

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

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

November 15, 2017

October 25, 2017

April 26, 2017

May 24, 2017

June 28, 2017

September 27, 2017

Tab 1

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, Institutional 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.

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

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

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

5 | (a)(1)(A) a judgment;

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

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

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

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

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

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

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

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

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

17 | (a)(2)(D) a party in default for any reason must be served with notice of entry of judgment
18 | under Rule [58A\(d\)](#); and

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

85 **Advisory Committee Notes**

86

1 **Rule 45. Subpoena.**

2 **(a) Form; issuance.**

3 (a)(1) Every subpoena shall:

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

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

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

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

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

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

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

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

17 and

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

143 Advisory Committee Notes

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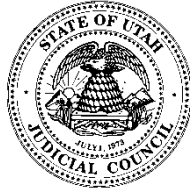
1 **Rule 84. Forms.**

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

4

Tab 3

Tab 4



Administrative Office of the Courts

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

MEMORANDUM

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

To: Civil Rules Committee
From: Nancy Sylvester *Nancy J. 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.

**The mission of the Utah judiciary is to provide the people an open, fair,
efficient, and independent system for the advancement of justice under the law.**

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

2 **(a) Pleadings.** Only these pleadings are allowed:

- 3 (a)(1) a complaint;
- 4 (a)(2) an answer to a complaint;
- 5 (a)(3) an answer to a counterclaim designated as a counterclaim;
- 6 (a)(4) an answer to a crossclaim;
- 7 (a)(5) a third-party complaint;
- 8 (a)(6) an answer to a third-party complaint; and
- 9 (a)(7) a reply to an answer if ordered by the court.

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

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

15 (b)(2) A request under [Rule 26](#) for extraordinary discovery must follow Rule [37\(a\)](#).

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

18 (b)(4) A request under Rule [45](#) to quash a subpoena must follow Rule [37\(a\)](#).

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

21 **(c) Name and content of motion.**

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

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

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

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

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

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

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

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

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

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

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

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

54 **(e) Name and content of reply memorandum.**

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

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

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

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

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

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

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

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

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

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

86 (g)(1) the motion;

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

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

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

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

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

102 **(j) Orders.**

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

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

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

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

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

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

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

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

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

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

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

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

130 (j)(6)(D) a statement of discovery issues under Rule [37\(a\)](#); and

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

180 (p)(5) motion to substitute parties;

181 (p)(6) motion to refer the action to or withdraw it from alternative dispute resolution under Rule 4-
182 510.05;

183 (p)(7) motion for a conference under Rule [16](#); and

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

185 **(g) Limit on order to show cause.** [REDACTED]
186 [REDACTED]
187 [REDACTED]
188 [REDACTED]

189 **Advisory Committee Notes**

190 Proposed Advisory Committee Note

191 The 2017 amendments to Rule 7 replace “filed” with “served” where response time was calculated
192 from filing. It is the advisory committee’s view that the term “filed” may be prejudicial to self-represented
193 litigants who do not have the benefit of electronic filing. For example, when a document is filed with the
194 court, it has not always been clear to a self-represented litigant when the time for response runs. But
195 response time from service is clearer. This amendment is not intended to supplant Rule 5(b), which
196 governs how, when, and to whom service is made, nor Rule 6(c), which provides for the addition of 3
197 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](#).

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.