Agenda

Advisory Committee on Rules of Civil Procedure

January 24, 2018
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, Chair
Logue Subcommittee Update and Recommendation	Tab 2	Judge Kent Holmberg, Nancy Sylvester
Rule 5(b)(5)(B). Papers "prepared" by the court	Tab 3	Nancy Sylvester, Dawn Hautamaki
Rule 26(a)(5). Pretrial Disclosures.	Tab 4	Judge Kent Holmberg
Rule 9. Pleading Special Matters.	Tab 5	Nancy Sylvester, Jonathan Hafen
Other business		Jonathan Hafen

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

Meeting Schedule:

February 28, 2018

March 28, 2018

April 25, 2018

May 23, 2018

June 27, 2018

September 26, 2018

October 24, 2018

November 28, 2018

Tab 1

UTAH SUPREME COURT ADVISORY COMMITTEE ON RULES OF CIVIL PROCEDURE

Meeting Minutes – November 15, 2017

PRESENT: Chair Jonathan Hafen, Judge Andrew Stone, Judge James Blanch, Judge Kent Holmberg, Judge Laura Scott, Judge Clay Stucki, James Hunnicutt, Rod Andreason, , Lauren DiFrancesco, Susan Vogel, Barbara Townsend, Michael Petrogeorge, Leslie Slaugh, Justin Toth, Paul Stancil, Lincoln Davies, Dawn Hatamaki

ABSENT: Trystan Smith, Timothy Pack, Amber Mettler, Judge Kate Toomey, Heather Sneddon

STAFF: Nancy Sylvester

GUESTS: Clayson Quigley, Mark Olson, Charles Stormont, Brian Rothschild

(1) WELCOME, APPROVAL OF MINUTES

Chair Jonathan Hafen welcomed the committee and asked for a motion on the minutes. Rod Andreason moved to approve the minutes; James Hunnicutt seconded. The motion passed unanimously.

(2) COMMENTS TO RULE 5

Clayson Quigley introduced a brief summary of the changes to the e-filing system regarding the court submitting its papers to the electronic filing service providers. Nancy Sylvester provided a brief summary of the comments and proposed change in response to the comments. The committee discussed the pros and cons of moving forward with eliminating the requirement for the court to prepare certificates of service when all parties are served electronically via the electronic filing service providers.

Judge Clay Stucki moved to approve Ms. Sylvester's proposed change to Rule 5, which provided that the court would prepare certificates of service when at least one party is self-represented. Judge Stone seconded the motion. The motion passed unanimously.

The committee also discussed a proposed change to Rule 5(d) addressing concerns regarding the timing between signing the certificate of service and actual service. The committee opted to table this issue pending review of a possible similar change to the Federal Rules of Civil Procedure.

Susan Vogel then raised an issue the Self-Help Center had been seeing with respect to paragraph (b)(5)(B). She said they often heard from people that they did not know that an order had even been signed by the court because they were not served with it. It raised the question of what constitutes a paper or order prepared by the court: 1) an order that is signed by the court; 2) an order that has been modified and then signed by the court; or 3) an order that only the court had prepared and

signed. The committee was split in its responses which appeared to support the Self-Help Center's point. The committee determined that it should take this issue up in the New Year.

(3) RULE 73. ATTORNEY FEES.

Mark Olsen presented a history of the origin of the Rule 73 schedule, which was to address a problem of judges receiving a significant number of attorney fee affidavits in debt collection cases, along with his proposal to modify the fee schedule to increase the fees.

Charles Stormont and Brian Rothschild presented their proposal and the reasoning for their proposed changes which reflect the view of the defense side of debt collection actions.

The committee asked a number of questions of the presenting guests and considered the multitude of concerns at issue in the competing proposals. The committee reached a consensus that some change to the fee schedule was appropriate, but opted to discuss the issue further at the next meeting. The committee invited the guests to work together to create a joint proposal and submit any additional comments to Ms. Sylvester for the committee's further consideration.

(4) SELECTION OF MEMBERS FOR JOINT SUBCOMMITTEE ON RULE 24

Ms. Sylvester asked for volunteers to be on a joint subcommittee with members of the Supreme Court Advisory Committee on the Utah Rules of Criminal Procedure to address proposed changes to Rule 24. Michael Petrogeorge and Leslie Slaugh volunteered.

(5) ADJOURNMENT

The remaining matters were deferred, and the committee adjourned at 6:00 pm. The next meeting will be held on January 24, 2018 at 4:00 pm at the Administrative Office of the Courts, Level 3.

Tab 2

Logue Subcommittee Conclusions

Final Draft

October 31, 2017

Subcommittee Members:

Nancy Sylvester (staff-URCP), Jeff Gray (URCrP), Mark Field (URAP), Jensie Anderson (URCrP), Lori Seppi (URAP), Kent Holmberg (URCP)

Rules at play: Criminal Rule 24(c), Civil Rule 60(b)(2), (c).

Background:

In *Logue v. Court of Appeals*, 2016 UT 44, the Utah Supreme Court stated, "It appears that criminal defendants, like Mr. Logue, who discover new evidence more than ninety days after sentencing must await the conclusion of their appeal before attempting to seek relief based on this evidence, even if it would likely entitle them to a new trial." It then directed the appropriate advisory committee on the rules of procedure to consider revising the rules so that they do not act as a categorical bar to motions for new trials.

The advisory committees for the rules of civil, criminal, and appellate procedure formed a joint subcommittee to consider revising the rules.

Conclusion:

The joint subcommittee has determined that no action should be taken at this time.

Reasoning:

The joint subcommittee considered adopting a provision for the rules of criminal procedure like that laid out in *White v. State*, 795 P.2d 648, and *Baker v. Western Sur. Co.*, 757 P.2d 878, which discuss Utah Rule of Civil Procedure 60(b) motions filed while a case is on appeal. Under Rule 60(b), you have 90 days to set aside a judgment based on newly discovered evidence. If the case is on appeal and it looks like the 60(b) motion is going to be granted, the parties notify the appellate court and the appellate court remands the case for a ruling on the 60(b) motion. In other words, while the appeal is pending, jurisdiction is not all or nothing. The district court retains some jurisdiction under Civil Rule 60.

The subcommittee decided that Utah Rule of Criminal Procedure 24 was the mostly likely place to adopt such a provision. Rule 24(c) currently says:

> (c) A motion for a new trial shall be made not later than 14 days after entry of the sentence, or within such further time as the court may fix before expiration of the time for filing a motion for new trial.

Mark Field and Jeff Gray prepared the first draft of the proposed amendment to rule 24 as follows:

> (c)**(1)** A motion for a new trial shall be made not later than 14 days after entry of the sentence, or within such further time as the court may fix before expiration of the **14-day period** for filing a motion for new trial.
>
> **(c)(2) Provided, however, a motion for new trial based solely on newly discovered material evidence that could not, with reasonable diligence, have been discovered and produced at trial, shall be made within 28 days of discovery, but no later than the date of oral argument if a direct appeal is pending in the case.**

Anticipated procedure: While a defendant's direct appeal is pending, if new evidence is discovered that could not have been discovered by the time of trial through the exercise of reasonable diligence, then the defendant may file a new trial motion with the trial court at any time up to the date of oral argument in the pending appeal.

1. The defendant is not required to seek permission from the appellate court to file the new trial motion. See *White v. State*, 795 P.2d 648, 649-50 (Utah 1990); *Baker v. Western Sur. Co.*, 757 P.2d 878, 880 (Utah Ct. App. 1988).
2. The appeal is not automatically stayed. A party may, however, request a stay.
3. The trial court has jurisdiction to consider the new trial motion. *See White*, 757 P.2d at 649; *Baker*, 757 P.2d at 880.
4. If the motion is denied, the defendant may file a separate appeal challenging the trial court's order. See *Baker*, 757 P.2d at 880.
5. If "the motion has merit, the trial court must so advise the appellate court, and the moving party may then request a remand." *White*, 795 P.2d at 650.
6. If the motion is granted, the State may file a separate appeal challenging the trial court's order. *See* Utah Code Ann. § 77-18a-1(3)(f).

Jensie Anderson and Lori Seppi disagreed with the procedure and timing requirements set forth in the first draft. They said that both parties—not just the state—should be permitted to appeal from the decision on the motion for new trial. They also stated that 28 days was too little time to conduct a newly discovered evidence investigation. They prepared a second draft as follows:

> (c)**(1)** A motion for a new trial shall be made not later than 14 days after entry of the sentence, or within such further time as the court may fix before expiration of the **14-day period** for filing a motion for new trial.
>
> **(c)(2) Provided, however, a motion for new trial based solely on newly discovered material evidence that could not, with reasonable diligence, have been discovered**

and produced at trial, may be made up to the date of oral argument if a direct appeal is pending in the case.

The subcommittee discussed both drafts and came up with a third draft that reached a middle ground as follows:

(c)**(1)** A motion for a new trial shall be made not later than 14 days after entry of the sentence, or within such further time as the court may fix before expiration of the **14-day period** for filing a motion for new trial.

(c)(2) A motion for new trial based solely on newly discovered material evidence that could not, with reasonable diligence, have been discovered and produced at trial, shall be made within 60 days of discovery or within such further time as the court may fix for good cause shown, but no later than up to the date of oral argument, or up to the date of disposition of the appeal if no oral argument is scheduled, if a direct appeal is pending in the case.

However, in discussing the merits of the third draft, the subcommittee turned to how the proposed rule change would affect cases in post-conviction. Mr. Field and Ms. Anderson, who both practice in post-conviction, stated that if the new rule is adopted it likely would create a procedural bar for post-conviction. In other words, the new rule would create a duty on the defendant's appellate counsel to conduct an investigation and file a motion for new trial due to newly discovered evidence.

Ms. Anderson and Ms. Seppi both expressed concern about such a rule change. The rule would permit a criminal defendant to raise newly discovered evidence while he still has a right to counsel. But appellate counsel is ill-equipped to conduct a full newly discovered evidence investigation. Appellate counsel—particularly appellate counsel for the indigent—lack the time, resources, and investigative tools necessary to fully investigate newly discovered evidence.

The subcommittee discussed how other jurisdictions handle newly-discovered evidence. Ms. Anderson explained that Utah is unique from the federal system and other states. In other states, motions for new trial based on newly discovered evidence can be brought at any time before the statute of limitations expires, whether immediately after conviction, during appeal, or in the post-conviction. For example, Wyoming has a 2-year statute of limitations to bring a motion for new trial based upon newly discovered evidence[1]; and Nevada has a tiered system of bringing it (1 year, 5 years with a rebuttable presumption of prejudice to the state, or 10 years in the interest of justice). In Utah, however, we have set up a system where newly discovered evidence is essentially limited to a post-conviction claim in the PCRA.

[1] During its next session, the Wyoming Legislature will consider a bill that removes the statute of limitations completely for a motion for new trial based upon newly discovered evidence.

The subcommittee also discussed the growing possibility that criminal defendants will receive the right to counsel in post-conviction or, at least, that trial courts will be encouraged to appoint counsel in many more post-conviction cases than they currently do. The Judicial Council recently met and voted to support such action. If criminal defendants will have better access to counsel in post-conviction, the argument that a defendant ought to be able to raise newly discovered evidence while he still has a right to counsel on appeal is less compelling.

In the end, Ms. Anderson, Ms. Seppi, Mr. Gray, and Mr. Field voted not to amend the rules to permit motions for newly discovered evidence on appeal. Judge Holmberg abstained.

Tab 3

Administrative Office of the Courts

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

Richard H. Schwermer
State Court Administrator
Raymond H. Wahl
Deputy Court Administrator

MEMORANDUM

To: Civil Rules Committee
From: Nancy Sylvester
Date: November 9, 2017
Re: Rule 5 and Service of Papers Prepared by the Court

At our November 2017 meeting during the Rule 5 discussion, Susan Vogel raised an issue the Self-Help Center had been seeing with respect to paragraph (b)(5)(B). She said they often heard from people that they did not know that an order had even been signed by the court because they were not served with it. It raised the question of what constitutes a paper or order prepared by the court: 1) an order that is signed by the court; 2) an order that has been modified and then signed by the court; or 3) an order that only the court had prepared and signed. The committee was split in its responses which appeared to support the Self-Help Center's point. Jonathan Hafen and I raised the issue with the Supreme Court during the finalization of the last Rule 5 amendments. The Court asked the committee to explore the first explanation with accompanying language ("issued" rather than "prepared by the court") or at a minimum provide more clarification in the rule.

In that vein, I reached out to the clerks of court to see what kind of impact the first explanation would have on them. Attached to this memo is that exchange. You will notice several recurring themes, such as changing the suggested term "issued" to "composed" and clarifying which papers should be served by the court. For example, the clerks did not seem to think the court should be serving garnishments.

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, or the court submitting it to the electronic filing service provider, 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) every paper ~~prepared~~ issued 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. Except in the juvenile court, this paragraph does not apply to papers required to be served under paragraph (b)(5)(B**)** when service to all parties is made under paragraph (b)(3)(A).

(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.

Advisory Committee Notes

Utah State Courts

Nancy Sylvester <nancyjs@utcourts.gov>

Clerks of Court feedback on Civil Rule 5

29 messages

Nancy Sylvester <nancyjs@utcourts.gov> Wed, Nov 22, 2017 at 12:31 PM
To: ClerksofCourt <ClerksofCourt@utcourts.gov>
Cc: "Jonathan O. Hafen" <jhafen@parrbrown.com>

Dear Clerks of Court,

The Supreme Court approved amendments to Civil Rule 5 today, which will be effective May 1. These amendments were requested by our IT department, which is working on streamlining processes related to serving notices to parties of case events. And at the Civil Rules Committee's meeting last Wednesday, the committee approved the amendments that circulated for comment with the addition of some language to address when pro se litigants are involved. But in the course of that discussion, the committee also identified a gap with respect to who serves orders. Some members argued that when the parties prepare the orders, they are required to serve them once signed by the court. Others argued that a court order should always be served by the court. Because of the split of opinion among committee members, we discussed adding some clarifying language to paragraph (b)(5) with the Supreme Court. The Supreme Court suggested replacing "prepared" with "issued" as follows:

> **(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) every paper ~~prepared~~ issued by the court will be served by the court.

The committee would like your feedback on this language before its next meeting. We look forward to your perspectives on this. Thank you.

Sincerely,

Nancy
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Nancy J. Sylvester
Associate General Counsel
Administrative Office of the Courts
450 South State Street
P.O. Box 140241
Salt Lake City, Utah
84114-0241
Phone: (801) 578-3808
Fax: (801) 578-3843
nancyjs@utcourts.gov

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30K

Nancy Sylvester <nancyjs@utcourts.gov> Wed, Nov 22, 2017 at 12:32 PM
To: James Peters <jamesp@utcourts.gov>
Cc: "Jonathan O. Hafen" <jhafen@parrbrown.com>

Jim,

Is there a good justice court clerks of court email address this could be sent out to? I want to make sure they have an opportunity to weigh in on this, too.

Thanks!

[Quoted text hidden]

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Lynn Wiseman <lynnw@utcourts.gov> Wed, Nov 22, 2017 at 12:45 PM
To: Nancy Sylvester <nancyjs@utcourts.gov>

Just to clarify Nancy - do I understand that to mean that if a document is signed by the court (even though it is prepared and submitted by one of the parties), it then becomes the court's responsibility to serve that document on all parties?

Lynn Wiseman
Clerk of Court
2nd District Juvenile Court
801-334-4779 (Office)
801-920-3640 (Cell)
lynnw@utcourts.gov

For eFiling questions, please contact vanessat@utcourts.gov and visit the website http://www.utcourts.gov/efiling/juvenile/.

[Quoted text hidden]

Nancy Sylvester <nancyjs@utcourts.gov> Wed, Nov 22, 2017 at 12:54 PM
To: Lynn Wiseman <lynnw@utcourts.gov>

Yes, I think that is the policy the Supreme Court is getting at, the idea being that once the court signs something, it becomes court prepared rather than party prepared. The court may even change something in the order the party prepared when it is signing it. The problem numerous practitioners have identified to the committee is that there is confusion among parties, especially pro se litigants, about when they should be serving orders--or if they should at all. And practices seem to vary across the state. So an order may be entered, but not all parties are receiving notice of it, which creates due process issues. I could see this creating a lot more work for the court where we've previously relied on the parties to serve, which is also an important perspective to consider.

[Quoted text hidden]

Lynn Wiseman <lynnw@utcourts.gov> Wed, Nov 22, 2017 at 12:58 PM
To: Nancy Sylvester <nancyjs@utcourts.gov>

I see what they are saying and the reasoning behind it. It does create more work for the court - more so for District, I think, than Juvenile, but it will impact us, as well.

Lynn Wiseman
Clerk of Court
2nd District Juvenile Court
801-334-4779 (Office)
801-920-3640 (Cell)
lynnw@utcourts.gov

For eFiling questions, please contact vanessat@utcourts.gov and visit the website http://www.utcourts.gov/efiling/juvenile/.

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Mikelle Ostler <mikelleo@utcourts.gov> Wed, Nov 22, 2017 at 2:05 PM
To: Nancy Sylvester <nancyjs@utcourts.gov>

Nancy,

I appreciate the information and the opportunity to provide feedback. I agree with the wording change and I believe that my District largely follows this process. Alan Sevison is our Region Chief for the AAG's office and he approached me a year or so ago about changing the way we processed child welfare orders. Previously, the Judge signed the order and the

AAG's were mailing out the copies. With the implementation of eFiling in the Juvenile Court, this meant that the AAG's office would have to file a separate certificate of service once the order had been signed. (That certificate of service would not be attached to the order.) Currently in our district, the Judge signs the order that the AAG prepared and then we, the court's clerical team, mail or email the copies of the signed order and include a certificate of service.

I feel that requiring the court to serve all signed orders is a more consistent and clear practice.

Have a lovely Thanksgiving!

Mikelle Ostler
Clerk of Court
Fourth District Juvenile Court
801-318-4026

On Wed, Nov 22, 2017 at 12:31 PM, Nancy Sylvester <nancyjs@utcourts.gov> wrote:
[Quoted text hidden]

Nancy Sylvester <nancyjs@utcourts.gov> Wed, Nov 22, 2017 at 2:07 PM
To: Mikelle Ostler <mikelleo@utcourts.gov>

Thank you very much for your feedback, Mikelle. I really appreciate it. I hope your Thanksgiving is lovely, too!
[Quoted text hidden]

Lynn Wiseman <lynnw@utcourts.gov> Mon, Nov 27, 2017 at 8:42 AM
To: Nancy Sylvester <nancyjs@utcourts.gov>

Hi Nancy,

Having thought about your reply, I see what they are trying to solve. I have heard from other Clerks of Court that there are judges around the state that feel this to be best practice and have asked their teams to do so. While it does add work to the court, and while we may get push back and negativity from the staff, that is our issue to deal with. Also, if we are changing our processes to fix a problem of someone else not following through with their responsibilities, I have an issue with that.

I do believe, however, that this change will eliminate that confusion. I think it also addresses the issue of a submitting party - upon receiving back a signed order - does not get it served to all parties. The parties do not always understand that it was the submitting party's responsibility to distribute the order and they blame the court, undermining the issues of trust, impartiality and the reputation of the court. Explanations do not always eliminate first impressions.

So, I see both sides of the fence. This feedback may not be very helpful, but my two cents.
Lynn

Lynn Wiseman
Clerk of Court
2nd District Juvenile Court
801-334-4779 (Office)
801-920-3640 (Cell)
lynnw@utcourts.gov

For eFiling questions, please contact vanessat@utcourts.gov and visit the website http://www.utcourts.gov/efiling/juvenile/.

[Quoted text hidden]

Gary Fairman <garybf@utcourts.gov> Mon, Nov 27, 2017 at 9:15 AM
To: Nancy Sylvester <nancyjs@utcourts.gov>

In our District that is the practice. The party that prepares the order, serves it as well. I like the way it reads. Thanks

Bo

On Wed, Nov 22, 2017 at 12:31 PM, Nancy Sylvester <nancyjs@utcourts.gov> wrote:
[Quoted text hidden]

Nancy Sylvester <nancyjs@utcourts.gov> Mon, Nov 27, 2017 at 9:28 AM
To: Lynn Wiseman <lynnw@utcourts.gov>

This feedback is very helpful, actually. Thank you, Lynn. The trust issue is a big one that cropped up in our comments when this rule was last circulated. If we can improve trust and confidence in the courts with this relatively simple change, I think the change is ultimately a very good one.
[Quoted text hidden]

Nancy Sylvester <nancyjs@utcourts.gov> Mon, Nov 27, 2017 at 9:28 AM
To: Gary Fairman <garybf@utcourts.gov>

Thank you, Bo.
[Quoted text hidden]

Tracy Walker <tracyw@utcourts.gov> Mon, Nov 27, 2017 at 11:13 AM
To: Nancy Sylvester <nancyjs@utcourts.gov>

Nancy,

I have some reservation about use of the word "issued" because I fear a war of semantics, more specifically, there are things that the district court "issues" - such as garnishments, supp orders, orders to show cause, etc. It's possible that using "issued" could lead to other interpretations of what things/papers the court is responsible for serving.

I'm sure everyone took a long time discussing a word that meets the need, but maybe "composed" by the court would work better.

Tracy J. Walker - Clerk of Court
Silver Summit, Tooele, West Jordan
8080 South Redwood Rd., Suite 1701
West Jordan, UT 84088
801.233.9771
tracyw@utcourts.gov

On Wed, Nov 22, 2017 at 12:31 PM, Nancy Sylvester <nancyjs@utcourts.gov> wrote:
[Quoted text hidden]

Nancy Sylvester <nancyjs@utcourts.gov> Mon, Nov 27, 2017 at 11:25 AM
To: Tracy Walker <tracyw@utcourts.gov>

Nope! It was a 5 minute discussion with the court. That's great feedback, Tracy. We'll keep playing around with the wording so that it's clear that orders must be served by the court.
[Quoted text hidden]

Keri Sargent <keris@utcourts.gov> Tue, Nov 28, 2017 at 9:09 AM
To: Nancy Sylvester <nancyjs@utcourts.gov>
Cc: ClerksofCourt <ClerksofCourt@utcourts.gov>, Kristen Rogers <kristenr@utcourts.gov>

Would replacing "issued" with "composed" take into account the orders prepared by attorneys and then signed by the court? I think the intent of the rule change is to shift the burden of sending out those kind of orders to all parties from the attorneys to the court. Which would place a lot of extra work (though probably not as much as I'm thinking) on judicial staff.

On Wed, Nov 22, 2017 at 12:31 PM, Nancy Sylvester <nancyjs@utcourts.gov> wrote:
[Quoted text hidden]

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Keri Sargent
Clerk of Court
6th District / Juvenile Court
(435) 896-2706
cell (435) 633-5549
keris@utcourts.gov

Nancy Sylvester <nancyjs@utcourts.gov> Tue, Nov 28, 2017 at 9:28 AM
To: Keri Sargent <keris@utcourts.gov>
Cc: ClerksofCourt <ClerksofCourt@utcourts.gov>, Kristen Rogers <kristenr@utcourts.gov>

Tracy also suggested "composed" and that word may accomplish it. Yes, this will shift the burden onto court staff to serve all orders but the comment has been made that eliminating this confusion would likely increase the public's trust and confidence in the courts, which is always a good goal.
[Quoted text hidden]

Keri Sargent <keris@utcourts.gov> Tue, Nov 28, 2017 at 9:41 AM
To: Nancy Sylvester <nancyjs@utcourts.gov>
Cc: ClerksofCourt <ClerksofCourt@utcourts.gov>, Kristen Rogers <kristenr@utcourts.gov>

Also, we would probably need to create a new certificate of notice. Would we do that as a separate document? Have the attorneys prepare a blank one? Maybe I'm thinking too far ahead but there's that to consider, too.

[Quoted text hidden]

Nancy Sylvester <nancyjs@utcourts.gov> Tue, Nov 28, 2017 at 9:45 AM
To: Keri Sargent <keris@utcourts.gov>
Cc: ClerksofCourt <ClerksofCourt@utcourts.gov>, Kristen Rogers <kristenr@utcourts.gov>, Clayson Quigley <claysonq@utcourts.gov>

I'm copying Clayson Quigley on this email chain because my understanding is that IT already has something in the works with respect to certificates of notice. That was captured in a recent amendment to Rule 5 that will be made effective in May.
[Quoted text hidden]

Dawn Hautamaki <dawnh@utcourts.gov> Tue, Nov 28, 2017 at 1:05 PM
To: Nancy Sylvester <nancyjs@utcourts.gov>

Nancy,

I just wanted to forward you some responses from some CoC's. I was trying to solicit some responses....not on one side or the other....just responses in general. I am not sure you have seen these so I wanted to pass them on. I may have some others to forward as well. I am also in the process of putting together my thoughts. More to come.

Thanks a bunch.

---------- Forwarded message ----------
From: **Christine Davies** <chrisd@utcourts.gov>
Date: Tue, Nov 28, 2017 at 12:07 PM
Subject: Re: Clerks of Court feedback on Civil Rule 5

To: Chris Jeppesen <chrisjj@utcourts.gov>
Cc: Alyson Brown <alysonb@utcourts.gov>, Gary Fairman <garybf@utcourts.gov>, Dawn Hautamaki <dawnh@utcourts.gov>, Kim Allard <kima@utcourts.gov>, Maureen Magagna <maureem@utcourts.gov>, Keri Sargent <keris@utcourts.gov>, Tracy Walker <tracyw@utcourts.gov>, Debbie Jacobsen <debbiej@utcourts.gov>, Loni Page <lonip@utcourts.gov>, Peggy Johnson <peggyj@utcourts.gov>, Kristene Laterza <kristenel@utcourts.gov>, Kristen Rogers <kristenr@utcourts.gov>, Lynn M Wiseman <lynnw@utcourts.gov>, Mikelle Ostler <mikelleo@utcourts.gov>

I would agree with Tracy and Alyson. I think this would impact the clerks to have to serve all orders. I am not sure that the clerks can take on anymore, they are already doing a lot.

On Tue, Nov 28, 2017 at 11:40 AM, Chris Jeppesen <chrisjj@utcourts.gov> wrote:

> I think 'composed' is more in line with what we already do. If a document is proposed and the judge makes a change, we do mail those out to all parties. I agree with Alyson regarding the increase in time and cost if there aren't some identifiable limits to what the rule requires. Thanks!
>
> On Tue, Nov 28, 2017 at 11:20 AM, Alyson Brown <alysonb@utcourts.gov> wrote:
>
> > I like Tracy's suggestion of "composed" as well. It would be a significant impact for the district court to serve all orders. I'm pretty sure we're not staffed to accomplish this task. I agree that rulings and orders composed by the court should be our responsibility to serve.
> >
> > --
> >
> > Utah State Courts
> >
> > **Alyson Brown**
> > Clerk of Court
> > Second District Court/Davis County
> > Phone: 801-447-3820
> > Email: alysonb@utcourts.gov
>
> --
>
> ***Chris Jeppesen, Clerk of Court***
> ***1st District/Juvenile Courts***
> ***Logan*** *435.750.1310*
> ***Brigham*** *435.734.4617*
> ***Cell*** *435.730.3133*

--

Chris Davies
3rd District Court - SL Depart
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P O Box 1860
450 South State Street
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801-238-7334
chrisd@utcourts.gov

--

Dawn Hautamaki

Clerk of Court
8th District & Juvenile Court
920 East Hwy 40
Vernal, UT 84078
(435) 781.9303 / office
(435) 790.0942 / cell

Nancy Sylvester <nancyjs@utcourts.gov> Tue, Nov 28, 2017 at 5:08 PM
To: Dawn Hautamaki <dawnh@utcourts.gov>

Thank you, Dawn. This is helpful.
[Quoted text hidden]
--
Nancy J. Sylvester
Associate General Counsel
Administrative Office of the Courts
450 South State Street
P.O. Box 140241
Salt Lake City, Utah
84114-0241
Phone: (801) 578-3808
Fax: (801) 578-3843
nancyjs@utcourts.gov

Dawn Hautamaki <dawnh@utcourts.gov> Wed, Nov 29, 2017 at 12:08 PM
To: Nancy Sylvester <nancyjs@utcourts.gov>

FYI
---------- Forwarded message ----------
From: **Debbie Jacobsen** <debbiej@utcourts.gov>
Date: Wed, Nov 29, 2017 at 9:53 AM
Subject: Re: Clerks of Court feedback on Civil Rule 5
To: Christine Davies <chrisd@utcourts.gov>
Cc: Chris Jeppesen <chrisjj@utcourts.gov>, Alyson Brown <alysonb@utcourts.gov>, Gary Fairman <garybf@utcourts.gov>, Dawn Hautamaki <dawnh@utcourts.gov>, Kim Allard <kima@utcourts.gov>, Maureen Magagna <maureem@utcourts.gov>, Keri Sargent <keris@utcourts.gov>, Tracy Walker <tracyw@utcourts.gov>, Loni Page <lonip@utcourts.gov>, Peggy Johnson <peggyj@utcourts.gov>, Kristene Laterza <kristenel@utcourts.gov>, Kristen Rogers <kristenr@utcourts.gov>, Lynn M Wiseman <lynnw@utcourts.gov>, Mikelle Ostler <mikelleo@utcourts.gov>

I agree with Alyson that rulings and orders composed by the court should be our responsibility to serve. However, I think the proposed rule change uses too broad a term in stating **every paper** ~~prepared~~ issued (composed) by the court will be served by the court. Using the language "every paper", whether the term "prepared" or "composed" is used, does not just encompass rulings and orders, every paper would include Minute Entries, etc. Using "issued" also brings it's own problems, as stated by others. Perhaps the change needs to be with the term "every paper", that's too absolute and all encompassing, maybe it should just say "every ruling and order prepared/composed by the court...".

We would not want to have to send out copies of every minute entry prepared or composed by the court, this would definitely take up a lot of clerk time. One of my smaller courts that does a large volume of traffic cases had been sending out copies of minute entries for traffic court to the pro se defendant's, and this not only took up clerk time to send, but it resulted in an increased mass of returned mail that took even more clerk time to process. They thought they had to do this, they are not doing it anymore.

Debbie Jacobsen
Clerk of Court
Fourth District Court
(801) 429-1176

On Tue, Nov 28, 2017 at 12:07 PM, Christine Davies <chrisd@utcourts.gov> wrote:

I would agree with Tracy and Alyson. I think this would impact the clerks to have to serve all orders. I am not sure that the clerks can take on anymore, they are already doing a lot.

On Tue, Nov 28, 2017 at 11:40 AM, Chris Jeppesen <chrisjj@utcourts.gov> wrote:

I think 'composed' is more in line with what we already do. If a document is proposed and the judge makes a change, we do mail those out to all parties. I agree with Alyson regarding the increase in time and cost if there aren't some identifiable limits to what the rule requires. Thanks!

On Tue, Nov 28, 2017 at 11:20 AM, Alyson Brown <alysonb@utcourts.gov> wrote:

I like Tracy's suggestion of "composed" as well. It would be a significant impact for the district court to serve all orders. I'm pretty sure we're not staffed to accomplish this task. I agree that rulings and orders composed by the court should be our responsibility to serve.

On Tue, Nov 28, 2017 at 9:46 AM, Gary Fairman <garybf@utcourts.gov> wrote:

Yes Dawn I completely agree with everything you said, and yes, I replied to Nancy myself, only because we get enough emails to read. But yes, exactly what Dawn said. Thanks Dawn

On Tue, Nov 28, 2017 at 8:36 AM, Dawn Hautamaki <dawnh@utcourts.gov> wrote:

Good morning all!

I attended the Rules of Civil Procedure Committee Meeting on November 15 when this discussion took place. I did share with my fellow juvenile CoC's, following that meeting, that due to the discussion that took place at that meeting, I was anticipating a rule change to follow. I must admit, I am a little shocked at how quickly it happened, but not that it happened. Basically, there was quite a bit of discussion regarding the court's (clerk's) failure to serve pro se litigants copies of proposed orders, once signed, that were submitted through efiling. Of course, upon hearing this, I felt it my duty (LOL) to let them know that per the rule (identified above) that once signed, the party who prepared and submitted the proposed order was responsible to serve the pro se parties and that the language on the electronic notification supported that (....pro se parties/self represented litigants will need to be served by traditional means). I truly was in the minority in believing that to be the practice. So, that brings us to Nancy's email.

This really will change the way we do business. Every order that the court signs would become the responsibility of the clerk to serve...that would be orders on all motions...CW orders....everything. I haven't seen any responses come back yet. Maybe that is because they haven't been sent as reply to all. But, just in case, I just wanted to provide you all with the background on where this is coming from and encourage you all to think about commenting if you have any concerns at all with this change. My intent is not to cause concern, just to give you background and ask you to to consider whether or not you have a comment you would like to share on the proposed change.

If you do decide to comment and wouldn't mind keeping me in the loop, I would greatly appreciate it. Knowing the comments ahead of time will help me feel a little more prepared for the discussion at our next committee meeting.

Thanks a bunch!

---------- Forwarded message ----------
From: **Nancy Sylvester** <nancyjs@utcourts.gov>
Date: Wed, Nov 22, 2017 at 12:31 PM
Subject: Clerks of Court feedback on Civil Rule 5
To: ClerksofCourt <ClerksofCourt@utcourts.gov>
Cc: "Jonathan O. Hafen" <jhafen@parrbrown.com>

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[Quoted text hidden]

[Quoted text hidden]

[Quoted text hidden]

[Quoted text hidden]

[Quoted text hidden]

Dawn Hautamaki <dawnh@utcourts.gov> Wed, Nov 29, 2017 at 1:15 PM
To: Nancy Sylvester <nancyjs@utcourts.gov>
Cc: ClerksofCourt <ClerksofCourt@utcourts.gov>

Nancy,

Here are my thoughts on the proposed change to Rule 5. I probably have more questions than answers. :-)

One of my concerns with the proposed verbiage is that the court issues several papers that it currently is not serving on all parties. For example Writs, Supp Orders, Order to Show Cause, etc. Could using "issued" be interpreted to mean that the court would be responsible for serving all of these documents on all parties? I am concerned this proposed change would create more confusion than clarity.

Additionally, I am concerned about the added workload. Hopefully it won't be as bad as I am thinking, but at first thought it seems substantial. Clerks typically go into the post signature queue to see if the order requires any follow up or post signature work. For example, if a hearing needs scheduled, the clerk would schedule it and click to complete/clear the signed order from the queue. If the proposed change is made, the clerk would have additional steps which would include: verifying all parties on the case, verifying whether or not they are represented by counsel, and if they are all represented by counsel nothing else would need to be done as they would all get notice electronically. If they are not all represented by counsel, clerks would have to print a copy of order, create a certificate of service, and rescan the order and certificate of service together to enter on the docket (which is going to create a new notification to the attorney electronically) and send in the mail. So, this would be additional notification beyond what Clayson was talking about in that meeting. It really could end up being notification overload to the attorneys depending on how many notifications each one of those steps creates.

Often times the orders are time sensitive, some filed last minute. The attorneys know their cases better than clerks do. As the notifications increase, it may become more difficult to sift through them. I am not saying it can't be done. I am just wondering what the impact would be considering all the orders on motions, i.e. motions to continue, to appear telephonically, transport orders, and so forth. Currently, at least in our district, when an attorney files an order to transport and it is signed, they make sure that transport for their client is arranged. Will that now be the court's responsibility? It seems like the attorneys should, and would want to, keep responsibility to follow up on their orders. I am sure there are still many other things we haven't thought of yet and won't until presented with it.

I am not saying it couldn't or shouldn't be done. It really is quite a shift in how we do things now. I am wondering if we are changing a rule because of need, because it makes sense or because of a lack of understanding. This notification practice was in place in the paper world and it seemed to work. We would get a copy of the signed order back with a certificate of service. Maybe this wasn't the practice everywhere, but it was what we were seeing in our district and it seemed to work very well. It makes me think all the confusion could have happened with the transition to efiling. Is this an issue of lack of communication and maybe we just need to clarify what currently exists or do we really need to change the rule?

Anyway, just my thoughts. Like I say, I have more questions than answers. Sorry.

Thanks a bunch.

On Wed, Nov 22, 2017 at 12:31 PM, Nancy Sylvester <nancyjs@utcourts.gov> wrote:
[Quoted text hidden]

--
Dawn Hautamaki
Clerk of Court
8th District & Juvenile Court
920 East Hwy 40

Vernal, UT 84078
(435) 781.9303 / office
(435) 790.0942 / cell

Loni Page <lonip@utcourts.gov> Wed, Nov 29, 2017 at 1:23 PM
To: Dawn Hautamaki <dawnh@utcourts.gov>
Cc: Nancy Sylvester <nancyjs@utcourts.gov>, ClerksofCourt <ClerksofCourt@utcourts.gov>

We don't currently send out any orders prepared by counsel in the 7th District and are not looking for changes the court makes to orders the attorneys submits.

Loni Page
Clerk of Court
7th Judicial District Court
435/259-1355

[Quoted text hidden]

Alyson Brown <alysonb@utcourts.gov> Wed, Nov 29, 2017 at 2:09 PM
To: Loni Page <lonip@utcourts.gov>
Cc: Dawn Hautamaki <dawnh@utcourts.gov>, Nancy Sylvester <nancyjs@utcourts.gov>, ClerksofCourt <ClerksofCourt@utcourts.gov>

Our practice would mirror the 7th District.
[Quoted text hidden]
--

Alyson Brown
Clerk of Court
Second District Court/Davis County
Phone: 801-447-3820
Email: alysonb@utcourts.gov

Tracy Walker <tracyw@utcourts.gov> Wed, Nov 29, 2017 at 2:18 PM
To: Alyson Brown <alysonb@utcourts.gov>
Cc: Loni Page <lonip@utcourts.gov>, Dawn Hautamaki <dawnh@utcourts.gov>, Nancy Sylvester <nancyjs@utcourts.gov>, ClerksofCourt <ClerksofCourt@utcourts.gov>

Same for my court sites in 3rd District Suburbs

Tracy J. Walker - Clerk of Court
Silver Summit, Tooele, West Jordan
8080 South Redwood Rd., Suite 1701
West Jordan, UT 84088
801.233.9771
tracyw@utcourts.gov

[Quoted text hidden]

Debbie Jacobsen <debbiej@utcourts.gov> Wed, Nov 29, 2017 at 2:47 PM
To: Tracy Walker <tracyw@utcourts.gov>
Cc: Alyson Brown <alysonb@utcourts.gov>, Loni Page <lonip@utcourts.gov>, Dawn Hautamaki <dawnh@utcourts.gov>, Nancy Sylvester <nancyjs@utcourts.gov>, ClerksofCourt <ClerksofCourt@utcourts.gov>

We are the same as 7th district, we don't send out copies of orders prepared by counsel, and we are not looking for changes in the post signature queue, just look for any follow-up the clerk may need to do. I think attorney's should be responsible for sending a copy of the order they submitted, once signed, to any pro se party on their case, regardless if there were changes or not. I can also see the value in having the court send a copy of an order/ruling that the court actually created, to any pro se parties (this would not include OSC's, writs, sup orders since those docs are not created by the court).

Debbie Jacobsen
Clerk of Court
Fourth District Court
(801) 429-1176

[Quoted text hidden]

Loni Page <lonip@utcourts.gov> Tue, Dec 5, 2017 at 2:31 PM
To: Debbie Jacobsen <debbiej@utcourts.gov>
Cc: Tracy Walker <tracyw@utcourts.gov>, Alyson Brown <alysonb@utcourts.gov>, Dawn Hautamaki <dawnh@utcourts.gov>, Nancy Sylvester <nancyjs@utcourts.gov>, ClerksofCourt <ClerksofCourt@utcourts.gov>

I would echo comments made that "issued" shifts the burden of all orders such as supp orders and OSCs to be served by the court. The parties are bringing the action to the court and should be required to serve the orders post-signature.

I'm not in favor of this rule change and wouldn't be even if "issued" were to be replaced with "composed" because the intent of the rule change is the same. I think this rule change stems from the convenience District eFiling has afforded attorneys. Attorneys now use eFiling in lieu of service and don't want to have to serve pro so litigants through traditional means. The courts have always served its own orders on all parties, pro se and not, and up until the recent rule change (and pending program update) don't even have eFiling to do it for us.

Should this rule change be approved, I don't think the amount of time clerks will spend serving pro so litigants and composing a certificate of service will be as substantial as I initially thought. However, the amount of time clerks will spend trying to determine if there are pro so parties to serve will be. We will have to determine that on every order we process post-signature. For a district whose clerks work in both district and juvenile court every day, the impact will be substantial.

Thank you for allowing us to offer our feedback.
Respectfully,

Loni Page
Clerk of Court
7th Judicial District Court
435/259-1355

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Nancy Sylvester <nancyjs@utcourts.gov> Wed, Jan 17, 2018 at 1:05 PM
To: Clayson Quigley <claysonq@utcourts.gov>

[Quoted text hidden]

Nancy Sylvester <nancyjs@utcourts.gov> Wed, Jan 17, 2018 at 1:05 PM

To: Clayson Quigley <claysonq@utcourts.gov>

---------- Forwarded message ----------
From: **Dawn Hautamaki** <dawnh@utcourts.gov>
Date: Wed, Nov 29, 2017 at 1:15 PM
Subject: Re: Clerks of Court feedback on Civil Rule 5
[Quoted text hidden]
[Quoted text hidden]

Nancy Sylvester <nancyjs@utcourts.gov> Wed, Jan 17, 2018 at 1:06 PM
To: Clayson Quigley <claysonq@utcourts.gov>

---------- Forwarded message ----------
From: **Debbie Jacobsen** <debbiej@utcourts.gov>
Date: Wed, Nov 29, 2017 at 2:47 PM
Subject: Re: Clerks of Court feedback on Civil Rule 5
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Tab 4

Administrative Office of the Courts

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

Richard H. Schwermer
State Court Administrator
Raymond H. Wahl
Deputy Court Administrator

MEMORANDUM

To: Civil Rules Committee
From: Nancy Sylvester
Date: November 9, 2017
Re: Rule 26

Judge Kent Holmberg contacted me about an issue with Rule 26. He said that Rule 26 has an apparent hole in it with respect to pretrial disclosures and witnesses. He proposed the following language:

(a)(5)Pretrial disclosures.

(a)(5)(A) A party shall, without waiting for a discovery request, serve on the other parties:

(a)(5)(A)(i) the name and, if not previously provided, the address and telephone number of each witness, unless solely for impeachment, separately identifying witnesses the party will call and witnesses the party may call;

(a)(5)(A)(ii) the name of witnesses whose testimony is expected to be presented by transcript of a deposition and a copy of the transcript with the proposed testimony designated; and

(a)(5)(A)(iii) a copy of each exhibit, including charts, summaries and demonstrative exhibits, unless solely for impeachment, separately identifying those which the party will offer and those which the party may offer.

(a)(5)(B) Disclosure required by paragraph (a)(5) shall be served on the other parties at least 28 days before trial. At least 14 days before trial, a party shall serve and file counter designations of deposition testimony, objections and grounds for the objections to the use of a deposition, to witnesses, and to the admissibility of exhibits. Other than objections under Rules 402 and 403 of the Utah Rules of Evidence, objections not listed are waived unless excused by the court for good cause.

450 South State Street / P.O. Box 140241 / Salt Lake City, Utah 84114-0241 / Tel: 801-578-3808 / Fax: 801-578-3843 / email: nancyjs@utcourts.gov

Rule 26. General provisions governing disclosure and discovery.

(a) Disclosure. This rule applies unless changed or supplemented by a rule governing disclosure and discovery in a practice area.

(a)(1) Initial disclosures. Except in cases exempt under paragraph (a)(3), a party shall, without waiting for a discovery request, serve on the other parties:

(a)(1)(A) the name and, if known, the address and telephone number of:

(a)(1)(A)(i) each individual likely to have discoverable information supporting its claims or defenses, unless solely for impeachment, identifying the subjects of the information; and

(a)(1)(A)(ii) each fact witness the party may call in its case-in-chief and, except for an adverse party, a summary of the expected testimony;

(a)(1)(B) a copy of all documents, data compilations, electronically stored information, and tangible things in the possession or control of the party that the party may offer in its case-in-chief, except charts, summaries and demonstrative exhibits that have not yet been prepared and must be disclosed in accordance with paragraph (a)(5);

(a)(1)(C) a computation of any damages claimed and a copy of all discoverable documents or evidentiary material on which such computation is based, including materials about the nature and extent of injuries suffered;

(a)(1)(D) a copy of any agreement under which any person may be liable to satisfy part or all of a judgment or to indemnify or reimburse for payments made to satisfy the judgment; and

(a)(1)(E) a copy of all documents to which a party refers in its pleadings.

(a)(2) Timing of initial disclosures. The disclosures required by paragraph (a)(1) shall be served on the other parties:

(a)(2)(A) by the plaintiff within 14 days after filing of the first answer to the complaint; and

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

(a)(3) Exemptions.

(a)(3)(A) Unless otherwise ordered by the court or agreed to by the parties, the requirements of paragraph (a)(1) do not apply to actions:

(a)(3)(A)(i) for judicial review of adjudicative proceedings or rule making proceedings of an administrative agency;

(a)(3)(A)(ii) governed by Rule 65B or Rule 65C;

(a)(3)(A)(iii) to enforce an arbitration award;

(a)(3)(A)(iv) for water rights general adjudication under Title 73, Chapter 4, Determination of Water Rights.

(a)(3)(B) In an exempt action, the matters subject to disclosure under paragraph (a)(1) are subject to discovery under paragraph (b).

(a)(4) Expert testimony.

(a)(4)(A) Disclosure of expert testimony. A party shall, without waiting for a discovery request, serve on the other parties the following information regarding any person who may be used at trial to present evidence under Rule 702 of the Utah Rules of Evidence and who is retained or specially employed to provide expert testimony in the case or whose duties as an employee of the party regularly involve giving expert testimony: (i) the expert's name and

qualifications, including a list of all publications authored within the preceding 10 years, and a list of any other cases in which the expert has testified as an expert at trial or by deposition within the preceding four years, (ii) a brief summary of the opinions to which the witness is expected to testify, (iii) all data and other information that will be relied upon by the witness in forming those opinions, and (iv) the compensation to be paid for the witness's study and testimony.

(a)(4)(B) Limits on expert discovery. Further discovery may be obtained from an expert witness either by deposition or by written report. A deposition shall not exceed four hours and the party taking the deposition shall pay the expert's reasonable hourly fees for attendance at the deposition. A report shall be signed by the expert and shall contain a complete statement of all opinions the expert will offer at trial and the basis and reasons for them. Such an expert may not testify in a party's case-in-chief concerning any matter not fairly disclosed in the report. The party offering the expert shall pay the costs for the report.

(a)(4)(C) Timing for expert discovery.

(a)(4)(C)(i) The party who bears the burden of proof on the issue for which expert testimony is offered shall serve on the other parties the information required by paragraph (a)(4)(A) within seven days after the close of fact discovery. Within seven days thereafter, the party opposing the expert may serve notice electing either a deposition of the expert pursuant to paragraph (a)(4)(B) and Rule 30, or a written report pursuant to paragraph (a)(4)(B). The deposition shall occur, or the report shall be served on the other parties, within 28 days after the election is served on the other parties. If no election is served on the other parties, then no further discovery of the expert shall be permitted.

(a)(4)(C)(ii) The party who does not bear the burden of proof on the issue for which expert testimony is offered shall serve on the other parties the information required by paragraph (a)(4)(A) within seven days after the later of (A) the date on which the election under paragraph (a)(4)(C)(i) is due, or (B) receipt of the written report or the taking of the expert's deposition pursuant to paragraph (a)(4)(C)(i). Within seven days thereafter, the party opposing the expert may serve notice electing either a deposition of the expert pursuant to paragraph (a)(4)(B) and Rule 30, or a written report pursuant to paragraph (a)(4)(B). The deposition shall occur, or the report shall be served on the other parties, within 28 days after the election is served on the other parties. If no election is served on the other parties, then no further discovery of the expert shall be permitted.

(a)(4)(C)(iii) If the party who bears the burden of proof on an issue wants to designate rebuttal expert witnesses it shall serve on the other parties the information required by paragraph (a)(4)(A) within seven days after the later of (A) the date on which the election under paragraph (a)(4)(C)(ii) is due, or (B) receipt of the written report or the taking of the expert's deposition pursuant to paragraph (a)(4)(C)(ii). Within seven days thereafter, the party opposing the expert may serve notice electing either a deposition of the expert pursuant to paragraph (a)(4)(B) and Rule 30, or a written report pursuant to paragraph (a)(4)(B). The deposition shall occur, or the report shall be served on the other parties, within 28 days after the election is served on the other parties. If no election is served on the other parties, then no further discovery of the expert shall be permitted.

(a)(4)(D) Multiparty actions. In multiparty actions, all parties opposing the expert must agree on either a report or a deposition. If all parties opposing the expert do not agree, then further discovery of the expert may be obtained only by deposition pursuant to paragraph (a)(4)(B) and Rule 30.

(a)(4)(E) Summary of non-retained expert testimony. If a party intends to present evidence at trial under Rule 702 of the Utah Rules of Evidence from any person other than an expert witness who is retained or specially employed to provide testimony in the case or a person whose duties as an employee of the party regularly involve giving expert testimony, that party

must serve on the other parties a written summary of the facts and opinions to which the witness is expected to testify in accordance with the deadlines set forth in paragraph (a)(4)(C). A deposition of such a witness may not exceed four hours.

(a)(5) Pretrial disclosures.

(a)(5)(A) A party shall, without waiting for a discovery request, serve on the other parties:

(a)(5)(A)(i) the name and, if not previously provided, the address and telephone number of each witness, unless solely for impeachment, separately identifying witnesses the party will call and witnesses the party may call;

(a)(5)(A)(ii) the name of witnesses whose testimony is expected to be presented by transcript of a deposition and a copy of the transcript with the proposed testimony designated; and

(a)(5)(A)(iii) a copy of each exhibit, including charts, summaries and demonstrative exhibits, unless solely for impeachment, separately identifying those which the party will offer and those which the party may offer.

(a)(5)(B) Disclosure required by paragraph (a)(5) shall be served on the other parties at least 28 days before trial. At least 14 days before trial, a party shall serve and file counter designations of deposition testimony, objections and grounds for the objections to the use of a deposition, to witnesses, and to the admissibility of exhibits. Other than objections under Rules 402 and 403 of the Utah Rules of Evidence, objections not listed are waived unless excused by the court for good cause.

(b) Discovery scope.

(b)(1) In general. Parties may discover any matter, not privileged, which is relevant to the claim or defense of any party if the discovery satisfies the standards of proportionality set forth below. Privileged matters that are not discoverable or admissible in any proceeding of any kind or character include all information in any form provided during and created specifically as part of a request for an investigation, the investigation, findings, or conclusions of peer review, care review, or quality assurance processes of any organization of health care providers as defined in the Utah Health Care Malpractice Act for the purpose of evaluating care provided to reduce morbidity and mortality or to improve the quality of medical care, or for the purpose of peer review of the ethics, competence, or professional conduct of any health care provider.

(b)(2) Proportionality. Discovery and discovery requests are proportional if:

(b)(2)(A) the discovery is reasonable, considering the needs of the case, the amount in controversy, the complexity of the case, the parties' resources, the importance of the issues, and the importance of the discovery in resolving the issues;

(b)(2)(B) the likely benefits of the proposed discovery outweigh the burden or expense;

(b)(2)(C) the discovery is consistent with the overall case management and will further the just, speedy and inexpensive determination of the case;

(b)(2)(D) the discovery is not unreasonably cumulative or duplicative;

(b)(2)(E) the information cannot be obtained from another source that is more convenient, less burdensome or less expensive; and

(b)(2)(F) the party seeking discovery has not had sufficient opportunity to obtain the information by discovery or otherwise, taking into account the parties' relative access to the information.

(b)(3) Burden. The party seeking discovery always has the burden of showing proportionality and relevance. To ensure proportionality, the court may enter orders under Rule 37.

(b)(4) Electronically stored information. A party claiming that electronically stored information is not reasonably accessible because of undue burden or cost shall describe the source of the electronically stored information, the nature and extent of the burden, the nature of the information not provided, and any other information that will enable other parties to evaluate the claim.

(b)(5) Trial preparation materials. A party may obtain otherwise discoverable documents and tangible things prepared in anticipation of litigation or for trial by or for another party or by or for that other party's representative (including the party's attorney, consultant, surety, indemnitor, insurer, or agent) only upon a showing that the party seeking discovery has substantial need of the materials and that the party is unable without undue hardship to obtain substantially equivalent materials by other means. In ordering discovery of such materials, the court shall protect against disclosure of the mental impressions, conclusions, opinions, or legal theories of an attorney or other representative of a party.

(b)(6) Statement previously made about the action. A party may obtain without the showing required in paragraph (b)(5) a statement concerning the action or its subject matter previously made by that party. Upon request, a person not a party may obtain without the required showing a statement about the action or its subject matter previously made by that person. If the request is refused, the person may move for a court order under Rule 37. A statement previously made is (A) a written statement signed or approved by the person making it, or (B) a stenographic, mechanical, electronic, or other recording, or a transcription thereof, which is a substantially verbatim recital of an oral statement by the person making it and contemporaneously recorded.

(b)(7) Trial preparation; experts.

(b)(7)(A) Trial-preparation protection for draft reports or disclosures. Paragraph (b)(5) protects drafts of any report or disclosure required under paragraph (a)(4), regardless of the form in which the draft is recorded.

(b)(7)(B) Trial-preparation protection for communications between a party's attorney and expert witnesses. Paragraph (b)(5) protects communications between the party's attorney and any witness required to provide disclosures under paragraph (a)(4), regardless of the form of the communications, except to the extent that the communications:

(b)(7)(B)(i) relate to compensation for the expert's study or testimony;

(b)(7)(B)(ii) identify facts or data that the party's attorney provided and that the expert considered in forming the opinions to be expressed; or

(b)(7)(B)(iii) identify assumptions that the party's attorney provided and that the expert relied on in forming the opinions to be expressed.

(b)(7)(C) Expert employed only for trial preparation. Ordinarily, a party may not, by interrogatories or otherwise, discover facts known or opinions held by an expert who has been retained or specially employed by another party in anticipation of litigation or to prepare for trial and who is not expected to be called as a witness at trial. A party may do so only:

(b)(7)(C)(i) as provided in Rule 35(b); or

(b)(7)(C)(ii) on showing exceptional circumstances under which it is impracticable for the party to obtain facts or opinions on the same subject by other means.

(b)(8) Claims of privilege or protection of trial preparation materials.

(b)(8)(A) Information withheld. If a party withholds discoverable information by claiming that it is privileged or prepared in anticipation of litigation or for trial, the party shall make the claim expressly and shall describe the nature of the documents, communications, or things not produced in a manner that, without revealing the information itself, will enable other parties to evaluate the claim.

(b)(8)(B) Information produced. If a party produces information that the party claims is privileged or prepared in anticipation of litigation or for trial, the producing party may notify any receiving party of the claim and the basis for it. After being notified, a receiving party must promptly return, sequester, or destroy the specified information and any copies it has 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 it. The producing party must preserve the information until the claim is resolved.

(c) Methods, sequence and timing of discovery; tiers; limits on standard discovery; extraordinary discovery.

(c)(1) Methods of discovery. Parties may obtain discovery by one or more of the following methods: depositions upon oral examination or written questions; written interrogatories; production of documents or things or permission to enter upon land or other property, for inspection and other purposes; physical and mental examinations; requests for admission; and subpoenas other than for a court hearing or trial.

(c)(2) Sequence and timing of discovery. Methods of discovery may be used in any sequence, and the fact that a party is conducting discovery shall not delay any other party's discovery. Except for cases exempt under paragraph (a)(3), a party may not seek discovery from any source before that party's initial disclosure obligations are satisfied.

(c)(3) Definition of tiers for standard discovery. Actions claiming $50,000 or less in damages are permitted standard discovery as described for Tier 1. Actions claiming more than $50,000 and less than $300,000 in damages are permitted standard discovery as described for Tier 2. Actions claiming $300,000 or more in damages are permitted standard discovery as described for Tier 3. Absent an accompanying damage claim for more than $300,000, actions claiming non-monetary relief are permitted standard discovery as described for Tier 2.

(c)(4) Definition of damages. For purposes of determining standard discovery, the amount of damages includes the total of all monetary damages sought (without duplication for alternative theories) by all parties in all claims for relief in the original pleadings.

(c)(5) Limits on standard fact discovery. Standard fact discovery per side (plaintiffs collectively, defendants collectively, and third-party defendants collectively) in each tier is as follows. The days to complete standard fact discovery are calculated from the date the first defendant's first disclosure is due and do not include expert discovery under paragraphs(a)(4)(C) and (D).

Tier	Amount of Damages	Total Fact Deposition Hours	Rule 33 Interrogatories including all discrete subparts	Rule 34 Requests for Production	Rule 36 Requests for Admission	Days to Complete Standard Fact Discovery
1	$50,000 or less	3	0	5	5	120
2	More than $50,000 and less than $300,000 or non-monetary relief	15	10	10	10	180

3	$300,000 or more	30	20	20	20	210

(c)(6) Extraordinary discovery. To obtain discovery beyond the limits established in paragraph (c)(5), a party shall file:

(c)(6)(A) before the close of standard discovery and after reaching the limits of standard discovery imposed by these rules, a stipulated statement that extraordinary discovery is necessary and proportional under paragraph (b)(2) and that each party has reviewed and approved a discovery budget; or

(c)(6)(B) before the close of standard discovery and after reaching the limits of standard discovery imposed by these rules, a request for extraordinary discovery under Rule 37(a).

(d) Requirements for disclosure or response; disclosure or response by an organization; failure to disclose; initial and supplemental disclosures and responses.

(d)(1) A party shall make disclosures and responses to discovery based on the information then known or reasonably available to the party.

(d)(2) If the party providing disclosure or responding to discovery is a corporation, partnership, association, or governmental agency, the party shall act through one or more officers, directors, managing agents, or other persons, who shall make disclosures and responses to discovery based on the information then known or reasonably available to the party.

(d)(3) A party is not excused from making disclosures or responses because the party has not completed investigating the case or because the party challenges the sufficiency of another party's disclosures or responses or because another party has not made disclosures or responses.

(d)(4) If a party fails to disclose or to supplement timely a disclosure or response to discovery, that party may not use the undisclosed witness, document or material at any hearing or trial unless the failure is harmless or the party shows good cause for the failure.

(d)(5) If a party learns that a disclosure or response is incomplete or incorrect in some important way, the party must timely serve on the other parties the additional or correct information if it has not been made known to the other parties. The supplemental disclosure or response must state why the additional or correct information was not previously provided.

(e) Signing discovery requests, responses, and objections. Every disclosure, request for discovery, response to a request for discovery and objection to a request for discovery shall be in writing and signed by at least one attorney of record or by the party if the party is not represented. The signature of the attorney or party is a certification under Rule 11. If a request or response is not signed, the receiving party does not need to take any action with respect to it. If a certification is made in violation of the rule, the court, upon motion or upon its own initiative, may take any action authorized by Rule 11 or Rule 37(b).

(f) Filing. Except as required by these rules or ordered by the court, a party shall not file with the court a disclosure, a request for discovery or a response to a request for discovery, but shall file only the certificate of service stating that the disclosure, request for discovery or response has been served on the other parties and the date of service.

Advisory Committee Notes

Legislative Note

Tab 5

Administrative Office of the Courts

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

Richard H. Schwermer
State Court Administrator
Raymond H. Wahl
Deputy Court Administrator

MEMORANDUM

To: Civil Rules Committee
From: Nancy Sylvester
Date: January 21, 2018
Re: Rule 5 and Service of Papers Prepared by the Court

Attorney Edward Havas contacted Jonathan Hafen about a potential amendment to Rule 9. He said, "I've experienced occasions in which I thought rule 9 was used in an abusive way by a defendant's counsel to name non-parties at fault on the verdict form late in the litigation, which I think is counter to the intent of the rule, if not its language." He submitted proposed language, which is attached to this memo.

Rule 9. Pleading special matters.

(a) Capacity or Authority to Sue; Legal Existence.

(1) In General. Except when required to show that the court has jurisdiction, a pleading need not allege:

(A) a party's capacity to sue or be sued;

(B) a party's authority to sue or be sued in a representative capacity; or

(C) the legal existence of an organized association of persons that is made a party.

(2) Raising Those Issues. To raise any of those issues, a party must do so by a specific denial, which must state any supporting facts that are peculiarly within the party's knowledge.

(b) Unknown parties.

(b)(1) Designation. When a party does not know the name of an opposing party, it may state that fact in the pleadings, and designate the opposing party in a pleading by any name. When the true name of the opposing party becomes known, the pleading must be amended.

(b)(2) Descriptions of interest in quiet title actions. If one or more parties in an action to quiet title are designated in the caption as “unknown,” the pleadings may describe the unknown persons as “all other persons unknown, claiming any right, title, estate or interest in, or lien upon the real property described in the pleading adverse to the complainant's ownership, or clouding its title.”

(c) Fraud, mistake, condition of the mind. In alleging fraud or mistake, a party must state with particularity the circumstances constituting fraud or mistake. Malice, intent, knowledge, and other conditions of a person’s mind may be alleged generally.

(d) Conditions precedent. In pleading conditions precedent, it is sufficient to allege generally that all conditions precedent have been performed or have occurred. When denying that a condition precedent has been performed or has occurred, a party must do so with particularity.

(e) Official document or act. In pleading an official document or official act it is sufficient to allege that the document was legally issued or the act was legally done.

(f) Judgment. In pleading a judgment or decision of a domestic or foreign court, a judicial or quasi-judicial tribunal, or a board or officer, it is sufficient to plead the judgment or decision without showing jurisdiction to render it.

(g) Time and place. An allegation of time or place is material when testing the sufficiency of a pleading.

(h) Special damage. If an item of special damage is claimed, it must be specifically stated.

(i) Statute of limitations. In pleading the statute of limitations it is not necessary to state the facts showing the defense but it may be alleged generally that the cause of action is barred by the statute, referring to or describing the statute by section number, subsection designation, if any, or designating the provision relied on sufficiently to identify it.

(j) Private statutes; ordinances. In pleading a private statute, an ordinance, or a right derived from a statute or ordinance, it is sufficient to refer to the statute or ordinance by its title and the day of its passage or by its section number or other designation in any official publication of the statute or ordinance. The court will take judicial notice of the statute or ordinance.

(k) Libel and slander.

(k)(1) Pleading defamatory matter. In an action for libel or slander it is sufficient to allege generally that the defamatory matter out of which the action arose was published or spoken

concerning the plaintiff. If the allegation is denied, the party alleging the defamatory matter must establish at trial that it was published or spoken.

(k)(2) Pleading defense. The defendant may allege the truth of the matter charged as defamatory and any mitigating circumstances to reduce the amount of damages. Whether or not justification is proved, the defendant may give evidence of the mitigating circumstances.

(l) Allocation of fault.

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

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

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

(l)(2) The information specified in paragraph (l)(1) must be included in the party's responsive pleading if then known or must be included in a supplemental notice filed within ~~a reasonable time~~ 60 days after the party discovers or reasonably should have discovered the factual and legal basis on which fault can be allocated. The court, upon motion and for good cause shown, may permit a party to file the information specified in paragraph (l)(1) after the expiration of any period permitted by this rule, but in no event later than 90 days before trial.

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

Advisory Committee Notes