new paragraph (f) to say in effect:

> Award of attorney fees. A motion or claim for attorney fees does not affect the finality of a judgment for any purpose, but, under Rule of Appellate Procedure 4, the time in which to file the notice of appeal runs from the disposition of the motion or claim.

A provision such as this would expressly run counter to *ProMax*, and we can expand upon that in the committee note, which I have amended accordingly. It would also address any doubts about the enforceability of a judgment while a motion for attorney fees is pending.

This new approach should not affect the amendments to Rule 73, and I have not included it because you have already approved it for comment. Neither will it affect Rule 54, but I have included it so you can review the proposed committee note based on your request from the last meeting.

Finally, the joint subcommittee recommended and the appellate committee agreed that a motion under Rule 60(b) would have the same effect as a motion under Rule 59 if the Rule 60(b) motion is filed within 28 days after the judgment. However the committee requested a note to Rule 60 that warns of the difference between filing a motion before and after the 28th day.

You have already approved for comment amendments to Rule 60 as part of our examination of all post-trial motions. None of the post-trial motion rules needs amendment because of this effort to re-examine *ProMax*, but an advisory note to Rule 60 is appropriate since the deadlines for a motion already vary depending on the grounds, and this change will add yet another effect. I recommend something similar to:

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

Encl Rule of Appellate Procedure 4
Rule of Civil Procedure 54
Rule of Civil Procedure 58A
Rule of Civil Procedure 60

Rule 4. Appeal as of right: when taken.

(a) Appeal from final judgment and order. In a case in which an appeal is permitted as a matter of right from the trial court to the appellate court, the notice of appeal required by Rule 3 shall be filed with the clerk of the trial court within 30 days after the date of entry of the judgment or order appealed from. However, when a judgment or order is entered in a statutory forcible entry or unlawful detainer action, the notice of appeal required by Rule 3 shall be filed with the clerk of the trial court within 10 days after the date of entry of the judgment or order appealed from.

(b) Time for appeal extended by certain motions.

(b)(1) If a party timely files in the trial court any of the following ~~motions~~, the time for all parties to appeal from the judgment runs from the entry of the dispositive order ~~disposing of the motion~~:

(b)(1)(A) A motion for judgment under Rule 50(b) of the Utah Rules of Civil Procedure;

(b)(1)(B) A motion to amend or make additional findings of fact, whether or not an alteration of the judgment would be required if the motion is granted, under Rule 52(b) of the Utah Rules of Civil Procedure;

(b)(1)(C) A motion to alter or amend the judgment under Rule 59 of the Utah Rules of Civil Procedure;

(b)(1)(D) A motion for a new trial under Rule 59 of the Utah Rules of Civil Procedure; ~~or~~

(b)(1)(E) A motion for relief under Rule 60(b) of the Utah Rules of Civil Procedure if the motion is filed no later than 28 days after the judgment is entered;

(b)(1)(F) A motion or claim for attorney fees; or

(b)(1)(G) A motion for a new trial under Rule 24 of the Utah Rules of Criminal Procedure.

(b)(2) A notice of appeal filed after announcement or entry of judgment, but before entry of an order disposing of any motion listed in ~~Rule 4~~ paragraph (b), shall be treated as filed after entry of the order and on the day thereof, except that such a notice of appeal is effective to appeal only from the underlying judgment. To appeal from a final order disposing of any motion listed in ~~Rule 4~~ paragraph (b), a party must file a notice of appeal or an amended notice of appeal within the prescribed time measured from the entry of the order.

(c) Filing prior to entry of judgment or order. A notice of appeal filed after the announcement of a decision, judgment, or order but before entry of the judgment or order shall be treated as filed after such entry and on the day thereof.

(d) Additional or cross-appeal. If a timely notice of appeal is filed by a party, any other party may file a notice of appeal within 14 days after the date on which the first notice of appeal is docketed in the court in which it was filed, or within the time otherwise prescribed by paragraphs (a) and (b) of this rule, whichever period last expires.

(e) Motion for extension of time.

(e)(1) The trial court, upon a showing of good cause, may extend the time for filing a notice of appeal upon motion filed before the expiration of the time prescribed by paragraphs (a) and (b) of this

rule. Responses to such motions for an extension of time are disfavored and the court may rule at any time after the filing of the motion. No extension shall exceed 30 days beyond the prescribed time or 14 days beyond the date of entry of the order granting the motion, whichever occurs later.

(e)(2) The trial court, upon a showing of good cause or excusable neglect, may extend the time for filing a notice of appeal upon motion filed not later than 30 days after the expiration of the time prescribed by paragraphs (a) and (b) of this rule. The court may rule at any time after the filing of the motion. That a movant did not file a notice of appeal to which paragraph (c) would apply is not relevant to the determination of good cause or excusable neglect. No extension shall exceed 30 days beyond the prescribed time or 14 days beyond the date of entry of the order granting the motion, whichever occurs later.

(f) Motion to reinstate period for filing a direct appeal in criminal cases. Upon a showing that a criminal defendant was deprived of the right to appeal, the trial court shall reinstate the thirty-day period for filing a direct appeal. A defendant seeking such reinstatement shall file a written motion in the sentencing court and serve the prosecuting entity. If the defendant is not represented and is indigent, the court shall appoint counsel. The prosecutor shall have 30 days after service of the motion to file a written response. If the prosecutor opposes the motion, the trial court shall set a hearing at which the parties may present evidence. If the trial court finds by a preponderance of the evidence that the defendant has demonstrated that the defendant was deprived of the right to appeal, it shall enter an order reinstating the time for appeal. The defendant's notice of appeal must be filed with the clerk of the trial court within 30 days after the date of entry of the order.

(g) Motion to reinstate period for filing a direct appeal in civil cases.

(g)(1) The trial court shall reinstate the thirty-day period for filing a direct appeal if the trial court finds by a preponderance of the evidence that:

(g)(1)(A) The party seeking to appeal lacked actual notice of the entry of judgment at a time that would have allowed the party to file a timely motion under paragraph (e) of this rule;

(g)(1)(B) The party seeking to appeal exercised reasonable diligence in monitoring the proceedings; and

(g)(1)(C) The party, if any, responsible for serving the judgment under Rule 58A(d) of the Utah Rules of Civil Procedure did not promptly serve a copy of the signed judgment on the party seeking to appeal.

(g)(2) A party seeking such reinstatement shall file a written motion in the trial court within one year from the entry of judgment. The party shall comply with Rule 7 of the Utah Rules of Civil Procedure and shall serve each of the parties in accordance with Rule 5 of the Utah Rules of Civil Procedure.

(g)(3) If the trial court enters an order reinstating the time for filing a direct appeal, a notice of appeal must be filed within 30 days after the date of entry of the order.

Advisory Committee Note

Paragraph (f) was adopted to implement the holding and procedure outlined in Manning v. State, 2005 UT 61, 122 P.3d 628.

Rule 54. Judgments; costs.

(a) Definition; form. "Judgment" as used in these rules includes a decree 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 should not contain a recital of pleadings, the report of a master, or the record of prior proceedings.

(b) Judgment upon multiple claims and/or involving multiple parties. When an action presents more than one claim for relief—whether as a claim, counterclaim, cross claim, or third party claim—and/or when multiple parties are involved, the court may enter judgment as to one or more but fewer than all of the claims or parties only if the court expressly determines that there is no just reason for delay. Otherwise, any order or other decision, however designated, that adjudicates fewer than all the claims or the rights and liabilities of fewer than all the parties does not end the action as to any of the claims or parties, and 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.

(d) Costs.

(d)(1) To whom awarded. 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 may be imposed only to the extent permitted by law.

(d)(2) How assessed. The party who claims costs must within 14 days after the entry of judgment file and serve a verified memorandum of costs. A party dissatisfied with the costs claimed may, within 7 days after service of the memorandum of costs, object to the claimed costs.

(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, is deemed served and filed on the date judgment is entered.

(e) Amending the judgment to add costs or attorney fees. If the court awards costs under paragraph (d) or attorney fees under Rule 73 after the judgment is entered, to include the award in the judgment, the party must file and serve an amended judgment including the costs or attorney fees, and the court will enter the amended judgment unless another party objects within 7 days after the amended judgment is filed.

Advisory Committee Notes

2016 amendments

Paragraph (e) describes the process by which the determination of costs or fees becomes part of the judgment. If there is legal error in entering judgment for costs or attorney fees, that error is reviewable on appeal just like any other. But if the underlying basis for the award of costs or attorney fees, such as the

defendant's liability in the action, is not upheld on appeal, the party should not be liable for costs or fees even if the award of costs or fees was entered without error or was not reviewed.

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

(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; or

(b)(5) for attorney fees under Rule 73.

(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 provides the basis for the entry of judgment.

(f) Award of attorney fees. A motion or claim for attorney fees does not affect the finality of a judgment for any purpose, but, under Rule of Appellate Procedure 4, the time in which to file the notice of appeal runs from the disposition of the motion or claim.

(g) 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.

~~(g)~~ (h) 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.

~~(h)~~ (i) 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, as follows:

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

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

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

The clerk must sign the judgment for the specified sum.

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

~~(i)(1)~~ (j)(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;

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

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

~~(i)(4)~~ (j)(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

2015 amendments

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 58A 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.

2016 amendments

The 2016 amendments in paragraphs (b) and (f) are part of a coordinated effort with the Advisory Committee on the Rules of Appellate Procedure to change the effect of a motion for attorney fees on the appealability of a judgment. The combined amendments of this rule and Rule of Appellate Procedure 4 effectively overturn *ProMax Development Corp. v. Raile*, 2000 UT 4, 998 P.2d 254 and *Meadowbrook, LLC v. Flower*, 959 P.2d 115 (Utah 1998). Paragraph (f) also addresses any doubts about the enforceability of a judgment while a motion for attorney fees is pending.

Under *ProMax* and *Meadowbrook* a judgment was not final until the claim for attorney fees had been resolved. An appeal filed before a claim for attorney fees had been resolved was premature and would be dismissed. Under the 2016 amendments, the time to appeal runs from the order disposing of a timely motion for attorney fees, just as it does timely motions under Rules 50, 52 and 59. The 2016 amendments to appellate Rule 4(b) also add a motion under Rule 60(b), but only if the motion is filed within 28 days after the judgment.

If a notice of appeal is filed before the order resolving the timely motion, the appeal is not dismissed; it is treated as filed on the day the order ultimately is entered, although the party must file an amended notice of appeal to appeal from the order disposing of the motion.

Although this change overturns *ProMax* and *Meadowbrook*, it is not the same as the federal rule. Under Federal Rule of Civil Procedure 58(e):

> Ordinarily, the entry of judgment may not be delayed, nor the time for appeal extended, in order to tax costs or award fees. But if a timely motion for attorney's fees is made under Rule 54(d)(2), the court may act before a notice of appeal has been filed and become effective to order that the motion have the same effect under Federal Rule of Appellate Procedure 4 (a)(4) as a timely motion under Rule 59.

In other words, a motion for attorney fees extends the time to appeal, but only if the trial court judge rules that it does. In the 2016 amendment of the state rules, a timely motion for attorney fees automatically has that effect.

Although the 2016 amendments change a policy of long standing in the Utah state courts, the amendments will help to protect the appellate rights of parties and avoid the cost of premature appeals.

Rule 60. Relief from judgment or order.

(a) Clerical mistakes. ~~Clerical~~ The court may correct a clerical mistake~~s in judgments, orders or other parts of the record and errors therein~~ or a mistake arising from oversight or omission~~ may be corrected by the court at any time of its own initiative or on the motion of any party and after such notice, if any, as the court orders~~ whenever one is found in a judgment, order, or other part of the record. The court may do so on motion or on its own, with or without notice. ~~During the pendency of an appeal, such mistakes may be so corrected before the appeal is docketed in the appellate court, and thereafter~~ After a notice of appeal has been filed and while the appeal is pending, the mistake may be ~~so~~ corrected only with leave of the appellate court.

(b) Mistakes; inadvertence; excusable neglect; newly discovered evidence; fraud, etc. On motion and upon ~~such~~ just terms ~~as are just~~, the court may ~~in the furtherance of justice~~ relieve a party or ~~his~~ its legal representative from a ~~final~~ judgment, order, or proceeding for the following reasons:

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

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

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

(b)(4) the judgment is void;

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

(b)(6) any other reason ~~justifying~~ that justifies relief ~~from the operation of the judgment~~.

(c) Timing and effect of the motion. ~~The~~ A motion ~~shall~~ under paragraph (b) must be ~~made~~ filed within a reasonable time and for reasons in paragraph (b)(1), (2), or (3), not more than 90 days after entry of the judgment~~,~~ or order~~,~~ or, if there is no judgment or order, from the date of the proceeding ~~was entered or taken~~. ~~A motion under this Subdivision (b)~~ The motion does not affect the finality of a judgment or suspend its operation.

(d) Other power to grant relief. This rule does not limit the power of a court to entertain an independent action to relieve a party from a judgment, order or proceeding or to set aside a judgment for fraud upon the court. The procedure for obtaining any relief from a judgment shall be by motion as prescribed in these rules or by an independent action.

Advisory Committee Notes

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

2016 amendments

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

Tab 5

Rule 13. Counterclaim and cross-claim.

(a) Compulsory counterclaim~~s~~.

(a)(1) A pleading ~~shall~~ must state as a counterclaim any claim ~~which~~ that—at the time of ~~serving the pleading~~ its service—the pleader has against an~~y~~ opposing party~~,~~ if ~~it~~ the claim:

(a)(1)(A) arises out of the transaction or occurrence that is the subject~~-~~ matter of the opposing party's claim; and

(a)(1)(B) does not require ~~for its adjudication the presence of third parties of~~ adding another party over whom the court cannot acquire jurisdiction.

(a)(2) ~~But the~~ The pleader need not state the claim if:

(a)(2)(A) ~~(1) at the time~~ when the action was commenced, the claim was the subject of another pending action, or

(a)(2)(B) ~~(2)~~ the opposing party ~~brought suit upon his~~ sued on its claim by attachment or other process ~~by which the court~~ that did not ~~acquire~~ establish personal jurisdiction ~~to render a personal judgment~~ over the pleader on that claim, and the pleader ~~is not stating~~ does not assert any counterclaim under this ~~R~~rule ~~13~~.

(b) Permissive counterclaim. A pleading may state as a counterclaim ~~any claim~~ against an opposing party ~~not arising out of the transaction or occurrence that is the subject matter of the opposing party's claim~~ any claim that is not compulsory.

(c) ~~Counterclaim exceeding opposing claim~~Relief sought in a counterclaim. A counterclaim ~~may or may~~ need not diminish or defeat the recovery sought by the opposing party. It may ~~claim~~ request relief ~~exceeding~~ that exceeds in amount or ~~different~~ differs in kind from ~~that~~ the relief sought ~~in the pleading of~~ by the opposing party.

(d) Counterclaim maturing or acquired after pleading. ~~A claim which either~~ The court may permit a party to file a supplemental pleading [under Rule 15] asserting a counterclaim that matured or was acquired by the ~~pleader~~ party after serving ~~his~~ an earlier pleading ~~may, with the permission of the court, be presented as a counterclaim by supplemental pleading~~.

~~**(e) Omitted counterclaim.** When a pleader fails to set up a counterclaim through oversight, inadvertence, or excusable neglect, or when justice requires, he may by leave of court set up the counterclaim by amendment.~~

~~(f)~~ (e) Cross-claim against co-party. A pleading may state as a cross~~-~~claim any claim by one party against a co~~-~~party ~~arising~~ if the claim arises out of the transaction or occurrence that is the subject~~-~~ matter ~~either~~ of the original action or of a counterclaim, ~~therein or relating to~~ or if the claim relates to any property that is the subject~~-~~ matter of the original action. ~~Such~~ The cross~~-~~claim may include a claim that the coparty ~~against whom it is asserted~~ is or may be liable to the cross~~-~~claimant for all or part of a claim asserted in the action against the cross~~-~~claimant.

~~(g)~~ (f) ~~A~~Joining additional parties ~~may be brought in.~~ ~~When the presence of parties other than those to the original action is required for the granting of complete relief in the determination of a~~

~~counterclaim or cross-claim, the court shall order them to be brought in as defendants as provided in these rules, if jurisdiction of them can be obtained.~~ Rules 19 and 20 govern the addition of a person as a party to a counterclaim or crossclaim.

~~(h)~~ (g) Separate trials; separate judgments. ~~Judgment on a counterclaim or cross-claim may be rendered in accordance with the terms of~~ If the court orders separate trials under Rule 42, it may enter judgment on a counterclaim or crossclaim under Rule 54(b) when it has jurisdiction to do so, even if the ~~claims of the~~ opposing party's claims have been dismissed or otherwise ~~disposed of~~ resolved.

NOTE: FRCP 13 does not include the equivalent of the following paragraphs:

~~(i)~~ (h) Cross demands not affected by assignment or death. When cross demands have existed between persons under ~~such~~ circumstances that, if one had brought an action against the other, a counterclaim could have been set ~~up~~ out, the two demands ~~shall be~~ are deemed compensated so far as they equal each other~~, and neither~~. Neither person can be deprived of the benefit ~~thereof~~ of the demand by ~~the~~ its assignment or death of the other person, except as provided in ~~Subdivision (j) of this rule~~ paragraph (i).

~~(j)~~ (i) Claims against assignee. Except as otherwise provided by law as to negotiable instruments and assignments of accounts receivable, any claim, counterclaim, or cross-claim ~~which~~ that could have been asserted against an assignor at the time of or before notice of ~~such~~ assignment, may be asserted against ~~his~~ the assignee, to the extent that ~~such~~ the claim, counterclaim, or cross-claim does not exceed recovery upon the claim of the assignee.

Rule 15. Amended and supplemental pleadings.

(a) Amendments before trial.

(a)(1) A party may amend ~~his~~ its pleading once as a matter of course ~~at any time before a responsive pleading is served or, if the pleading is one to which no responsive pleading is permitted and the action has not been placed upon the trial calendar, he may so amend it at any time~~ within:

(a)(1)(A) 21 days after serving it ~~is served~~; or

(a)(1)(B) if the pleading is one to which a responsive pleading is required, 21 days after service of a responsive pleading or 21 days after service of a motion under Rule 12(b), (e), or (f), whichever is earlier.

(a)(2) ~~Otherwise~~ In all other cases, a party may amend ~~his~~ its pleading only ~~by leave of~~ with the court's permission or ~~by written consent of~~ the ~~adverse party; and leave shall be freely given~~ opposing party's written consent. The party must attach its proposed amended pleading to the motion to permit an amended pleading. The court should freely give permission when justice ~~so~~ requires.

(a)(3) ~~A party shall plead in response to an amended pleading~~ Any required response to an amended pleading must be filed within the time remaining ~~for response~~ to respond to the original pleading or within 14 days after service of the amended pleading, whichever ~~period may be the longer, unless the court otherwise orders~~ is later.

(b) Amendments ~~to conform to the evidence~~ during and after trial.

(b)(1) When an issue~~s~~ not raised ~~by~~ in the pleadings ~~are~~ is tried by the parties' express or implied consent ~~of the parties~~, ~~they shall~~ it must be treated in all respects as if ~~they had been~~ raised in the pleadings. ~~Such amendments of the pleadings as may be necessary to cause them to conform to the evidence and to raise these issues may be made upon motion of any party at any time, even after judgment; but~~ A party may move—at any time, even after judgment—to amend the pleadings to conform them to the evidence and to raise an unpleaded issue. But failure ~~so~~ to amend does not affect the result of the trial of ~~these~~ that issue~~s~~.

(b)(2) If, at trial, a party objects that evidence is ~~objected to at the trial on the ground that it is~~ not within the issues ~~made by~~ raised in the pleadings, the court may ~~allow~~ permit the pleadings to be amended ~~when the presentation of the merits of the action will be subserved thereby~~. The court should freely permit an amendment when doing so will aid in presenting the merits and the objecting party fails to satisfy the court that the ~~admission of such~~ evidence would prejudice ~~him in maintaining his~~ that party's action or defense ~~up~~on the merits. The court ~~shall~~ may grant a continuance~~, if necessary,~~ to enable the objecting party to meet ~~such~~ the evidence.

(c) Relation back of amendments. ~~Whenever~~ An amendment to a pleading relates back to the date of the original pleading when:

(c)(1) the law that provides the applicable statute of limitations allows relation back;

(c)(2) ~~the claim or defense asserted in the amended pleading~~ the amendment asserts a claim or defense that arose out of the conduct, transaction, or occurrence set ~~forth~~ out—or attempted to be set ~~forth~~ out—in the original pleading~~, the amendment relates back to the date of the original pleading~~; or

(c)(3) the amendment changes the party or the naming of the party against whom a claim is asserted, if paragraph (c)(2) is satisfied and if, within the period provided by Rule 4(b) for serving the summons and complaint, the party to be brought in by amendment:

(c)(3)(A) received such notice of the action that it will not be prejudiced in defending on the merits; and

(c)(3)(B) knew or should have known that the action would have been brought against it, but for a mistake concerning the proper party's identity.

(d) Supplemental pleadings. ~~Upon~~ On motion ~~of a party~~ and reasonable notice, the court may, ~~upon reasonable notice and upon such terms as are~~ on just terms, permit ~~him~~ a party to ~~serve~~ file a supplemental pleading setting ~~forth~~ out any transaction~~s~~, ~~or~~ occurrence~~s~~, or event~~s~~ ~~which have~~ that happened ~~since~~ after the date of the pleading ~~sought~~ to be supplemented. ~~Permission may be granted~~ The court may permit supplementation even though the original pleading is defective in ~~its statement of~~ stating a claim ~~for relief~~ or defense. ~~If the court deems it advisable that the adverse~~ The court may order that the opposing party plead to the supplemental pleading~~, it shall so order, specifying the time therefor~~ within a specified time.

Tab 6

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November 13, 2015

To: Civil Rules Committee
From: Tim Shea
Re: Rule 12

The committee agreed in September to propose a process for accepting the summons and complaint replacing waiver of service and service by mail. That approach will require a conforming amendment to Rule 12(a) to recognize the different time in which to answer. Rule 12 should move forward in tandem with Rule 4.

We also had a request some time ago from John Bogart to eliminate from Rule 12 the requirement for a bond by a nonresident plaintiff. He writes:

> Bonds are permissive for in-state plaintiffs but mandatory for out-of-state plaintiffs (on motion). Whatever justification may have existed for this rule, there is no practical basis for it now. Most banking and other financial institutions are regional or national, and there are very few obstacles to collecting judgments across state lines. Where the plaintiff is located should not matter to whether a cost bond is appropriate.

The remaining amendments adopt the style and phrasing of the federal rule. The resulting state rule is nearly identical to the federal rule with 2 exceptions:

- In keeping with the committee's earlier decision, I have required documents to be "filed" within the designated times after the triggering document is served. FRCP 12 generally requires documents to be "served" within the designated times after the document is served. If documents are filed electronically, the two dates will be the same for all practical purposes.

- And I have omitted from the state rule the authority of the state and its agencies and employees to answer within 60 days of the complaint.

Federal Rule 12 does not have the equivalent of state Rule 12(i): "The filing of a responsive pleading after the denial of any motion made pursuant to these rules shall not be deemed a waiver of such motion." It seems to go without saying in the federal rule. If it needs to be said in the state rule, paragraph (i) should be reinstated.

I want to point out what appears to be a problem with the federal rule. Under proposed paragraph (h):

> A party waives any defense listed in paragraphs (b)(2)–(b)(5) by:
>
> (h)(1)(A) omitting it from a motion in the circumstances described in paragraph (g)(2); or
>
> (h)(1)(B) failing to either:
>
> (h)(2)(B)(i) make it by motion under this rule; or
>
> (h)(2)(B)(ii) include it in a responsive pleading or in an amendment allowed by Rule 15(a)(1) as a matter of course.

It appears to me that the circumstances of (h)(1)(A) are wholly included in (h)(1)(B), and so the former is not needed.

Rule 12. Defenses and objections: when and how presented; motion for judgment on the pleadings; consolidating motions; waiving defenses; pretrial hearing.

(a) ~~When presented~~ Time to serve a responsive pleading. Unless ~~otherwise provided~~ another time is specified by this rule, statute or order ~~of the court~~, the time to file a responsive pleading is as follows:

(a)(1) ~~a~~ A defendant ~~shall serve~~ must file an answer:

(a)(1)(A) within 21 days after ~~the service of~~ being served with the summons and complaint ~~is complete~~ if served within the state; ~~and~~

(a)(1)(B) within 30 days after ~~service of~~ being served with the summons and complaint ~~is complete~~ if served outside the state; or

(a)(1)(C) if it has timely accepted the summons and complaint under Rule 4(d), within 21 days after the date the defendant signs the agreement to accept the summons and complaint, but only if the plaintiff files the agreement.

(a)(2) A party ~~served with a pleading stating a cross-claim shall serve an answer thereto within 21 days after the service. The plaintiff shall serve a reply to a~~ must file an answer to a counterclaim ~~in the answer~~ or crossclaim within 21 days after being served with the pleading that states the counterclaim or crossclaim ~~service of the answer or, if a reply is ordered by the court, within 21 days after service of the order, unless the order otherwise directs~~.

(a)(3) A party must file a reply to an answer within 21 days after being served with an order to reply, unless the order sets a different time.

(a)(4) ~~The service of a motion under this rule alters these periods of time as follows, unless a different time is fixed by order of the court, but a motion directed to fewer than all of the claims in a pleading does not affect the time for responding to the remaining claims~~ Unless the court sets a different time, filing a motion under this rule alters these periods as follows:

~~(a)(1)~~ (a)(4)(A) If the court denies the motion or postpones its disposition until ~~the~~ trial ~~on the merits~~, the responsive pleading ~~shall~~ must be ~~served~~ filed within 14 days after notice of the court's action~~;~~.

~~(a)(2)~~ (a)(4)(B) If the court grants a motion for a more definite statement, the responsive pleading ~~shall~~ must be ~~served~~ filed within 14 days after ~~the service of~~ being served with the more definite statement.

(b) How to ~~presented~~ defenses. Every defense~~, in law or fact,~~ to a claim for relief in any pleading~~, whether a claim, counterclaim, cross-claim, or third-party claim, shall~~ must be asserted in the responsive pleading ~~thereto~~ if one is required~~, except that the following defenses may at the option of the pleader be made~~. But a party may assert the following defenses by motion:

(b)(1) lack of subject-matter jurisdiction ~~over the subject matter,~~;

(b)(2) lack of personal jurisdiction ~~over the person,~~;

(b)(3) improper venue~~,~~;

(b)(4) ~~insufficiency of~~ insufficient process~~,~~;

(b)(5) ~~insufficiency of~~ insufficient service of process~~,~~;

(b)(6) failure to state a claim upon which relief can be granted~~,~~; and

(b)(7) failure to join ~~an indispensable~~ a party under Rule 19.

A motion ~~making~~ asserting any of these defenses ~~shall~~ must be made before pleading if a ~~further~~ responsive pleading is ~~permitted~~ allowed. No defense or objection is waived by ~~being joined~~ joining it with one or more other defenses or objections in a responsive pleading or motion ~~or by further pleading after the denial of such motion or objection~~. If a pleading sets ~~forth~~ out a claim for relief ~~to which the adverse party is not required to serve~~ that does not require a responsive pleading, ~~the adverse~~ an opposing party may assert at ~~the~~ trial any defense ~~in law or fact~~ to that claim ~~for relief~~. ~~If, on a motion asserting the defense numbered (6) to dismiss for failure of the pleading to state a claim upon which relief can be granted, matters outside the pleading are presented to and not excluded by the court, the motion shall be treated as one for summary judgment and disposed of as provided in Rule 56, and all parties shall be given reasonable opportunity to present all material made pertinent to such a motion by Rule 56.~~

(c) Motion for judgment on the pleadings. After the pleadings are closed but ~~within such time as~~ early enough not to delay the trial, ~~any~~ a party may move for judgment on the pleadings.

(d) Result of presenting matters outside the pleadings. If, on a motion ~~for judgment on the pleadings~~ under paragraph (b)(6) or paragraph (c), matters outside the pleadings are presented to and not excluded by the court, the motion ~~shall~~ must be treated as one for summary judgment ~~and disposed of as provided in~~ under Rule 56~~, and all~~. All parties ~~shall~~ must be given a reasonable opportunity to present all the material ~~made~~ that is pertinent to ~~such a~~ the motion ~~by Rule 56~~.

~~**(d) Preliminary hearings.** The defenses specifically enumerated (1) - (7) in subdivision (b) of this rule, whether made in a pleading or by motion, and the motion for judgment mentioned in subdivision (c) of this rule shall be heard and determined before trial on application of any party, unless the court orders that the hearings and determination thereof be deferred until the trial.~~

(e) Motion for a more definite statement. ~~If a pleading~~ A party may move for a more definite statement of a pleading to which a responsive pleading is ~~permitted~~ allowed but which is so vague or ambiguous that ~~a~~ the party cannot reasonably ~~be required to frame a responsive pleading, the party may move for a more definite statement before interposing a responsive pleading~~ prepare a response. The motion ~~shall~~ must be filed before filing a responsive pleading and must point out the defects complained of and the details desired. If ~~the motion is granted and the order of~~ the court orders a more definite statement and the order is not obeyed within 14 days after notice of the order or within ~~such other~~ the time ~~as~~ the court ~~may fix~~ sets, the court may strike the pleading ~~to which the motion was directed~~ or ~~make such~~ issue any other appropriate order ~~as it deems just~~.

(f) Motion to strike. ~~Upon motion made by a party before responding to a pleading or, if no responsive pleading is permitted by these rules, upon motion made by a party within 21 days after the service of the pleading, the~~ The court may ~~order stricken~~ strike from ~~any~~ a pleading ~~any~~ an insufficient defense or any redundant, immaterial, impertinent, or scandalous matter. The court may act:

(f)(1) on its own; or

(f)(2) on motion made by a party either before responding to the pleading or, if a response is not allowed, within 21 days after being served with the pleading.

(g) ~~Consolidation of defenses~~ Joining motions; limitation on further motions. ~~A party who makes a motion under this rule may join with it the other motions herein provided for and then available~~

(g)(1) A motion under this rule may be joined with any other motion allowed by this rule. ~~If~~

(g)(2) Except as provided in paragraph (h)(2) or (h)(3), a party ~~makes~~ that files a motion under this rule ~~and does not include therein all defenses and objections then available which this rule permits to be raised by motion, the party shall~~ must not ~~thereafter make a~~ file another motion ~~based on any of the~~ under this rule raising a defense~~s~~ or objection~~s so omitted, except as provided in subdivision (h) of this rule~~ that was available to the party but omitted from its earlier motion.

(h) ~~Waiver of~~ Waiving and preserving certain defenses.

(h)(1) A party waives ~~all~~ any defense~~s and objections not presented either by motion or by answer or reply, except (1) that the defense of failure~~ listed in paragraphs (b)(2)–(b)(5) by:

(h)(1)(A) omitting it from a motion in the circumstances described in paragraph (g)(2); or

(h)(1)(B) failing to either:

(h)(2)(B)(i) make it by motion under this rule; or

(h)(2)(B)(ii) include it in a responsive pleading or in an amendment allowed by Rule 15(a)(1) as a matter of course.

(b)(2) Failure to state a claim upon which relief can be granted, ~~the defense of~~ failure to join ~~an indispensable~~ a party under Rule 19, ~~and the objection of~~ or failure to state a legal defense to a claim may ~~also be made by a later pleading, if one is permitted, or by motion for judgment on the pleadings or at the trial on the merits, and except (2) that, whenever it appears by suggestion of the parties or otherwise that the court lacks jurisdiction of the subject matter, the court shall dismiss the action. The objection or defense, if made at the trial, shall be disposed of as provided in Rule 15(b) in the light of any evidence that may have been received~~ be raised:

(b)(2)(A) in any pleading allowed or ordered under Rule 7(a);

(b)(2)(B) by a motion under paragraph (c); or

(b)(2)(C) at trial.

(b)(3) If the court determines at any time that it lacks subject-matter jurisdiction, the court must dismiss the action.

(i) ~~Pleading after denial of a motion.~~ ~~The filing of a responsive pleading after the denial of any motion made pursuant to these rules shall not be deemed a waiver of such motion.~~ **Hearing before trial.** If a party so moves, any defense in paragraphs (b)(1) – (b)(7)—whether raised in a pleading or by motion—and a motion under paragraph (c) must be heard and decided before trial unless the court orders a deferral until trial.

~~**(j) Security for costs of a nonresident plaintiff.** When the plaintiff in an action resides out of this state, or is a foreign corporation, the defendant may file a motion to require the plaintiff to furnish security for costs and charges which may be awarded against such plaintiff. Upon hearing and determination by the court of the reasonable necessity therefor, the court shall order the plaintiff to file a $300.00 undertaking with sufficient sureties as security for payment of such costs and charges as may be awarded against such plaintiff. No security shall be required of any officer, instrumentality, or agency of the United States.~~

~~**(k) Effect of failure to file undertaking.** If the plaintiff fails to file the undertaking as ordered within 30 days of the service of the order, the court shall, upon motion of the defendant, enter an order dismissing the action.~~