Agenda

Advisory Committee on Rules of Civil Procedure

January 27, 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 26.3. Disclosure in unlawful detainer actions. Rule 9 alternative	Tab 2	Tim Shea
Rule 4. Process.	Tab 3	Tim Shea
Review of changes to federal rules of civil procedure	Tab 4	Paul Stancil, Lincoln Davies, James Hunnicutt, Evelyn Furse
Rule 35. Physical and mental examination of persons.	Tab 5	Tim Shea
Rule 7A. Motion for order to show cause.	Tab 6	Tim Shea
Rule 7. Pleadings allowed; motions, memoranda, hearings, orders.	Tab 7	Tim Shea

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

Meeting Schedule:

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

Tab 1

UTAH SUPREME COURT ADVISORY COMMITTEE ON RULES OF CIVIL PROCEDURE

Meeting Minutes – December 16, 2015

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

I. Welcome and approval of minutes. [Tab 1]

Jonathan Hafen welcomed the committee and guests, and invited a motion to approve the November minutes. Judge Blanch moved to approve the minutes, and Judge Toomey seconded. The motion carried unanimously.

II. Rule 26.3. Disclosure in forcible entry and detainer actions. [Tab 2]

Mr. Hafen invited the committee's guests to address proposed Rule 26.3. James H. Deans thanked the committee for the opportunity to address the proposed rule and confirmed the circulation of his materials to the committee. He reported that there is some confusion regarding where evictions fit into Rule 26. In his experience, there are an enormous number of pro se tenants. Thanks to the forms provided to landlords, roughly 10% of landlords are also pro se. The lowest common denominator should be that the landlord attaches the rental agreement and 3 day notice to the complaint. In a sense, those are initial disclosures. The tenant responds, but if a hearing is set within 10 days as is normally the case, there is not enough time for the tenant to exchange documents. The tenant comes to the hearing, and the judge's job at that hearing is to determine possession. Documents are not exchanged. If there are issues that remain for trial following the hearing, he proposes that the Rule 26 requirements be merged into pretrial disclosures to be exchanged 14 days before trial. That allows him to know what the tenant is going to bring in terms of exhibits and witnesses, and also permits the trial to occur within the statutory time frame.

Kirk Cullimore reported that his office files roughly 350 eviction cases per month. Out of every 100 eviction cases he files, about 70% result in defaults. Of the 30% who respond, over half of those are tenants who admit they owe money but seek more time to pay. In his experience, only 10-12 cases out of every 100 present a real dispute. And of those, less than 50% show up at the hearing. Thus, he has only 3-5 cases per month where there is actually a dispute that requires an evidentiary hearing, and those cases typically involve whether rent has been paid. Mr. Cullimore has been in front of most judges in state, and in his experience, if tenants can present evidence that rent has been paid, the landlord is typically sent back to the table to deal with it. Mr. Cullimore is concerned that requiring upfront disclosures simply increases costs and paperwork for landlords and the court when 99% of eviction cases

do not present any real issue. That said, he recognizes that tenants in the remaining 1% of cases need some protection. He proposes, as is consistent with his office's practice, that landlords include both a copy of the lease agreement and the notice with service of the complaint and summons. If an answer is filed wherein the tenant raises a legitimate defense, the landlord should have an obligation to provide additional documents. In other words, the tenant should be required to do something before the landlord is required to do more. That reduces the increased burden of disclosures from 100% of cases down to roughly 20% of cases. On a pay or vacate matter, there is no hearing unless requested. The tenant could include documents with the request. Cases alleging criminal activity are more problematic, but from a legal standpoint, these cases require a fast pace because the landlord has a higher need to resolve criminal activity issues quickly. And oftentimes, those cases rely solely on testimony, not documents. Even so, he does not file complaints that reference only "criminal activity"—he wants to give notice of the activity at issue. His concern is that we are creating a rule for a very small percentage of cases. He agrees that the lease agreement and notice can be provided with the summons and complaint. An itemized calculation of damages is more difficult—he is unsure whether that can be provided so early. Judge Pullan asked whether the landlord could provide a calculation of rent past due. Mr. Cullimore said he could.

Mary Jane Ciccarello addressed the committee, and explained that she directs the self-help center of the court and deals with pro se litigants all the time, including plaintiffs and defendants in eviction actions. For fiscal year 2015, eviction actions were among the top 3 case filing types at approximately 7,500. Both sides are represented in only 4% of cases. Tenants are self-represented in 96% of cases. With respect to defaults, she raised the issue of "false defaults"—i.e., when tenants simply have no idea what's going on and they drop out despite having a legitimate defense. And eviction actions have a huge impact on tenants. They may be dealing with non-payment, but in her experience, it is more often complicated family issues. Her staff attorneys reported that having landlords provide, as many do, a copy of the lease and notice actually served with the complaint, is helpful. In her experience, pro se landlords often serve multiple copies of the notices, so tenants do not know which notice to respond to. OCAP doesn't calculate the rent due or treble damages in the complaint, so it would be nice if that was in there. The notice generated in OCAP does put in rent due and any late fees. In the minutes from the last meeting, Judge Toomey had suggested adopting a standard complaint form. OCAP is moving people to a standard complaint form, and if this rule were in place, she believes landlords would be more specific in complaints, particularly in response to Judge Pullan's comments. With respect to the burden on landlords, she reported that pro se landlords are already burdened with some pre-filing information, including military service declarations and orders (which are very burdensome to prepare, as SSN and DOB are needed), which many courts require to be filed with the complaint. Requiring landlords to serve with the complaint a copy of the lease agreement and the notice actually served on the tenant, and to provide a calculation of past due rent, would help landlords get organized and would also give tenants some real information to go on in completing a good answer. Ledgers are probably too onerous, and most pro se tenants won't know what a ledger is anyway. She is also concerned about any requirement that other complaints about the tenant be filed, as that information would then be part of the public record and it may be damaging to the pro se tenant.

Martin Blaustein responded that, under the current rules, tenants may be held responsible for treble damages but the landlord has no obligation to spell out the specifics of the debt owed in the complaint. Many cases are simple, but many are not. Eviction cases are akin to strict liability for treble damages against tenants; landlords should not be heard to complain about providing more specific information in and with their complaints to establish their entitlement to those damages. Leslie Slaugh asked whether it would be sufficient for the landlord to provide disclosures at the time the tenant requests a hearing. Mr. Blaustein thinks it should be done at the time of the complaint because the evidentiary hearing can turn into a trial. Thus, the fight in these cases occurs within the first ten days. Judge Blanch

commented that we don't have disclosure requirements that accompany the filing of a complaint in any other type of action. Our notice pleading regime arguably results in complaints that omit critical information. But all a tenant must do to place something at issue is file an answer. Then an evidentiary hearing is conducted, and if a disclosure requirement kicks in at that point, we're talking about a much smaller category of cases. That would protect defendants across the board on the default rule—that a verified complaint or affidavit be filed before default is entered. If this obligation is imposed contemporaneously with the filing of the complaint, an inordinate burden is placed on landlords and tenants do not benefit that much. Instead, we could change the pleading rule to require more detail for complaints of this type (and most that he sees include these details). If those details are required by rule, affidavits are required for the entry of default, and a disclosure requirement is imposed when a request for hearing is made, he believes that would provide the protection that Mr. Blaustein seeks without imposing an overwhelming burden of requiring disclosures with every complaint. Mr. Blaustein responded that he sees disclosures at the time of the complaint filing as a Rule 11 issue. The landlord is making an allegation that a certain amount is owed, counsel should investigate that amount and the landlord should have records and be able to provide evidence of that amount. Judge Blanch asked whether something short of a disclosure requirement at the time of filing, such as more specificity in the complaint (achieved perhaps through an amendment to Rule 8), plus a disclosure requirement when a hearing is requested, would achieve the same thing. Mr. Blaustein said that, at the time of the notice for hearing, you may have only a week. If a tenant knows he/she had an obligation but paid by money order, and the landlord claims he/she never received it, the tenant has to get verification from the maker which often takes 30 days. He has had a situation where a tenant has lost possession because the tenant could not prove payment by money order in a timely fashion.

Jacob Kent addressed the committee and supported the production of a ledger by the landlord. He explained that many times the landlord's accounting is at issue, i.e., whether rent for a particular month has been properly applied to fees owing from a previous time period. The sooner a tenant receives a ledger, the sooner a tenant can determine what kind of defense he/she really has. Judge Pullan asked whether Mr. Kent supported the production of the ledger at the time of the complaint or the time of the hearing. Mr. Kent preferred the time of the complaint, as it would help the tenant prepare an answer. The tenant has only 3 days to answer and does not have the luxury of figuring out possible defenses based upon unknown accounting errors of the landlord. Judge Blanch noted that if a tenant needs 30 days to get the evidence he/she needs, won't the hearing be long over? Mr. Kent said that issue may not be resolved, but producing the ledger will assist tenants in other cases where an amount is alleged to be owed but the tenant can see from the ledger that the landlord inappropriately applied a rent check to illegitimate fees. Mr. Hafen raised the issue of ledger formats—ledgers are not kept in any uniform fashion and it may be difficult for pro se tenants to understand them. How helpful are they? Mr. Kent said that it depends on how the ledger was prepared, but something is better than nothing. Judge Toomey questioned whether a ledger is really necessary, as other specific information is more easily produced. Mr. Kent reiterated the importance of a ledger to show what was paid and when, and how the money was applied. James Hunnicutt asked whether "ledger" is a defined term, to which Mr. Kent responded that it is not. Kent Holmberg suggested the use of "accounting," which is a term of art. Mr. Hunnicutt asked whether there is a form that could be added to OCAP that would accomplish this. Ms. Ciccarello responded that the OCAP forms do not perform that kind of calculation. Mr. Shea cautioned the committee against generalizing about the good practices of Messrs. Deans and Cullimore, as there are a lot of eviction complaints that do not provide anywhere near the same level of information. He also noted that the difficulty with the OCAP forms is that, although we encourage people to use those forms, nothing mandates that they be used.

Mr. Cullimore explained that under the unlawful detainer statute, when a 3-day notice is served, landlords must strictly adhere to the requirements. The notice says what is owed. Tenants then have 3

days to talk with the landlord and discuss what is owed. If the amount on the 3-day notice is too high, then the notice is invalid and the landlord has to start the lawsuit over again. Thus, landlords already have an incentive to plug in accurate numbers. Lincoln Davies asked how difficult it is to put an accounting in the complaint on what is due and why. Leslie Slaugh added that the complaint should at least specify for which months' rent hasn't been paid. Mr. Cullimore said that a ledger is only helpful when put in contest. Mr. Slaugh responded that a tenant doesn't know whether to contest it if they don't have the information up front. Most have a good idea, but some aren't sure which months were not paid. Mr. Cullimore said that he recognizes the threat of treble damages, but the evidentiary hearing is only on occupancy. Mr. Slaugh noted that once occupancy is determined, the motivation to continue fighting changes if the tenant loses. Mr. Cullimore said that the legislative intent was for this process to be quick. He has no problem with providing more detail in the complaint regarding what is owed, but if the entirety of a ledger must be disclosed, a complaint could be many pages long detailing several months of back rent, late fees, utility fees, etc., which is unnecessary at that point in the litigation. If the tenant files an answer, then the landlord can produce a ledger. Mr. Blaustein commented that landlords don't have to start over if the notice is defective; judges are just looking at whether a debt is owed at the evidentiary hearing, and if a debt is owed, the tenant loses possession. The initial notice is critical for the tenant to know how the landlord came to the amount that is allegedly owed. Once the notice goes out, landlords do not negotiate because they have an opportunity to get treble damages. Judge Furse noted that nothing the committee does will have an effect on what happens with the notice.

Mr. Hafen thanked the guests for their input.

Committee discussion:

- Mr. Hafen said the issues to decide are both the timing of any disclosures and their substance. Mr. Slaugh said that at least a detailed calculation of rent should be included in the complaint. Judge Toomey noted that would require a modification to Rule 8. Mr. Hafen said it could go in the complaint or in a disclosure with the complaint. Judge Pullan said that he is reluctant to mess with the pleading standard. Mr. Slaugh said that he does not have a preference for how it is done, but an upfront landlord communication on how the calculation has been done is necessary.

- Mr. Hafen asked whether the disclosure should go with the complaint or notice of hearing. Judge Blanch responded that he preferred the notice of hearing stage because of the number of tenants who default. Although he sympathizes with tenants, he will treat anything as an answer. And only then do you have evidence submitted to the court. That seems like the right time to exchange information. He also likes the idea of the complaint including more information than Rule 8. It could be accomplished through 9—pleading special matters. Another subparagraph could be added to the rule to describe the level of detail that better practitioners already include in their complaints. Mr. Hafen commented that if we're looking at Rule 26.3(b)(3), that information could be incorporated into Rule 9, as it is not necessarily evidence. But rental agreements, ledgers, and notice are evidence.

- Judge Furse noted that Rule 26.3(b)(3) is a classic Rule 26(a)(1) calculation of damages disclosure. Judge Blanch noted that in the ordinary case, those are not provided until after the answer is filed. Judge Furse said that the damages disclosure should come with the complaint in eviction actions because the landlord has already done that calculation. It may not need to be as extensive as in the proposed rule, but the basic calculation has been performed. She would also add "known at the time of filing" to that subparagraph, as many

types of damages continue to accrue post-filing. Judge Blanch agreed that the damages calculation should be furnished at the time of the complaint. Rather than a disclosure obligation, however, he favored a Rule 9 pleading obligation. Mr. Shea said that, in essence, that should be doable. The effect on the plaintiff petitioner is probably the same. Both items (b)(1) and (b)(3) are classic initial disclosure items, and accelerating the time when they are provided makes sense. Mr. Shea expressed concern about whether to include them in the complaint, however, given Ms. Ciccarello's astute observation that such information becomes part of the public record. Allegations regarding criminal misconduct could be particularly damaging. Judge Furse said that she is reluctant to use Rule 9 to address this issue, as it, along with Rule 8, is a much more substantive rule with very clear goals. We may receive more pushback if we attempt to modify Rule 9 and potentially create a heightened pleading standard in eviction cases. There may be less of a political reaction if the change is made through accelerated disclosures.

- Judge Blanch said it seemed odd to have one category of cases with an inordinate amount of defaults and to impose accelerated disclosures and more detailed complaint requirements in those cases. Judge Pullan questioned how hard it really is to itemize damages. Judge Blanch agreed that an itemization of damages should be done through Rule 9, as these actions are unique to state court. Judge Shea cautioned the committee against drawing generalized conclusions about what people are doing. Although tenants are defaulting at a high rate, those defaults are occurring without information. They may react differently if more information is provided upfront by landlords. Paul Stancil asked what amounts to an inordinate burden on landlords, and at what point we think in terms of protecting a discrete minority. He discussed his personal and family experience with landlords and ledgers. If the change occurs in the pleading standard, the damages information is just in the complaint. The evidence is not seen. It is hard to balance the costs on plaintiffs, but he is concerned about the pleading standard as there is something different about the nature of these cases. The 3-day notice and the evidentiary hearing on possession drive the entire case. Judge Blanch agreed, and recognized that these cases have a huge impact after possession is decided. These cases proceed so quickly that the difference in the timing of the disclosures, whether with the complaint or when a request for hearing is made, is only a matter of days. If he thought that giving more information upfront would change the default rate, he might change his mind. Otherwise, he thinks we should require a more detailed calculation of damages in the complaint, and then impose a requirement for accelerated disclosures only if the tenant files an answer.

- Judge Furse suggested disclosure up front, but minimizing the burden of the disclosure at that time. For example, only include the lease agreement, eviction notice, and an itemized calculation of rent at the time of filing, and then an explanation for the factual basis for eviction and a list of witnesses at the occupancy hearing if there is one. She would not require the remaining disclosures. Instead, she would impose an obligation on the tenant to provide a short explanation of the defenses they have and their witnesses no later than 2 days before the hearing. Mr. Slaugh asked why this information shouldn't be shared at the time of the tenant's answer. From a pro se standpoint, it may be easier to include that information in a single document—the answer—rather than ask pro se tenants to prepare a separate document with the disclosure information. Judge Pullan suggested having the landlord include an itemized calculation of rent, damages, costs and attorneys' fees known at the time of the complaint, as he does not believe that is too burdensome, and then have the tenant include the disclosures proposed by Judge Furse at the time of the answer. He believes too

much mischief is created by the term "ledgers." He believes we mean an accounting, but that is too burdensome at the beginning of a case. Thus, he is in favor of the disclosures in Rule 26.3(b)(1), (2), (3), and (7) being provided with the complaint, and the information in (b)(6) being provided once a request for hearing is made. He would not require the information in (b)(4) or (5) to be provided.

- Judge Furse commented that whatever we do, the tenant needs to be notified of his/her obligation. If the tenant's disclosures are to be provided at the time of the answer, we should make it clear that changes to those disclosures before the hearing are okay. For example, if there is no hearing date yet and a party learns that someone cannot appear when the date is set, we don't want to hold people to the same standards as we would for a normal trial given the short time frames. Judge Hafen commented that if we have two disclosure stages for the landlord, perhaps we adopt two stages for the tenant as well, i.e., disclosures at the time of the complaint and the answer, and additional disclosures two days before the hearing.

- Lincoln Davies expressed his support for the inclusion of a specific damage calculation in the complaint. The advantage is that the damages are then subject to Rule 11, which holds the landlord to a higher standard and strikes the balance between efficiency and justice. Mr. Hafen suggested that the committee consider a mocked up version of Rule 9 to see what it might look like if we required an itemized damage calculation in eviction actions. Judge Blanch commented that if the calculation is in the complaint, it creates an obligation, and the tenant would have to either admit or deny the amount alleged to be owed in the answer. Amber Mettler asked whether the committee may change the contents of a complaint if the statute specifically sets forth what it must contain. Mr. Hafen said the committee needs to look at that. In addition, he suggested that the committee consider a competing proposal that the damage calculation be provided through a separate disclosure. Judge Toomey endorsed the approach of considering competing proposals on the issue. Judge Furse noted that while drafting, we should be attuned to how Rule 6(c) might affect what we do on this issue. Mr. Shea asked for clarification on the competing proposals, and Mr. Hafen responded that the committee would like to see what Judges Furse and Pullan have recommended, and then competing proposals for the Rule 26.3(b)(3) information to be included with disclosures at the time of the complaint or incorporated into the complaint through an amendment to Rule 9. Mr. Shea will also research the issue concerning the content of the complaint, and the proposals will be reviewed next month. Mr. Slaugh so moved and Mr. Davies seconded. The motion carried unanimously.

III. Nancy Sylvester.

Jonathan Hafen announced that Tim Shea is leaving our committee. He has served on the committee for 20 years, and we will find an appropriate way to recognize him at a future meeting. We are looking forward to Nancy Sylvester filling his shoes. Mr. Shea will continue to help with the transition until Ms. Sylvester is comfortable. Mr. Hafen noted Justice Durrant's compliment that Mr. Shea has done more to shape the civil procedure rules in the last 20 years than anyone else. He will continue to be a resource to us. Judge Toomey said that she has had occasion to work with Ms. Sylvester over the last year and has every confidence that she will learn quickly and work hard.

IV. Rule 6. Time. [Extra materials]

Mr. Shea reported that a difficulty has arisen with respect to Rule 6 given the changes we made to Rule 7. Rule 6 has long provided 3 extra days to respond to some triggering event if service was by mail. When we changed Rule 7 to say that the responding party must do something (usually file an opposing memorandum or reply), we used the date that the document is filed to trigger the responding event. Thus, the 3-day mailing provision in Rule 6 is not invoked because the triggering event is the filing date, not the service date. Self-represented parties have expressed some concern about this issue. If we give 7-14 days to a lawyer who was served simultaneously with the filing, we're taking 3 days off the table for pro se parties. They don't even know about the filing until 3 days later when the mail arrives.

Discussion:

- Mr. Slaugh noted that Rule 5 currently allows service by email upon agreement. Mr. Shea responded that a self-represented party has to agree to receive notice by email, and they could refuse. And even if they agree, it is still optional; other methods of service are still available. Mr. Slaugh questioned whether we should change Rule 6 to say that if a self-represented party requests service by email, it is then mandatory? That would cure the problem. He would hate to go back and change Rules 6 and 7.

- Ms. Mettler asked when this is happening, as she always gives 3 extra days when service has been accomplished by mail. Barbara Townsend commented that practically speaking, that is how it works. Mr. Shea responded that a technical reading of the rule eliminates the 3 days because the "if" clause doesn't apply. Judge Furse said that prisoners would be a significant category of people who cannot be served by email. Mr. Shea said that if Rule 6(c) is quickly amended and published, the change would catch up and we could make the amendment effective on May 1 with everything else. However, he questioned whether a change to Rule 6 was the best vehicle for accomplishing the fix. He believes the best vehicle is to change Rule 7 back to a service date rather than a filing date, although he hates to make that change since our amendments to Rule 7 were such a big deal. This issue is an unexpected repercussion of that decision, however.

- Mr. Holmberg commented that the State has significant pro se litigation in different areas, and has been operating under the assumption that if a pro se party is served by mail, 3 days are always added to the response time. Therefore, this does not represent a change in practice. Mr. Hafen said that the fix is to make practice comply with the rule. Mr. Shea also commented that he suspects most courts are generous when it comes to the back end of these deadlines. Ms. Mettler suggested that we consider giving 3 days to everyone for mailing, like the federal courts do. Mr. Townsend asked whether there was any downside to making this change in Rule 6, as opposed to Rule 7. Mr. Slaugh commented that, although Rule 6 doesn't govern appeals, it may trip someone up on filing a notice of appeal—e.g., if a judgment was served by mail, are 3 extra days added for the appeal? The same issue exists for motions for new trial. We need to look at how this might impact other rules. Mr. Shea agreed that the Rule 6 change would have that effect. Judge Pullan noted that people would assume they have 3 extra days when in fact they don't. Mr. Hafen asked Mr. Slaugh whether he thought the cleaner fix is to Rule 7. Mr. Slaugh said yes, it would be cleaner, although distasteful. Judge Pullan asked if there was anything wrong with allowing the 3 days. Mr. Slaugh noted that it is simply trickier to calculate. One party will have one deadline, and another will have a different deadline, depending on the type of service. Mr. Shea commented that responding to a motion is substantively different from filing a motion after the entry of judgment. And he is convinced, based on Mr. Slaugh's comments, that further

amendment to Rule 6 is not the way to go. Mr. Hafen asked whether we have enough time to fix Rule 7 and have it go out for comment with the rest of the rules. Mr. Shea commented that if the general practice is to allow the 3 days, perhaps the committee should leave Rule 7 and amend it in due course. Mr. Hafen proposed looking at the option of Rule 7 or something else in due course.

V. Rule 4. Process. Service on a defendant before trial if at least one defendant is timely served.

Kent Holmberg reported that the Supreme Court had asked the committee to review Rule 4 and the subparagraph providing that, once a plaintiff serves one defendant, the plaintiff may take up until the time of trial to serve any remaining defendants. He, Steve Marsden and Judge Blanch reviewed the issue, and polled surrounding states and federal courts. They could not find any other jurisdiction that puts defendants in two separate classes like this. Idaho is 6 months. Colorado is 62 days. Other states are pretty similar to the federal court, i.e., if you can't serve a defendant, upon motion of any party or the court's own motion, the remaining defendants can be dismissed or extra time to serve or service by publication may be allowed. In terms of practice, if a defendant is brought into a case that has been going on for over a year, you have to decide whether to retake depositions, revisit the schedule, etc. There is prejudice there. If there is no incentive for the plaintiff to move forward, the plaintiff won't. Accordingly, the subcommittee's recommendation is to go to 120 days, similar to what other jurisdictions are doing.

Discussion:

- Mr. Shea asked what the requirement would be. The plaintiff has to serve all defendants within 120 days, file a motion for more time to complete service, or something else? Mr. Holmberg responded that under the existing rule, the court may allow a longer time for service for good cause shown. If service is not timely, the defendant will be dismissed without prejudice. The same language could apply to all defendants instead of just the first defendant. Therefore, he proposes to simply delete that sentence. Mr. Shea asked whether a plaintiff may file a motion for more time to serve after the 120 day deadline. Mr. Holmberg answered yes, so long as there had been no dismissal. Judge Furse commented that she typically looks at Rule 6 and whether excusable neglect has been shown. If the plaintiff can articulate it, more time is given. Before she would dismiss, however, she would typically do an order to show cause. Mr. Shea said that is the practice in the Third District as well.

- Ms. Mettler asked whether the state court system is able to determine if one or more defendants have not been served and kick out a notice to show cause. Mr. Shea responded that he doesn't know whether the system can tie proof of service to a particular defendant. Mr. Holmberg commented that if dismissal is not automatic, the issue of dismissal could still be raised at some point during the litigation. In other states, that is what generally what happens. Judge Furse said that the federal rule requires dismissal unless service is achieved, but it is not followed exactly.

- Judge Pullan asked whether there was any sense in staying with the federal rule of 90 days. Mr. Holmberg responded that Judge Blanch strongly preferred 120 days, as the case load in state court is different. Mr. Slaugh commented that he has seen long periods when defendants are out of the country. Judge Furse said that oftentimes plaintiffs seek to obtain judgment from the first defendant and, if not successful, to go after the others. Judge Toomey said that she believes the plaintiff could come into court with a motion in those situations, but in the average case, she is not sure 120 days is needed. Mr. Hafen asked for a straw poll

on the committee regarding 90 or 120 days, and most preferred 90 days. Mr. Hunnicutt mentioned that in family law cases, divorces cannot be finalized for 90 days after filing. So oftentimes, the other side is not served during those 90 days and the parties work on a settlement. Once a deal is reached, and the 90 day mark passes, the parties can file the settlement and be done, and never worry about actual service. Mr. Davies expressed his concern regarding cases with many defendants, some of whom may be hard to find. Judge Toomey said that the plaintiff could always seek to enlarge the time in those cases. Mr. Shea commented that, other than the federal rule, no one has raised the 120 day issue. The only issue is whether serving someone immediately before trial is okay. Mr. Hafen said that, based on the straw poll, the proposed rule should say 90 days and we'll discuss whether to stay with 90 or go with 120 and await Judge Blanch's input.

VI. Rule 64. Writs in general.

Mr. Shea reported that Mr. Slaugh has convinced him there will never be a circumstance in which two garnishments would be effective simultaneously because the first will always reach the limit. Judge Furse suggested that we ask Angelina Tsu how this may have come about. Mr. Hafen asked whether there was any reason to amend, absent something from Ms. Tsu. Mr. Shea responded no, unless we change "shall" to "must."

VII. Rules 12, 13 and 15.

Mr. Shea reported that Rules 13 and 15 are ready to send out for comment. He did perform some additional research on subsections (i) and (j) per our last meeting. He is reluctant to disturb sleeping ghosts, but these subsections are not used very frequently. With respect to page 31, lines 45-55, no one could think of a purpose for it. The only reason Mr. Shea can think of as to why these subsections should not be removed is that they are old. Mr. Hafen asked why we should have stuff in the rules with no purpose. Judge Furse said it is a headache to leave it in. Mr. Holmberg commented that in the case where the subsections were cited, the judge determined they did not apply. Judge Toomey moved to remove subsections (i) and (j). Ms. Townsend seconded. The motion carried unanimously.

Mr. Shea said that the Rule 15 amendments are largely in response to an opinion by Judge Voros. Other amendments are to adopt the style and grammar changes from the federal rules. He does not believe further amendments were made after the last meeting, but no motion to approve the rule was made. Judge Toomey moved to send Rules 13 and 15 out for comment. Paul Stancil seconded. The motion carried unanimously.

VIII. Review of changes to federal rules of civil procedure.

Paul Stancil reported that the latest federal rule amendments are probably the most controversial since 1993. He quickly gave a summary of the rule amendments, which fall into three categories: (1) case management; (2) discovery process; and (3) cleanup.

With respect to case management and the waiver of service of process, Mr. Stancil explained that the federal rules have moved the form from Rules 5 and 6 into Rule 4. Not much has changed, except that service must be accomplished in 90 days instead of 120. Real estate condemnation actions are exempted. The amendments also eliminate the different forms of scheduling conferences. He believes it was intended that federal judges have these conferences in person, but he does not believe the rule requires that. He expects we will see a wide variation in practice with some judges having conferences

telephonically or otherwise. Judge Furse agrees. Paul said that a big change concerns electronically stored information. There was a deliberate decision to discuss and embrace the preservation of data, not simply for production and the costs and burdens associated with that, but also to expand judges' power to order preservation as part of a scheduling order.

With respect to discovery, Mr. Stancil said the federal rule amendments are adopting the proportionality standard from Utah. Burden-shifting and proportionality become part of what is relevant and not relevant. Mr. Hafen asked how many other states have adopted Utah's approach, and Mr. Stancil said not many. Mr. Hafen said that what we've done has been good for the practice in Utah and he is curious whether it has had any influence nationally. The federal rules seem to suggest that it has, and Judge Pullan has testified to these folks. Judge Pullan commented that Utah gave great comfort to the federal rules committee that this was doable. Denver has a Rule 1 initiative and is keeping track of discovery rule changes in various states. Judge Toomey said that the evaluation we received was positive. Mr. Stancil reported that we will no longer see "reasonably calculated to lead to the discovery of admissible evidence" in the federal rules. We will have to wait and see how that plays out in the case law. Judge Furse said that the magistrates are being taught in trainings that the standard for relevance is narrower.

Mr. Stancil also reported that judges are now expressly allowed to allocate expenses through protective orders, as well as specifying the time, place, and manner of discovery. Early Rule 34 requests have also been adopted; parties may issue Rule 34 requests "more than 21 days after" service of the summons and complaint. Previously, such requests could not be issued until after the attorney conference. Mr. Stancil believes these early requests disfavor defendants because it ratchets up their anxiety. He will be surprised if plaintiffs do not use it for that purpose—it has a disproportionate impact on defendants. Judge Pullan commented that by serving RFPs before the scheduling conference, you might have a better sense of potential preservation issues.

Mr. Stancil said that parties are now required to address issues relating to the preservation of ESI in their discovery plan. Conforming amendments deal with the change to proportionality. He is interested to hear from the committee regarding refusals to produce on proportionality grounds, as he is concerned about objections on that basis. Rule 37(e) implements changes regarding the preservation of ESI. If ESI should have been preserved in anticipation of litigation, and cannot be restored because a party failed to take reasonable steps to preserve, the court may order measures no greater than necessary to cure the prejudice. It limits the district court's ability to issue negative inference instructions to situations where a party acted with intent to deprive the other side of information.

Mr. Stancil said that he doesn't entirely understand the changes to Rule 55, but that the amendments got rid of all forms except Rules 5 and 6.

Mr. Hafen said that he would like to see the subcommittee come back to us and say whether we should consider making some of these same changes to the Utah rules. One of our pillars in rulemaking is that if we can be consistent with what the federal court has done, we should. Mr. Hafen offered the committee's thanks for Paul Stancil and Tim Shea's work in getting the pilot program launched for earlier judicial involvement in Tier 3 cases.

IX. Adjournment.

The meeting adjourned at 6:02 pm. The next meeting will be held on January 27, 2016 at 4:00pm at the Administrative Office of the Courts, Level 3.

Tab 2

Timothy M. Shea
Appellate Court Administrator

Andrea R. Martinez
Clerk of Court

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January 21, 2016

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

Rule 26.3 option

I have attached a revised draft of Rule 26.3. Regarding disclosures for the occupancy hearing, the statute permits either party to request a hearing. So I included deadlines based on whether the plaintiff or defendant requests the hearing.

We did not discuss at the last meeting whether counter designations of deposition testimony and objections is relevant in eviction proceedings. See paragraph (d). If not, the last two sentences should be removed.

Also, we need to consider how this rule should apply to an eviction under Title 57, Chapter 16, Mobile Home Park Residency Act. I included the reference in paragraph (a) at Mr. Baustein's request, and it seems reasonable. But under Section 57-16-6(3), certain actions must be brought under the Rules of Civil Procedure, and certain actions, at the plaintiff's option, may be brought under the Rules of Civil Procedure or the unlawful detainer provisions. If the regular disclosure and discovery requirements of Rule 26 apply in some circumstances, we should be careful not to inadvertently restrict their application.

Rule 9 option

You also asked for a draft amendment to Rule 9 requiring that the plaintiff include in the complaint an itemized calculation of all money owed. Remember that Rule 9 is being amended to eliminate the reference to an action to renew a judgment. That proposal has been published for comment.

The committee discussed whether a rule can or should modify the requirements of a statute. Section 78B-6-807 requires only an allegation of rent owed. Because the statute is missing part of a verb, whether the complaint may or must "claim damages or compensation for the

occupation of the premises" is unclear. Other than its title — "allegations *permitted* in complaint" — Section 78B-6-807 is silent on whether anything else might be included:

(1) The plaintiff, in his complaint:

(a) shall set forth the facts on which he seeks to recover;

(b) may set forth any circumstances of fraud, force, or violence which may have accompanied the alleged forcible entry, or forcible or unlawful detainer; and

(c) claim damages or compensation for the occupation of the premises, or both.

(2) If the unlawful detainer charged is after default in the payment of rent, the complaint shall state the amount of rent due.

....

Given the supreme court's constitutional authority for rules of procedure, whether a statute can govern something as procedural as pleading requirements is a valid question. Presumably this is a circumstance in which Rule 1 recognizes the validity of the statute.

> These rules govern the procedure in the courts of the state of Utah in all actions of a civil nature, whether cognizable at law or in equity, and in all statutory proceedings, except as governed by other rules promulgated by this court or statutes enacted by the Legislature and except as stated in Rule 81.

Rule 81 provides: "These rules shall apply to all special statutory proceedings, except insofar as such rules are by their nature clearly inapplicable."

Rule 26.3. Disclosure in unlawful detainer actions.

(a) Scope. This rule applies to all actions for eviction or damages arising out of an unlawful detainer under Title 78B, Chapter 6, Part 8, Forcible Entry and Detainer or Title 57, Chapter 16, Mobile Home Park Residency Act when the tenant is not a commercial tenant.

(b) Plaintiff's disclosures.

(b)(1) Disclosures served with complaint and summons. Instead of the disclosures and timing of disclosures required by Rule 26(a), the plaintiff must serve on the defendant with the summons and complaint:

(b)(1)(A) any written rental agreement;

(b)(1)(B) the eviction notice that was served;

(b)(1)(C) an itemized calculation of rent past due, damages, costs and attorney fees known at the time of filing;

(b)(1)(D) an explanation of the factual basis for the eviction; and

(b)(1)(E) notice to the defendant of the defendant's obligation to serve the disclosures required by paragraph (c).

(b)(2) Disclosures for occupancy hearing.

(b)(2)(A) If the plaintiff requests an evidentiary hearing to determine occupancy under Section 78B-6-810, the plaintiff must serve on the defendant with the request:

(b)(2)(A)(i) any document not yet disclosed that the plaintiff will offer at the hearing; and

(b)(2)(A)(ii) the name and, if known, the address and telephone number of each fact witness the plaintiff may call at the occupancy hearing and, except for an adverse party, a summary of the expected testimony.

(b)(2)(B) If the defendant requests an evidentiary hearing to determine occupancy, the plaintiff must serve the disclosures required by paragraph (b)(2)(A) on the defendant no less than 2 days before the hearing.

(c) Defendant's disclosures.

(c)(1) Disclosures served with answer. Instead of the disclosures and timing of disclosures required by Rule 26(a), the defendant must serve on the plaintiff with the answer an explanation of the factual basis for the defense.

(c)(2) Disclosures for occupancy hearing.

(c)(2)(A) If the defendant requests an evidentiary hearing to determine occupancy under Section 78B-6-810, the defendant must serve on the plaintiff with the request:

(c)(2)(A)(i) any document not yet disclosed that the defendant will offer at the hearing; and

(c)(2)(A)(ii) the name and, if known, the address and telephone number of each fact witness the defendant may call at the occupancy hearing and, except for an adverse party, a summary of the expected testimony.

(c)(2)(B) If the plaintiff requests an evidentiary hearing to determine occupancy, the defendant must serve the disclosures required by paragraph (c)(2)(A) on the plaintiff no less than 2 days before the hearing.

(d) Pretrial disclosures; objections. No later than 14 days before trial, the parties must serve the disclosures required by Rule 26(a)(5)(A). No later than 14 days before trial, each party must serve and file counter designations of deposition testimony, objections and grounds for the objections to the use of a deposition and to the admissibility of exhibits. Other than objections under Rules 402 and 403 of the Utah Rules of Evidence, objections not listed are waived unless excused by the court for good cause.

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. 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~~ corrected.

~~(a)(3)~~ (c) Actions to quiet title; description of interest of unknown parties. ~~In~~ If a party in an action to quiet title ~~wherein any of the parties are~~ is 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.

(n) Unlawful detainer. In addition to the requirements of Section 78B-6-807, the complaint in an action for eviction or damages arising out of an unlawful detainer under Title 78B, Chapter 6, Part 8, Forcible Entry and Detainer or Title 57, Chapter 16, Mobile Home Park Residency Act when the tenant is not a commercial tenant, must include an itemized calculation of rent past due, damages, costs and attorney fees known at the time of filing.

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.

Tab 3

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January 21, 2016

To: Civil Rules Committee
From: Tim Shea
Re: Rule 4. Process

I have attached a revised draft of Rule 4. The further amendments are in paragraph (b), eliminating the authority to serve a defendant any time before trial and changing the time in which to serve the complaint and summons from 120 days to 90.

Paragraph (d) establishes the concept of acceptance of the complaint and summons, and is intended to replace service by mail and waiver of service. You have agreed in concept to this approach, but the amendments have not been approved to be published for comment.

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~~ 90 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, failure to accept. A person who accepts the summons and complaint retains all defenses and objections. If a person fails, without good cause, to complete, sign and return acceptance of the summons and complain, the court must award to the plaintiff the expenses later incurred in making service and the reasonable expenses, including attorney's fees, of any motion required to collect those service expenses.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Advisory Committee Notes

Tab 4

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 5

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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January 21, 2016

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

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

I understand that the current committee note is being used to argued that, when the defense examiner is designated as a testifying expert, the examiner's report required by Rule 35(b) need not be provided. Only the expert's report under Rule 26.

If the committee believes this to be sound policy, I recommend amending paragraph (b). Even if the current note is ambiguous, the rule itself seems clear.

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.

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 6

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January 21, 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) the court finds that immediate and irreparable harm to the moving party will result 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

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