Agenda

Advisory Committee on Rules of Civil Procedure

December 16, 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, James H. Deans, Kirk Cullimore, Mary Jane Ciccarello
Rule 6. Time.	Tab 3	Tim Shea
Rule 4. Process. Service on a defendant before trial if at least one defendant is timely served.		Steve Marsden, James Blanch, Kent Holmgren
Review of changes to federal rules of civil procedure		Paul Stancil, Lincoln Davies, James Hunnicutt, Evelyn Furse
Rule 13. Counterclaim and crossclaim. Rule 15. Amended and supplemental pleadings.	Tab 4	Tim Shea
Rule 12. Defenses and objections.	Tab 5	Tim Shea
Rule 64. Writs in general.	Tab 6	Tim Shea

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

Meeting Schedule:

January 27, 2016

February 24, 2016

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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 – November 18, 2015

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

I. Welcome and approval of minutes. [Tab 1] – Tim Shea.

Tim Shea welcomed the committee and invited any amendments to the minutes or a motion for approval. Judge Toomey moved to approve the minutes and Paul Stancil seconded. The motion carried.

II. Rule 26.3 Disclosure in Forcible Entry and Detainer Actions.

Mr. Shea welcomed attorneys Martin Blaustein, Jacob Kent and Holly Petersen to the meeting to discuss their proposal to adopt Rule 26.3 in landlord/tenant cases. They represent tenants in landlord/tenant disputes, covering approximately 2/3 of the State.

Mr. Blaustein presented to the committee on the reasons for adopting Rule 26.3. Plaintiffs do not have to serve initial disclosures until 14 days after an answer is filed. In landlord/tenant disputes, the occupancy hearing is generally in less than 10 days, and unless the case proceeds after that, the tenant is unlikely to receive discovery from the plaintiff. In Mr. Blaustein's experience, if the landlord is claiming that rent is owed, there is no disclosure in the complaint regarding the calculation. In criminal nuisance cases, the tenant likewise does not know the specifics of the allegations. This information is critical to a successful defense. Under the current system, tenants must defend themselves without crucial information when the consequences may include treble damages and yet the landlord is under no obligation to disclose evidence or information regarding damages upfront. Mr. Blaustein proposed Rule 26.3, which would require landlords to serve initial disclosures with the complaint and, because tenants may not otherwise know that they must also submit initial disclosures, to provide tenants with notice at the time of service that they must also serve initial disclosures when they file their answer.

Discussion:

- Leslie Slaugh commented that if tenants are unlikely to comply with the initial disclosure requirement we don't want that failure to hold up the answer. He asked whether tenants should be given additional time to submit initial disclosures. Mr. Blaustein responded that the problem is tenants have only 5 business days to answer, and the parties could have a trial before 5 more days have passed. Magistrate Furse suggested alternatively making the tenants' deadline 24 hours before the occupancy hearing. Judge Blanch commented that in his practice, only possession is addressed at the occupancy hearing and usually the tenant will

admit that he/she is behind on rent. How much is owed is decided later. Mr. Blaustein said most courts have a similar practice, but some try to resolve the entire case at the first hearing and will take testimony on damages. In addition, he noted that sometimes notices are defective. Judge Anderson commented that he determines only whether rent has been paid at the occupancy hearing. If it hasn't, possession usually goes to the landlord. Judge Blanch can recall dozens and dozens of these hearings, but only 4 or 5 where a full evidentiary hearing was conducted in the beginning where the defendants would have benefitted from more time. In his experience, tenants typically don't disagree with the amount owed, and it is a burden on landlords to require initial disclosure information with the complaint.

- Mr. Slaugh noted that under the current proposal, the landlord still has to make the disclosure even if the tenant defaults. Judge Anderson said the majority of these cases go by default, and in most of the remaining cases, the defendants don't present much of a defense. This proposal imposes an obligation upfront on 100% of cases. Terri McIntosh asked whether the landlord would be required to produce documents as well, since only a small number of cases would seem to benefit. Judge Blanch asked whether tenants are sufficiently protected if they deny that they owe what the landlord claims is owed, since the landlord bears the burden of proof. Mr. Blaustein responded that oftentimes what is included in the definition of "rent" is the issue. Some practitioners and landlords take the position that anything owed is "rent," including property damage, interest, attorney fees, etc. This is important because a pro se tenant may not be able to see the distinction, and what amount is subject to trebling under the statute is of paramount importance. Mr. Shea commented that it may be difficult to draw conclusions about the value of early disclosure from the way things are now, because currently tenants are making decision in a vacuum.

- Ms. McIntosh asked whether something more modest would be sufficient, i.e., that the landlord provide a computation of claimed damages in the complaint. If there is a subsequent hearing, documents will be produced. She said that landlords are likely to complain that serving initial disclosures with complaints is a significant burden when the majority of cases result in default. Judge Anderson commented that there seems to be a consensus that landlords provide more information on the calculation of amounts owed. The question remains as to whether full initial disclosures up front should be required. Judge Toomey suggested the development of a form complaint that includes the damage requirements. Judge Blanch said that Mr. Blaustein's concerns are legitimate, but in his experience, the number of unlawful detainer hearings where upfront disclosures would make a difference is a very small percentage. In most cases, the amount of the arrearage is not at issue at the occupancy hearing—if the tenant is in arrears, possession usually goes to the landlord. But the landlord is not excused from his burden to establish damages at trial. Paul Stancil said that if disclosures are made ahead of time, it will change the calculus for tenants on how (or if) they choose to defend the case.

- Judge Furse commented that tenants should receive a 3-day notice with the amount due if the issue is non-payment of rent. Other notices may be more difficult, such as for criminal nuisance. Holly Petersen explained to the committee that 3-day notices often are not specific enough to calculate what the landlord claims is owed. A total is included in the notice, but it could reflect several separate items. Likewise, when the landlord claims other lease violations and criminal violations, the notices are often vague. Recently, she handled a case alleging "suspicion of criminal activity." Her client was going into the hearing blind without sufficient

information to know what was being alleged. With more information up front, a tenant can make a decision on whether the issue is worth fighting, or try to minimize damages.

- Mr. Slaugh asked, if a notice to quit says the tenant owes $1000 but the tenant owed only $300, is the tenant still evicted? Even though they had no opportunity to cure with $300? Mr. Blaustein responded that under a 1928 Utah Supreme Court case, the court determined that less was owed than the landlord alleged and the tenant was given 24 hours to cure by paying the lesser amount. The problem, however, is that now there is the potential for having to pay attorney fees, court costs, late fees, etc. Judge Blanch suggested that rather than adopt Rule 26.3, the committee recommend that more specificity on damages be required in landlord eviction complaints. Judge Toomey reiterated that a form complaint with more specific damages would help.

- Mr. Shea commented that, if the committee's concern is that the landlord may not have immediate possession of some records, but would still want to introduce them at trial, the committee could specify what has to be included in the list of disclosures, including a calculation of damages and the lease. Judge Blanch said if he were a landlord, he would view the list of required disclosures under Rule 26 as quite burdensome to produce at the outset. One lawyer who does most of the eviction cases before him has a form complaint with blanks where he includes the degree of specifity Mr. Blaustein is requesting. Mr. Slaugh said that at least more detailed computation of damages should be included. Mr. Shea said that the Rule 26 exemptions do not currently include landlord-tenant evictions, but Judge Blanch commented that the cases are practically over by the time the disclosure requirement kicks in.

- Judge Anderson and Ms. McIntosh asked whether lawyers on both sides of these cases have discussed this issue. Ms. McIntosh proposed that Mr. Blaustein discuss the rule proposal with landlord attorneys and make a more specific recommendation on the disclosures needed to meet tenant needs. Mr. Slaugh asked whether commercial landlord/tenant cases should be excluded, since the expedited procedures don't apply to commercial tenants. Messrs. Shea and Blaustein indicated that the rule could probably be specific to residential tenants. Judge Toomey said it would be a good idea to defer a month to invite the main landlord attorneys to discuss the issue. While the committee is sympathetic to Mr. Blaustein's concerns, we do not want to create unrealistic burdens. Judge Furse also recommended that the Utah Apartment Association be involved and perhaps the folks at the Tuesday Night Bar. Mr. Shea also suggested including Mary Jane from the Self-Help Center.

III. Rule 4. [Tab 3] – Tim Shea.

The committee deferred discussion on Rule 4.

IV. Report on action by the appellate rules committee.

Mr. Shea reported that the appellate rules committee has approved their part of the joint effort to establish the effect of motions for attorney fees on the timeliness of a notice of an appeal under URAP 4. The subcommittee recommended adoption of the federal rule, which would have established that

motions for attorney fees have no effect on the finality of judgments but judges could order that the time for appeal does not begin to run until the final order on fees. The appellate rules committee, however, concluded that although a motion for fees should not affect finality and a judgment can be appealed while the motion is pending, the default should be that the time in which to appeal does not begin to run until the judge rules on the motion for fees. In essence, they recommended that the motion for fees be treated like the others in URAP 4, which will require a change to the proposed Rule 58A. Mr. Shea's recommendation is on page 47, i.e., that a motion for fees does not affect the finality of a judgment, but that the time for appeal runs from disposition of the motion.

Mr. Shea explained that the further amendment to Rule 54 is just the committee note to address Judge Blanch's concern and confirm that if a defendant does not appeal an attorney fee award but the judgment is overturned on appeal, the defendant is not liable for fees.

Discussion:

- Mr. Slaugh suggested that the scenario identified by Judge Blanch is not going to happen if the appellate rules committee's proposal on URAP 4 is adopted because the attorney fee issue will go up on appeal at the same time as the judgment. Ms. Mettler commented that if you appeal the judgment then file a post-trial motion, you may have to file an amended or new notice of appeal regarding the motion. Mr. Shea said that under the new formulation of the rule, a notice of appeal filed after the judgment was entered but before attorney fees are determined is held in abeyance until the judge rules on the motion. Judge Blanch said the language in the note makes sense to keep.

Mr. Shea reported that the appellate rules committee agreed with including Rule 60(b) on the list of circumstances in which the notice of appeal deadline would run from the disposition of the motion. Mr. Shea drafted a note to that effect, which highlights the difference a day makes. A Rule 60(b) motion may be filed up until 90 days after the judgment is entered and it will still be timely, but it won't have the same effect as filing it within 28 days.

Discussion:

- Mr. Hunnicutt asked whether attorney fee motions should also be connected to the 28-day deadline. Mr. Shea responded that motions for fees must be filed within 14 days of the judgment's entry under the new Rule 73 to be sent out for comment.

- Mr. Shea also asked whether he should attempt to summarize the outcome of the subcommittee's review before these rules are sent out for comment to give a level of comfort with them. Although the Supreme Court recognized that adoption of the federal rule was a possible outcome, he is unsure whether the justices anticipated the additional changes the committee is recommending. The appellate rules committee would like to see what the public has to say, as would our subcommittee. Given that, Judge Toomey moved to adopt Mr. Shea's suggestions and send the rules out for comment. Judge Blanch seconded. Mr. Hunnicutt commented that Rule 4(b)(1)(f) sounds loose, and that perhaps "claim" should be eliminated. Mr. Shea suggested that Rule 73 be referenced in a comment, but that because "claim" is used in Rule 73, it may be problematic to remove "claim" from Rule 4. With that reference added, Judge Toomey again moved to send the rules out for comment. All approved.

V. Rule 13 and 15.

Mr. Shea discussed the further draft of Rule 15. Kent Holmberg had reported that there is no state rule counterpart for the U.S. attorney general provision in the federal rule, so Mr. Shea removed that provision. Mr. Shea also reported that Rule 13 has some further amendments to discuss, including a question regarding Rule 13(d).

Discussion:

- Mr. Slaugh questioned whether "jurisdiction" is the correct word in Rule 13 on page 54, line 43. Mr. Shea said it is a copy-and-paste from the federal rule. Mr. Slaugh said to leave it. Judge Blanch said at worst, it is unnecessary.

- Although the new Rule 15 follows the federal rule, Mr. Shea questioned whether paragraph (d) is necessary—wouldn't a supplemental pleading asserting a counterclaim be an amendment under Rule 15 just like an omitted counterclaim under (eliminated) paragraph (e)? Mr. Slaugh identified one distinction: under Rule 15, a party is amending a complaint that already exists, whereas under paragraph (e), a party is asserting a counterclaim that did not previously exist.

- Mr. Hunnicutt asked whether the idea is to loosen the standard to amend pleadings. Mr. Shea said that a substantive change to Rule 15 was suggested by Justice Voros regarding relation-back. Judge Voros felt the federal rule was a better expression of policy and an express policy, whereas under the state rule, parties have to rely on case law. The other Rule 15 changes are controlled by phrasing and grammar styles in the federal rule that resulted in some substantive changes. For example, now the plaintiff has discretion to amend under some circumstances that under the former rule required stipulation. Since we're amending Rule 15 to address the relation-back issue, we are amending Rule 13 to delete paragraph (e),

- Mr. Stancil said, with respect to the use of "jurisdiction" in Rule 13, he thinks it is there because the federal court is a court of limited jurisdiction. It likely doesn't matter, however, because the state court will virtually always have jurisdiction. Judge Blanch agreed that it probably doesn't matter, but since we are following the federal rule, it may look as though we are doing something we don't have jurisdiction to do if we remove it.

- Mr. Shea mentioned that there is no federal counterpart for the final two paragraphs of Rule 13. He made some style suggestions, but questioned whether they are necessary, as they appear to describe a situation that is outside of litigation. The committee discussed the meaning of the two paragraphs, whether they reflect a rule of procedure or are more substantive, and whether they should be removed or left alone. Ms. McIntosh suggested that Mr. Shea perform some historical research on the two paragraphs.

VI. Rule 12

Mr. Shea discussed Rule 12 and the committee's prior approval of proposing a process to accept service of a summons and complaint and replacing the "waiver" of service process in the rule. This

approach necessitated an amendment to Rule 12 to identify the time in which to answer. Mr. Shea also said that John Bogart has requested that we eliminate cost bonds for out-of-state plaintiffs.

Discussion:

- Mr. Slaugh commented that practitioners have been accepting service forever and have never needed lines 10-12. He asked what is different about accepting service that mandates a new rule that says if you accept service you have to answer within 21 days. Mr. Shea responded that this might be better under Rule 4, but the concept was to replace service by mail and waiver of service with the concept of acceptance of service. The defendant responds with some kind of written acknowledgement that ends up in court file so the court has reasonable assurance that the defendant has been given the complaint and summons and understands them sufficiently to return the form. There is a practice among lawyers of accepting service on behalf of clients, and Mr. Shea said he doesn't know if this would disrupt that. The defendant can also control the time in which the 21 days begins by not signing immediately. Mr. Slaugh suggested that it might be easier to say in Rule 4 that if you accept service, then service is effective on the date you accept. Mr. Shea said the problem with that is there is no record of when service was accepted. This allows for a receipt by requiring the defendant to send the acceptance back in a return envelope, which will have a date.

- Mr. Shea pointed out that Rule 12(h)(1)(A) seems to be encompassed entirely by (h)(1)(B). Although this is how the federal rules express it, he questioned whether they are duplicative. Prof. Stancil said he doesn't think they are duplicative. Without (h)(1)(A), (h)(1)(B) could be read very restrictively such that if you tried to file a second motion, it would be a motion under this rule. Although horribly worded, he thinks it is necessary. He suggested changing (h)(1)(B) to say "Rule 12" instead of "this rule." Judges Baxter and Anderson agreed with that proposed change. Mr. Shea explained, however, that throughout the rules he has used "this rule" to refer to the entire rule. Judge Toomey noted that changing it would result in a consistency problem.

- Mr. Shea said that the bond requirement in Rule 12 for out-of-state plaintiffs was in the last two paragraphs on page 63. There is no counterpart in the federal rule, so consistent with Mr. Bogart's suggestion, he struck the requirement. Judges Toomey and Blanch agree with the removal. Mr. Slaugh said there are cases that give greater rights to in-state litigants, but that removal of the bond requirement for out-of-state plaintiffs is not offensive to the overall scheme.

VII. Adjournment.

The meeting adjourned at 5:40 pm. The next meeting will be held on December 16, 2015 at 4:00 pm at the Administrative Office of the Courts.

Tab 2

Timothy M. Shea
Appellate Court Administrator

Andrea R. Martinez
Clerk of Court

Supreme Court of Utah

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December 12, 2015

To: Civil Rules Committee
From: Tim Shea
Re: Rule 26.3

I have attached a revised draft of Rule 26.3, trying to accommodate the suggestions made by Mr. Blaustein, Mr. Deans and committee members.

I believe everyone is agreed that the supreme court does not have the authority to require disclosures with the eviction notice.

Mr. Deans suggests that what would otherwise be the plaintiff's disclosures be treated as attachments to the complaint. I recommend that the rule treat the information and documents—whatever the list ends up being—as disclosures.

The supreme court adopted mandatory disclosures about 20 years ago and expanded on that model in 2011. Rule 26 already regulates disclosure, including express consequences for failure to comply with the requirements. I do not believe that a requirement to attach documents to a complaint will bring with it those regulations. There will be no practical difference on what the plaintiff must serve with the complaint. The disclosures would not be filed with the complaint, whereas attachments would be.

I have not included Mr. Dean's suggestion that only the documents attached to the complaint (or disclosed) can be used at the immediate occupancy hearing. Provided the rule treats the documents as disclosures, I believe Rule 26(d)(4) will have that effect:

> If a party fails to disclose or to supplement timely a disclosure or response to discovery, that party may not use the undisclosed witness, document or material at any hearing or trial unless the failure is harmless or the party shows good cause for the failure.

Mr. Deans suggests that there be no disclosure requirement for the tenant until the pretrial disclosures, in which case paragraph (b)(7) would

not be needed. The committee should discuss the policy of requiring disclosures by only one party. For the time being, I have drafted alternative provisions for paragraph (c).

Regarding pretrial disclosures, Rule 26(a)(5) is probably appropriate for content but not timing, so I have included paragraph (d) in the proposed rule.

Unsure of its relevance, I have not included anything regarding another pretrial requirement of Rule 26(b)(5)(B): "counter designations of deposition testimony, objections and grounds for the objections to the use of a deposition and to the admissibility of exhibits." To the extent that it is relevant, absent a special provision in Rule 26.3, the timing of Rule 26(a)(5)(B)—14 days before trial—would apply.

Mr. Deans suggests that the notice of trial include notice to the parties of their pretrial disclosure obligations. If the district court generates the notice of trial, the additional statement would have to be programmed.

Rule 26.3. Disclosures in forcible entry and detainer actions.

(a) Scope. This rule applies to all actions for 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 when the tenant is not a commercial tenant.

(b) Plaintiff's initial disclosures. Instead of the disclosures and timing of disclosures required by Rule 26(a), the plaintiff must serve on the defendant with the summons and complaint:

(b)(1) any written rental agreement;

(b)(2) the eviction notice;

(b)(3) an itemized calculation of rent past due, damages, costs and attorney fees;

(b)(4) ledgers;

(b)(5) complaints by other tenants about the defendant;

(b)(6) any document that the plaintiff wants to ogfer at the immediate occupancy hearing; and

(b)(7) notice to the defendant of the defendant's obligation to serve the disclosures required by paragraph (c).

(c) Defendant's initial disclosures. Instead of the disclosures and timing of disclosures required by Rule 26(a), no later than 2 days before the immediate occupancy hearing the defendant must serve on the plaintiff any document that the defendant wants to offer at the immediate occupancy hearing.

(c) No initial disclosures by defendant. The disclosures required by Rule 26(a) do not apply to the defendant.

(d) Pretrial disclosures. No later than 14 days before trial, the parties must serve the disclosures required by Rule 26(a)(5)(A).

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.

Martin S. Blaustein
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Utah State Courts

Tim Shea <tims@utcourts.gov>

Cullimore Email

1 message

Rod N. Andreason <randreason@kmclaw.com> Wed, Nov 18, 2015 at 7:38 PM
To: "tims@utcourts.gov" <tims@utcourts.gov>
Cc: "Jonathan O. Hafen (jhafen@parrbrown.com)" <jhafen@parrbrown.com>, "Heather Sneddon (hsneddon@aklawfirm.com)" <hsneddon@aklawfirm.com>

Tim,

In case you haven't already received it, please see the attached. Sorry I couldn't make it today (not sure how long I'll be at the office tonight).

Thanks, Rod

Rod N. Andreason

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---------- Forwarded message ----------
From: Kirk Cullimore <kirk@cullimore.net>
To: "jhafen@parrbrown.com" <jhafen@parrbrown.com>
Cc: "sanderson@mc2b.com" <sanderson@mc2b.com>, "Rod N. Andreason" <randreason@kmclaw.com>,

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Date: Wed, 18 Nov 2015 17:55:47 +0000
Subject: Civil Procedure Advisory Committee

I have recently been informed that tomorrow your committee will be hearing a proposal to revamp Rule 26 for eviction cases. The proposal you have received is from Utah Legal Services. I have read their proposal to the committee and would like the opportunity to discuss why it is not only not necessary but would likely have a negative effect on all the parties involved in the process.

The attorneys who handle the vast majority of unlawful detainer cases have obtained the respect of the judges in the manner in which the cases are handled. Although the process is expedited as required by statute, defendants who have legitimate defenses and file appropriate pleadings get a hearing in front of a judge.

Mr. Blaustein has implied that defendants do not get their day in court to defend against the claims. I have found just the opposite. The Courts are obligated by statute to hold an evidentiary hearing in two different cases:

1. Failure to Pay. If the case is based upon the failure to pay rent, then if the defendant files a responsive pleading, an evidentiary hearing is held to determine who should have occupancy of the premises during the litigation. At that hearing, the judge determines if the defendant has failed to pay rent without a legal defense. Both parties may put forth evidence as to that single issue.

2. Criminal Activity. If the case is based upon criminal activity then the court sets a hearing as required by statute. At that evidentiary hearing the judge takes evidence to again determine who should get possession of the premises during the pendency of the action. Both parties may put forth evidence to establish or disprove that the alleged criminal acts occurred.

The legislature established these parameters because they felt the need to quickly resolve issues of occupancy. Although the courts MAY resolve other issues at these hearings, it is my experience that judges only do so if there are clearly no issues in dispute.

Adding more requirements early in the process only increases the costs to both the defendants and the plaintiffs.

I do not have time today to review the entire process and proposal. I will do so in the next

few days and get more information to you. I would ask that the committee allow me or another landlord attorney to present alternatives before the committee makes any recommendations. Please feel free to call me on my cell with questions. 801-631-4531

Kirk A. Cullimore

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This is a communication from a Debt Collector.

This is an attempt to collect a debt. Any information obtained will be utilized for that purpose.

noname.eml
39K

James H. Deans
Timothy S. Deans
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Salt Lake City, UT 84102

Telephone: 801-575-5005
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November 20, 2015

To: Tim Shea
From: Jim Deans
Cc: Marty Blaustein

Dear Mr. Shea,

I would like to give you some feedback from a landlord attorney's perspective concerning eviction cases.

Mr. Blaustein proposes that non-attorneys be bound by Rule 26 disclosure requirement in their initial eviction notice. The rules of Civil Procedure don't apply to anyone until a lawsuit is filed. Second, it would not seem fair to hold non-attorneys to know the elements of Rule 26.

As far as disclosures go, I would propose that once an eviction lawsuit is filed it would seem reasonable that the landlord attach as exhibits to the complaint the written rental agreement, if there is one, and the eviction notice and other exhibits such as ledgers, and other tenants' complaints. These documents attached as exhibits would serve as the landlord's initial disclosures. The rule would provide that only those documents attached to the complaint could be raised at an expedited 10-day immediate occupancy hearing.

It has been my experience that if a judge determines that rent is not owed the judge doesn't issue an Order of Restitution. The same applies to other eviction cases if the burden is not made.

Also, if a judge doesn't want to issue an Order of Restitution the judge can defer the decision of that issue to the assigned judge. The judge can also defer the issue of possession, but set bonds for both parties to post at the occupancy hearing. I have seen the judge shift through the issues remarkably well and avoid blindsiding tenants at these hearings.

With the complaint exhibits acting as initial disclosures, I would suggest that tenants not be required to produce any initial disclosures unless a trial is scheduled to determine all issues in the case. The Statute requires the trial be held either within 30 days of the posting of bonds or 60 days of the Complaint being served. In either case, I would think a statement in the notice of trial requiring parties to exchange exhibits and a witness list within 14 days before the trial would be sufficient. A failure to exchange exhibits would result in them being barred from use at the trial. This has been the practice of the judges in trying to justify the idea that it is not a trial by ambush.

I believe this procedure would have the benefit of avoiding additional legal expenses to landlords and also allowing tenants a fair opportunity to see what would be presented at the immediate occupancy hearing. I can draft specific language for the judge if you wish.

Sincerely,

James H Deans

JHD/ds

UTAH LEGAL SERVICES

UTAH LEGAL SERVICES
Committed to Equal Justice

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December 4, 2015

RE: Rule 26 Disclosures

Dear Mr. Shea:

I have read comments of Mr. Deans, as stated in his November 20, 2015 letter to you, and agree with his conclusions. Mr. Deans speaks with insight and a sincere willingness to seek a solution to the Rule 26.3 matter currently before the committee. Mr. Deans has offered a compelling solution, one that protects the rights of landlords and the rights of tenants without overly burdening the respective parties.

We look forward to further discussions on December 16th.

Sincerely,

Martin S. Blaustein
Attorney at Law
mblaustein@utahlegalservices.org

cc: James Deans
Kirk Cullimore

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LSC

Tab 3

Timothy M. Shea
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Andrea R. Martinez
Clerk of Court

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Appellate Clerks' Office
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December 12, 2015

To: Civil Rules Committee
From: Tim Shea
Re: Rule 6

My apologies, but I have an important item to add to the December 16 agenda. Since we decided to adopt a uniform description of "filing" documents, there are some circumstances in which the time to respond is based on the filing date rather than the service date. For represented parties, the two are the same since service is through the e-filing system. However, self-represented who are served by mail are at a disadvantage. The existing Rule 6(c) that allows 3 extra day if service is by mail applies only if the responsive act is after service.

The supreme court has already approved your recommended amendments to Rule 6, but this issue came up after the comment period.

Rule 6. Time.

(a) Computing time. The following rules apply in computing any time period specified in these rules, any local rule or court order, or in any statute that does not specify a method of computing time.

(a)(1) When the period is stated in days or a longer unit of time:

(a)(1)(A) exclude the day of the event that triggers the period;

(a)(1)(B) count every day, including intermediate Saturdays, Sundays, and legal holidays; and

(a)(1)(C) include the last day of the period, but if the last day is a Saturday, Sunday, or legal holiday, the period continues to run until the end of the next day that is not a Saturday, Sunday or legal holiday.

(a)(2) When the period is stated in hours:

(a)(2)(A) begin counting immediately on the occurrence of the event that triggers the period;

(a)(2)(B) count every hour, including hours during intermediate Saturdays, Sundays, and legal holidays; and

(a)(2)(C) if the period would end on a Saturday, Sunday, or legal holiday, the period continues to run until the same time on the next day that is not a Saturday, Sunday, or legal holiday.

(a)(3) Unless the court orders otherwise, if the clerk's office is inaccessible:

(a)(3)(A) on the last day for filing under Rule 6(a)(1), then the time for filing is extended to the first accessible day that is not a Saturday, Sunday or legal holiday; or

(a)(3)(B) during the last hour for filing under Rule 6(a)(2), then the time for filing is extended to the same time on the first accessible day that is not a Saturday, Sunday, or legal holiday.

(a)(4) Unless a different time is set by a statute or court order, filing on the last day means:

(a)(4)(A) for electronic filing, at midnight; and

(a)(4)(B) for filing by other means, the filing must be made before the clerk's office is scheduled to close.

(a)(5) The "next day" is determined by continuing to count forward when the period is measured after an event and backward when measured before an event.

(a)(6) "Legal holiday" means the day for observing:

(a)(6)(A) New Year's Day;

(a)(6)(B) Dr. Martin Luther King, Jr. Day;

(a)(6)(C) Washington and Lincoln Day;

(a)(6)(D) Memorial Day;

(a)(6)(E) Independence Day;

(a)(6)(F) Pioneer Day;

(a)(6)(G) Labor Day;

(a)(6)(H) Columbus Day;

(a)(6)(I) Veterans' Day;

(a)(6)(J) Thanksgiving Day;

(a)(6)(K) Christmas; and

(a)(6)(L) any day designated by the Governor or Legislature as a state holiday.

(b) Extending time.

(b)(1) When an act may or must be done within a specified time, the court may, for good cause, extend the time:

(b)(1)(A) with or without motion or notice if the court acts, or if a request is made, before the original time or its extension expires; or

(b)(1)(B) on motion made after the time has expired if the party failed to act because of excusable neglect.

(b)(2) A court must not extend the time to act under Rules 50(b) and (c), 52(b), 59(b), (d) and (e), and 60(b).

(c) Additional time after service by mail. When a party may or must act within a specified time after service or after filing and service is made by mail under Rule 5(b)(1)(A)(iv), 3 days are added after the period would otherwise expire under paragraph (a).

Tab 4

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December 12, 2015

To: Civil Rules Committee
From: Tim Shea
Re: Rule 13(i) and (j)

When the committee considered the proposed amendments to Rule 13, no one understood the purpose of paragraphs (i) and (j). I have traced them to the Civil Practice Act of February 17, 1870. They survived compilations and recodifications in 1888, 1898, 1907, 1917, 1933 and 1943. They migrated to Rule 13 when the Rules of Civil Procedure were adopted in 1950.

The 1943 Code indicates that there was then—and there is now—no equivalent provision in the federal rules. There have been cases citing the provisions. The most recent reference that I could find is Lundstrom v. Radio Corp. of Am., 405 P2d 339 (Utah 1965).

Unless there are further amendments or research, I believe the proposed amendments to Rule 13 and Rule 15 are ready to be published for comment.

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 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.

~~(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 5

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 12; 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.

(h)(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:

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

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

(h)(2)(C) at trial.

(h)(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.~~

Tab 6

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December 12, 2015

To: Civil Rules Committee
From: Tim Shea
Re: Rule 64

Angelina Tsu has requested that Rule 64 be amended to permit multiple writs of garnishment of earnings so long as the total of all writs does not exceed the limit established by federal law. That amendment is found in paragraph (d)(3)(B). The remaining amendments are style and grammar changes similar to those from the federal rules. There is no federal counterpart to this rule.

Rule 64. Writs in general.

(a) Definitions. As used in Rules 64, 64A, 64B, 64C, 64D, 64E, 69A, 69B and 69C:

(a)(1) "Claim" means a claim, counterclaim, cross claim, third party claim or any other claim.

(a)(2) "Defendant" means the party against whom a claim is filed or against whom judgment has been entered.

(a)(3) "Deliver" means actual delivery or to make the property available for pick up and give to the person entitled to delivery written notice of availability.

(a)(4) "Disposable earnings" means that part of earnings for a pay period remaining after the deduction of all amounts required by law to be withheld.

(a)(5) "Earnings" means compensation, however denominated, paid or payable to an individual for personal services, including periodic payments pursuant to a pension or retirement program. Earnings accrue on the last day of the period in which they were earned.

(a)(6) "Notice of exemptions" means a form that advises the defendant or a third person that certain property is or may be exempt from seizure under state or federal law. The notice ~~shall~~ must list examples of exempt property and indicate that other exemptions may be available. The notice ~~shall~~ must instruct the defendant of the deadline for filing a reply and request for hearing.

(a)(7) "Officer" means any person designated by the court to whom the writ is issued, including a sheriff, constable, deputy thereof or any person appointed by the officer to hold the property.

(a)(8) "Plaintiff" means the party filing a claim or in whose favor judgment has been entered.

(a)(9) "Property" means the defendant's property of any type not exempt from seizure. Property includes but is not limited to real and personal property, tangible and intangible property, the right to property whether due or to become due, and an obligation of a third person to perform for the defendant.

(a)(10) "Serve" with respect to parties means any ~~method~~ manner of service authorized by Rule 5 and with respect to non-parties means any manner of service authorized by Rule 4.

(b) Security.

(b)(1) Amount. When security is required of a party, the party ~~shall~~ must provide security in the sum and form ordered by the court ~~deems adequate~~. For security by the plaintiff, the amount should be sufficient to reimburse other parties for damages, costs and attorney fees incurred as a result of a writ wrongfully obtained. For security by the defendant, the amount should be equivalent to the amount of the claim or judgment or the value of the defendant's interest in the property. In fixing the amount, the court may consider any relevant factor. The court may relieve a party from ~~the necessity of~~ providing security if ~~it appears that~~ none of the parties will incur damages, costs or attorney fees ~~as a result of a writ wrongfully obtained~~ or ~~if there exists some~~ for other substantial reasons ~~for dispensing with security~~. The amount of security does not establish or limit the amount of damages, costs or attorney fees ~~recoverable if the writ is wrongfully obtained~~.

(b)(2) Jurisdiction over surety. A surety submits to the jurisdiction of the court and irrevocably appoints the clerk of the court as agent upon whom papers affecting the surety's liability may be served. The surety ~~shall~~ must file with the clerk of the court the address to which the clerk may ~~mail~~ send papers. The surety's liability may be enforced on motion without ~~the necessity of~~ an independent action. If the opposing party recovers judgment or if the writ is wrongfully obtained, the surety will pay the judgment, damages, costs and attorney fees not to exceed the sum specified in the contract. The surety is responsible for returning ~~of~~ property ordered returned.

(b)(3) Objection. The court may issue additional writs upon the original security subject to the objection of the opposing party. The opposing party may object to the sufficiency of the security or the sufficiency of the sureties within ~~five~~ 7 days after service of the writ. The burden to show the sufficiency of the security and the sufficiency of the sureties is on the proponent of the security.

(b)(4) Security of governmental entity. No security is required of the United States, the State of Utah, or an officer, agency, or subdivision of either, nor when prohibited by law.

(c) Procedures in aid of writs.

(c)(1) Referee. The court may appoint a referee to monitor hearings under this ~~subsection~~ paragraph.

(c)(2) Hearing; witnesses; discovery. The court may conduct hearings ~~as necessary~~ to identify property and to apply the property toward the satisfaction of the judgment or order. Witnesses may be subpoenaed to appear, testify and produce records. The court may permit discovery.

(c)(3) Restraint. The court may forbid any person from transferring, disposing or interfering with the property.

(d) Issuance of writ; service

(d)(1) Clerk to issue writs. The clerk of the court ~~shall~~ issues writs. A court in which a transcript or abstract of a judgment or order has been filed has the same authority to issue a writ as the court that entered the judgment or order. If the writ directs the seizure of real property, the clerk of the court ~~shall~~ must issue the writ to the sheriff of the county in which the real property is located. If the writ directs the seizure of personal property, the clerk of the court may issue the writ to an officer of any county.

(d)(2) Content. The writ may direct the officer to seize the property, to keep the property safe, to deliver the property to the plaintiff, to sell the property, or to take other specified actions. If the writ is to enforce a judgment or order for the payment of money, the writ ~~shall~~ must specify the amount ordered to be paid and the amount due.

(d)(2)(A) If the writ is issued ex parte before judgment, the clerk ~~shall~~ must attach to the writ plaintiff's affidavit or declaration, detailed description of the property, notice of hearing, order authorizing the writ, notice of exemptions and reply form.

(d)(2)(B) If the writ is issued before judgment but after a hearing, the clerk ~~shall~~ must attach to the writ plaintiff's affidavit or declaration and detailed description of the property.

(d)(2)(C) If the writ is issued after judgment, the clerk ~~shall~~ must attach to the writ plaintiff's application, detailed description of the property, the judgment, notice of exemptions and reply form.

(d)(3) Service.

(d)(3)(A) Upon whom; effective date. The officer ~~shall~~ must serve the writ and accompanying papers on the defendant, and, as applicable, the garnishee and any person named by the plaintiff as claiming an interest in the property. The officer may simultaneously serve notice of the date, time and place of sale. A writ is effective upon service.

(d)(3)(B) Limits on writs of continuing garnishment of earnings.

(d)(3)(B)(i) ~~A~~ Unless the total amount of earnings garnished from all writs does not exceed the limit established by Rule 64D(a), a writ of continuing garnishment of earnings served while a previous writ of continuing garnishment of earning is in effect is effective upon expiration of the previous writ; otherwise, a writ of continuing garnishment is effective upon service.

(d)(3)(B)(ii) ~~Only one~~ Multiple writs of garnishment of earnings may be in effect at one time, but the total amount of earnings garnished from all writs must not exceed the limit established by Rule 64D(a). One additional writ of continuing garnishment of earnings in favor of a judgment creditor for a subsequent pay period may be served on the garnishee while an earlier writ of continuing garnishment is in effect.

(d)(3)(C) Return; inventory. Within 14 days after service, the officer ~~shall~~ must return the writ to the court with proof of service. If property has been seized, the officer ~~shall~~ must include an inventory of the property and whether the property is held by the officer or the officer's designee. If a person refuses to give the officer an affidavit or declaration describing the property, the officer ~~shall~~ must indicate the fact of refusal on the return, and the court may require that person to pay the costs of any proceeding ~~taken~~ for the purpose of obtaining ~~such~~ the information.

(d)(3)(D) Service of writ by publication. The court may order service of a writ by publication upon a person entitled to notice in circumstances in which service by publication of a summons and complaint would be appropriate under Rule 4.

(d)(3)(D)(i) If service of a writ is by publication, substantially the following ~~shall~~ must be published under the caption of the case:

To _____, [Defendant/Garnishee/Claimant]:

A writ of _____ has been issued in the above-captioned case commanding the officer of _____ County as follows:

[Quoting body of writ]

Your rights may be adversely affected by these proceedings. Property in which you have an interest may be seized to pay a judgment or order. You have the right to claim property

exempt from seizure under statutes of the United States or this state, including Utah Code, Title 78B, Chapter 5, Part 5.

(d)(3)(D)(ii) The notice ~~shall~~ must be published in a newspaper of general circulation in each county in which the property is located at least 14 days ~~prior to~~ before the due date for the reply or at least 14 days ~~prior to~~ before the date of any sale, or as the court orders. The date of publication is the date of service.

(e) Claim to property by third person.

(e)(1) Claimant's rights. Any person claiming an interest in the property has the same rights and obligations as the defendant with respect to the writ and with respect to providing and objecting to security. Any claimant named by the plaintiff and served with the writ and accompanying papers ~~shall~~ must exercise those rights and obligations within the same time allowed the defendant. Any claimant not named by the plaintiff and not served with the writ and accompanying papers may exercise those rights and obligations at any time before the property is sold or delivered to the plaintiff.

(e)(2) Join claimant as defendant. The court may order any named claimant joined as a defendant in interpleader. The plaintiff ~~shall~~ must serve the order on the claimant. ~~The~~ Upon being served claimant is ~~thereafter~~ a defendant to the action and ~~shall~~ must answer within 14 days, setting forth any claim or defense. The court may enter judgment for or against the claimant to the limit of the claimant's interest in the property.

(e)(3) Plaintiff's security. If the plaintiff requests that an officer seize or sell property claimed by a person other than the defendant, the officer may request that the court require the plaintiff to file security.

(f) Discharge of writ; release of property.

(f)(1) By defendant. ~~At~~ The defendant may file security and a motion to discharge the writ any time before notice of sale of the property or before the property is delivered to the plaintiff~~, the defendant may file security and a motion to discharge the writ~~. The plaintiff may object to the sufficiency of the security or the sufficiency of the sureties within 7 days after service of the motion. ~~At~~ The defendant may file a motion to discharge the writ on the ground that the writ was wrongfully obtained any time before notice of sale of the property or before the property is delivered to the plaintiff~~, the defendant may file a motion to discharge the writ on the ground that the writ was wrongfully obtained~~. The court ~~shall~~ must give the plaintiff reasonable opportunity to correct a defect. The defendant ~~shall~~ must serve the order to discharge the writ upon the officer, plaintiff, garnishee and any third person claiming an interest in the property.

(f)(2) By plaintiff. The plaintiff may discharge the writ by filing a release and serving it upon the officer, defendant, garnishee and any third person claiming an interest in the property.

(f)(3) Disposition of property. If the writ is discharged, the court ~~shall~~ must order any remaining property and proceeds of sales delivered to the defendant.

(f)(4) Copy filed with county recorder. If an order discharges a writ upon property seized by filing with the county recorder, the officer or a party ~~shall~~ must file a certified copy of the order with the county recorder.

(f)(5) Service on officer; disposition of property. If the order discharging the writ is served on the officer:

(f)(5)(A) before the writ is served, the officer ~~shall~~ must return the writ to the court;

(f)(5)(B) while the property is in the officer's custody, the officer ~~shall~~ must return the property to the defendant; or

(f)(5)(C) after the property is sold, the officer ~~shall~~ must deliver any remaining proceeds of the sale to the defendant.