# Agenda

## Advisory Committee on Rules of Civil Procedure

February 22, 2017
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

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| Welcome and approval of minutes | Tab 1 | Jonathan Hafen |
| Comments to rules 5, 45, 84 | Tab 2 | Nancy Sylvester |
| FRCP Rule 37(e). Failure to Preserve ESI | Tab 3 | Paul Stancil, Judge Stone, Judge Pullan |
| Rules 7, 101: filed vs. served and pro se litigants | Tab 4 | Nancy Sylvester |
| Arizona reforms (discussion only) | | Lincoln Davies, Paul Stancil |

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

**Meeting Schedule:**

March 22, 2017

October 25, 2017

April 26, 2017

May 24, 2017

June 28, 2017

September 27, 2017

November 15, 2017

# Tab 1

# UTAH SUPREME COURT ADVISORY COMMITTEE ON RULES OF CIVIL PROCEDURE

## Meeting Minutes – January 25, 2017

**PRESENT:** Jonathan Hafen, Judge Andrew Stone, Paul Stancil, Amber Mettler, Rod Andreason, Leslie Slaugh, Terri McIntosh, Kent Holmberg, Trystan Smith, Barbara Townsend, Heather Sneddon, Sammi Anderson

**TELEPHONE:** Dawn Hautamaki, Judge Derek Pullan

**ABSENT:** Judge James Blanch, Judge Kate Toomey, Lincoln Davies, Romaine Marshall, James Hunnicutt, Judge John Baxter

**STAFF:** Nancy Sylvester, Lauren Hosler

**GUESTS:** None

### (1) WELCOME, APPROVAL OF MINUTES

Chair Jonathan Hafen welcomed the committee. Nancy Sylvester presented the meeting minutes from the November 16, 2016 meeting. Proposed changes to the minutes were discussed. Rod Andreason moved to approve those minutes, as amended; Terri McIntosh seconded. The motion was approved unanimously.

### (2) COMMENTS TO RULES 7, 65C, 35

Ms. Sylvester reviewed comments to Rule 7 and the committee discussed them. In response to a comment from Judge Samuel McVey, the following Advisory Committee note was proposed and approved: "Rule 7(q) is directed only at limitations on order to show cause hearings initiated by parties. Nothing in this rule is intended to limit or alter the inherent power of the court to initiate order to show cause hearings to assess whether cases should be dismissed for failure to prosecute or to otherwise manage the court's docket." There were no comments on Rule 65C. Leslie Slaugh moved to send amended Rules 7 (with the aforementioned Advisory Committee note) and 65C to the Utah Supreme Court; Trystan Smith seconded the motion. With no further discussion, the motion was approved unanimously.

The committee then discussed the comments to Rule 35 at length, and ultimately determined that no further changes to Rule 35 were warranted. Judge Andrew Stone moved to send amended Rule 35 to the Utah Supreme Court for approval; Barbara Townsend seconded. The committee unanimously approved the motion.

**(3) FRCP RULE 37(e); FAILURE TO PRESERVE ESI**

Paul Stancil began the discussion on Rule 37(e) by presenting a summary of the key differences between Judge Stone's position and Judge Derek Pullan's position regarding proposed changes to Rule 37(e).

Judge Stone presented his position first. He said he is concerned that the stated bases for treating electronic discovery differently from paper discovery are no longer present in light of advances in technology. He thinks it is too high of a burden to require a party to prove intentional destruction before a permissive adverse inference may be given. He noted that it is unclear what burden would be required for such a showing and that the rule is only implicated after the duty to preserve has been triggered. Judge Stone also disagreed with the premise that a permissive adverse instruction is always a "death penalty" sanction, and instead is confident that it is possible to give a neutral permissive adverse inference. Judge Stone said he is also concerned that the proposed rule may permit gamesmanship by restricting the judge's ability to sanction parties for misconduct. Judge Stone walked the committee through his recommendation, which, first and foremost, was no amendment to the rule, but then potentially an alternative amendment.

Next, Judge Pullan presented his position. Judge Pullan's primary goal in advocating for the federal language was that juries would decide cases on the evidence before them, not on adverse instructions or missing evidence. Judge Pullan's focus is on the neutrality from the bench toward juries when it comes to missing evidence. He did not think the judge should be putting his or her thumb on the scale regarding missing documents' contents. Judge Pullan isn't concerned about gamesmanship, because he thinks gamesmanship can be determined to be evidence of intentional destruction. Judge Pullan's proposal is to amend Rule 37 as previously suggested, which is largely consistent with the recently amended federal rule. Judge Pullan noted the benefit of consistency with the federal rule in that a robust body of case law will quickly develop in federal courts which will assist in interpreting the rule. As an alternative, Judge Pullan agrees with removing the limitation on permissive adverse inferences, as proposed by Judge Stone.

Professor Stancil noted that errors are inevitable, and that no rule will eliminate the possibility of errors. He also noted that it is a natural human tendency to presume that missing documents are the result of a nefarious plot, and that anything that tips the scale further in that direction is dangerous.

Kent Holmberg noted that electronic discovery is more than just emails, which are easily stored, but also includes voicemails, text messages, telephone calls, browsing history, etc. He said without an amendment to the rule, entities may reasonably determine that in response to every notice of claim or preservation letter, it is necessary to gather up all employee cell phones to gather potentially responsive documents, incurring a significant expense.

Mr. Slaugh stated his preference for uniformity with the federal rule. Judge Stone noted that this committee has been a leader in the past, amending Rule 26 with a shift towards proportionality, and that it should do so again, because it is better to be right than uniform. Mr. Smith discussed the burden of proof under both proposals. Judge Pullan noted his agreement with Judge Stone regarding the importance of being right over being uniform. Judge Pullan also raised the "intent to deprive" standard and the varying degrees of intent under criminal law and proposed a modification of intent

to include conduct committed "knowingly." Judge Stone responded that the proposal did not assuage his concerns about removing the judge's ability to give a permissive instruction. The committee also discussed what preliminary findings would be necessary regarding the initial existence of a specific missing document versus the general existence of a category of missing documents. The committee also discussed the distinction and nuances between "may presume" and "must presume," i.e. a mandatory versus permissive rebuttable presumption, and how that works in practice.

Ultimately, the committee decided to defer a decision on the proposals to the next meeting.

**(4) ADJOURNMENT**

The remaining matters were deferred, and the Committee adjourned at 6:04pm. The next meeting will be held on February 22, 2017 at 4:00pm at the Administrative Office of the Courts, Level 3.

# Tab 2

Posted: January 3, 2017

**Utah Courts**

# Rules of Civil Procedure – Comment Period Closes February 17, 2017

**URCP005** Service and filing of pleadings and other papers. Amend. Adopts the prisoner mailbox rule, which provides that pleadings and papers filed by an inmate confined in an institution are timely if they are deposited in the institution's internal mail system on or before the last day for filing.

**URCP045** Subpoena. Amend. In conformity with Rule 84's repeal, makes a technical amendment to paragraph (A)(1)(E).

**URCP084** Forms. Repeal. Since the task of creating and updating court forms will now reside with the newly formed Judicial Council Standing Committee on Forms under UCJA Rules 1-205 and 3-117, the Supreme Court's Advisory Committee on the Rules of Civil Procedure will no longer create forms.

## URCP 5

### Posted by Nathan Phelps

Regarding the suggested amendment to URCP 5:

I have no problem with the substance of the amendment, but I believe logically it fits better under URCP 6. The whole of Rule 6, like the amendment, deals with how to measure time and timeliness, and URCP 6(c), like the amendment, explains that service in certain form extends to act.

> *Nancy's comment:*
>
> *Mr. Phelps raises a good point and it's one that's worth exploring in conjunction with Mr. Kaiser's comment below.*

### Posted by Kyle Kaiser

Dear Members of the Rules Committee and the Honorable Justices of the Supreme Court:

I write to comment regarding the proposed amendment to Rule 5. I am the Section Director of the Civil Rights Section of the Litigation Division of the Utah Attorney General's Office. I defend government agents and agencies against claims of civil rights violations, which often includes claims brought by incarcerated persons. I have experience with the issues created when inmates are required to serve and file documents with the court and with opposing parties within a certain period of time. I write to support the suggested rule change, but to also suggest a few changes to make the rule clearer, more manageable, and fairer for all parties involved. Though I have consulted with other Assistant Utah Attorneys General in the preparation of these comments, please note my comments are made from me, have not been approved by the Office of the Attorney General, and may not be the opinion of the Office, the Division, or other employees.

I generally support the codification of the "prison mailbox" rule into the Rules of Civil Procedure. In my experience defending the Utah Department of Corrections and its employees, a prisoner's mail may be delayed as much as five days from the time it is received by the mailroom of the Utah State Prison or the Central Utah Correctional Facility to reach the prisoner for incoming mail, or placed in outgoing mail by the prisoner to reach the Postal Service. This is because the mailroom must review and X-ray all incoming and outgoing mail. And even though the mailroom does not read items marked "Legal Mail," the sheer volume of mail processed by these institutions daily slows the process for all pieces of mail. The process may be delayed even further if the prisoner is indigent and needs to follow required processes for free postage for legal

mail. As a result, prisoners at the Prison may only have a few days to respond to dispositive motions, discovery, or other time-sensitive, litigation-related documents.

Accordingly, the attorneys in the Civil Rights Section generally apply a "de facto" prison mailbox rule. We generally do not seek to strike pleadings for timeliness unless they were not deposited in the prison's internal mail system until well after the due date. We also generally calculate our response times from the U.S. mail postmark date, or on the date docketed by the court. We have not had any serious challenges or issues with such a practice. However, our informal practice does result in ambiguity regarding when documents are actually due, and whether the court has or will properly process them.

Codifying a prison mailbox rule would be beneficial to all parties. It would give both the inmate and those litigating against the inmate the confidence that pleadings and other papers would be timely filed and served and would reduce ambiguity regarding every party's responsibility.

However, a number of changes to the proposed rule should be made in order to meet those goals. First, the rule should be modified to include documents that are served and not filed, and to take into account response times for such documents. Second, the rule should be modified to recognize the legal mail procedures at institutions and the necessity of indigent postage filings.

SUGGESTED CHANGES TO PROPOSED RULE:

(1) The rule should be modified to include documents that are only served and need not be filed.

The current rule mentions only papers "filed" by an inmate confined in an institution. This language comes largely from the pre-December 2016 version of Federal Rule of Appellate Procedure 25(a)(2)(C), the only federal rule that creates any sort of prison mailbox rule.

In the appellate courts, where virtually all documents are filed, this language would be sufficient. However, at the trial level, there are a number of documents that do not need to be filed with the Court that are regularly served upon opposing parties. The most common types of these documents are requests for discovery and responses thereto.

This issue is further exacerbated by the fact that the Committee has suggested that districts, by local rule, may prohibit the filing of discovery with the court, and may even prohibit the filing of certificates of service related to the discovery. If such rules were enacted, either the proposed prison mailbox rule would be ineffective, or calculating deadlines to respond would be virtually impossible. I therefore suggest that the proposed rule be amended to include options for calculating response dates to documents that are served but not filed. My proposal starts the time from when the document is placed in U.S. Mail (the postmark date) rather than the date the inmate places the document in the prison's internal mail system. This provides the most

certainty as postmarks are not manipulable by inmates and avoids the mailroom delay discussed above.

However, by adding a discussion of documents "served," unrepresented inmates may believe that service of process may be effected by mail. Such service on governmental entities is generally not allowed under the Utah Rules of Civil Procedure. E.g., Utah R. Civ. P. 4(d)(1)(J). Accordingly, language should be added to distinguish service of papers from service of process.

(2) The rule should be modified to recognize legal mail requirements at correctional institutions and to adapt to the necessity of indigent postage.

The rule, as currently written, requires an inmate to certify that at the time of deposit in the prison mail system "first-class postage has been prepaid." Additionally, the rule eschews former Federal Rule of Appellate Procedure 25(a)'s requirement that the inmate has used any available internal prison mail systems. The result of this is that the current rule requires inmates to prepay postage. Many, if not most, inmates are indigent, and do not have the means to prepay postage. Following the U.S. Supreme Court's requirement that inmates be provided "at state expense with paper and pen to draft legal documents ... and with stamps to mail them," Bounds v. Smith, 430 U.S. 817, 825 (1977), the Utah Department of Corrections has implemented policies to provide postage to inmates for purposes of legal mail. See, e.g. Utah Department of Corrections, Insitutional Operations Division Manual, FD03 Inmate Mail, available at https://webapps.corrections.utah.gov/webdav_pub/F%20-%20Institutional%20Operations%20Public%20Policy/FD03%20-%20Inmate%20Mail.pdf; Utah Department of Corrections, Institutional Operations Division Manual, FD15/2.02 Indigent Mail, available at https://webapps.corrections.utah.gov/webdav_pub/F%20-%20Institutional%20Operations%20Public%20Policy/FD15%20-%20Indigent%20Status.pdf. However, to qualify, inmates must properly comply with Department of Corrections procedures, including properly requesting indigent postage for legal mail and verifying their indigent status. Id.

Accordingly, the rule, as drafted, is insufficient to describe the process or availability of inmate mail. Inmates will not be able to certify that postage has been prepaid, as currently required by the proposed rule, when indigent. However, inmates should also not have the benefit of the prison mailbox rule if they flout the institution's rules (for example, by not providing an affidavit of indigency in their request for legal mail franking) in an attempt to get free postage. The rule should be modified to both provide inmates the flexibility to receive the benefit of the rule even if they cannot prepay postage, while respecting correctional institution's requirements for free mail. The language provided incorporates some of the new Appellate Rule 25(a)'s requirements, while maintaining a simpler format.

SUGGESTED, AMENDED RULE:

Papers filed or served by an inmate confined in an institution are timely filed or served if they are deposited in the institution's internal mail system on or before the last day for filing or service. Timely filing or service may be shown by a notarized statement or written declaration setting forth the date of deposit and stating that first-class postage has been, or is being, prepaid, and that the inmate has complied with any applicable requirements for legal mail set by the institution. Response time will be calculated from the date the papers are received by the court, or, for papers served on parties that do not need to be filed with the court, the postmark date the papers were deposited in U.S. mail, plus any time added by Utah Rule of Civil Procedure 6.

The provisions in this subsection do not apply to service of process, governed by Utah Rule of Civil Procedure 4.

Thank you for your consideration, and feel free to contact me with any questions.

Kyle Kaiser
Section Director, Civil Rights Section
Litigation Division
Utah Attorney General's Office

*Nancy's comment:*
*I wish more comments looked like this one. It is well thought out and offers a suggested amendment, which saves time. That said, I wonder if the "filed or served" language in the first part of Mr. Kaiser's suggestion is confusing. He does clarify it later in the sentence beginning with "Response time will be calculated...." so perhaps this is a non-issue, but it's one we are grappling with right now in Rules 7 and 101. Having both terms can be confusing to pro se litigants and can lead to uncertainty. His explanation above addresses why both are needed, but this is something the committee should discuss.*

**URCP 45**

**None.**

**URCP 84**

**None.**

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

**(a) When service is required.**

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

(a)(1)(A) a judgment;

(a)(1)(B) an order that states it must be served;

(a)(1)(C) a pleading after the original complaint;

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

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

(a)(1)(F) a written notice, appearance, demand, offer of judgment, or similar paper.

**(a)(2) Serving parties in default.** No service is required on a party who is in default except that:

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

(a)(2)(B) a party in default for any reason other than for failure to appear must be served as provided in paragraph (a)(1);

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

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

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

**(a)(3) Service in actions begun by seizing property.** If an action is begun by seizing property and no person is or need be named as defendant, any service required before the filing of an answer, claim or appearance must be made upon the person who had custody or possession of the property when it was seized.

**(b) How service is made.**

**(b)(1) Whom to serve.** If a party is represented by an attorney, a paper served under this rule must be served upon the attorney unless the court orders service upon the party. Service must be made upon the attorney and the party if

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

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

**(b)(2) When to serve.** If a hearing is scheduled 7 days or less from the date of service, a party must serve a paper related to the hearing by the method most likely to be promptly received. Otherwise, a paper that is filed with the court must be served before or on the same day that it is filed.

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

(b)(3)(A) except in the juvenile court, submitting it for electronic filing if the person being served has an electronic filing account;

(b)(3)(B) emailing it to the email address provided by the person or to the email address on file with the Utah State Bar, if the person has agreed to accept service by email or has an electronic filing account;

(b)(3)(C) mailing it to the person's last known address;

(b)(3)(D) handing it to the person;

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

(b)(3)(F) leaving it at the person's dwelling house or usual place of abode with a person of suitable age and discretion who resides there; or

(b)(3)(G) any other method agreed to in writing by the parties.

**(b)(4) When service is effective.** Service by mail or electronic means is complete upon sending.

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

(b)(5)(A) every paper required to be served must be served by the party preparing it; and

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

**(c) Serving numerous defendants.** If an action involves an unusually large number of defendants, the court, upon motion or its own initiative, may order that:

(c)(1) a defendant's pleadings and replies to them do not need to be served on the other defendants;

(c)(2) any cross-claim, counterclaim avoidance or affirmative defense in a defendant's pleadings and replies to them are deemed denied or avoided by all other parties;

(c)(3) filing a defendant's pleadings and serving them on the plaintiff constitutes notice of them to all other parties; and

(c)(4) a copy of the order must be served upon the parties.

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

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

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

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

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

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

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

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

**(g) Filing by inmate.** Papers filed by an inmate confined in an institution are timely filed if they are deposited in the institution's internal mail system on or before the last day for filing. Timely filing may be shown by a notarized statement or written declaration setting forth the date of deposit and stating that first-class postage has been prepaid. Response time will be calculated from the date the papers are received by the court.

**Advisory Committee Notes**

**Rule 45. Subpoena.**

**(a) Form; issuance.**

(a)(1) Every subpoena shall:

(a)(1)(A) issue from the court in which the action is pending;

(a)(1)(B) state the title and case number of the action, the name of the court from which it is issued, and the name and address of the party or attorney responsible for issuing the subpoena;

(a)(1)(C) command each person to whom it is directed

(a)(1)(C)(i) to appear and give testimony at a trial, hearing or deposition, or

(a)(1)(C)(ii) to appear and produce for inspection, copying, testing or sampling documents, electronically stored information or tangible things in the possession, custody or control of that person, or

(a)(1)(C)(iii) to copy documents or electronically stored information in the possession, custody or control of that person and mail or deliver the copies to the party or attorney responsible for issuing the subpoena before a date certain, or

(a)(1)(C)(iv) to appear and to permit inspection of premises;

(a)(1)(D) if an appearance is required, specify the date, time and place for the appearance; and

(a)(1)(E) include a notice to persons served with a subpoena in a form substantially similar to the ~~court~~ approved subpoena form. A subpoena may specify the form or forms in which electronically stored information is to be produced.

(a)(2) The clerk shall issue a subpoena, signed but otherwise in blank, to a party requesting it, who shall complete it before service. An attorney admitted to practice in Utah may issue and sign a subpoena as an officer of the court.

**(b) Service; fees; prior notice.**

(b)(1) A subpoena may be served by any person who is at least 18 years of age and not a party to the case. Service of a subpoena upon the person to whom it is directed shall be made as provided in Rule 4(d).

(b)(2) If the subpoena commands a person's appearance, the party or attorney responsible for issuing the subpoena shall tender with the subpoena the fees for one day's attendance and the mileage allowed by law. When the subpoena is issued on behalf of the United States, or this state, or any officer or agency of either, fees and mileage need not be tendered.

(b)(3) If the subpoena commands a person to copy and mail or deliver documents or electronically stored information, to produce documents, electronically stored information or tangible things for inspection, copying, testing or sampling or to permit inspection of premises, the party or attorney responsible for issuing the subpoena shall serve each party with the subpoena by delivery or other method of actual notice before serving the subpoena.

**(c) Appearance; resident; non-resident.**

(c)(1) A person who resides in this state may be required to appear:

(c)(1)(A) at a trial or hearing in the county in which the case is pending; and

(c)(1)(B) at a deposition, or to produce documents, electronically stored information or tangible things, or to permit inspection of premises only in the county in which the person resides, is employed, or transacts business in person, or at such other place as the court may order.

(c)(2) A person who does not reside in this state but who is served within this state may be required to appear:

(c)(2)(A) at a trial or hearing in the county in which the case is pending; and

(c)(2)(B) at a deposition, or to produce documents, electronically stored information or tangible things, or to permit inspection of premises only in the county in which the person is served or at such other place as the court may order.

**(d) Payment of production or copying costs.** The party or attorney responsible for issuing the subpoena shall pay the reasonable cost of producing or copying documents, electronically stored information or tangible things. Upon the request of any other party and the payment of reasonable costs, the party or attorney responsible for issuing the subpoena shall provide to the requesting party copies of all documents, electronically stored information or tangible things obtained in response to the subpoena or shall make the tangible things available for inspection.

**(e) Protection of persons subject to subpoenas; objection.**

(e)(1) The party or attorney responsible for issuing a subpoena shall take reasonable steps to avoid imposing an undue burden or expense on the person subject to the subpoena. The court shall enforce this duty and impose upon the party or attorney in breach of this duty an appropriate sanction, which may include, but is not limited to, lost earnings and a reasonable attorney fee.

(e)(2) A subpoena to copy and mail or deliver documents or electronically stored information, to produce documents, electronically stored information or tangible things, or to permit inspection of premises shall comply with Rule 34(a) and (b)(1), except that the person subject to the subpoena must be allowed at least 14 days after service to comply.

(e)(3) The person subject to the subpoena or a non-party affected by the subpoena may object under Rule 37 if the subpoena:

(e)(3)(A) fails to allow reasonable time for compliance;

(e)(3)(B) requires a resident of this state to appear at other than a trial or hearing in a county in which the person does not reside, is not employed, or does not transact business in person;

(e)(3)(C) requires a non-resident of this state to appear at other than a trial or hearing in a county other than the county in which the person was served;

(e)(3)(D) requires the person to disclose privileged or other protected matter and no exception or waiver applies;

(e)(3)(E) requires the person to disclose a trade secret or other confidential research, development, or commercial information;

(e)(3)(F) subjects the person to an undue burden or cost;

(e)(3)(G) requires the person to produce electronically stored information in a form or forms to which the person objects;

(e)(3)(H) requires the person to provide electronically stored information from sources that the person identifies as not reasonably accessible because of undue burden or cost; or

(e)(3)(I) requires the person to disclose an unretained expert's opinion or information not describing specific events or occurrences in dispute and resulting from the expert's study that was not made at the request of a party.

(e)(4)(A) If the person subject to the subpoena or a non-party affected by the subpoena objects, the objection must be made before the date for compliance.

(e)(4)(B) The objection shall be stated in a concise, non-conclusory manner.

(e)(4)(C) If the objection is that the information commanded by the subpoena is privileged or protected and no exception or waiver applies, or requires the person to disclose a trade secret or other confidential research, development, or commercial information, the objection shall sufficiently describe the nature of the documents, communications, or things not produced to enable the party or attorney responsible for issuing the subpoena to contest the objection.

(e)(4)(D) If the objection is that the electronically stored information is from sources that are not reasonably accessible because of undue burden or cost, the person from whom discovery is sought must show that the information sought is not reasonably accessible because of undue burden or cost.

(e)(4)(E) The objection shall be served on the party or attorney responsible for issuing the subpoena. The party or attorney responsible for issuing the subpoena shall serve a copy of the objection on the other parties.

(e)(5) If objection is made, or if a party requests a protective order, the party or attorney responsible for issuing the subpoena is not entitled to compliance but may request an order to compel compliance under Rule 37(a). The objection or request shall be served on the other parties and on the person subject to the subpoena. An order compelling compliance shall protect the person subject to or affected by the subpoena from significant expense or harm. The court may quash or modify the subpoena. If the party or attorney responsible for issuing the subpoena shows a substantial need for the information that cannot be met without undue hardship, the court may order compliance upon specified conditions.

**(f) Duties in responding to subpoena.**

(f)(1) A person commanded to copy and mail or deliver documents or electronically stored information or to produce documents, electronically stored information or tangible things shall serve on the party or attorney responsible for issuing the subpoena a declaration under penalty of law stating in substance:

(f)(1)(A) that the declarant has knowledge of the facts contained in the declaration;

(f)(1)(B) that the documents, electronically stored information or tangible things copied or produced are a full and complete response to the subpoena;

(f)(1)(C) that the documents, electronically stored information or tangible things are the originals or that a copy is a true copy of the original; and

(f)(1)(D) the reasonable cost of copying or producing the documents, electronically stored information or tangible things.

(f)(2) A person commanded to copy and mail or deliver documents or electronically stored information or to produce documents, electronically stored information or tangible things shall copy or produce them as they are kept in the usual course of business or shall organize and label them to correspond with the categories in the subpoena.

(f)(3) If a subpoena does not specify the form or forms for producing electronically stored information, a person responding to a subpoena must produce the information in the form or forms in which the person ordinarily maintains it or in a form or forms that are reasonably usable.

(f)(4) If the information produced in response to a subpoena is subject to a claim of privilege or of protection as trial-preparation material, the person making the claim may notify any party who received the information of the claim and the basis for it. After being notified, the party must promptly return, sequester, or destroy the specified information and any copies of it and may not use or disclose the information until the claim is resolved. A receiving party may promptly present the information to the court under seal for a determination of the claim. If the receiving party disclosed the information before being notified, it must take reasonable steps to retrieve the information. The person who produced the information must preserve the information until the claim is resolved.

**(g) Contempt.** Failure by any person without adequate excuse to obey a subpoena served upon that person is punishable as contempt of court.

**(h) Procedure when witness evades service or fails to attend.** If a witness evades service of a subpoena or fails to attend after service of a subpoena, the court may issue a warrant to the sheriff of the county to arrest the witness and bring the witness before the court.

**(i) Procedure when witness is confined in jail.** If the witness is a prisoner, a party may move for an order to examine the witness in the jail or prison or to produce the witness before the court or officer for the purpose of being orally examined.

**(j) Subpoena unnecessary.** A person present in court or before a judicial officer may be required to testify in the same manner as if the person were in attendance upon a subpoena.

**Advisory Committee Notes**

**~~Rule 84. Forms.~~**

~~The forms contained in the Appendix of Forms are sufficient under the rules and are intended to indicate the simplicity and brevity of statement which the rules contemplate.~~

# Tab 3

# Administrative Office of the Courts

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

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

## MEMORANDUM

**To:** Civil Rules Committee
**From:** Nancy Sylvester
**Date:** February 17, 2017
**Re:** Rule 37(e)

At the January meeting, the committee had a robust discussion, led by Judge Stone, Judge Pullan, and Paul Stancil, on the merits of amending Rule 37(e) in conformity with the 2015 federal amendments. The committee did not yet reach a consensus on any amendments. Judge Stone, Judge Pullan, and Paul agreed to explore some of the topics raised during the discussion, including:

1) "presume" v. "infer" in (e)(1)(B)(1);

2) "may" v. "must" in (e)(1)(B)(2); and

3) moving a portion of the federal comment into the rule (see Judge Pullan's comments below).

In subsequent communications, Judge Stone noted that his primary concern (although he has others) remains making clear that the limitation in the rule is only a limitation on sanctions for destruction of documents. He thinks it should be clear that the court's ability to sanction for other conduct, make inferences, or instruct a jury on permissible inferences is not restricted outside that context.

Paul has said he will come to the meeting with more background on the federal case law surrounding its version of 37(e). He also said he had a lengthy conversation with Chief Judge Lee Rosenthal (S.D.Tex.) about the federal experience under the rule thus far. He is looking forward to sharing her thoughts with the group as well.

Judge Pullan maintains that he'd prefer adopting the federal rule in its current state in part because of the value inherent in state rules having the benefit of a large, developing body of federal case law.

Below for your reference is the discussion that led to last month's debate (this is also in the January materials).

## JUDGE STONE'S E-MAIL REGARDING FRCP 37(e)

I have a few of general objections to the proposed Rule:

1) I think it is based on a logically flawed premise: that, as a matter of law, any loss of information that does not occur with the specific intent to conceal it from an opponent in litigation cannot justify an inference that the information was adverse to the party that lost it;

2) It assumes that the determination of intentional destruction is clear-cut and binary;

3) It adopts a view of the judge's role in preliminary fact finding that is inconsistent with how the Utah Supreme Court views that role in other contexts; and,

4) I cannot recall any other place in the Rules of Civil Procedure or even Evidence that restricts the judge's discretion with respect to how the jury is to be instructed.

The first point is, I think easy to logically demonstrate. Imagine a company that collects, from a variety of sources, all sorts of user comments and reviews on its products. They are reduced to electronic form, any paper originals shredded, and the electronic records forwarded to the marketing department. Long before any threatened litigation, the company adopts the following policy- the comments are logged by date, positive reviews and comments are uploaded to a marketing database for use in future marketing, negative comments are deleted.

The original database logs 1,000 comments. 300 are preserved in the positive comment marketing database. May the jury infer the 700 destroyed comments were negative? Why shouldn't the judge be able to tell them they can make an inference if they think the facts support it?

Suppose counsel for the company makes the following jury argument: "The Judge has instructed you to consider only the evidence you have heard or seen during this trial—you must not make any inferences about those 700 emails, because they are not in evidence." Is opposing counsel entitled to an instruction that such an inference does not violate the instructions? Or is opposing counsel limited to the "common sense" instruction? What about the circumstantial evidence instruction? Is that inappropriate in this circumstance, because it arguably tells the jury that it could, from the indirect evidence (the policy of deleting negative emails) infer the fact to be proven? What is the difference?

For that matter, I believe the proposed Rule, by forbidding an instruction on how to apply the evidence, could be interpreted to affect the 403 analysis of its admissibility: because the jury may not be instructed that it may use the fact of the missing documents to infer they were negative, introducing that fact is only likely to mislead or confuse or

prejudice them. Are we ready to say that evidence of the fact that a document existed but was lost through anything less than intentional spoliation is never relevant?

My second point complicates this problem further. Because the permissive instruction is prohibited except in cases where there is an affirmative finding that the party that "should have" preserved the documents but failed "acted with the intent to deprive another," a much larger class of cases are implicated. What about reckless behavior? Is it unreasonable to believe that some persons, in some contexts, might take less care of negative information than they do with documents that reflect positively on them? What is the standard of proof for showing "intent to deprive another"? Because the conduct is fraudulent in nature there's probably a pretty good argument that it's clear and convincing. Can we really say, categorically, that absent clear and convincing evidence of intent to deprive, there is no case that would justify an inference? Recall as well that we are working here with the absence of evidence—because the document is gone, there is often very little evidence about the reason it is gone.

Assume the case that the committee seemed to be focused on, in which the missing document and negative inference is case-dispositive. (I think this is the rare exception in actual practice). Plaintiff has made the not-insubstantial showings that the document existed and that it "should have been preserved." The Court considers all the evidence and concludes that it, personally, cannot conclude (by whatever standard is to be applied) that the documents were lost with the intent to deprive the plaintiff. But significantly, the Court also concludes that a reasonable jury might come to the opposite conclusion as to intent. Under the rule's proposed text, the default position is innocence. Here, the case is disposed of because the case relies on an inference that the Court is prohibited from instructing the jury it may, but is not required to, make. It would make no sense to send a case to a jury on an inference that the Court is prohibited, under an express rule, from instructing the jury it is allowed to make. So in this example a case is resolved in the defendant's favor, because the defendant destroyed a document it should have preserved. I do not think that is consistent with current Utah law on the inferences the court is required to make at this stage -- this rule flips that principle on its head.

This is where my third concern mentioned above comes into play. Federal courts are understandably more comfortable with judges adopting this gatekeeper role. Utah appellate court decisions on the role of a judge are far more jury-oriented. We require threshold showings of reliability, and trust juries to make the ultimate decisions of fact. If the inference to be made as to the destruction of a document is a fact relevant to an underlying dispute, I believe the policies of the Utah appellate courts would be to allow it to be litigated for the jury. And I do not see any reason to handicap that litigation by restricting the court's power to give appropriate (and pretty standard) instructions on how to review evidence.

I have a few alternative proposals, listed below in the order that I consider preferable:

1) Do not amend the Rule. When courts and rules committees started the process of addressing ESI, we were behind the times, and the reality was that the expense of ESI storage and ease by which it is lost justified a special rule. I would argue that we are once again behind the times: ESI storage is now vastly cheaper than hard copy storage, and vastly easier to secure from loss than hard copies. That is precisely why it has become so predominant. Inexpensive, cloud-based storage has really changed that original paradigm. I cannot think of any compelling reason to treat the destruction of an email differently than the destruction of a letter, other than the email destruction by an enterprise of any significant size nowadays seems far more likely to be intentional than the loss of a physical letter. We in Utah can still learn from case law specific to ESI without attempting to address it in a special rule.

2) If the distinction between ESI and other documents is to be retained, delete the reference to a permissive ("may") adverse inference instruction from those sanctions listed as restricted to intentional deprivation cases, and make clear that the court and the jury remain free to make such inferences in appropriate cases.

3) Adopt a shifting burdens approach:

a. Once the party seeking the document shows its existence and the fact that it should have been preserved, the burden of explanation for its loss should shift to the party that lost the document. If mere negligent loss of the document does not support a reasonable inference that it was adverse (a point I don't think follows logically in every case, see above), at least require the party at fault to prove by preponderance that the loss was merely negligent. This would require some explanation for the loss instead of the "we dunno" approach I often see. That at least gives the other party fair grounds to attack an actual explanation.

b. Absent an affirmative finding by the court of mere negligence or less, the "may infer" instruction should be available in appropriate cases, at the court's discretion. For the life of me, I have a hard time thinking of other means of alleviating prejudice that will actually matter at trial.

c. If the party seeking the inference proves (again, probably by clear and convincing evidence) an intent to deprive, the harsher sanctions under the current rule (beyond the permissive inference instruction) should become available.

To be clear, I think the third option is based on a logical fallacy, and improperly restricts the judge's traditional role in instructing the jury. But it is at least significantly preferable to adopting innocent destruction as a default rule for handling missing ESI.

Finally, I think by straying into dictating what instructions the court may give to a jury, the proposed amendment oversteps the appropriate role of the rules. We have model

Instructions, but even those are optional. I think decisions on proper instructions should be flexible and case-by-case, and not categorically limited by rules made in the abstract. I think that may be at least part of the reason for the preceding subsection regarding the court's "inherent power" that this amendment expressly seeks to limit.

For reference, here is the instruction I gave in the Berg case I mentioned at the meeting:

If a party fails to present otherwise admissible evidence that was at some time reasonably available to that party, and was not equally available to the other party, then you may infer that the evidence is unfavorable to the party that had access to it. In determining whether to make such an inference, you should consider the party's reason, if offered, for not presenting it. Whether to make such an inference, and the weight you give to it, is entirely up to you.

Ultimately, I don't see this type of instruction is a sanction at all, and should not be addressed as a sanction. Instructing the jury as to how to process evidence is something that courts do all the time. If a court has determined that the fact that a document existed and was lost is probative of a fact at issue, the court should be free to instruct the jury how it may consider that evidence in its deliberations. The parties can litigate the inferences to be drawn from those facts.

**JUDGE PULLAN'S RESPONSE TO JUDGE STONE'S E-MAIL**

In my view, many of the concerns raised arise out of (1) a misunderstanding of what the Rule does and what it does not do; and (2) forgetting context—that we are dealing with the scope of available sanctions for the loss of electronically stored information ("ESI").

In summary, proposed Rule 37(e) only applies when certain prerequisites have been met. Specifically:

- First, the electronically stored information "should have been preserved." In other words, the ESI was lost or destroyed after the common law duty to preserve or some other duty to preserve (i.e. statutory, regulatory, or court order) arose. In Judge Stone's hypothetical, the policy of the company to delete negative emails is adopted "long before any threatened litigation"—before there was any duty to preserve. Rule 37(e) would have no application to these facts.

- Second, the ESI is lost because a party failed to take reasonable steps to preserve it.

- Third, the ESI cannot be restored or replaced through additional discovery. Before courts resort to sanctions, the focus should be on recovery of lost information so

that the case can be tried on the merits and not on presumptions about the content of missing evidence.

If these prerequisites are met, the Court may: (1) only upon a finding of prejudice from the loss, "order measures no greater than necessary to cure the prejudice;" or (2) only upon finding that the party acted with "intent to deprive another party of the information's use in the litigation" impose what have been called the "nuclear sanctions." These include: (A) presuming the lost information was unfavorable to the party; (2) instructing the jury that it "may or must presume the information was unfavorable" to the party who lost it; or (3) dismiss the action or enter a default. FRCP 37(e)(1)(2)(A-C).

The rule applies only to "adverse inference" instructions. It does not prohibit giving traditional missing evidence instructions (like the one at the end of Judge Stone's email). The rule does not forbid parties from presenting evidence to the jury concerning the loss of ESI and what inferences might be drawn from that loss. URCP 37(e)(2), Comment.

The rule does not forbid the jury from being the fact finder about intent to deprive. The comment provides: "This finding [of intent to deprive] may be made by the court when ruling on a pretrial motion, when presiding at a bench trial, or when deciding whether to give an adverse inference instruction at trial. If a court were to conclude that the intent finding should be made by a jury, the court's instruction should make clear that the jury may infer from the loss of the information that it was unfavorable to the party that lost it only if the jury first finds that the party acted with the intent to deprive another party of the information's use in the litigation." FRCP 37(e)(2), Comment.

Having said this, the objection that courts should never be in the business of making findings about why the ESI was lost and "intent to deprive" disregards the fact that we are dealing with a judicial discovery sanction. In this context, courts are uniquely qualified to determine intent and have done so under Utah Rule 37(b) for many years. These discovery sanctions have always required a judicial determination that a party had engaged in intentional, willful, or persistent dilatory conduct.

To understand why "intent to deprive" is required before an adverse inference instruction is given requires an appreciation for how these instructions developed. The comment to Rule 37(e)(2) provides:

> Adverse-inference instructions were developed on the premise that a party's intentional loss or destruction of evidence to prevent its use in litigation gives rise to a reasonable inference that the evidence was unfavorable to the party responsible for loss or destruction of the evidence. Negligent or even grossly negligent behavior does not logically

> support that inference. Information lost through negligence may have been favorable to either party, including the party that lost it, and inferring that it was unfavorable to that party may tip the balance at trial in ways the lost information never would have. The better rule for the negligent or grossly negligent loss of electronically stored information is to preserve a broad range of measures to cure prejudice caused by its loss, but to limit the most severe measures to instances of intentional loss or destruction.

I agree with this reasoning. When a party intentionally destroys evidence to prevent its use in the litigation, it is reasonable to infer that the content of the now missing evidence was adverse to that party's claims or defenses. But when ESI is lost by mistake, the inference about its adverse content is without foundation. The lost information may well have been favorable. An adverse inference instruction under these circumstances invites the jury to speculate. When dealing with missing evidence, greater care should be taken.

Importantly, an adverse inference instruction—like the other (e)(2) sanctions—is "nuclear" because it is outcome determinative. We cannot underestimate the impact of the judge—the otherwise neutral arbiter—putting his or her finger on the scale and telling the jury they "must" presume that the content of missing ESI was unfavorable.

Like Judge Stone and I, the federal circuits were split on the question of when an inference about the adverse nature of missing ESI is reasonable. The federal rule rejects cases that sustained adverse inference instructions for negligent or grossly negligent loss of ESI. Residential Funding Corp. v. DeGeorge Financial Corp., 306 F.3d 99 (2d Cir. 2002).

Finally, the exponential growth of ESI continues to impose on parties an overwhelming burden and expense. The uncertainty of when "nuclear sanctions" may be imposed has caused parties to engage in over-preservation which is frankly unsustainable. Counsel for Microsoft testified before the Advisory Committee on the Federal Rules in Phoenix in 2014. He explained that for every one document actually received into evidence, Microsoft was preserving over 675,000 (I think). Moreover, ESI can be lost by mere inaction—even when reasonable steps are taken to preserve it. I am not persuaded that we have turned a technological corner in this regard, especially when the data we keep is growing at an exponential rate.

In conclusion, my position is:

1. Adopt rule 37(e) as is. Eliminate the uncertainty surrounding the nuclear sanctions. Allow Utah to benefit from a uniform standard and the case law that is already developing in the federal courts.

2. If a change is made, eliminate the prohibition of "may presume" instructions. This would allow for the flexibility Judge Stone desires.

3. Don't address burdens of proof in the rule. The drafters of the federal rule expressly avoided this issue. See, FRCP 37(e)(2), Comment. Judges should be permitted to have flexibility to decide this issue on a case by case basis.

**JUDGE STONE'S REPLY TO JUDGE PULLAN'S MEMO RE FRCP 37(e)**

I appreciate Judge Pullan's thoughtful response to my email. I thought I would offer a brief reply.

The logical assumption that no inference arises based on a merely negligent failure to preserve is only supportable if one assumes no other facts regarding the original set of documents or their preservation. If any outside fact makes it more likely than not that a negative document is lost than a positive one, the correct inference is that the lost document was most probably negative. With a lot of effort to recall my symbolic logic, I could show my math, but I won't attempt that here. Instead, take my original example. Litigation is threatened or commences. The preservation memo goes out, but the IT director for the marketing department is out sick for the ten days after the memo. 100 documents are lost as a result. One is at issue. Based on my original assumptions, there's a 70% chance that that document was negative.

What does the proposed Rule tell me if I am sitting as the factfinder? In a jury context, what can I instruct the jury to do with this information? The plain language of the rule bars me from presuming that the lost information was unfavorable, or instructing the jury that it may infer as much.

If the logic of the rule is that the sole fact that a document was not preserved does not lead to an inference that it was adverse, then its restrictions on instructions should be expressly limited to that situation. If courts are free to instruct juries that they may consider the failure to preserve along with other facts in determining whether the lost document was more likely adverse than not, then it should say so. I have proposed language below that accommodates this concern.

As an aside, I do not accept the proposition that the failure to preserve a relevant document during litigation does not generate a reasonable inference on its own that the document was adverse to the case. We are dealing here with a custodian who has an interest in the case. We apply filters in determining what to preserve and what to produce. Even predictive coding is potentially subject to user bias. Perhaps I am cynical, but I maintain that if the universe of documents to be preserved is subject to any human

intervention, there exists a likelihood that conscious or implicit biases will affect the quality of what documents are preserved.

Moreover, the proposed rule has a built-in bias of its own. It effectively assumes negligence as the default position. Absent a finding of intent to deprive, the rule requires that the court not presume the documents were adverse to the party at fault, and not instruct a jury that they may make such an inference. That may be appropriate in the context of sanctions. But if the rule is limited to sanctions, it should say so, and not purport to limit otherwise reasonable instructions or inferences. Again, I think the language below addresses this.

Finally, I continue to believe that a special rule for ESI is now, with all respect, quaint. Those 675,000 documents cited by Microsoft and mentioned by Judge Pullan? Sounds like a lot, but they would fit in your pocket. A gigabyte will hold just under 30,000 email files. If you add in other types of files such as powerpoint and spreadsheet files, the average (from what I can tell, unweighted for frequency) is about 5,000 documents per gigabyte. So Microsoft's 675,000 documents per exhibit drops to 135 gigabytes. My iPhone holds 124. That data can be searched in a matter of seconds. Yes, ESI can be lost through automated processes—the flip side is that, unlike physical documents, ESI can be preserved throughout an enterprise in automated fashion. Cloud storage is cheap and mathematically far more reliable than physical storage. Compare the rate of cloud storage (pennies per gigabyte per month) to costs for storing the old banker's boxes of documents. Compare the reliability rates of preserving electronic data with the handwritten "shred dates" on stacks of boxes curated by part-time college kids. Why are we cutting a break for those who fail to preserve electronic data and not those who fail to preserve physical documents? Why restrict judges' ability to adapt sanctions for ESI, when we have trusted them to address those issues with respect to physical documents?

My view is that the existing rule is adequate to address ESI and we should trust judges to apply logically supportable inferences and instructions. However, if the Committee insists on amending the Rule, I would suggest the following modifications to proposed 37(e)(1):

> (e)(1) Failure to Preserve Electronically Stored Information. If electronically stored information that should have been preserved in the anticipation or conduct of litigation is lost because a party failed to take reasonable steps to preserve it, and it cannot be restored or replaced through additional discovery, the court:
>
> (e)(1)(A) upon finding prejudice to another party from loss of the information, may order measures no greater than necessary to cure the prejudice; or

> (e)(1)(B) only upon finding that the party acted with the intent to deprive another party of the information's use in the litigation may:
>
> (e)(1)(B)(1) presume, based on the failure to preserve alone, that the lost information was unfavorable to the party;
>
> (e)(1)(B)(2) instruct the jury that, based on the failure to preserve alone, it may or must presume the information was unfavorable to the party; or
>
> (e)(1)(B)(3) dismiss the action or enter a default judgment.
>
> (e)(1)(C) Absent exceptional circumstances, a court may not impose sanctions under these rules on a party for failing to provide electronically stored information lost as a result of the routine, good-faith operation of an electronic information system.
>
> (e)(1)(D) Nothing in this rule bars a court from considering, or instructing a jury that it may consider, a failure to preserve electronically stored information, along with all other evidence in the case, in inferring the content of the lost information or any other fact at issue in the case.

This is not entirely inconsistent with the federal rule's comments. Those comments state that the federal rule permits a court to allow "the parties to present evidence to the jury concerning the loss and likely relevance of information and [to instruct] the jury that it may consider that evidence, along with all the other evidence in making its decision." The comment goes on to say, however, that this "would not involve instructing a jury it may draw an adverse inference from loss of information." I think this fine distinction impermissibly regulates the judge's ability to instruct the jurors. It is not supported by logic, because with additional facts an adverse inference may be appropriate, and it appears to favor a vague "in making its decision" instruction in lieu of a specific instruction that the content of the document may be inferred from its destruction and other collateral facts. To the extent the comment then goes on to require the jury to make a finding of intent to deprive before making an adverse inference regarding the document, the federal committee wanders into substantive law, not procedure. We should not be legislating a safe harbor for parties who have failed to preserve documents they were obliged to preserve.

**Rule 37. Statement of discovery issues; Sanctions; Failure to admit, to attend deposition or to preserve evidence.**

**(a) Statement of discovery issues.**

(a)(1) A party or the person from whom discovery is sought may request that the judge enter an order regarding any discovery issue, including:

(a)(1)(A) failure to disclose under Rule 26;

(a)(1)(B) extraordinary discovery under Rule 26;

(a)(1)(C) a subpoena under Rule 45;

(a)(1)(D) protection from discovery; or

(a)(1)(E) compelling discovery from a party who fails to make full and complete discovery.

**(a)(2) Statement of discovery issues length and content.** The statement of discovery issues must be no more than 4 pages, not including permitted attachments, and must include in the following order:

(a)(2)(A) the relief sought and the grounds for the relief sought stated succinctly and with particularity;

(a)(2)(B) a certification that the requesting party has in good faith conferred or attempted to confer with the other affected parties in person or by telephone in an effort to resolve the dispute without court action;

(a)(2)(C) a statement regarding proportionality under Rule 26(b)(2); and

(a)(2)(D) if the statement requests extraordinary discovery, a statement certifying that the party has reviewed and approved a discovery budget.

**(a)(3) Objection length and content.** No more than 7 days after the statement is filed, any other party may file an objection to the statement of discovery issues. The objection must be no more than 4 pages, not including permitted attachments, and must address the issues raised in the statement.

**(a)(4) Permitted attachments.** The party filing the statement must attach to the statement only a copy of the disclosure, request for discovery or the response at issue.

**(a)(5) Proposed order.** Each party must file a proposed order concurrently with its statement or objection.

**(a)(6) Decision.** Upon filing of the objection or expiration of the time to do so, either party may and the party filing the statement must file a Request to Submit for Decision under Rule 7(g). The court will promptly:

(a)(6)(A) decide the issues on the pleadings and papers;

(a)(6)(B) conduct a hearing by telephone conference or other electronic communication; or

(a)(6)(C) order additional briefing and establish a briefing schedule.

**(a)(7) Orders.** The court may enter orders regarding disclosure or discovery or to protect a party or person from discovery being conducted in bad faith or from annoyance, embarrassment, oppression, or undue burden or expense, or to achieve proportionality under Rule 26(b)(2), including one or more of the following:

(a)(7)(A) that the discovery not be had or that additional discovery be had;

(a)(7)(B) that the discovery may be had only on specified terms and conditions, including a designation of the time or place;

(a)(7)(C) that the discovery may be had only by a method of discovery other than that selected by the party seeking discovery;

(a)(7)(D) that certain matters not be inquired into, or that the scope of the discovery be limited to certain matters;

(a)(7)(E) that discovery be conducted with no one present except persons designated by the court;

(a)(7)(F) that a deposition after being sealed be opened only by order of the court;

(a)(7)(G) that a trade secret or other confidential information not be disclosed or be disclosed only in a designated way;

(a)(7)(H) that the parties simultaneously deliver specified documents or information enclosed in sealed envelopes to be opened as directed by the court;

(a)(7)(I) that a question about a statement or opinion of fact or the application of law to fact not be answered until after designated discovery has been completed or until a pretrial conference or other later time;

(a)(7)(J) that the costs, expenses and attorney fees of discovery be allocated among the parties as justice requires; or

(a)(7)(K) that a party pay the reasonable costs, expenses and attorney fees incurred on account of the statement of discovery issues if the relief requested is granted or denied, or if a party provides discovery or withdraws a discovery request after a statement of discovery issues is filed and if the court finds that the party, witness, or attorney did not act in good faith or asserted a position that was not substantially justified.

**(a)(8) Request for sanctions prohibited.** A statement of discovery issues or an objection may include a request for costs, expenses and attorney fees but not a request for sanctions.

**(a)(9) Statement of discovery issues does not toll discovery time.** A statement of discovery issues does not suspend or toll the time to complete standard discovery.

**(b) Motion for sanctions.** Except as provided in paragraph (e), ~~U~~unless the court finds that the failure was substantially justified, the court, upon motion, may impose appropriate sanctions for the failure to follow its orders, including the following:

(b)(1) deem the matter or any other designated facts to be established in accordance with the claim or defense of the party obtaining the order;

(b)(2) prohibit the disobedient party from supporting or opposing designated claims or defenses or from introducing designated matters into evidence;

(b)(3) stay further proceedings until the order is obeyed;

(b)(4) dismiss all or part of the action, strike all or part of the pleadings, or render judgment by default on all or part of the action;

(b)(5) order the party or the attorney to pay the reasonable costs, expenses, and attorney fees, caused by the failure;

(b)(6) treat the failure to obey an order, other than an order to submit to a physical or mental examination, as contempt of court; and

(b)(7) instruct the jury regarding an adverse inference.

**(c) Motion for costs, expenses and attorney fees on failure to admit.** If a party fails to admit the genuineness of a document or the truth of a matter as requested under Rule 36, and if the party requesting the admissions proves the genuineness of the document or the truth of the matter, the party requesting the admissions may file a motion for an order requiring the other party to pay the reasonable

costs, expenses and attorney fees incurred in making that proof. The court must enter the order unless it finds that:

(c)(1) the request was held objectionable pursuant to Rule 36(a);

(c)(2) the admission sought was of no substantial importance;

(c)(3) there were reasonable grounds to believe that the party failing to admit might prevail on the matter;

(c)(4) that the request was not proportional under Rule 26(b)(2); or

(c)(5) there were other good reasons for the failure to admit.

**(d) Motion for sanctions for failure of party to attend deposition.** If a party or an officer, director, or managing agent of a party or a person designated under Rule 30(b)(6) to testify on behalf of a party fails to appear before the officer taking the deposition after service of the notice, any other party may file a motion for sanctions under paragraph (b). The failure to appear may not be excused on the ground that the discovery sought is objectionable unless the party failing to appear has filed a statement of discovery issues under paragraph (a).

**(e) Failure to preserve evidence.** Except as provided in paragraph (e)(1), ~~N~~nothing in this rule limits the inherent power of the court to take any action authorized by paragraph (b) if a party destroys, conceals, alters, tampers with or fails to preserve a document, tangible item, ~~electronic data~~ or other evidence in violation of a duty.

**(e)(1) Failure to Preserve Electronically Stored Information.** If electronically stored information that should have been preserved in the anticipation or conduct of litigation is lost because a party failed to take reasonable steps to preserve it, and it cannot be restored or replaced through additional discovery, the court:

(e)(1)(A) upon finding prejudice to another party from loss of the information, may order measures no greater than necessary to cure the prejudice; or

(e)(1)(B) only upon finding that the party acted with the intent to deprive another party of the information's use in the litigation may:

(e)(1)(B)(1) presume that the lost information was unfavorable to the party;

(e)(1)(B)(2) instruct the jury that it may or must presume the information was unfavorable to the party; or

(e)(1)(B)(3) dismiss the action or enter a default judgment.

(e)(1)(C) Absent exceptional circumstances, a court may not impose sanctions under these rules on a party for failing to provide electronically stored information lost as a result of the routine, good-faith operation of an electronic information system.

**Advisory Committee Notes**

New note (add to Advisory Committee Notes):

The 2016 amendments to paragraph (e) merged the 2015 amendments to Federal Rule of Civil Procedure 37(e). The federal amendments "addressed the serious problems resulting from the continued exponential growth in the volume of [electronically-stored] information" by providing "measures a court may employ if information that should have been preserved is lost." Fed. R. Civ. P. 37, Advisory Committee Notes, 2015 Amendment. Unlike the federal rule, Utah's rule 37(e) also addressed non-electronically stored evidence. The committee preserved the language addressing that subject.

# Tab 4

# Administrative Office of the Courts

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

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

## MEMORANDUM

**To:** Civil Rules Committee
**From:** Nancy Sylvester
**Date:** January 21, 2017
**Re:** Rules 7 and 101: "filed" versus "served"

Both Mary Jane Ciccarello and Brent Johnson raised concerns about the "filed" versus "served" language in Rule 7. At the September meeting, Mary Jane addressed how the term "filed" unfairly impacts pro se litigants and requested that where it is used to calculate response time it should be changed to "served." She also raised the same concern with Rule 101, which uses the term, "filed and served." Using both terms, she said, is even more confusing. She requested uniformity between the two rules.

Attached are the two rules with the proposed amendments. Because service happens simultaneously with filing when both parties are represented, this should have no impact on attorneys' current practice in that situation. Rule 6(c) also already controls when service is made by mail and at least one party is unrepresented.



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**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.

**(g) Limit on order to show cause.** [redacted]

**Advisory Committee Notes**

Proposed Advisory Committee Note

The 2017 amendments to Rule 7 replace "filed" with "served" where response time was calculated from filing. It is the advisory committee's view that the term "filed" may be prejudicial to self-represented litigants who do not have the benefit of electronic filing. For example, when a document is filed with the court, it has not always been clear to a self-represented litigant when the time for response runs. But response time from service is clearer. This amendment is not intended to supplant Rule 5(b), which governs how, when, and to whom service is made, nor Rule 6(c), which provides for the addition of 3 days when service is made by mail.

**Rule 101. Motion practice before court commissioners.**

**(a) Written motion required.** An application to a court commissioner for an order must be by motion which, unless made during a hearing, must be made in accordance with this rule. A motion must be in writing and state succinctly and with particularity the relief sought and the grounds for the relief sought. Any evidence necessary to support the moving party's position must be presented by way of one or more affidavits or declarations or other admissible evidence. The moving party may also file a supporting memorandum.

**(b) Time to file and serve.** The moving party must file the motion and any supporting papers with the clerk of the court and obtain a hearing date and time. The moving party must serve the responding party with the motion and supporting papers, together with notice of the hearing at least 28 days before the hearing. If service is more than 90 days after the date of entry of the most recent appealable order, service may not be made through counsel.

**(c) Response.** Any other party may file a response, consisting of any responsive memorandum, affidavit(s) or declaration(s). The response must be ~~filed and~~ served on the moving party at least 14 days before the hearing.

**(d) Reply.** The moving party may file a reply, consisting of any reply memorandum, affidavit(s) or declaration(s). The reply must be ~~filed and~~ served on the responding party at least 7 days before the hearing. The contents of the reply must be limited to rebuttal of new matters raised in the response to the motion.

**(e) Counter motion.** Responding to a motion is not sufficient to grant relief to the responding party. A responding party may request affirmative relief by way of a counter motion. A counter motion need not be limited to the subject matter of the original motion. All of the provisions of this rule apply to counter motions except that a counter motion must be ~~filed and~~ served with the response. Any response to the counter motion must be ~~filed and~~ served no later than the reply to the motion. Any reply to the response to the counter motion must be ~~filed and~~ served at least 3 business days before the hearing. The reply must be served in a manner that will cause the reply to be actually received by the party responding to the counter motion (i.e. hand-delivery, fax or other electronic delivery as allowed by rule or agreed by the parties) at least 3 business days before the hearing. A separate notice of hearing on counter motions is not required.

**(f) Necessary documentation.** Motions and responses regarding temporary orders concerning alimony, child support, division of debts, possession or disposition of assets, or litigation expenses, must be accompanied by verified financial declarations with documentary income verification attached as exhibits, unless financial declarations and documentation are already in the court's file and remain current. Attachments for motions and responses regarding child support and child custody must also include a child support worksheet.

**(g) No other papers.** No moving or responding papers other than those specified in this rule are permitted.

**(h) Exhibits; objection to failure to attach.**

(h)(1) Except as provided in paragraph (h)(3) of this rule, any documents such as tax returns, bank statements, receipts, photographs, correspondence, calendars, medical records, forms, or photographs must be supplied to the court as exhibits to one or more affidavits (as appropriate) establishing the necessary foundational requirements. Copies of court papers such as decrees, orders, minute entries, motions, or affidavits, already in the court's case file, may not be filed as exhibits. Court papers from cases other than that before the court, such as protective orders, prior divorce decrees, criminal orders, information or dockets, and juvenile court orders (to the extent the law does not prohibit their filing), may be submitted as exhibits.

(h)(2) If papers or exhibits referred to in a motion or necessary to support the moving party’s position are not served with the motion, the responding party may file and serve an

objection to the defect with the response. If papers or exhibits referred to in the response or necessary to support the responding party's position are not served with the response, the moving party may file and serve an objection to the defect with the reply. The defect must be cured within 2 business days after notice of the defect or at least 3 business days before the hearing, whichever is earlier.

(h)(3) Voluminous exhibits which cannot conveniently be examined in court may not be filed as exhibits, but the contents of such documents may be presented in the form of a summary, chart or calculation under Rule 1006 of the Utah Rules of Evidence. Unless they have been previously supplied through discovery or otherwise and are readily identifiable, copies of any such voluminous documents must be supplied to the other parties at the time of the filing of the summary, chart or calculation. The originals or duplicates of the documents must be available at the hearing for examination by the parties and the commissioner. Collections of documents, such as bank statements, checks, receipts, medical records, photographs, e-mails, calendars and journal entries, that collectively exceed ten pages in length must be presented in summary form. Individual documents with specific legal significance, such as tax returns, appraisals, financial statements and reports prepared by an accountant, wills, trust documents, contracts, or settlement agreements must be submitted in their entirety.

**(i) Length.** Initial and responding memoranda may not exceed 10 pages of argument without leave of the court. Reply memoranda may not exceed 5 pages of argument without leave of the court. The total number of pages submitted to the court by each party may not exceed 25 pages, including affidavits, attachments and summaries, but excluding financial declarations and income verification. The court commissioner may permit the party to file an over-length memorandum upon ex parte application and showing of good cause.

**(j) Late filings; sanctions.** If a party files or serves papers beyond the time required in this rule, the court commissioner may hold or continue the hearing, reject the papers, impose costs and attorney fees caused by the failure and by the continuance, and impose other sanctions as appropriate.

**(k) Limit on order to show cause.** An application to the court for an order to show cause may be made only for enforcement of an existing order or for sanctions for violating an existing order. An application for an order to show cause must be supported by affidavit or other evidence sufficient to show cause to believe a party has violated a court order.

**(l) Hearings.**

(l)(1) The court commissioner may not hold a hearing on a motion for temporary orders before the deadline for an appearance by the respondent under Rule 12.

(l)(2) Unless the court commissioner specifically requires otherwise, when the statement of a person is set forth in an affidavit, declaration or other document accepted by the commissioner, that person need not be present at the hearing. The statements of any person not set forth in an affidavit, declaration or other acceptable document may not be presented by proffer unless the person is present at the hearing and the commissioner finds that fairness requires its admission.

**(m) Motions to judge.** The following motions must be to the judge to whom the case is assigned: motion for alternative service; motion to waive 90-day waiting period; motion to waive divorce education class; motion for leave to withdraw after a case has been certified as ready for trial; and motions in limine. A court may provide that other motions be considered by the judge.

**(n) Objection to court commissioner's recommendation.** A recommendation of a court commissioner is the order of the court until modified by the court. A party may object to the recommendation by filing an objection under Rule 108.

Proposed Advisory Committee Note

The 2017 amendments to Rule 101 replace “filed and served” with simply “served.” It is the advisory committee’s view that the term “filed” in that phrase is unnecessary and may be confusing. Paragraph (b) governs when to file and serve motions in practice before commissioners and Rule 5(e) sets forth the documents that must be filed with the court.