Agenda

Advisory Committee on Rules of Civil Procedure

February 24, 2016
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 4. Process.	Tab 2	Tim Shea
Rule 35. Physical and mental examination of persons.	Tab 3	Tim Shea
Review comments to Rules 9, 26.1, 26.2, 41, 54, 58A, 58C, 73	Tab 4	Nancy Sylvester
Review of changes to federal rules of civil procedure	Tab 5	Paul Stancil, Lincoln Davies, James Hunnicutt, Evelyn Furse
Rule 7A. Motion for order to show cause.	Tab 6	Nancy Sylvester
Rule 7. Pleadings allowed; motions, memoranda, hearings, orders.	Tab 7	Nancy Sylvester

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

Meeting Schedule:

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 – January 27, 2016

Present:	Jonathan Hafen, Lincoln Davies, Rod Andreason, Sammi Anderson, Terri McIntosh, Trystan Smith, Paul Stancil, James Hunnicutt, Amber Mettler, Kent Holmberg, Steve Marsden
Telephone:	Lori Woffinden, Judge Pullan, Judge Furse, Judge Anderson
Staff:	Timothy M. Shea, Heather M. Sneddon, Nancy Sylvester
Guests:	James H. Deans, Kirk Cullimore, Jr., Martin Blaustein, Hollee Petersen, Jacob Kent, Lane Gleave
Not Present:	Judge Toomey, Barbara Townsend, Judge Blanch, Leslie Slaugh, Judge Baxter, Scott Bell, David Scofield

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

Jonathan Hafen welcomed the committee and invited a motion to approve the December meeting minutes. Rod Andreason identified one correction: changing Judge Shea to Tim Shea. Mr. Andreason moved to approve the meeting minutes with the proposed correction. Kent Holmberg seconded the motion and it carried unanimously.

II. Rule 26.3, Disclosure in Unlawful Detainer Actions; and Rule 9 alternative. [Tab 2] – Tim Shea

Tim Shea addressed Rule 26.3. The amendments are designed to describe the required disclosures in residential forcible entry/unlawful detainer actions. At the last meeting, Mr. Shea was asked to draft a Rule 9 option that would describe what is required for the complaint, and to draft a Rule 26.3 option that would describe the records/documents to be disclosed. Mr. Shea drafted both, but recommends the Rule 26.3 approach so that the information comes in the form of a disclosure rather than in the complaint. He believes that approach offers more flexibility and that the existing rules regarding the nature and consequences of disclosures will attach, whereas they might not attach to the complaint. A much broader issue exists regarding the statutory provisions for a forcible entry/unlawful detainer complaint, and whether the state legislature had the authority to do what it has done. For that reason, he recommended that the committee stay away from the complaint.

Mr. Shea tried to memorialize in Rule 26.3 the conclusions the committee reached at the last meeting. Accordingly, the required disclosures are built around the complaint and summons on the plaintiff side. Further disclosures are required if there is an occupancy hearing. The defendant's disclosures are built around the answer, and then the hearing. The party who requests the occupancy hearing will make disclosures first, and then the responding party will make their disclosures before the hearing. Mr. Shea raised a further question about paragraph (d) and whether counter-designations of deposition testimony and objections are relevant in eviction proceedings. If not, there is no need for that paragraph.

With respect to Rule 9 and the committee's request that a mark-up be proposed, Mr. Shea prepared new paragraph (n) on page 20. It did not include nearly as much detail as Rule 26.3, but he said the committee could still describe the disclosures in Rule 26.3. In response to Kent Holmberg's question, Mr. Shea confirmed that he does *not* recommend the committee change Rule 9. By way of explanation, Mr. Shea said that the Utah Supreme Court is over the Utah Rules of Civil Procedure. The legislature may amend a rule of procedure only by joint resolution with a 2/3 majority of both houses. Although it has been around a long time, the forcible entry/unlawful detainer statute was not adopted through that process and it is clearly procedural. If the Utah Rules of Civil Procedure describe what must be pleaded in addition to what is required in the statute, Mr. Shea believes it will raise an issue regarding the balance of authority between the legislature and the Supreme Court. He suggested that the committee stay well away from that. In addition, the mechanism for passing information from one party to another has always been through disclosures and discovery requests. He believes that is the more appropriate vehicle.

Discussion:

- Mr. Hafen asked whether anyone advocated for the Rule 9 option. Amber Mettler responded that there is an even more practical reason to avoid an amendment to Rule 9—if the required disclosures are accomplished only through Rule 9, the only way to bring the issue before the Court would be to file a motion to dismiss. If the disclosures are accomplished through Rule 26, the issue can be more easily brought before the judge at the hearing. Mr. Andreason commented that the argument in favor of a Rule 9 change last time was that Rule 11 would apply. Mr. Shea noted that disclosures also have Rule 11 consequences, and Ms. Mettler directed the committee to Rule 26(e) on that issue.

- Mr. Hafen requested comments on Mr. Shea's proposed Rule 26.3 language. Mr. Shea relayed Leslie Slaugh's emailed comments, which included a suggestion that "when the tenant is not a commercial tenant" in lines 3-4 apply only to forcible entry/unlawful detainer actions. Judge Pullan questioned whether lines 44-45 were necessary, given the language of Rule 26(a)(5)(B). Mr. Shea said he believed lines 42-25 could be eliminated. Ms. Mettler commented that objections to the admissibility of exhibits are also covered, but she was not sure if those were really made in these cases. Mr. Holmberg noted that one of the committee's guests previously advised that 3 out of 100 cases go to trial. Fourteen days is not workable because it is the same as initial disclosures. The regular rule is 28 and 14 days, so perhaps this rule should be 14 days for designations and 7 for counter-designations and objections. Mr. Andreason asked whether the occupancy hearing and trial are separate events. Mr. Shea responded that technically they are separate, but that the trial can be subsumed in the occupancy hearing.

- James Deans commented that at the occupancy hearing, most judges bifurcate and do not turn the hearing into the trial. Only the issue of possession is decided at the hearing. He hasn't seen a judge in many years conduct a trial at the occupancy hearing. Mr. Hafen commented that another guest had said the occupancy hearing was the critical piece. Mr. Deans responded that if possession is granted to the landlord, oftentimes the landlords decide they are done and they move on. Martin Blaustein said that in other parts of the state, some judges will hold evidentiary hearings at the possession level if they think they can resolve all of the issues. There are occasions where judges will hear the entire case at that stage. Kirk Cullimore, Jr. said last year his office filed between 2,000 and 3,000

evictions. They had perhaps 10 that went to trial within the expedited time frame under the statute.

- Based upon the comments of the guests, Mr. Shea said the final lines of paragraph (d) appear to still be relevant, even if invoked rarely. The main issue is timing; if pretrial disclosures are required 14 days before trial, perhaps counter designations should be provided 7 days before. Mr. Cullimore said that was probably appropriate, but practically speaking, once a trial date is set, typically the parties stipulate right then on when disclosures will happen based on the trial date and the judge's calendar.

- Mr. Cullimore asked what was meant by "itemization of rent past due," and what it accomplishes. He believes the amount is included in the 3-day notice. Steve Marsden asked if there was a practical problem where landlords frequently could not come up with an itemized calculation. Mr. Cullimore explained that they receive ledgers from landlords, but oftentimes they are not easily understood. Messrs. Andreason and Hafen noted that "itemization" was a compromise instead of requiring a ledger. Mr. Shea further noted that an itemization is important because certain types of damages can be trebled.

- Another guest questioned whether the changes to Rule 26.3 will have the opposite effect of protecting tenants. He believes that tenants won't provide the required disclosures. Mr. Shea responded that the committee shouldn't decide what to do based on what tenants have done in the past when they were not given sufficient information. With more information, tenants can make more informed decisions. He thinks the disclosures will be helpful.

- Judge Pullan commented that an itemization is important for the reasons discussed at the last meeting. He also questioned whether anything is gained by requiring an explanation for the factual basis for the eviction. Even with notice pleading, aren't we getting that already? It might have some value in cases alleging a crime or nuisance, but in most cases, he wonders whether we are gaining much. Mr. Shea said that he was trying to put the thoughts voiced at the last hearing into the rule.

- Mr. Andreason expressed his concern regarding paragraph (c)(1) and the requirement for two sets of disclosures by tenants. Mr. Blaustein said that he anticipated the tenant's answer would include the basis for the defense.

- Mr. Cullimore expressed his concern regarding Rule 26.3(b)(1) given the high percentage of defaults in these cases. An itemized calculation could be different than the ledger. Judge Pullan clarified that the rule does not require a ledger, and asked why a landlord would be pleading something different than what was disclosed. By way of example, Mr. Cullimore explained that a 3-day notice may have been served on Jan. 5th, but the case was not turned over to him for filing until Jan. 20th and now there are additional charges. The complaint alleges the rent owing through the date of the complaint. Mr. Hafen asked whether the concern would be alleviated if "known" was changed to "sought" in paragraph (b)(1)(C). Mr. Cullimore said that would be in the complaint. He asked whether the committee could word the rule in a way that said if the information was not in the complaint, then it must be in a separate disclosure. Messrs. Shea and Hafen said that if the landlord already knows the amount, it shouldn't be difficult to provide. Mr. Holmberg asked if you could call a complaint a disclosure. Mr. Blaustein commented that there is a lot of Supreme Court authority that

what gives rise to a complaint is the 3-day notice. You can't add issues to the complaint that are not reflected in the notice without getting an objection. The tenant should have an opportunity to challenge specific allegations, and if the tenant knows what is going on, the tenant is more likely to show up if there is something to challenge.

- Summarizing the committee's comments, Mr. Hafen proposed moving the commercial tenant language in paragraph (a) to after the unlawful detainer statute, changing "known" to "sought" on line 11, changing 14 to 7 in line 42, and removing (c)(1). Terri McIntosh raised line 13 concerning the factual basis for the eviction. From prior meetings, the committee has expressed concerns about the complaint including specific information about crimes due to the harm that may cause tenants. She suggested that we be more specific regarding what we want the landlord to disclose. Mr. Shea commented that the statute requires the plaintiff to set forth the facts upon which he/she seeks to recover. Ms. McIntosh asked whether the intention is to have the complaint say that crimes have been committed, and then to have the disclosure be more specific. Sammi Anderson asked whether we need to deal with the disclosure of documents, including police reports. Mr. Hafen suggested adding something like "unless otherwise provided in the complaint" to avoid the duplication issue. James Hunnicutt agreed with that proposal. Judge Pullan said that in failure to pay rent cases, tenants basically have what they need in the complaint. In other cases, like nuisance and crime cases, he thinks we should have a more detailed statement. Mr. Shea agreed with the proposal that the factual basis for the eviction should be provided in a disclosure unless included in the complaint. Mr. Andreason said that he likes the encouragement to include the information in the complaint.

- Judge Furse expressed her concern that the case law does not require much to be disclosed in the complaint; alleging a lease violation would be sufficient. She is concerned that plaintiffs will believe they have stated enough with that kind of allegation. Mr. Hafen clarified that we would simply be giving plaintiffs an option to include the required information in a complaint. If it isn't there, the plaintiff must serve all of the disclosures in the rule. He asked whether the "unless provided in the complaint" language should be added to line 7 or 13. Mr. Andreason said that putting it in line 7 avoids other redundancies. Mr. Hunnicutt agreed.

- With respect to the suggested change of "known" to "sought" in line 11, Ms. Mettler said that she assumed it would not prevent the accrual of attorneys' fees. Mr. Shea said that was not the intent. Mr. Hunnicutt proposed removing the word "known," which would solve the ambiguity. Mr. Hafen agreed. Judge Furse said that she preferred "known" over "sought," and would keep "known" in the rule.

- Ms. Anderson moved to remove the word "known" from line 11, to approve Mr. Slaugh's proposal regarding the "commercial tenant" clause in paragraph (a), and to add "unless provided in the complaint" to line 7. Mr. Marsden seconded and the motion carried.

- Mr. Marsden moved to strike (c)(1) from the rule, which Messrs. Andreason and Hunnicutt seconded. All approved the motion except Judge Pullan, who dissented. He said the rule is well drafted the way it is, he doesn't believe it is a trap, and he thinks it creates predictability for what a tenant is obligated to do. Ms. Mettler proposed that the committee adopt similar language to line 7; i.e., unless the information is included in the answer, the defendant must serve a disclosure with the explanation. Ms. Anderson expressed her

approval, as it would make the rule symmetrical. Mr. Andreason said that the default rate is so high that to get any response is great. In his view, requiring tenants to do more by providing a more thorough factual basis for their defense seems like too much. Mr. Hafen commented that we're dealing with the 10% of tenants who are going to file an answer, and with respect to them, we want to lay out a simple road map for what they have to do. Mr. Marsden questioned whether a denial of everything in the complaint is a sufficient factual basis under the rule. Mr. Hunnicutt asked whether a tenant may defend him or herself at the hearing if they don't do the disclosure. Mr. Andreason said that we're lucky to get 10% of tenants to respond, and asked whether we want to add to their burden.

- Several guests provided comments about occupancy hearings, and whether judges would allow tenants to present evidence if they had not provided disclosures. Mr. Marsden commented that (c)(1) merely requires an explanation of the tenant's defense; landlords will not receive emails or a list of witnesses, they will receive a 2-line narrative at best. He expressed his view that it was a trap for pro se tenants on a technical requirement that gives the landlord no practical information.

- Mr. Hafen noted that the committee had already voted to remove (c)(1) from the rule and asked whether anyone wanted to make a motion to put it back in. Ms. Mettler moved to include (c)(1) in the rule with her proposed modification. Judge Pullan seconded. The motion did not carry.

- Mr. Hafen asked whether there was a motion to alter lines 30-45 of Rule 26.3. Mr. Hunnicutt said that Rule 5 requires service within a week and in a prompt fashion, but delivery and receipt does not have to be guaranteed. He suggested that the committee address the issue of actual delivery, given the tightness of deadlines that are 2 days before the occupancy hearing. Mr. Holmberg suggested that service be accomplished by the method under which it will be most promptly received. Mr. Hunnicutt agreed. Although Rule 5 addresses the issue, he commented that pro se parties are unlikely to read Rule 5. The guests commented that most tenants show up at the hearing with their evidence rather than serve the landlord with it beforehand. Mr. Cullimore said that he doubted any judge would enforce the rule. Several committee members noted, however, that he would want the information even if it wasn't provided in every case, especially in cases where the tenant was represented. Mr. Hunnicutt moved to incorporate his proposed amendment that service be accomplished through the method most promptly to be received, and to make it symmetrical for the plaintiff. Ms. Anderson seconded. The motion carried.

- Mr. Hafen invited a motion concerning paragraph (d). Mr. Holmberg moved that the 14-day deadline be changed to 7 days. Mr. Hunnicutt seconded and the motion carried. Judge Pullan moved to strike lines 44 and 45, beginning with "other than." Mr. Marsden seconded. Mr. Shea noted those lines were already part of Rule 26. All voted in favor of the motion.

- Ms. Anderson moved to publish Rule 26.3 for comment as amended. The motion was seconded and all voted in favor.

III. Rule 4, Process. [Tab 3] – Tim Shea

Mr. Shea explained that there are two issues for the committee to address on Rule 4. First, we have been invited by the Supreme Court to consider what to do about lines 10-13, which allow a plaintiff to serve a second defendant right up to the date of trial if the first defendant was timely served. The subcommittee proposed the deletion of that provision.

Discussion:

- Although the federal rules are changing to 90 days, Mr. Hunnicutt proposed that the committee not make a similar change to line 6 of Rule 4 and to instead keep it at 120 days. He has spoken with other divorce lawyers, commissioners, and Mary Jane. They believe the change will negatively impact pro se and low income litigants in family law where each step of the process is an emotional obstacle. Mr. Andreason said that he is persuaded; it sounds like a distinct difference between the state and federal systems. Mr. Hafen commented that one of our committee's pillars is that we should try to achieve symmetry with the federal rules when possible, but if there is a good reason to deviate, we should deviate. Judge Pullan said that in cases where service is difficult, he thinks it is unlikely that service will be accomplished in 120 days if it isn't accomplished in 90 days. He doesn't believe the courts will be inundated with motions to extend the time for service if the change is made to 90 days. Mr. Hunnicutt responded that he didn't think the floodgates would open, but that there would be a definite uptick in motions, which would mean more work for divorce lawyers and commissioners. Lori Woffinden said that from a clerical standpoint, the court's CORIS system has a method to send out notice in 120 days. She knows that it can be changed, but there won't be any changes to CORIS until it is rewritten in 2-4 years. Nancy Sylvester said that she believes that is incorrect; if it needs to be done it simply must be prioritized. Ms. Woffinden said that in the past, this issue was at the bottom of the priority list. Judge Pullan said that Ms. Woffinden had a good point. He has had grave difficulty getting any priority with IT. Paul Stancil said that he was leaning toward Mr. Hunnicutt's proposal of 120 days. He is not sure there is a magic number, but he is persuaded that we don't have to follow the federal rule simply to follow it. There are different considerations, and the state dockets should be driving our decision. Mr. Hunnicutt moved to leave the timeframe at 120 days. Mr. Stancil seconded. The motion carried.

The second issue on Rule 4 concerns acceptance of service. Mr. Shea said that the committee previously asked him to prepare something regarding acceptance of service, so he prepared paragraph (d). Acceptance and waiver of service are based on the same concept, so Mr. Shea proposed that they be deleted and that service by mail be adopted instead. If we have acceptance of service, there would be a process whereby the defendant would complete a form, send it to the plaintiff, and the plaintiff would file it with the court. In that instance, the court would have some assurance that the defendant is aware of lawsuit. The software application that Lane Gleave has developed would certainly qualify. The language in paragraph (d) is platform independent, as long as the court eventually ends up with the receipt or acknowledgement. Other methods would work, including first class mail, so long as a receipt comes back. Other amendments to the rule address the style and grammar changes that the committee has been trying to identify as it proceeds through rule changes. Mr. Hafen invited comments from the committee.

Discussion:

- Mr. Gleave said that perhaps he does not understand the proposal, but he believes deleting the option of permitting service by mail is limiting. He is not sure that we want to remove that option for service. Mr. Shea said that an acceptance of service can be delivered by mail, but that in some senses, the option to serve by mail would be eliminated. He did not perceive any purpose in serving by mail or commercial courier service if the acceptance provisions are adopted. Ms. Anderson asked whether those methods of service are conceptually distinct, and what happens if a defendant doesn't accept service. Mr. Gleave said that in many instances, he attempts service when a defendant is not home and the distance traveled is quite far for a second or third attempt. Sometimes those defendants opt to receive a certified copy instead. Mr. Shea said that paragraph (d) simply reflected his perception, and that perhaps (d)(2) should be reinstated. Ms. Anderson said we're talking about 2 different things. One is a method of service available to a plaintiff, and one is a method of acceptance available to a defendant. She believes we should have both, and moved to reinstate (d)(2) (on page 26). Mr. Andreason seconded. All voted in favor of the motion.

- Judge Pullan raised the language in (d)(4) reflected on page 24, lines 59-63, which updates lines 201-202 on page 28. Trystan Smith said that, from his perspective, (d)(4) is problematic for defendants. Many times you can't find your client to get authority to accept service. Mr. Shea commented on the federal rule equivalent, and explained that (d)(4) is in essence an edited copy and paste from the federal rule. Mr. Hafen asked whether a change of "person" to "defendant" would resolve the issue. Mr. Smith said that it would not. There could be an innocent reason for the inability to accept service, but the defendant is still left to fight over good cause. Ms. Mettler said that she has clients who may not be able to give permission to accept service within the time required. Ms. Anderson commented that the rule seems geared toward those who are difficult to serve; most business entities have registered agents who are easy to serve.

- Mr. Hafen asked whether Mr. Smith had similar concerns regarding existing paragraph (f). Mr. Andreason noted that the difference is attorneys' fees. Mr. Hafen said that the existing paragraph also does not include a good cause element. Judge Pullan said he objected to the concept. If he is sued on an unmeritorious claim, and he refuses to accept service and then he wins and is entitled to his costs, the rule would seem to require him to then pay the plaintiff for the costs and fees associated with service. Mr. Hafen asked whether conceptually the committee was fine with leaving the old paragraph (f) in, but not including lines 59-63 in (d)(4). Messrs. Smith and Hunnicutt agreed. Judge Pullan commented that he doesn't like the fact that if he didn't play nice and has to defend an unmeritorious claim, he might still have to pay for service. It isn't good policy. Mr. Stancil said that conceptually, he understands that acceptance is designed to think about a new method of service, i.e., electronic. He sees that as conceptually different from waiver. Lines 59-63 are talking about the stick to encourage someone to agree to service via email. It is a pretty big stick, however, with attorneys' fees included. Mr. Andreason said that he hopes the majority of cases are not bogus, and that the reason the rule is set up this way is so that plaintiffs have a stick for putative defendants who are trying to evade service. Mr. Shea commented that if the plaintiff prevails, service costs are recoverable. Under (d)(4), you don't have to prevail to recover.

- Mr. Hafen asked whether anyone is in favor of leaving in the second sentence of (d)(4), i.e., lines 60-63. Ms. Anderson moved to strike those lines. Ms. Mettler seconded. The motion carried.

IV. Rule 35, Physical and mental examination of persons.

Mr. Smith explained that he had sent an email regarding the minutes for the January 2011 advisory committee meeting that addressed Rule 26 experts and how they relate to Rule 35(b). To steer the committee's discussion of Rule 35 at the next meeting, he encouraged the committee to review those minutes, as well as the minutes from the August 2011 meeting, to see the committee's prior discussion of Rule 35.

The meeting adjourned at 5:59 pm. The next meeting will be held on February 24, 2016 at 4:00pm at the Administrative Office of the Courts, Level 3.

Tab 2

(d) **Method of service**. Unless waived in writing, service of the summons and complaint shall be by one of the following methods:

(d)(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, service shall be sufficient if the person serving the same shall state the name of the process and offer to deliver a copy thereof. Personal service shall be made as follows:

(d)(1)(A) Upon any individual other than one covered by subparagraphs (B), (C) or (D) below, by delivering a copy of the summons and the complaint to the individual personally, or by leaving a copy at the individual's dwelling house or usual place of abode with some person of suitable age and discretion there residing, or by delivering a copy of the summons and the complaint to an agent authorized by appointment or by law to receive service of process, or by delivering a copy of the summons and complaint by electronic download to a person who, at the time of service, has agreed to be served electronically.

(d)(1)(B) Upon an infant (being a person under 14 years) by delivering a copy of the summons and the complaint to the infant and also to the infant'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, or with whom the infant resides, or in whose service the infant is employed;

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

(d)(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, promptly deliver the process to the individual served;

(d)(1)(E) Upon any corporation not herein otherwise provided for, upon 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 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 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 place of business;

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

(d)(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) 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) 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) 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) Upon a department or agency of the state of Utah, or upon any 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, commercial courier service, or electronic download.**

(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)(2)(d) The summons and complaint may be served upon an individual other than one covered by paragraphs (d)(1)(B) or (d)(1)(C) by electronic download in any state or judicial district of the United States provided the defendant agrees, at the time of service, to be served electronically.

(d)(2)(e) Service shall be complete upon verification of receipt of the document by the receiving party.

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~~ against the unserved defendant will be dismissed~~,~~ without prejudice on ~~application~~ motion of any party or ~~upon~~ on 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 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, proof of acceptance. A person who accepts the summons and complaint retains all defenses and objections. The plaintiff must promptly file the agreement and a copy of the summons.

~~(d)~~ (e) Method~~s~~ 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)~~ (e)(2) Service by mail or commercial courier service.

~~(d)(2)(A)~~ (e)(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)~~ (e)(1)(B) or (e)(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)~~ (e)(2)(B) The summons and complaint may be served upon an entity covered by paragraphs ~~(d)(1)(E) through (d)(1)(I)~~ (e)(1)(E) through (e)(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)~~ (e)(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)(3) Service in a foreign country. Service in a foreign country ~~shall~~ must be made as follows:

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

~~(d)(4)(A) Where~~ (e)(4)(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)(4)(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)(4)(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 3

Timothy M. Shea
Appellate Court Administrator

Andrea R. Martinez
Clerk of Court

Supreme Court of Utah

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Appellate Clerks' Office
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February 16, 2016

To: Civil Rules Committee
From: Tim Shea
Re: Rule 35

Since Rule 35 was amended November 1, 2007 to coordinate its sanction provisions with those in Rule 16 and Rule 37, the committee has discussed the rule several times in order to regulate medical examinations. There appear to be four meetings relevant to the procedural question of whether the defense examiner's Rule 35 report is required when the examiner is designated as a testifying expert.

The first time was January 27, 2010. An excerpt from the minutes:

> Rule 35. Mr. Wikstrom led a brief discussion regarding physical examinations. The Committee determined that if the examiner is going to testify, the examiner will have to be disclosed under the expert disclosure requirements.

Language to this effect was added to the rule in the April 25, 2010 draft, which was included in the materials for the April 28 meeting. A committee note was first introduced at the June 23 meeting. In relevant part it read: "Medical examiners will be treated as other expert witnesses are treated, with the requirement of a report under Rule 26." The note was edited over time, but this sentence remained largely intact.

The committee next considered Rule 35 on January 26, 2011 as part of the evaluation of the "preliminary" comments to the discovery amendments. This is the excerpt from the minutes that Trystan Smith circulated before the last meeting.

> A. RULE 26 - EXPERTS.
>
> Mr. Shaughnessy circulated revisions to Rule 26(a)(3) and the committee discussed at length expert testimony under the revised rules, including expert depositions and reports, the timing of expert disclosures, how the revised rule will work in cases involving multiple parties on one side, the treatment of

> non-retained experts and trial demonstratives. The committee approved the proposed changes to Rule 26(a)(3), with a revised version of the rule to be circulated. The committee also discussed the ways in which the revisions to Rule 26(a)(3) may impact Rule 35. Mr. Shea proposed changing Rule 35(b) to read that "If the party requesting the examination wishes to call the examiner as a witness, the party shall disclose the expert as required by Rule 26(a)(3)." Under this change, the medical examiner is required to give the dictated medical report completed following the examination in all events. However, if the medical examiner is then called to testify, the witness must then also meet the requirements of Rule 26(a)(3). The committee approved this change. January 26, 2011.

I don't pretend to understand the language that I proposed, since the quoted sentence had by that time been in the working draft for several months.

The discovery amendments, including Rule 35, were officially published for comment during the summer of 2011 and approved effective November 1. There were no changes to Rule 35 in the interim.

I have attached the amendment to the committee note proposed by Frank Carney and Mr. Carney's cover letter. The amendments to the rule itself are modest, correcting two references and several style or grammar changes. Mr. Carney's amendment to the committee note is intended as a clearer description of paragraph (b).

If the committee believes the better policy is to require delivery of the examiner's Rule 35 report only if the examiner is not designated as an expert, I recommend amending paragraph (b) to plainly state that.

MEMORANDUM

To: Rules Committee
From: Frank Carney
Date: April 24, 2015
Subject: Rule 35

You will recall that we amended Rule 35 on medical examinations several years ago, removing the requirement for automatic production of reports from prior examinations, allowing for routine video recording of the examination, etc.

However, issues have inadvertently arisen over the need in all cases for a report of the examination. At the time, our intention (to my recollection) was that ALL medical examinations would require a report of that examination to be produced. This was independent of the requirement for a report from testifying experts under Rule 26.

Our Advisory Committee Note, among other things, says this:

The former requirement of Rule 35(c) providing for the production of prior reports on other examinees by the examiner was a source of great confusion and controversy. It is the Committee's view that this provision is better eliminated, and in the amended rule there is no longer an automatic requirement for the production of prior reports of other examinations. ***Medical examiners will be treated as other expert witnesses are treated, with the required disclosure under Rule 26 and the option of a report or a deposition.***

The idea behind the last sentence was that one could always subpoena reports from prior examinations, and then attempt to prove "proportionality." Unfortunately, this last sentence has been interpreted by some as meaning that reports need not be provided under Rule 35, but only under Rule 26, when the expert is designated as a testifying expert.

I do not recall that being our intention. There are cases where a Rule 35 examiner is not called as a witness– for example, if the opinions are unexpectedly favorable to the plaintiff. Nevertheless, a report should be required, and the defendant should not have the option of withholding the opinion by not designating the examiner as an expert for trial.

The attached draft amendment to the Advisory Committee Note resolves this issue.

Utah State Courts

Nancy Sylvester <nancyjs@utcourts.gov>

Approved Minutes regarding Rule 26 (a) (3) and Rule 35 (b) - dated January 26, 2011

Trystan Smith <trystan.smith.usyt@statefarm.com> Wed, Jan 27, 2016 at 4:32 PM
To: Amber Mettler <amettler@swlaw.com>, Barbara Townsend <barbara.townsend@utahbar.org>, Heather Sneddon <hsneddon@aklawfirm.com>, James Hunnicutt <jim@dolowitzhunnicutt.com>, Jeni Wood <jeniw@utcourts.gov>, Jonathan Hafen <jhafen@parrbrown.com>, Judge Derek Pullan <dpullan@utcourts.gov>, Judge Evelyn Furse <Evelyn_Furse@utd.uscourts.gov>, Judge James Blanch <jblanch@utcourts.gov>, Judge John Baxter <jlbaxter@utcourts.gov>, Judge Kate Toomey <ktoomey@utcourts.gov>, Judge Lyle Anderson <landerso@utcourts.gov>, Kent Holmberg <kholmberg@utah.gov>, Leslie Slaugh <slaughl@provolawyers.com>, Lincoln Davies <daviesl@law.utah.edu>, Lori Woffinden <loriw@utcourts.gov>, Nancy Sylvester <nancyjs@utcourts.gov>, Paul Stancil <stancilp@law.byu.edu>, Rod Andreason <randreason@kmclaw.com>, Sammi Anderson <sanderson@mc2b.com>, Steve Marsden <marsden.steve@dorsey.com>, Terrie McIntosh <terrie.mcintosh@gmail.com>, Trystan Smith <trystan.smith.usyt@statefarm.com>

MINUTES

UTAH SUPREME COURT ADVISORY COMMITTEE ON THE RULES OF CIVILPROCEDURE
Wednesday January 26, 2011
Administrative Office of the Courts

IV. SIMPLIFIED RULES OF DISCOVERY.

A. RULE 26 - EXPERTS.

Mr. Shaughnessy circulated revisions to Rule 26(a)(3) and the committee discussed at length expert testimony under the revised rules, including expert depositions and reports, the timing of expert disclosures, how the revised rule will work in cases involving multiple parties on one side, the treatment of non-retained experts and trial demonstratives. The committee approved the proposed changes to Rule 26(a)(3), with a revised version of the rule to be circulated. The committee also discussed the ways in which the revisions to Rule 26(a)(3) may impact Rule 35. Mr. Shea proposed changing Rule 35(b) to read that "If the party requesting the examination wishes to call the examiner as a witness, the party shall disclose the expert as required by Rule 26(a)(3)." Under this change, the medical examiner is required to give the dictated medical report completed following the examination in all events. However, if the medical examiner is then called to testify, the witness must then also meet the requirements of Rule 26(a)(3). The committee approved this change.

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Rule 35. Physical and mental examination of persons.

(a) Order for examination. When the mental or physical condition or attribute of a party or of a person in the custody or control of a party is in controversy, the court may order the party to submit to a physical or mental examination by a suitably licensed or certified examiner or to produce for examination the person in the party's custody or control. The order may be made only on motion for good cause shown. All papers related to the motion and notice of any hearing ~~shall~~ must be served on a nonparty to be examined. The order ~~shall~~ must specify the time, place, manner, conditions, and scope of the examination and the person by whom the examination is to be made. The person being examined may record the examination by audio or video means unless the party requesting the examination shows that the recording would unduly interfere with the examination.

(b) Report. The party requesting the examination ~~shall~~ must disclose a detailed written report of the examiner, setting out the examiner's findings, including results of all tests made, diagnoses and conclusions. If the party requesting the examination wishes to call the examiner as an expert witness, the party ~~shall~~ must disclose the examiner as an expert as required by Rule ~~26(a)(3)~~ 26(a)(4).

(c) Sanctions. If a party or a person in the custody or under the legal control of a party fails to obey an order entered under paragraph (a), the court on motion may take any action authorized by Rule ~~37(e)~~ 37(b), except that the failure cannot be treated as contempt of court.

Advisory Committee Notes

Rule 35 has been substantially revised. A medical examination is not a matter of right, but should only be permitted by the trial court upon a showing of good cause. Rule 35 has always provided, and still provides, that the proponent of an examination must demonstrate good cause for the examination. And, as before, the motion and order should detail the specifics of the proposed examination.

The parties and the trial court should refrain from the use of the phrase "independent medical examiner," using instead the neutral appellation "medical examiner," "Rule 35 examiner," or the like.

The ~~C~~committee has determined that the benefits of recording generally outweigh the downsides in a typical case. The amended rule therefore provides that recording shall be permitted as a matter of course unless the person moving for the examination demonstrates the recording would unduly interfere with the examination.

Nothing in the rule requires that the recording be conducted by a professional, and it is not the intent of the committee that this extra cost should be necessary. The committee also recognizes that recording may require the presence of a third party to manage the recording equipment, but this must be done without interference and as unobtrusively as possible.

The former requirement of Rule 35(c) providing for the production of prior reports on other examinees by the examiner was a source of great confusion and controversy. It is the ~~C~~committee's view that this provision is better eliminated, and in the amended rule there is no longer an automatic requirement for the production of prior reports of other examinations. ~~Medical examiners will be treated as other expert~~

~~witnesses are treated, with the required disclosure under Rule 26 and the option of a report or a deposition.~~

A report must be provided for all medical examinations under this rule. If the medical examiner is going to be called as an expert witness at trial, then the designation and disclosures under Rule 26(a)(4) also are required, and the opposing party has the option of requiring, in addition to the Rule 35(b) report, the expert's report or deposition under Rule 26(a)(4)(C).

Tab 4

Comments to Rules 9, 26.1, 26.2, 41, 54, 58A, 58C, 73

Rule 9:

Nathan Whittaker
December 30, 2015 at 2:27 pm

Rule 9:

ll. 2-8: Consider replacing with the language of Fed. R. Civ. P. 9(a). The only thing that is not in the federal language is the last sentence, and that can either be added to the language or simply deleted as self-evident and unnecessary.

ll. 7-8, 27-28, & 45-46: Consider deleting the last sentence of each; it is self-evident that these issues would be determined at trial, making these sentences unnecessary. If needed, a note could be added that issues of capacity, conditions precedent, and statutes of limitation should be decided at trial along with other claims and defenses.

l. 8: Change “shall” to “must” or “may”.

ll. 9-18: Consider renumbering (b) and (c) as (b)(1) and (b)(2), as they are both about unknown parties. I suggest the following headers:

“(b) unknown parties”

“(b)(1) designation”

“(b)(2) Descriptions of interest in quiet title actions”

~~l. 9: Replace “defendant” with “party”.~~

l. 10: Consider replacing “may” with “must”.

ll. 11 & 12: Delete “or proceeding” in both lines as unnecessary.

l. 11: Replace “name, provided that when” with “name. When”.

~~l. 13: Replace “corrected” with “amended” — the term corrected does not have any meaning in the rules in referring to pleadings, and it creates an ambiguity as to whether the party should go through the amendment process of Rule 15 or some other process. Changing the term to amended clarifies that ambiguity.~~

~~l. 14: Change “a party” to “one or more parties” — it corresponds better to the phrase “may describe the unknown persons” in line 16.~~

l. 45: Delete “If the allegation is denied,” as the statute of limitations is a defense, and defenses are not admitted or denied under Rule 8 unless the court specifically orders.

~~l. 47: Replace “statute of this state, or an ordinance of any political subdivision” with “statute of this state, an ordinance of any political subdivision”, as the phrases are part of a series with “a right derived from a statute or ordinance”.~~

ll. 47-48: Consider replacing “statute of this state, or an ordinance of any political subdivision” with “statute or ordinance”. First, the only information this gives us is that statutes are enacted by the state and

ordinances by political subdivisions, and I don't know that this information adds anything. Also, I'm not sure whether other states' private statutes or ordinances are enforceable in Utah courts, but regardless, I would like to have a party pleading an out-of-state statute be required to give the same information as a party seeking to enforce a Utah private statute.

l. 50: not sure whether it should be "must" or "will".

ll. 65-79: There are several problems with this provision:

First, a non-party's residential address and personal telephone number is classified as a private record under UCJA 4-202.02(4)(K). This information should therefore not be included in a pleading or notice filed with the Court, but rather should be included with a party's disclosures.

Second, there is a problem with the sentence "The court, upon motion and for good cause shown, may permit a party to file the information specified in subsection (l)(1) after the expiration of any period permitted by this rule, but in no event later than 90 days before trial." As there does not appear to be any "period permitted by this rule" to expire, it is ambiguous whether a party seeking to allocate fault that did not include that defense in its answer must seek to amend its answer to add the defense under Rule 15 like any other defense, or whether it may file a supplemental notice without seeking leave of the court.

Third, this rule conflicts with 26(c)(5), which requires a defendant in a personal injury action (but no other action) to disclose the information required by Rule 9(m). As 9(m) currently requires the information to be included in the answer or supplemental notice, this does not make sense.

To solve these problems, I would recommend changing the rules as follows:

Replace Rule 9(m) with—

9(m) Allocation of fault.

(m)(1) A party seeking to allocate fault to a non-party under Title 78B, Chapter 5, Part 8 must affirmatively state the following in a responsive pleading under Rule 8(c):

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

(m)(1)(B) the non-party's name. If the party does not know the name of the non-party, it must state that fact and provide any other information known or reasonably available to the party identifying the non-party, such as the non-party's relationship to known parties or non-parties, the non-party's employer, or the non-party's business address, business telephone number.

(m)(2) A party may amend its responsive pleading to state the information required by paragraph (m)(1) under Rule 15(a). A motion to amend a pleading to state the information required by paragraph (m)(1) must be filed no less than 90 days before trial.

(m)(3) A party must not seek to allocate fault to a non-party except by compliance with this rule.

Rule 26.1

Justin Caplin
December 31, 2015 at 8:44 am

URCP 26.1 Disclosure deadlines.

I like the change putting 26.1 disclosures on the same schedule as 26 and requiring the Respondent's disclosures to be served regardless of the status of the Petitioner's.

Rule 26.2

Nathan Whittaker
December 30, 2015 at 2:27 pm

Add to Rule 26(a)(1)(A):

26(a)(1)(A)(iii) each non-party identified under Rule 9(m)(1).

Delete Rule 26.2(c)(5).

l. 67: Replace "shall" with "must".

ll. 71-72: Consider replacing "If the identity of the non-party is unknown, the party shall so state." with "If the party does not know the name of the non-party, it must state that fact."

l. 72: Replace "shall" with "must".

l. 79: Replace "may not" with "must not".

Rule 41

Rule 54

Nathan Whittaker
December 30, 2015 at 2:27 pm

Rule 54:

ll. 21-26: Paragraphs (d)(2) and (d)(3) suggest that a memorandum of costs cannot be ruled upon until after a judgment is entered. When considered with Paragraph (e), this means that there will be an amended judgment in nearly every case. I would recommend changing the proposed rules so that they run from the recording of the verdict or decision that provides the basis for entry of judgment rather than the judgment itself, or at least provide the prevailing party with the option of filing a memorandum of costs before the entry of judgment without tolling the opposing party's time to respond to the memorandum until after the entry of the judgment. Perhaps change "within 14 days" on line 21 to "not later than 14 days" to mirror the language of Rule 59, see Hudema v. Carpenter, 1999 UT 290, ¶ 18, 989 P.2d 491 (Utah App. 1999) (holding that "not later than 10 days after the entry of judgment" specifically allows a party to file before the entry of the judgment), and delete (d)(3).

ll. 28-29: Consider deleting "to include the award in the judgment" as unnecessary—it makes the sentence hard to read, and it makes it ambiguous whether a party must amend a judgment to include costs and attorney fees or whether it can get an award in a separate order pursuant to Rule 7(j)(8).

~~l. 29: Add the word "prevailing" between "the" and "party".~~

~~ll. 29-30: Replace "fees, and the court" with "fees. The court".~~

Rule 58A

Rule 58C

Graeme Abraham
December 17, 2015 at 4:14 pm

URCP 058C
My office has been getting varying and inconsistent rulings regarding how interest is to be treated in a renewed judgment. Some judges allow contractual interest rates to carry over while others require the U.C.A. 15-1-4 statutory rates carrying forward. Regarding the U.C.A. 15-1-4 rates, there is also a discrepancy in whether the rate from the year the judgment originally entered or the year when the judgment renews should apply. It would be nice to have some guidance on this issue in the rule itself.

Nathan Whittaker
December 30, 2015 at 2:27 pm

Rule 58C:

ll. 2 & 10: Add the words "under Rule 7" between "motion" and "in"; delete paragraph (c).

Rule 73

Keisuke Ushijima
December 24, 2015 at 11:16 am

Regarding URCP 73, the fee schedule [tentatively (f)] should be updated.

For instance, the allowed $250 amount for the range for 0 to 1,500, should be eliminated.

At minimum, we should use the $325 amount (if not more) and extend the range for judgment amounts of 0 to 2,000. It could match Court Filing Fees for suits $2000 or less.

Nathan Whittaker
January 21, 2016 at 12:04 pm

Rule 73:

The rule (or perhaps just the advisory committee note) may want to distinguish between a motion for attorney fees, which includes a full statement of grounds, affidavit, etc., and a subsidiary request for attorney fees pursuant to a motion, such as one made under URCP 11(c) or 37(a)(7)(K), or in response to a meritless or dilatory motion under UCA § 78B-5-825 (see Rohan v. Boseman, 2000 UT App 109, ¶¶ 36-40, 46 P.3d 753 (applying statute to motions)). I'm certain that the courts would not want parties filing separate motions for attorney fees (along with an affidavit of fees that would have to be revised) every time they sought fees in a motion or in response to a motion. In considering this, the committee may also want to consider whether URCP 7(n) is applicable to a nonmoving party's request for attorney fees for the necessity of responding to a meritless or dilatory motion. Again, filing such a request as a separate motion would likely have the effect of unnecessarily multiplying the filings in the case, and the committee may want to nip it in the bud.

Mark Olson
January 29, 2016 at 11:41 am

(The comments below refer to exhibits which can be downloaded at:
https://www.dropbox.com/s/2qx2xsvay8ter37/rule73exhibits.pdf)

My name is Mark Olson. I'm a debt collection attorney and former chair of the collection section of the bar. I have no comments concerning the proposed changes to Rule 73 per se, but I would like to propose an

additional change: that the Rule 73 fee schedule be revised to reflect increased costs since the last adjustment 13 years ago.

For some, the default fee schedule may be a quaint artifact, anachronistic and not worth considering. Most attorneys will rarely, if ever, use the schedule. However, the schedule is probably used in a majority of court filings, and for many collection attorneys, myself included, the schedule has become the default fee for their services. For that segment of the bar, keeping the schedule relatively up-to-date is vital to their livelihood.

HISTORY OF THE FEE SCHEDULE

In fact, the schedule was actually created with the collection bar in mind. The idea originated in 1991 by the Board of Circuit Court Judges to address several problems caused by the vast number of default judgments filed by collection attorneys. Those issues, presented to the Judicial Council as outlined in the minutes of their meeting on September 10, 1991 were: “1) The volume of cases makes it particularly burdensome for Circuit Court Judges to individually review and approve all of the affidavits in each case; 2) creates lack of uniformity between the judges; 3) creates an impediment toward consolidation, and 4) does not provide a way to challenge an attorney for the attorney fees sought.” (Exhibit A) The proposal, originally outlined in a memo by then Circuit Court Judge Michael Hutchings, went through a few iterations before finally being approved as a part of Rule 4-505 of the Code of Judicial Administration. (Exhibit B)

The schedule worked well for several years, not only for the courts, but for collection attorneys as well. The collection bar appreciates the consistent, simplified method of obtaining fee awards. Over time, however, inflationary pressures eroded the value of the schedule for those of us relying on the schedule. Many of us stopped using the schedule in favor of routinely filing fee affidavits. As the schedule lost effectiveness due to reduced utilization, the time came for it to be updated.

As then chair of the collection section, I took it upon myself to approach first the Judicial Council via letter, and subsequently the Rules Committee, where I appeared as a guest on March 26, 2003, to explain why the schedule needed to be updated. (Exhibit C)

The committee considered a variety of ways to revise the schedule, including making no changes whatsoever. One member’s thought was that over time inflation would increase the size of awards and move them up the schedule, thus resulting in higher fee awards. Such an approach, however, would do nothing for the vast number of small cases which would never reach the threshold principal where fees begin to increase; those would be stuck at $150 (then the fee schedule starting point).

In the end the committee decided to eliminate the first tier of the schedule, thus eliminating the tier awarding $150 at a principal balance of $750. The new schedule started with the former second tier: $250 in fees for cases with a principal balance below $2000. The new schedule and other changes went into effect on November 1, 2003.

TIME FOR AN ADJUSTMENT TO THE SCHEDULE

Now, 13 years later, the time has come once more to revise the fee schedule. As in 2003, so much time has passed since the last revision that the minimum fee no longer realistically reflects the cost of obtaining a default judgment. Not only that, several new requirements have been added to the process, making it more involved, time consuming and, thus, expensive to take a case to default judgment.

MORE WORK IS REQUIRED TO OBTAIN A DEFAULT JUDGMENT NOW COMPARED TO THE TIME OF THE LAST REVISION

Several additional steps have been added to the process since 2003, both formal and informal, making default judgments more costly.

First of all, we are now required to check a military database to ensure that the defendant is not in the military, and to file a copy of the results with a separate affidavit.

Many courts have also instituted their own various requirements. The Second District Court in Odgen, for example, requires us to prepare and file a Judgment Information Statement with every default judgment. Park City requires motions for entry of default judgment. Salt Lake requires separate affidavits detailing any collection fee included in the principal (in other jurisdictions we are able to include that statement in our complaints).

Most recent is an affidavit newly required by URCP 55(b)(1)(D). This rule requires the additional work of researching items for the affidavit, creating the affidavit, working with the affiant to obtain a signature, and ultimately electronically filing it with the other default documents. (The requirement can alternatively be satisfied via verified complaint, but that requires the same work.)

That brings us to the issue of electronic filing, which takes a lot more staff time than the old process. For example, instead of our prior practice of simply printing a complaint, having it served, and dropping it in the messenger box for delivery to court, it now involves printing hard copies for service, generating electronic pdf and rtf versions, saving and maintaining those copies, not to mention the cumbersome filing process.

THE COSTS OF DOING BUSINESS HAVE INCREASED

The costs of doing business have increased significantly since 2003, to the point that attorneys are once again beginning to file fee affidavits in lieu of seeking fees under the schedule. That trend is bound to continue, counteracting some of the very reasons the rule was created in the first place. The schedule must be updated; the question is how to quantify how much the schedule should be increased.

We could look to attorney salaries as one general measure of inflation in the practice of law. According to Bureau of Labor Statistics figures, mean attorney annual wages nationally have increased 22.96% from 2003 to 2014, the last year for which statistics are available. I tried finding similar data for Utah, but the closest I could find was for the category of “Professional, Scientific & Technical Services” wages in the Utah Department of Workforce Services Industry and Employment Wage database. Wages in that category have gone up 41.32% from 2003 to 2015.

How about hourly rates for attorney fees? More so than general attorney salaries, increases in hourly rates have a stronger correlation to the Rule 73 fee schedule. I can’t find any hard Utah data comparing rates over the period in question, but one corollary we can consider is the “Laffey Matrix,” a table of hourly attorney rates, broken down by years of practice, used by the District of Columbia Federal Court in making attorney fee awards. The Matrix has also been adapted for local use by several other courts around the country. Comparing Laffey Matrices from 2002-03 and 2015-16, the hourly rate for attorneys with 4-7 years of practice, for example, has risen 52.06%.

Now let’s break down what inflation has done to some of the biggest expenses for anyone trying to maintain a law practice, starting with wages. One place to look for data is the Employment Cost Index, a national measure of changes in prices paid for the compensation of labor. It shows that employment costs

of all workers over all industries have risen 32.48% through June of 2015. To narrow the focus to what attorneys actually pay staff in Utah, I turned to Utah Workforce Services data. I found that "Administrative and Support Services" wages have increased 61.61% from 2003 to 2015.

Rent and health insurance premiums are two more major components of the cost of running a law practice, and they too have seen significant increases. According to a market analysis performed annually by Coldwell Banker Real Estate, office lease rates in Salt Lake City have risen 36.32% during the period in question. Health insurance premiums have also risen dramatically. I haven't found and hard data covering limited to the years in question, but according to the Kaiser Family Foundation health insurance premiums increased 13.1% per year during the years 1999 to 2009.

I have faced similar cost increases of my own in running my practice, even though I have fought to keep costs down as much as possible. The average rate I pay paralegals and support staff has risen 27.01% from 2003 to the present. Firm paid health insurance premiums per employee have gone up a staggering 123.5 %. We have managed to keep our lease costs relatively in check, but only by moving twice in search of cheaper rent: first from downtown to the airport area, and then to our current home in West Valley City.

From these various statistics we see that attorney salaries and billing rates have gone up somewhere in the range of 23% to 52%. Major costs of doing business have gone up anywhere from 32% for salaries (based on averages for all workers in the US), 36% for rent in the Salt Lake valley, and something north of 100% for health insurance. During this time the schedule has not changed.

HOW THE SCHEDULE SHOULD BE REVISED

I propose one simple tweak: eliminate the first two lines of the schedule. That is essentially what was done 13 years ago (except that we would now remove two lines instead of one.) The result would be a fee of $400 for principal balances up to $2500, with the balance of the schedule remaining the same. This would represent an increase of 60% in the starting point of the schedule. That increase is generally in line with many of the statistical increases I have laid out, and is actually less than the 2003 fee increase of 66.7% ($150 to $250). That should also be adequate to compensate for the additional work now required to reach default judgment.

One thing to consider is that whatever increase is adopted, it is likely to remain the same for the next decade or more. We aren't asking for annual adjustments, we can live with requesting a review ever decade or so. However, from the day it goes into effect the schedule will start depreciating and falling behind the current equivalent.

The existing schedule has been in effect long enough that its value to collection attorneys has eroded and some are starting to file fee affidavits. As more resort to affidavits reflecting their true fees, a greater burden will be imposed on the courts. The first update to the fee schedule was done some 11 years after the original. It has now been over 12 years since that last revision. My recommendation is that the Supreme Court adjust the current schedule by eliminating the first two tiers and bringing the starting point up to a more reasonable $400. Also, I would be happy to meet with the committee at its convenience to discuss this issue further.

Chip Shaner
January 29, 2016 at 2:51 pm

Rule 73:

The Rule 73 chart for fees has not been updated in over 10 years and does not reflect the costs of doing business in 2016. Since Rule 73 was last updated the cost of doing business has risen greatly. Employee and healthcare costs have contributed greatly to this increase. Furthermore, the courts have imposed burdens on attorneys that simply did not exist 10 years ago. This includes additional effort for default affidavits, military service affidavits, collection fee affidavits, and the additional time and cost for mandatory electronic filing. Given that the amount of fees awarded under Rule 73 is inadequate, I would strongly suggest that the Utah Supreme Court seriously look at raising the baseline amount of attorney's fees that are awarded under this rule.

Quinn Kofford
January 29, 2016 at 3:45 pm

The process and pleadings now required to obtain default have changed significantly since the fee schedule was last revised. Additionally, it has been several years since this schedule was analyzed against the backdrop of inflation, increased filing fees, increased costs, and increased attorney fee rates.

I personally believe that the starting tier should either be combined with the second tier, or that all tiers be upwardly adjusted by at least $50.

Without appropriate adjustments to the schedule, the purpose, predicability and "judicial ease" of the schedule will become moot as more and more attorney's choose to file individual affidavits which would then need to be reviewed on a case-by-case basis.

Rebecca Mader
February 1, 2016 at 12:13 pm

Re URCP 073:

Subsection (d) of this rule should be revised and brought up to date. Costs of doing business have gone up in the last ten years, and those attorneys who rely on this schedule to collect attorney fees are struggling due to the low fee awards provided for.

Those attorneys in private practice who charge their clients by billable hours are able to increase their fees as their costs increase; debt collection attorneys who work on a contingency basis often do not have this luxury. I would propose that each section (0-1500, 1500-2000, 2000-2500 and so on) be increased by at least $50.00 per amount range, to assist in offsetting increased costs for attorneys who collect attorney fees based on this schedule.

Spencer Lythgoe
February 1, 2016 at 4:08 pm

I agree with the others below who have commented that the fee schedule in Rule 73 needs to be updated to account for inflation and the increased costs of obtaining a default judgment due to recent rule changes. Thirteen years without any adjustment is a substantial period of time. It seems like fairness dictates increasing the fees that can be requested under the table. Otherwise, attorneys may discontinue using the fee table and start filing affidavits of costs that could bog down the court system.

Kirk Cullimore Jr
February 1, 2016 at 4:15 pm

The Rule 73 fee schedule needs to be updated. The costs of doing business have substantially increased since the fee schedule was last visited, including substantial increases in court filing fees. Additionally, the amount of work and process to even be awarded a default has substantially increased with SCRA requirements, e-filing requirements, new Rule 55 requirements, etc. The lower tiers of the schedule simply do not represent a reasonable estimation of attorney fees in today's market. This is requiring my office to file affidavits with more and more cases which defeats the judicial efficiency principles sought by the Rule 73 schedule.

Kirk A. Cullimore
February 1, 2016 at 4:19 pm

The original purpose behind the attorney's fee schedule was not only to provide a minimum basis of attorneys fees but to allow the judges to allow court clerks to sign off on the default judgments. It was really more for judicial economy. Since the last revision of the schedule was more than 13 years ago, the current schedule needs to be adjusted. All costs associated with filing cases has increased for an attorney. The addition of electronic filing has dramatically increased the costs of filing cases. All costs of operations of a law firm have significant increases since 2013 including staff, office space, filing fees, insurance costs, etc.

Our office has already started to file attorneys fee affidavits and not use the schedule because it no longer is sufficiently close to what our actual costs are on most cases. I anticipate that many other attorneys are in the same boat. If the schedule is not updated, then the purpose of saving the judges time via use of the schedule will be lost.

I have reviewed other comments. I believe that Mark Olson, who has been involved in this for some time, has stated effectively the reasons for schedule to be revised.

I support the changes to Rule 73. I further believe that the schedule needs revision concurrently and that the starting tier should be at the $400 level.

Edwin Parry
February 2, 2016 at 6:09 pm

It seems that this is a good opportunity to review the fee schedule set forth in Rule 73 URCP. It has been approximately ten years (possibly more) since the schedule has been addressed. The costs of doing business have increased dramatically since that time. Additionally, as frame of reference the costs of filing a complaint have increase by 50-100% during that same period of time.

It seems to me that a recalculation of the attorney's fees with the minimum fee starting at $325.00 for damages sought of $0.00 to $1,500.00 and then shifting the present attorney fees authorized up one level with a new cap of $825.00 for amounts $4,500.01 up.

G. Scott Jensen
February 2, 2016 at 6:48 pm

My name is Scott Jensen, I am the current chair of the Collection Section for the Utah State Bar. The Rule 73 fee schedule , which was set up for collections is in need of an update. Mark Olson has done a great job of researching the history of the Rule above. I also believe that the Rule as it stands is outdated. Our expenses as collection attorneys has become increasingly more burdensome. I believe that the lowest category for attorneys fees should begin at least at $400.00 for debts from $1.00 to $1,500.00

Richard Frandsen
February 2, 2016 at 6:48 pm

The amounts and thresholds of Rule 73 need to be updated. This rule is important as it saves valuable court time and frankly attorney time. But these amounts need to be updated occasionally as are court fees and default interest rates. It's hard to imagine handling even a tiny case from start to finish for an attorney fee of $250.

Derek Barclay
February 2, 2016 at 8:14 pm

I concur with others that the Rule 73 fee schedule needs to be updated and the minimum fee allowed increased. In addition to increased costs since the fee schedule was first implemented, more work is now required in order to obtain a default judgment. When you also consider increased attorney salaries/billing rates, the minimum fee is no longer reasonable and in many cases results in the need to file an attorney fee affidavit, which also increases the workload for the courts/judges. In light of these reasons and those expressed by others, the minimum fee for cases under $1500 should be at least $350 and the rest of the scale adjusted accordingly.

Jefferson Cannon
February 2, 2016 at 11:44 pm

Rule 73:

In joining what others have posted, the Rule 73 chart for fees has not been updated in over 10 years and does not reflect the costs of doing business in 2016. We have seen the cost of business rise in every sector of our businesses. A few years ago the courts addressed their needs in rising costs of business by raising the filing fees significantly; however, the attorneys fees chart in rule 73 has not been addressed to reflect the rising cost of business for attorneys. It is now an appropriate time for the Supreme Court to review the fee chart and raise the compensation allowed for attorneys.

Rule 9. Pleading special matters.

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

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

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

~~(b)~~ (d) Fraud, mistake, condition of the mind. In ~~all averments of~~ alleging fraud or mistake, a party must state with particularity the circumstances constituting fraud or mistake ~~shall be stated with particularity~~. Malice, intent, knowledge, and other conditions of a person's mind ~~of a person~~ may be ~~averred~~ alleged generally.

~~(c)~~ (e) Conditions precedent. In pleading ~~the performance or occurrence of~~ conditions precedent, it is sufficient to ~~aver~~ allege generally that all conditions precedent have been performed or have occurred. ~~A denial of performance or occurrence shall be made specifically and~~ When denying that a condition precedent has been performed or has occurred, a party must do so with particularity~~, and when so made the~~. The party pleading the performance or occurrence shall ~~on the trial~~ establish the facts showing ~~such~~ performance or occurrence at trial.

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

~~(e)~~ (g) Judgment. In pleading a judgment or decision of a domestic or foreign court, a judicial or quasi-judicial tribunal, or ~~of~~ a board or officer, it is sufficient to ~~aver~~ plead the judgment or decision without ~~setting forth matter~~ showing jurisdiction to render it. ~~A denial of jurisdiction shall be made specifically and with particularity and when so made the party pleading the judgment or decision shall establish on the trial all controverted jurisdictional facts.~~

~~(f)~~ (h) Time and place. ~~For the purpose of~~ An allegation of time or place is material when testing the sufficiency of a pleading~~, averments of time and place are material and shall be considered like all other averments of material matter~~.

~~(g)~~ (i) Special damage. ~~When~~ If an item~~s~~ of special damage ~~are~~ is claimed, ~~they shall~~ it must be specifically stated.

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

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

~~(j)~~ (l) Libel and slander.

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

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

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

~~(l)~~ (m) Allocation of fault.

~~(l)(1)~~ (m)(1) A party seeking to allocate fault to a non-party under Title 78B, Chapter 5, Part 8 shall file:

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

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

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

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

Advisory Committee Note

The 2016 amendments deleted former paragraph (k) on renewing judgments because it was superfluous. The Renewal of Judgment Act (Utah Code Sections 78B-6-1801 through 78B-6-1804) allows a domestic judgment to be renewed by motion, and Section 78B-5-302 governs domesticating a foreign judgment, which can then be renewed by motion.

The process for renewing a judgment by motion is governed by Rule 58C.

Rule 26.1. Disclosure and discovery in domestic relations actions.

(a) Scope. This rule applies to the following domestic relations actions: divorce; temporary separation; separate maintenance; parentage; custody; child support; and modification. This rule does not apply to adoptions, enforcement of prior orders, cohabitant abuse protective orders, child protective orders, civil stalking injunctions, or grandparent visitation.

(b) Time for disclosure. In addition to the disclosures required in Rule 26, in all domestic relations actions, the documents required in this rule ~~shall be disclosed by the petitioner within 14 days after service of the first answer to the complaint and by the respondent within 28 days after the petitioner's first disclosure or 28 days after that respondent's appearance, whichever is later~~ must be served on the other parties:

(b)(1) by the plaintiff within 14 days after filing of the first answer to the complaint; and

(b)(2) by the defendant within 42 days after filing of the first answer to the complaint or within 28 days after that defendant's appearance, whichever is later.

(c) Financial declaration. Each party ~~shall~~ must disclose to all other parties a fully completed court-approved Financial Declaration and attachments. Each party ~~shall~~ must attach to the Financial Declaration the following:

(c)(1) For every item and amount listed in the Financial Declaration, excluding monthly expenses, ~~the producing party shall attach~~ copies of statements verifying the amounts listed on the Financial Declaration that are reasonably available to the party.

(c)(2) For the two tax years before the petition was filed, complete federal and state income tax returns, including Form W-2 and supporting tax schedules and attachments, filed by or on behalf of that party or by or on behalf of any entity in which the party has a majority or controlling interest, including, but not limited to, Form 1099 and Form K-1 with respect to that party.

(c)(3) Pay stubs and other evidence of all earned and un-earned income for the 12 months before the petition was filed.

(c)(4) All loan applications and financial statements prepared or used by the party within the 12 months before the petition was filed.

(c)(5) Documents verifying the value of all real estate in which the party has an interest, including, but not limited to, the most recent appraisal, tax valuation and refinance documents.

(c)(6) All statements for the 3 months before the petition was filed for all financial accounts, including, but not limited to checking, savings, money market funds, certificates of deposit, brokerage, investment, retirement, regardless of whether the account has been closed including those held in that party's name, jointly with another person or entity, or as a trustee or guardian, or in someone else's name on that party's behalf.

(c)(7) If the foregoing documents are not reasonably available or are in the possession of the other party, the party disclosing the Financial Declaration ~~shall~~ must estimate the amounts entered on

the Financial Declaration, the basis for the estimation and an explanation why the documents are not available.

(d) Certificate of service. Each party ~~shall~~ must file a Certificate of Service with the court certifying that he or she has provided the Financial Declaration and attachments to the other party ~~in compliance with this rule~~.

(e) Exempted agencies. Agencies of the State of Utah are not subject to these disclosure requirements.

(f) Sanctions. Failure to fully disclose all assets and income in the Financial Declaration and attachments may subject the non-disclosing party to sanctions under Rule 37 including an award of non-disclosed assets to the other party, attorney's fees or other sanctions deemed appropriate by the court.

(g) Failure to comply. Failure of a party to comply with this rule does not preclude any other party from obtaining a default judgment, proceeding with the case, or seeking other relief from the court.

(h) Notice of requirements. Notice of the requirements of this rule ~~shall~~ must be served on the Respondent and all joined parties with the initial petition.

Advisory Committee Notes

Rule 26.2. Disclosures in personal injury actions.

(a) Scope. This rule applies to all actions seeking damages arising out of personal physical injuries or physical sickness.

(b) Plaintiff's additional initial disclosures. Except to the extent that plaintiff moves for a protective order, plaintiff's Rule 26(a) disclosures ~~shall~~ must also include:

(b)(1) A list of all health care providers who have treated or examined the plaintiff for the injury at issue, including the name, address, approximate dates of treatment, and a general description of the reason for the treatment.

(b)(2) A list of all other health care providers who treated or examined the plaintiff for any reason in the 5 years before the event giving rise to the claim, including the name, address, approximate dates of treatment, and a general description of the reason for the treatment.

(b)(3) Plaintiff's Social Security number (SSN) or Medicare health insurance claim number (HICN), full name, and date of birth. The SSN and HICN may be used only for the purposes of the action, including compliance with the Medicare, Medicaid, and SCHIP Extension Act of 2007, unless otherwise ordered by the court.

(b)(4) A description of all disability or income-replacement benefits received if loss of wages or loss of earning capacity is claimed, including the amounts, payor's name and address, and the duration of the benefits.

(b)(5) A list of plaintiff's employers for the 5 years preceding the event giving rise to the claim if loss of wages or loss of earning capacity is claimed, including the employer's name and address and plaintiff's job description, wage, and benefits.

(b)(6) Copies of all bills, statements, or receipts for medical care, prescriptions, or other out-of-pocket expenses incurred as a result of the injury at issue.

(b)(7) Copies of all investigative reports prepared by any public official or agency and in the possession of plaintiff or counsel that describe the event giving rise to the claim.

(b)(8) Except as protected by Rule 26(b)(5), copies of all written or recorded statements of individuals, in the possession of plaintiff or counsel, regarding the event giving rise to the claim or the nature or extent of the injury.

(c) Defendant's additional disclosures. Defendant's Rule 26(a) disclosures ~~shall~~ must also include:

(c)(1) A statement of the amount of insurance coverage applicable to the claim, including any potential excess coverage, and any deductible, self-insured retention, or reservations of rights, giving the name and address of the insurer.

(c)(2) Unless the plaintiff makes a written request for a copy of an entire insurance policy to be disclosed under Rule 26(a)(1)(D), it is sufficient for the defendant to disclose a copy of the declaration page or coverage sheet for any policy covering the claim.

(c)(3) Copies of all investigative reports, prepared by any public official or agency and in the possession of defendant, defendant's insurers, or counsel, that describe the event giving rise to the claim.

(c)(4) Except as protected by Rule 26(b)(5), copies of all written or recorded statements of individuals, in the possession of defendant, defendant's insurers, or counsel, regarding the event giving rise to the claim or the nature or extent of the injury.

(c)(5) The information required by Rule ~~9(l)~~ 9(m).

Advisory Committee Note

Rule 41. Dismissal of actions.

(a) Voluntary dismissal; effect ~~thereof~~.

(a)(1) By the plaintiff.

(a)(1)(A) Subject to ~~the provisions of~~ Rule 23(e) and ~~of~~ any applicable statute, the plaintiff may dismiss an action ~~may be dismissed by the plaintiff~~ without a court order ~~of court~~ by filing:

(a)(1)(A)(i) a notice of dismissal ~~at any time before service by the adverse~~ before the opposing party ~~of~~ serves an answer or ~~other response to the complaint permitted under these rules~~ a motion for summary judgment; or

(a)(1)(A)(ii) a stipulation of dismissal signed by all parties who have appeared.

(a)(1)(B) Unless the notice or stipulation states otherwise ~~stated in the notice of dismissal~~, the dismissal is without prejudice~~, except that a notice of dismissal operates as an adjudication upon the merits when filed by a~~. But if the plaintiff ~~who has once~~ previously dismissed ~~in~~ any federal- or state-court ~~of the United States or of any state an~~ action based on or including the same claim, a notice of dismissal operates as an adjudication on the merits.

(a)(2) By court order ~~of court~~. ~~Unless the plaintiff timely files a notice of dismissal under~~ Except as provided in paragraph (a)(1) ~~of this subdivision of this rule~~, an action may only be dismissed at the plaintiff's request ~~of the plaintiff on~~ by court order ~~of the court based either~~ on~~:~~

~~(a)(2)(i) a stipulation of all of the parties who have appeared in the action; or~~

~~(a)(2)(ii) upon such~~ terms ~~and conditions as~~ the court ~~deems~~ considers proper. If a defendant has pleaded a counterclaim ~~has been pleaded by a defendant prior to the service upon him of~~ before being served with the plaintiff's motion to dismiss, the action ~~shall not~~ may be dismissed ~~against~~ over the defendant's objection ~~unless~~ only if the counterclaim can remain pending for independent adjudication by the court. Unless the order states otherwise ~~specified in the order~~, a dismissal under this paragraph is without prejudice.

(b) Involuntary dismissal; effect ~~thereof~~. ~~For failure of~~ If the plaintiff fails to prosecute or to comply with these rules or any court order ~~of court~~, a defendant may move ~~for dismissal of an~~ to dismiss the action or ~~of~~ any claim against ~~him~~ it. ~~After the plaintiff, in an action tried by the court without a jury, has completed the presentation of his evidence the defendant, without waiving his right to offer evidence in the event the motion is not granted, may move for a dismissal on the ground that upon the facts and the law the plaintiff has shown no right to relief. The court as trier of the facts may then determine them and render judgment against the plaintiff or may decline to render any judgment until the close of all the evidence. If the court renders judgment on the merits against the plaintiff, the court shall make findings as provided in Rule 52(a).~~ Unless the ~~court in its order for~~ dismissal order otherwise ~~specifies~~ states, a dismissal under this ~~subdivision~~ paragraph and any dismissal not ~~provided for in~~ under this rule, other than a dismissal for lack of jurisdiction, ~~or for~~ improper venue, or ~~for lack of an indispensable~~ failure to join a party under Rule 19, operates as an adjudication ~~up~~on the merits.

(c) Dismissal of counterclaim, cross-claim, or third-party claim. ~~The provisions of this rule apply~~ This rule applies to the dismissal of any counterclaim, cross-claim, or third-party claim. A claimant's voluntary dismissal ~~by the claimant alone pursuant to Paragraph~~ under paragraph (a)(1) ~~of Subdivision (a) of this rule shall~~ must be made before a responsive pleading is served or, if there is ~~none~~ no responsive pleading, before ~~the introduction of~~ evidence is introduced at ~~the~~ a trial or hearing.

(d) Costs of previously-dismissed action. If a plaintiff who ~~has once~~ previously dismissed an action in any court ~~commences~~ files an action based ~~up~~on or including the same claim against the same defendant, the court may ~~make such~~ order ~~for the payment~~ the plaintiff to pay all or part of the costs of the previous action ~~previously dismissed as it may deem proper~~ and may stay the proceedings ~~in the action~~ until the plaintiff has complied ~~with the order~~.

(e) Bond or undertaking to be delivered to ~~adverse~~ opposing party. ~~Should~~ If a party dismisses ~~his~~ a complaint, counterclaim, cross-claim, or third-party claim, ~~pursuant to Subdivision~~ under paragraph (a)(1)~~(i) above,~~ after a provisional remedy has been allowed ~~such~~ the party, the bond or undertaking filed in support of ~~such~~ the provisional remedy must ~~thereupon~~ be delivered ~~by the court~~ to the ~~adverse~~ party against whom ~~such~~ the provisional remedy was obtained.

Advisory Committee Note

The 2016 amendments adopt the plain-language style of Federal Rule of Civil Procedure 41. And, like the federal rule, the 2016 amendments move a central provision of paragraph (b) from this rule to Rule 52(e). Formerly, if a plaintiff had presented its case and the evidence did not support the claim, the court—in a trial by the court—could find for the defendant without having to hear the defendant's evidence. The equivalent provision now found in Rule 52(e) extends that principle to claims other than the plaintiff's and, if a party's evidence on any particular element of the cause of action is complete but insufficient, allows the court to make findings and conclusions and enter judgment accordingly.

In these circumstances the court's action goes beyond simple dismissal; the court is finding for a party on the merits. This principle more properly belongs in the rule on findings and conclusions than in the rule on dismissing an action.

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 prevailing party must file and serve an amended judgment including the costs or attorney fees~~,~~. ~~and t~~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 58C. Motion to renew judgment.

(a) Motion. A judgment creditor may renew a judgment by filing a motion in the original action before the statute of limitations on the original judgment expires. A copy of the judgment must be filed with the motion.

(b) Affidavit. The motion must be supported by an affidavit:

(b)(1) accounting for the original judgment and all post-judgment payments, credits, and other adjustments provided for by law or contained in the original judgment; and

(b)(2) affirming that notice was sent to the most current address known for the judgment debtor, stating what efforts the creditor has made to determine whether it is the debtor's correct address.

(c) Rule 7 applies. The procedures and time limits of Rule 7 apply.

(d) Effective date of renewed judgment. If the court grants the motion, the court will enter an order renewing the original judgment from the date of entry of the order or from the scheduled expiration date of the original judgment, whichever occurs first. The statute of limitations on the renewed judgment runs from the date the order is signed and entered.

Advisory Committee Note

The Renewal of Judgment Act (Utah Code Sections 78B-6-1801 through 78B-6-1804) allows a domestic judgment to be renewed by motion, and Section 78B-5-302 governs domesticating a foreign judgment, which can then be renewed by motion. The statute of limitations on an action for failure to pay a judgment is governed by Section 78B-2-311.

Rule 73. Attorney fees.

(a) Time in which to claim. ~~When attorney fees are authorized by contract or by law, a request for attorney fees shall be supported by affidavit or testimony~~ Attorney fees must be claimed by filing a motion for attorney fees no later than 14 days after the judgment is entered unless the party claims attorney fees in accordance with the schedule in ~~subsection (d)~~ paragraph (f) or in accordance with Utah Code Section 75-3-718 and no objection to the fee has been made.

(b) Content of motion. ~~An affidavit supporting a request for or augmentation of attorney fees shall set forth~~ The motion must:

(b)(1) ~~the basis for~~ specify the judgment and the statute, rule, contract, or other grounds entitling the party to the award;

(b)(2) ~~a reasonably detailed description of the time spent and work performed, including for each item of work the name, position (such as attorney, paralegal, administrative assistant, etc.) and hourly rate of the persons who performed the work~~ disclose, if the court orders, the terms of any agreement about fees for the services for which the claim is made;

(b)(3) specify factors showing the reasonableness of the fees, if applicable;

(b)(4) specify the amount of attorney fees claimed and any amount previously awarded; and

(b)(5) disclose if the ~~affidavit is in support of~~ attorney fees are for services rendered to an assignee or a debt collector, the terms of any agreement for sharing the fee and a statement that the attorney ~~is not sharing~~ will not share the fee ~~or any portion thereof~~ in violation of Rule of Professional Conduct 5.4.

(c) Supporting affidavit. The motion must be supported by an affidavit or declaration that reasonably describes the time spent and work performed, including for each item of work the name, position (such as attorney, paralegal, administrative assistant, etc.) and hourly rate of the persons who performed the work.

(d) Liability for fees. The court may decide issues of liability for fees before receiving submissions on the value of services. If the court has established liability for fees, the party claiming them may file an affidavit and a proposed order. The court will enter an order for the claimed amount unless another party objects within 7 days after the affidavit and proposed order are filed.

~~(c)~~ (e) Fees claimed in complaint. If a party ~~requests~~ claims attorney fees ~~in accordance with the schedule in subsection (d)~~ under paragraph (f), the ~~party's~~ complaint ~~shall~~ must state the basis for attorney fees, state the amount of attorney fees allowed by the schedule, cite the law or attach a copy of the contract authorizing the award, and, if the attorney fees are for services rendered to an assignee or a debt collector, a statement that the attorney will not share the fee ~~or any portion thereof~~ in violation of Rule of Professional Conduct 5.4.

~~(d)~~ (f) Schedule of fees. Attorney fees awarded under the schedule may be augmented only for considerable additional efforts in collecting or defending the judgment and only after further order of the court.

Amount of Damages, Exclusive of Costs, Attorney Fees and Post-Judgment Interest, Between	and:	Attorney Fees Allowed
0.00	1,500.00	250.00
1,500.01	2,000.00	325.00
2,000.01	2,500.00	400.00
2,500.01	3,000.00	475.00
3,000.01	3,500.00	550.00
3,500.01	4,000.00	625.00
4,000.01	4,500.00	700.00
4,500.01	or more	775.00

Advisory Committee Notes

Tab 5

Summary of December 2015 Amendments
To
Federal Rules of Civil Procedure

Federal Rule	Subject Matter	"Substantive" Change?	Summary of Changes
1	Purpose of Rules	No	Adds "employed by the courts and parties" to purpose statement
4(d)(1)(C)	Waiver of Service	No	Requires service of specific waiver form (appended to rule).
4(m)	Time Limit for Service	Yes	Shortens ordinary service time limit to 90 days; adds real estate condemnation proceedings to list of actions exempted from ordinary time limit
16(b)(1)(B);	Scheduling Conference	??	Eliminates language authorizing telephonic, mail or other form of scheduling conference prerequisite to issuance of scheduling order
16(b)(2)	Scheduling Order	Yes	Allows delay for good cause but shortens deadlines for scheduling order to earlier of 90 days after any defendant served/60 days after any defendant appears (from 120/90)
16(b)(3)(B) (iii)	Scheduling Order	Yes	Expands powers to order disclosure, discovery, *or preservation* of ESI
16(b)(3)(iv)	Scheduling Order	No	Allows scheduling order to include party "snap-back" agreements reached under F.R.E. 502 (deals with attorney-client privilege/work product, and scope of waiver)
26(b)(1)	Scope of Discovery	Yes	Converts "proportionality" from objection available to producing party to prima facie element of "discoverability." (Largely tracks URCP 26(b)(2)); replaces "reasonably calculated to lead. . . ." with "need not be admissible in evidence to be discoverable."
26(b)(2)(C)(iii)	Limitations on Frequency/Extent of Discovery	Yes	Deletes old proportionality provision and requires court to limit discovery if request falls "outside the scope permitted by Rule 26(b)(1)."
26(c)(1)(B)	Protective Orders	Yes	Expressly allows court to allocate

			expenses of authorized discovery in addition to specifying time and place.
26(d)(2)(A)	Early Rule 34 Requests	Yes	Inserts provision allowing parties to issue Rule 34 Requests for Production "[m]ore than 21 days after" service of summons and complaint. (Old rule: generally no discovery allowed until after first Rule 26(f) conference).
26(d)(2)(B)	Early Rule 34 Requests	Yes	Early Rule 34 requests considered served at first Rule 26(f) conference.
26(d)(3)	Sequence of Discovery	Yes	Retains default "any sequence" approach, but instead of old "on motion" trigger, allows exceptions when "the parties stipulate or the court orders otherwise for the parties' and witnesses' convenience and in the interest of justice."
26(f)(3)(C)	Discovery Plan	Yes	Requires that parties' discovery plan address issues relating to preservation of ESI, not just disclosure and discovery.
26(f)(3)(D)	Discovery Plan	??	Mirrors amendment to 16(b)(3)(iv); requires discovery plan to ask court for order under F.R.E. 502 if parties agree on a privilege/work product snap-back procedure.
30(a)(2)	Oral Depositions	Yes	Explicitly requires court to consider Rule 26(b)(1) discoverability standard in deciding whether to permit depositions allowable only with leave of court (i.e., more than ten per "side," redeposition of same deponent, depositions before first Rule 26 conference, deposition of imprisoned deponent).
30(d)(1)	Oral Deposition Duration	No	Conforms rule to new discoverability structure by requiring court to allow additional deposition time "consistent with Rule 26(b)(1) and (2)" rather than "consistent with Rule 26(b)(2)" alone.
31(a)(2)	Deposition by Written Questions	Yes	Conforms "with leave" requirements to approach set forth in 30(a)(2) (i.e., court must consider R.26(b)(1)

			discoverability standard in deciding whether to order "with leave" deposition by written questions).
33(a)(1)	Interrogatories to Parties	Yes	Conforms "with leave" authorization to serve more than 25 written interrogatories as above (i.e., leave "may be granted" if "consistent with Rule 26(b)(1) and (2)."
34(b)(2)(A)	Requests for Production	Yes	Default response time for "early Rule 34 Request" is within 30 days after first Rule 26(f) conference.
34(b)(2)(B)	Requests for Production	Yes	Requires that responding party "state with specificity the grounds for objecting to" a request. Expressly allows responding party to state that it will produce copies of documents/ESI rather than permitting inspection. Production must be completed "no later than the time for inspection specified in the request or another reasonable time specified in the response."
34(b)(2)(C)	Requests for Production	Yes	Objections must state whether responsive materials are being withheld on basis of that objection. Objection to part of request must specify objectionable part and permit inspection of remainder.
37(a)(3)(B)(iv)	Motion to Compel	No	Closes technical loophole. Old rule seemingly allowed motion to compel if party produced documents, by tying motion only to failure "to respond that inspection will be permitted" or actual failure to permit inspection. New rule does not permit motion to compel if party has produced responsive documents.
37(e)	Failure to Preserve ESI	Yes	Significant shift in treatment of ESI preservation obligations (see below for detailed summary)
55	Default; Default Judgment	Maybe	Clarifies/limits court ability to set aside default *judgment* under Rule 60(b) approach to "*final* default judgment;" old rule otherwise identical save for omission of "final."

84	Forms	Yes	All forms abrogated; Forms 5 and 6 moved to Rule 4

Tab 6

Timothy M. Shea
Appellate Court Administrator

Andrea R. Martinez
Clerk of Court

Supreme Court of Utah

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Appellate Clerks' Office
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February 17, 2016

To: Civil Rules Committee

From: Tim Shea

Re: Motion for order to show cause

The Code of Judicial Administration has two rules governing the process for a motion for an order to show cause. The rules are identical, but they cover only the 5th and 6th judicial districts. I believe that this motion should be governed by a rule of procedure rather than a rule of administration. I have used the existing CJA rule as the baseline with some further suggested amendments.

Rule 7A. Motion for order to show cause.

(a) Motion. To obtain an order to show cause for violation of an order or judgment, a party must file a motion for an order to show cause following the procedures of this rule.

(b) Affidavit or declaration. The motion must be accompanied by at least one affidavit made on personal knowledge or declaration under Utah Code Section 78B-5-705 made on personal knowledge showing that the affiant or declarant is competent to testify on the matters set forth. At least one affidavit or declaration must state the title and date of entry of the order or judgment that the moving party seeks to enforce. Collectively, the affidavits or declarations must set forth facts that would be admissible in evidence and that would support a finding that the party has violated the order or judgment.

(c) Order to show cause. The motion must be accompanied by a proposed order to show cause, which must:

(c)(1) state the title and date of entry of the order or judgment that the moving party seeks to enforce;

(c)(2) state the relief sought by the moving party;

(c)(3) state whether the moving party has requested that the nonmoving party be held in contempt and, if that request has been made, state that the penalties for contempt may include, but are not limited to, a fine of up to $1000 and confinement in jail for up to 30 days.

(c)(4) order the nonmoving party to appear personally or through counsel at a specific date, time and place to explain whether the nonmoving party has violated the order or judgment;

(c)(5) state that no written response is required;

(c)(6) state that the hearing is not an evidentiary hearing, but is for the purpose of determining:

(c)(6)(A) whether the nonmoving party denies the claims made by the moving party;

(c)(6)(B) whether an evidentiary hearing is needed;

(c)(6)(C) the issues on which evidence needs to be submitted; and

(c)(6)(D) the estimated length of an evidentiary hearing.

(d) Service of the order. The moving party must have the order, the motion and all affidavits and declarations personally served on the nonmoving party in a manner provided in Rule 4 at least 7 days before the hearing. For good cause the court may order that service be made on the nonmoving party's counsel of record in a manner provided in Rule 5. The court may order less than 7 days' notice of the hearing if:

(d)(1) the motion requests an earlier date; and

(d)(2) it clearly appears from specific facts shown by affidavit or declaration that immediate and irreparable injury, loss, or damage will result to the moving party if the hearing is not held sooner.

(e) First hearing.

(e)(1) At the hearing, the court will determine:

(e)(1)(A)whether the nonmoving party denies the claims made by the moving party;

(e)(1)(B) whether an evidentiary hearing is needed;

(e)(1)(C) the issues on which evidence needs to be submitted; and

(e)(1)(D) the estimated length of an evidentiary hearing.

(e)(2) The court may enter an order regarding any claim that the nonmoving party does not deny. The court may order the parties to file memoranda before the evidentiary hearing. Memoranda must follow the requirements of Rule 7.

(f) Evidentiary hearing. The moving party bears the burden of proof on all claims made in the motion.

(g) Limitations. A motion for an order to show cause may not be used to obtain any order other than an order to show cause. This rule does not apply to an order to show cause issued by the court on its own initiative. A motion for an order to show cause presented to a court commissioner must follow Rule 101.

Tab 7

Administrative Office of the Courts

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

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

MEMORANDUM

To: Civil Rules Committee
From: Nancy Sylvester
Date: February 17, 2016
Re: Rule 7

Brent Johnson brought up a concern about the effect of Rule 7 on pro se litigants. The rule appeared to prejudice those litigants who did not have the benefit of e-filing because it contained references throughout to filing, rather than service. Tim changed the time to respond to the date of service so people have the benefit of the 3-day mailing provision in Rule 6. He believes Rule 7 is the only rule affected.

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

(a) Pleadings. Only these pleadings are allowed:

(a)(1) a complaint;

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

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

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

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

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

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

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

(b)(1) A motion, other than a motion described in paragraphs (b)(2), (b)(3) or (b)(4), made in proceedings before a court commissioner must follow Rule 101.

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

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

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

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

(c) Name and content of motion.

(c)(1) The rules governing captions and other matters of form in pleadings apply to motions and other papers. The moving party must title the motion substantially as: “Motion [short phrase describing the relief requested].” The motion must include the supporting memorandum. The motion must include under appropriate headings and in the following order:

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

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

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

(c)(3) If the motion is for relief authorized by Rule 12(b) or 12(c), Rule 56 or Rule 65A, the motion may not exceed 25 pages, not counting the attachments, unless a longer motion is permitted by the court. Other motions may not exceed 15 pages, not counting the attachments, unless a longer motion is permitted by the court.

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

(d)(1) A nonmoving party may file a memorandum opposing the motion within 14 days after the motion is ~~filed~~ served. The nonmoving party must title the memorandum substantially as: "Memorandum opposing motion [short phrase describing the relief requested]." The memorandum must include under appropriate headings and in the following order:

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

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

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

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

(d)(3) If the motion is for relief authorized by Rule 12(b) or 12(c), Rule 56 or Rule 65A, the memorandum opposing the motion may not exceed 25 pages, not counting the attachments, unless a longer memorandum is permitted by the court. Other opposing memoranda may not exceed 15 pages, not counting the attachments, unless a longer memorandum is permitted by the court.

(e) Name and content of reply memorandum.

(e)(1) Within 7 days after the memorandum opposing the motion is ~~filed~~ served, the moving party may file a reply memorandum, which must be limited to rebuttal of new matters raised in the memorandum opposing the motion. The moving party must title the memorandum substantially as "Reply memorandum supporting motion [short phrase describing the relief requested]." The memorandum must include under appropriate headings and in the following order:

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

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

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

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

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

(e)(3) If the motion is for relief authorized by Rule 12(b) or 12(c), Rule 56 or Rule 65A, the reply memorandum may not exceed 15 pages, not counting the attachments, unless a longer

memorandum is permitted by the court. Other reply memoranda may not exceed 10 pages, not counting the attachments, unless a longer memorandum is permitted by the court.

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

(g) Request to submit for decision. When briefing is complete or the time for briefing has expired, either party may file a "Request to Submit for Decision, but, if no party files a request, the motion will not be submitted for decision. The request to submit for decision must state whether a hearing has been requested and the dates on which the following documents were filed:

(g)(1) the motion;

(g)(2) the memorandum opposing the motion, if any;

(g)(3) the reply memorandum, if any; and

(g)(4) the response to objections in the reply memorandum, if any.

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

(i) Notice of supplemental authority. A party may file notice of citation to significant authority that comes to the party's attention after the party's motion or memorandum has been filed or after oral argument but before decision. The notice may not exceed 2 pages. The notice must state the citation to the authority, the page of the motion or memorandum or the point orally argued to which the authority applies, and the reason the authority is relevant. Any other party may promptly file a response, but the court may act on the motion without waiting for a response. The response may not exceed 2 pages.

(j) Orders.

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

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

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

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

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

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

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

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

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

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

(j)(6)(B) a motion that can be acted on without waiting for a response;

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

(j)(6)(D) a statement of discovery issues under Rule 37(a); and

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

(j)(7) Orders entered without a response; ex parte orders. An order entered on a motion under paragraph (l) or (m) can be vacated or modified by the judge who made it with or without notice.

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

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

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

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

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

(k)(4) be accompanied by a request to submit for decision and a proposed order that has been approved by the other parties.

(l) Motions that may be acted on without waiting for a response.

(l)(1) The court may act on the following motions without waiting for a response:

(l)(1)(A) motion to permit an over-length motion or memorandum;

(l)(1)(B) motion for an extension of time if filed before the expiration of time;

(l)(1)(C) motion to appear pro hac vice; and

(l)(1)(E) other similar motions.

(l)(2) A motion that can be acted on without waiting for a response must:

(l)(2)(A) be titled as a regular motion;

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

(l)(2)(C) cite the statute or rule authorizing the motion to be acted on without waiting for a response; and

(l)(2)(D) be accompanied by a request to submit for decision and a proposed order.

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

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

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

(m)(3) cite the statute or rule authorizing the ex parte motion;

(m)(4) be accompanied by a request to submit for decision and a proposed order.

(n) Motion in opposing memorandum or reply memorandum prohibited. A party may not make a motion in a memorandum opposing a motion or in a reply memorandum. A party who objects to evidence in another party’s motion or memorandum may not move to strike that evidence. Instead, the party must include in the subsequent memorandum an objection to the evidence.

(o) Overlength motion or memorandum. The court may permit a party to file an overlength motion or memorandum upon a showing of good cause. An overlength motion or memorandum must include a table of contents and a table of authorities with page references.

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

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

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

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

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

(p)(5) motion to substitute parties;

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

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

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

Advisory Committee Notes