Agenda

Advisory Committee on Rules of Civil Procedure

June 27, 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, fond farewell to departing members, and approval of minutes	Tab 1	Chief Justice Durrant and Jonathan Hafen, Chair
Rules 4, 11, 55, and 63. Review of comments.	Tab 2	Nancy Sylvester
Rules 101 and 105. Review of comments.	Tab 3	Nancy Sylvester
Rule 73. Attorney Fees. Review of comments.	Tab 4	Nancy Sylvester
Rule 24: Resolving differences with URCrP 12 and URAP 25A.	Tab 5	Leslie Slaugh, Michael Petrogeorge, Nancy Sylvester
Rule 26: Assignment of subcommittee. Deadline for report is September meeting	Tab 6	Jonathan Hafen, Nancy Sylvester
Order to show cause rule: Introduction and assignment of subcommittee. Deadline for report is September meeting.	Tab 7	Brent Johnson, Jonathan Hafen
Other business		Jonathan Hafen

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

Meeting Schedule:

September 26, 2018

October 24, 2018

November 28, 2018

Tab 1

UTAH SUPREME COURT ADVISORY COMMITTEE ON RULES OF CIVIL PROCEDURE

Meeting Minutes May 23, 2018

PRESENT: Chair Jonathan Hafen, Judge Kate Toomey, Susan Vogel, Katy Strand (Recording Secretary), Judge Andrew Stone, Heather Sneddon, Judge Laura Scott, Judge Kent Holmberg, Leslie Slaugh, Michael Petrogeorge, Judge James Blanch, Dawn Hautamaki, Lauren DiFrancesco, Jim Hunnicutt, Judge Amber Mettler, Judge Clay Stucki

EXCUSED: Rod Andreason, Barbara Townsend, Trystan Smith, Justin Toth, Lincoln Davies, Paul Stancil

GUESTS: Clayson Quigley, Patricia Owen

STAFF: Nancy Sylvester

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(1) WELCOME, APPROVAL OF MINUTES.

Jonathan Hafen welcomed everyone to the meeting and requested a motion on the April minutes. Judge Toomey moved to approve the minutes, Judge Andrew Stone seconded, and the motion passed unanimously.

(2) UPDATE ON RULE 5, ORDERS SERVED BY THE COURT, NEW CJA RULE 4-511, MANDATORY EMAIL ADDRESS, AND RULE 10, CONFORMING AMENDMENTS.

Mr. Hafen and Nancy Sylvester introduced Rule 5 and Ms. Sylvester proposed that the committee hold off on these rules until the programing for MyCase is done. Clayson Quigley reported that MyCase will be a portal where parties can log in and gain access to all of the documents on their case. They will receive notifications and see scheduled hearings. In phase 2, much further down the road this will include efiling. He also reported that MyCase will also be used for online dispute resolution (ODR). ODR will allow parties to discuss issues and attempt to resolve issues before filing cases. If parties are eligible for online dispute resolution, MyCase will inform them.

Mr. Quigley reported that MyCase will be available this summer, but only for small claims. It should be available for all cases by the end of the year.

Dawn Hautamaki reported that the clerks have discussed starting to gather email addresses so that they will be able to send out items to pro se litigants via email. The clerks would like this type of service to be automated.

Mr. Hafen asked what was stopping the rules from requiring email addresses from all litigants. Mr. Quigley responded that the collection of email addresses is currently a problem. Dawn Hautamaki

pointed out that often the courts do not get all the addresses, and email may be more problematic. Further, when filling out certificates of service, email does not auto-populate. Leslie Slaugh noted that once a litigant answers there should be an email under Rule 10. The email could then be put into the system. Judge Blanch stated that his clerks use email to send notice. But when a default is possible, Judge Blanch requires his clerks to also mail the notice.

Ms. Hautamaki said clerks won't email pro se litigants currently unless there is a consent to service by email on file. Mr. Slaugh said he saw no reason why service by email should not be presumptively valid. Judge Kate Toomey believed that parties must be able to opt out.

Ms. Sylvester proposed changing Rule 5(b)(3)(B) to say "emailing it to the most recent email address provided by the person pursuant to Rule 10(a)(3) or to the email address on file with the Utah State Bar." Ms. Sylvester argued that this would allow for an opt out, as they do not have to put an email address in the caption if they don't have one. Susan Vogel stated that putting an email in the caption does not let parties know that they may get served there. Mr. Slaugh argued this concern was too paternalistic; if they provide an email they should assume it will be used. Judge Blanch proposed that the form answer could include information telling them that the email will be used for service, but any changes to the forms should be decided by the forms committee.

Judge Holmberg expressed concern that parties could change email addresses and they would not be properly updated in the system. Judge Stucki proposed adding a reference to Rule 76 so that the updated address will be used.

The language in Rule 5(b)(3)(B) was changed to "emailing it to the most recent email address provided by the person pursuant to Rule 10(a)(3) or Rule 76, or to the email address on file with the Utah State Bar." The full language of the rule is as follows:

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 most recent email address provided by the person pursuant to Rule 10(a)(3) or Rule 76, 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 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.

Leslie Slaugh moved to recommend the rule to the Supreme Court. Judge Toomey seconded. The motion passed unanimously.

(3) Rule 109. Automatic temporary domestic orders. New.

Ms. Sylvester reported that proposed Rule 109 was discussed by the Board of District Court Judges after the committee finalized its edits. Regarding the question of service versus notice of the Rule 109 injunction, the Board proposed that paragraph (d)(2) say the injunction is binding "on the respondent after filing of the initial petition and upon receipt of a signed copy of the injunction." The Board felt this struck a middle ground between simple notice and Rule 4 service, both of which carried concerns. The Board also proposed removing the modifier "unduly" regarding involving children in the case. Judge Stone supported these changes. Lauren DiFrancesco expressed concerns about providing a signed order in each case, as each case would not have an assigned judge at the time of filing. Judge Stone stated that it would be a standing order signed by the presiding judge and a copy would be provided in each case.

Ms. Vogel questioned the use of the term "receipt." Judge Scott stated that it requires the actual injunction to be provided, which avoids parties representing what was in the injunction, but does not require actual service, avoiding the possibility that a party could knowingly avoid service in order to violate the injunction. The rule was proposed as follows:

Rule 109. Automatic injunction in certain domestic relations cases.

(a) **Actions in which an automatic domestic injunction enters.** In an action for divorce, annulment, temporary separation, custody, parent time, support, or paternity, an injunction automatically enters when the initial petition is filed. The injunction contains the applicable provisions of this rule.

(b) **General provisions.**

(b)(1) If the action concerns the division of property then neither party may transfer, encumber, conceal, or dispose of any property of either party without the written consent of the other party or an order of the court, except in the usual course of business or to provide for the necessities of life.

(b)(2) Neither party may disturb the peace of the other party or harass, annoy, or bother the other party.

(b)(3) Neither party may commit domestic violence or abuse against the other party or a child.

(b)(4) Neither party may use the other party's name, likeness, image, or identification to obtain credit, open an account for service, or obtain a service.

(b)(5) Neither party may cancel or interfere with telephone, utility, or other services used by the other party.

(b)(6) Neither party may cancel, modify, terminate, change the beneficiary, or allow to lapse for voluntary nonpayment of premiums, any policy of health insurance, homeowner's or renter's insurance, automobile insurance, or life insurance without the written consent of the other party or pursuant to further order of the court.

(c) **Provisions regarding a minor child.** The following provisions apply when a minor child is a subject of the petition.

(c)(1) Neither party may engage in non-routine travel with the child without the written consent of the other party or an order of the court unless the following information has been provided to the other party:

(c)(1)(A) an itinerary of travel dates and destinations;

(c)(1)(B) how to contact the child or traveling party; and

(c)(1)(C) the name and telephone number of an available third person who will know the child's location.

(c)(2) Neither party may do the following in the presence or hearing of the child:

(c)(2)(A) demean or disparage the other party;

(c)(2)(B) attempt to influence a child's preference regarding custody or parent time; or

(c)(2)(C) say or do anything that would tend to diminish the love and affection of the child for the other party, or involve the child in the issues of the petition.

(c)(3) Neither party may make parent time arrangements through the child.

(c)(4) When the child is under the party's care, the party has a duty to use best efforts to prevent third parties from doing what the parties are prohibited from doing under this order or the party must remove the child from those third parties.

(d) **When the injunction is binding.** The injunction is binding

(d)(1) on the petitioner upon filing the initial petition; and

(d)(2) on the respondent after filing of the initial petition and upon receipt of a signed copy of the injunction.

(e) **When the injunction terminates.** The injunction remains in effect until the final decree is entered, the petition is dismissed, the parties otherwise agree in a writing signed by all parties, or further order of the court.

(f) **Modifying or dissolving the injunction.** A party may move to modify or dissolve the injunction.

(f)(1) Prior to a responsive pleading being filed, the court shall determine a motion to modify or dissolve the injunction as expeditiously as possible. The moving party must serve the nonmoving party at least 48 hours before a hearing.

(f)(2) After a responsive pleading is filed, a motion to modify or to dissolve the injunction is governed by Rule 7 or Rule 101, as applicable.

(g) **Separate conflicting order.** Any separate order governing the parties or their minor children will control over conflicting provisions of this injunction.

(h) **Applicability.** This rule applies to all parties other than the Office of Recovery Services.

Mr. Hunnicutt moved to recommend the rule as written above to the Supreme Court. Judge Stucki seconded. The motion passed.

(4) CIVIL RULE 58 AND APPELLATE RULE 4

Ms. Sylvester and Mr. Hafen introduced the concerns of the Supreme Court regarding Rule of Civil Procedure 58 and Appellate Rule 4. The Supreme Court was concerned that these two rules in concert created a "trap for the diligent," as Paul Burke said. This was demonstrated in the recent Court of Appeals case, *McQuarrie v. McQuarrie*, 2017 UT App 209. In *McQuarrie*, the husband appealed a district court order that awarded the wife attorney fees with the amount to be determined at a later date. The wife moved for summary disposition because, she argued, the husband did not appeal from a final order. The Court of Appeals agreed with the wife and dismissed the appeal. But there is an argument that the husband didn't have a choice but to appeal at that time since the finality of the order was not clear. Mr. Slaugh proposed reconstituting the Rule 58 subcommittee to evaluate the rules. Judge Mettler said she would work with the subcommittee to discuss the changes needed.

(5) ADJOURNMENT

The committee adjourned at 5:45 p.m. The next meeting will be held on June 27, 2018 in the Judicial Council Room of the Matheson Courthouse.

Tab 2

URCP Rules 4, 11, 55, 63

URCP004. Process. Amend. Makes amendments that conform to **S.B. 188 (2018)**. Effective May 8, 2018 pursuant to CJA Rule 11-105(5), expedited rulemaking.

URCP011. Signing of pleadings, motions, affidavits, and other papers; representations to court; sanctions. Amend. Makes amendments that conform to **S.B. 188 (2018)**. Effective May 8, 2018 pursuant to CJA Rule 11-105(5), expedited rulemaking.

URCP055. Default. Amend. Makes amendments that conform to **S.B. 188 (2018)**. Effective May 8, 2018 pursuant to CJA Rule 11-105(5) expedited rulemaking.

URCP063. Disability or disqualification of a judge. Amend. Makes amendments that conform to **S.B. 188 (2018)**. Effective May 8, 2018 pursuant to CJA Rule 11-105(5).

https://www.utcourts.gov/utc/rules-comment/2018/05/07/rules-of-civil-procedure-comment-period-closes-june-21-2018/

No comments posted.

Tab 3

URCP Rules 101 and 105

URCP0101. Motion practice before court commissioners. Amend. Makes conforming amendments pursuant to SB 25 (2018), which reduced the 90-day waiting period for a divorce to 30 days. Effective May 8, 2018 pursuant to CJA rule 11-105(5).

URCP0105. Shortening 30 day waiting period in divorce actions. Amend. Makes conforming amendments pursuant to SB 25 (2018), which reduced the 90-day waiting period for a divorce to 30 days. Effective May 8, 2018 pursuant to CJA rule 11-105(5).

https://www.utcourts.gov/utc/rules-comment/2018/04/11/rules-of-civil-procedure-comment-period-closes-may-26-2018/

Comments

Posted by Amanda

This is the greatest change yet! Countless citizens enter the courthouse requesting a divorce and once they hear about the 90 day waiting period they immediately respond with "Why do we have to wait the 90 day waiting period, if I want a divorce, I want a divorce! It isn't anyone's business! I shouldn't be forced to stay married to someone I don't want to be married to!"

Comments like those above happen consistently and absolutely on a daily basis. They then usually ask how they can waive and have to go through the process of doing so.

I understand the 90 days was an attempt to offer reconciliation time, but I would venture that less than 10% of divorces actually were ever reconciled. Instead it just seemed to aggravate people.

Nancy's response:

This is a comment in support of the legislatively-created policy.

Posted by Spencer Ball

I am in favor of making litigation easier for litigants, but this rule change shortening the time period only cheapens marriage, making it all the more meaningless of an institution.

Nancy's response:

This comment expresses disagreement with the legislatively-created policy behind the rule amendments. I recommend no change in response.

Tab 4

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: June 22, 2018
Re: Civil Rule 24, Appellate Rule 25A, Criminal Rule 12

A subcommittee consisting of representatives from the Appellate, Criminal, and Civil Procedures Committees has been studying how to better coordinate Civil Rule 24, Appellate Rule 25A, and Criminal Rule 12 and intervention when the constitutionality of a statute or ordinance is challenged.

The subcommittee agreed on four points:

1. Regarding the service of the notice: Do not require a specific subject line in the notice, or that attachments be PDF searchable, and keep the notice general like Rule 25A.

2. For Rule 24 and Rule 12: Add the content and timing provisions of paragraphs (d)(1)(A) and (B), which address notice to the Attorney General, to the notice requirements for the local governments. This could be done by cross reference.

3. Do not add specific address or contact information into the rule for the local governments.

4. Do not address notice to the legislative branch. The Attorney General has a duty by statute to notify the legislature when there is a constitutional challenge.

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 24. Intervention.

(a) Intervention of right. Upon timely application anyone shall be permitted to intervene in an action: (1) when a statute confers an unconditional right to intervene; or (2) when the applicant claims an interest relating to the property or transaction which is the subject of the action and ~~he~~ the applicant is so situated that the disposition of the action may as a practical matter impair or impede ~~his~~ the applicant's ability to protect that interest, unless the applicant's interest is adequately represented by existing parties.

(b) Permissive intervention. Upon timely application anyone may be permitted to intervene in an action: (1) when a statute confers a conditional right to intervene; or (2) when an applicant's claim or defense and the main action have a question of law or fact in common. When a party to an action relies for ground of claim or defense upon any statute or executive order administered by a governmental officer or agency or upon any regulation, order, requirement, or agreement issued or made pursuant to the statute or executive order, the officer or agency upon timely application may be permitted to intervene in the action. In exercising its discretion the court shall consider whether the intervention will unduly delay or prejudice the adjudication of the rights of the original parties.

(c) Procedure. A person desiring to intervene shall serve a motion to intervene upon the parties as provided in Rule 5. The motions shall state the grounds therefor and shall be accompanied by a pleading setting forth the claim or defense for which intervention is sought.

(d) Constitutionality of statutes and ordinances.

(d)(1) If a party challenges the constitutionality of a statute in an action in which the Attorney General has not appeared, the party raising the question of constitutionality shall notify the Attorney General of such fact as described in paragraphs (d)(1)(A), (d)(1)(B), and (d)(1)(C). The court shall permit the state to be heard upon timely application.

(d)(1)(A) **Form and Content**. The notice shall (i) be in writing, (ii) be titled "Notice of Constitutional Challenge Under URCP 24(d)," (iii) concisely describe the nature of the challenge, and (iv) include, as an attachment, the pleading, motion, or other paper challenging the constitutionality of the statute.

(d)(1)(B) **Timing**. The party shall serve the notice on the Attorney General on or before the date the party files the paper challenging the constitutionality of the statute.

(d)(1)(C) **Service**. The party shall serve the notice on the Attorney General by email or, if circumstances prevent service by email, by mail at the addresses below, and file proof of service with the court. ~~For service by email, the "Subject" of the email be "Rule 24(d) Notice" and the notice and attachments shall be in a searchable pdf format.~~

Email: notices@agutah.gov

Mail:

Office of the Utah Attorney General

Attn: Utah Solicitor General

350 North State Street, Suite 230

P.O. Box 142320

Salt Lake City, Utah 84114-2320

(d)(2) If a party challenges the constitutionality of a county or municipal ordinance in an action in which the district attorney, county attorney, or municipal attorney has not appeared, the party raising the question of constitutionality shall notify the district attorney, county attorney, or municipal attorney of such fact. The procedures shall be as provided in paragraphs (d)(1)(A), (d)(1)(B), and (d)(1)(C) except that service will be on the individual county or municipality. The court shall permit the county or municipality to be heard upon timely application.

(d)(3) Failure of a party to provide notice as required by this rule is not a waiver of any constitutional challenge otherwise timely asserted. If a party does not serve a

notice as required under paragraphs (d)(1) or (d)(2), the court may postpone the hearing until the party serves the notice.

Rule 25A. Challenging the constitutionality of a statute or ordinance.

(a) **Notice to the Attorney General or the district, county, or municipal attorney; penalty for failure to give notice.**

(a)(1) When a party challenges the constitutionality of a statute in an appeal or petition for review in which the Attorney General has not appeared, every party must serve its principal brief and any subsequent brief on the Attorney General on or before the date the brief is filed.

(a)(2) When a party challenges the constitutionality of a county or municipal ordinance in an appeal or petition for review in which the responsible county or municipal attorney has not appeared, every party must serve its principal brief and any subsequent brief on the district, county, or municipal attorney on or before the date the brief is filed ,and file proof of service with the court.

(a)(3) If an appellee or cross-appellant is the first party to challenge the constitutionality of a statute or ordinance, the appellant must serve its principal brief on the Attorney General or the district, county, or municipal attorney no more than 7 days after receiving the appellee's or the cross-appellant's brief and must serve its reply brief on or before the date it is filed.

(a)(4) Every party must serve its brief on the Attorney General by email or, if circumstances prevent service by email, by mail at the addresses below, ~~or mail at the following address~~ and ~~must~~ file proof of service with the court. ~~For service by email, the "Subject" of the email must be "Rule 25(A)(a) Service" and the brief must be in a searchable pdf format.~~

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Email:

notices@agutah.gov

Mail:

Office of the Utah Attorney General

Attn: Utah Solicitor General

350 North State Street, Suite 230

~~320 Utah State Capitol~~

P.O. Box 142320

Salt Lake City, Utah 84114-2320

(a)(5) If a party does not serve a brief as required by this rule and supplemental briefing is ordered as a result of that failure, a court may order that party to pay the costs, expenses, and attorney fees of any other party resulting from that failure.

~~(j) **Intervention by the Legislature**. Intervention by the Legislature shall be in accordance with Utah Code Section 36-12-7. Notice to the Legislature of a claim that challenges the constitutionality of a state statute, the validity of legislation, or any action of the Legislature shall be in accordance with Utah Code Section 67-5-1.~~

(b) **Notice by the Attorney General, ~~legislative general counsel,~~ or district, county, or municipal attorney; amicus brief.**

(b)(1) Within 14 days after service of the brief that presents a constitutional challenge the Attorney General or other government attorney will notify the appellate court whether it intends to file an amicus brief. The Attorney General or other government attorney may seek up to an additional 7 days' extension of time from the court. Should the Attorney General or other government attorney decline to file an amicus brief, that entity should plainly state the reasons therefor.

(b)(2) If the Attorney General or other government attorney declines to file an amicus brief, the briefing schedule is not affected.

(b)(3) If the Attorney General or other government attorney intends to file an amicus brief, that brief will come due 30 days after the notice of intent is filed. Each governmental entity may file a motion to extend that time as provided under Rule 22. On a governmental entity filing a notice of intent, the briefing schedule established under Rule 13 is vacated, and the next brief of a party will come due 30 days after the amicus brief is filed.

(c) **Call for the views of the Attorney General or district, county, or municipal attorney.** Any time a party challenges the constitutionality of a statute or ordinance,

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the appellate court may call for the views of the Attorney General or of the district, county, or municipal attorney and set a schedule for filing an amicus brief and supplemental briefs by the parties, if any.

(d) **Participation in oral argument.** If the Attorney General, ~~legislative general counsel,~~ or district, county, or municipal attorney files an amicus brief, the Attorney General, legislative general counsel, or district, county, or municipal attorney will be permitted to participate at oral argument.

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Rule 12. Motions.

(a) Motions. An application to the court for an order shall be by motion, which, unless made during a trial or hearing, shall be in writing and in accordance with this rule. A motion shall state succinctly and with particularity the grounds upon which it is made and the relief sought. A motion need not be accompanied by a memorandum unless required by the court.

(b) Request to Submit for Decision. If neither party has advised the court of the filing nor requested a hearing, when the time for filing a response to a motion and the reply has passed, either party may file a request to submit the motion for decision. If a written Request to Submit is filed it shall be a separate pleading so captioned. The Request to Submit for Decision shall state the date on which the motion was served, the date the opposing memorandum, if any, was served, the date the reply memorandum, if any, was served, and whether a hearing has been requested. The notification shall contain a certificate of mailing to all parties. If no party files a written Request to Submit, or the motion has not otherwise been brought to the attention of the court, the motion will not be considered submitted for decision.

(c) Time for filing specified motions. Any defense, objection or request, including request for rulings on the admissibility of evidence, which is capable of determination without the trial of the general issue may be raised prior to trial by written motion.

(c)(1) The following shall be raised at least 7 days prior to the trial:

(c)(1)(A) defenses and objections based on defects in the indictment or information ;

(c)(1)(B) motions to suppress evidence;

(c)(1)(C) requests for discovery where allowed;

(c)(1)(D) requests for severance of charges or defendants;

(c)(1)(E) motions to dismiss on the ground of double jeopardy ; or

(c)(1)(F) motions challenging jurisdiction, unless good cause is shown why the issue could not have been raised at least 7 days prior to trial.

(c)(2) Motions for a reduction of criminal offense at sentencing pursuant to Utah Code Section 76-3-402(1) shall be in writing and filed at least 14 days prior to the date of sentencing unless the court sets the date for sentencing within ten days of the entry of conviction. Motions for a reduction of criminal offense pursuant to Utah Code Section 76-3-402(2) may be raised at any time after sentencing upon proper service of the motion on the appropriate prosecuting entity.

(d) Motions to Suppress. A motion to suppress evidence shall:

(d)(1) describe the evidence sought to be suppressed;

(d)(2) set forth the standing of the movant to make the application; and

(d)(3) specify sufficient legal and factual grounds for the motion to give the opposing party reasonable notice of the issues and to enable the court to determine what proceedings are appropriate to address them.

If an evidentiary hearing is requested, no written response to the motion by the non-moving party is required, unless the court orders otherwise. At the conclusion of the evidentiary hearing, the court may provide a reasonable time for all parties to respond to the issues of fact and law raised in the motion and at the hearing.

(e) A motion made before trial shall be determined before trial unless the court for good cause orders that the ruling be deferred for later determination. Where factual issues are involved in determining a motion, the court shall state its findings on the record.

(f) Failure of the defendant to timely raise defenses or objections or to make requests which must be made prior to trial or at the time set by the court shall constitute waiver thereof, but the court for cause shown may grant relief from such waiver.

(g) A verbatim record shall be made of all proceedings at the hearing on motions, including such findings of fact and conclusions of law as are made orally.

(h) If the court grants a motion based on a defect in the institution of the prosecution or in the indictment or information, it may also order that bail be

continued for a reasonable and specified time pending the filing of a new indictment or information. Nothing in this rule shall be deemed to affect provisions of law relating to a statute of limitations.

(i) **Motions challenging the constitutionality of statutes and ordinances**.

(i)(1) If a party in a court of record challenges the constitutionality of a statute in an action in which the Attorney General has not appeared, the party raising the question of constitutionality shall notify the Attorney General of such fact as described in as described in paragraphs (i)(1)(A), (i)(1)(B), and (i)(1)(C). The court shall permit the state to be heard upon timely application.

(i)(1)(A) **Form and Content**. The notice shall (i) be in writing, (ii) be titled "Notice of Constitutional Challenge Under URCrP 12(i)," (iii) concisely describe the nature of the challenge, and (iv) include, as an attachment, the pleading, motion, or other paper challenging the constitutionality of the statute.

(i)(1)(B) **Timing**. The party shall serve the notice on the Attorney General on or before the date the party files the paper challenging the constitutionality of the statute.

(i)(1)(C) **Service**. The party shall serve the notice on the Attorney General by email or, if circumstances prevent service by email, by mail at the addresses below, and file proof of service with the court.

Email: notices@agutah.gov

Mail:

Office of the Utah Attorney General

Attn: Utah Solicitor General

350 North State Street, Suite 230

P.O. Box 142320

Salt Lake City, Utah 84114-2320

(i)(2) If a party challenges the constitutionality of a county or municipal ordinance in an action in which the district attorney, county attorney, or municipal attorney has

not appeared, the party raising the question of constitutionality shall notify the district attorney, county attorney, or municipal attorney of such fact. The procedures shall be as provided in paragraphs (i)(1)(A), (i)(1)(B), and (i)(1)(C) except that service will be on the individual county or municipality. The court shall permit the county or municipality to be heard upon timely application.

(i)(3) Failure of a party to provide notice as required by this rule is not a waiver of any constitutional challenge otherwise timely asserted. If a party does not serve a notice as required under paragraphs (d)(1) or (d)(2), the court may postpone the hearing until the party serves the notice.

Tab 6

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: May 18, 2018
Re: Rule 26 issues

Below are several Rule 26 issues that have been raised recently. A subcommittee should study these out over the summer and propose amendments to the rule.

Rule 26 has an apparent hole in it for pretrial disclosures. The required objection to the pretrial disclosures Here is some proposed 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.	26	Judge Holmberg
1. URCP 26(a)(2) - There seems to be some confusion about how URCP 26(a)(2)(B) operates in cases with multiple defendants, specifically whether each defendant has to serve its initial disclosures within 42 days of the first defendant's answer or within 42 days of its first answer. This can be problematic when 1 defendant	26	Lauren DiFrancesco

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answers and the other moves to dismiss - does the moving defendant have to serve its initial disclosures before motion to dismiss is ruled on because (1) the first answer has been filed (by the other defendant) and (2) this defendant appeared when the motion to dismiss was filed? I propose one of the following two options to clarify (with a preference for the first): **Option A** (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~~ its first answer to the complaint or within 28 days after that defendant's appearance, whichever is later. **Option B** (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~~ that defendant's first answer to the complaint or within 28 days after that defendant's appearance, whichever is later 2. URCP 26(a)(1)(B) - I understand there have been instances where parties are producing documents in unreasonably burdensome formats (i.e., very large PDFs) which are not how they are kept in the ordinary course of business -- as is required when documents are produced pursuant to URCP 34(c). I think this could be solved with an advisory committee note to say that any documents produced pursuant to this rule should be produced in accordance with Rule 34(c).		
I have a case where I represent the defendant and I have hired an expert on causation, an issue for which the plaintiff bears the burden of proof. I anticipated that my expert would respond to the plaintiff's disclosed causation expert's opinion. Lo and behold, plaintiff did not disclose any causation expert. I looked at the timing of disclosure rule on disclosures for experts offered by the party without the burden of proof—my situation here. I cannot find in that rule any timing for an expert offered by a party who does not bear the burden of proof on the issue—here, causation—when the party with the burden of proof has disclosed no expert on that issue. Any guidance on what my disclosure timing obligations might be? Tuesday is my deadline for election if the plaintiff had disclosed an expert but there is no expert to make an election on. My expert's opinions that causation does not exist are not finalized because we anticipated responding to what is now a non-existent expert.	26	David W. Scofield
Today in our Forms Committee meeting the Committee struggled a bit with the initial disclosures form. Rule 26(a)(1)(B) states that the party must initially disclose copies of "documents, data compilations, electronically stored information, and tangible things." Randy Dryer stated that in his experience electronically stored	26	Brent Johnson/ Forms Committee

information is not shared at this stage. And others stated that it seems unreasonable to serve copies of tangible things. The Committee suggested that maybe the rule should not require service of those things but instead the person should describe what they have and arrangements can later be made on how those things can be accessed. The Committee ultimately approved the form with it only calling for a description of those things and they suggested that maybe your committee may want to review the rule and determine what they really want. I'm just passing this on for what it's worth. The Forms Committee does not expect any type of response unless your committee wants to tell us that, absolutely, copies of those things should be provided and we should change our form accordingly.		

Tab 7

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: May 18, 2018
Re: Motions to compel compliance with a decree, order, or judgment

The Forms Committee has proposed a change to the procedure for enforcing court orders. The proposal is basically to get rid of orders to show cause and do everything through regular motion practice. My understanding is that this process will be especially helpful when License Paralegal Practitioners begin practicing.

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Rule _____ Motions to compel compliance with a decree, order, or judgment.

Intent:

Applicability:

This rule shall apply to courts of record.

Statement of the Rule:

(1) Motion. A party who seeks to enforce an order, a decree, or a judgment of a court against an opposing party shall proceed by motion under rule 7 of the Utah Rules of Civil Procedure or by motion under rule 101 of the Utah Rules of Civil Procedure if the motion will be heard by a commissioner.

(2) Affidavit. The motion must be accompanied by at least one supporting affidavit. Each supporting affidavit must be based on personal knowledge and must set forth admissible facts and not mere conclusions. At least one supporting affidavit must state the title and date of entry of the order, decree, or judgment the moving party seeks to enforce.

(3) Contents of motion. The motion must state whether the moving party is requesting that the opposing party be held in contempt and, if such a request is made, recite that the sanctions for contempt may include, but are not limited to, a fine of $1000 or less, a jail commitment of 30 days or less, or a jail commitment until the opposing party performs an act required by the court.

(4) Service. If the party is seeking sanctions, the moving party must serve the motion and all supporting affidavits in the manner prescribed for service of a summons and complaint, unless the moving party shows good cause for service to be made by mailing or delivery to the opposing party's counsel of record and the court so orders.

(5) Expedited response. The party filing the motion may request an expedited schedule for responding to the motion and for holding a hearing. The court shall grant the request if it clearly appears from specific facts shown by affidavit that immediate and irreparable injury, loss, or damage will result to the moving party if the process is not expedited.

(6) Hearing on the motion. If a hearing is requested, the court shall conduct a scheduling hearing to determine

(6)(A) whether an opposing party contests the allegations made by the moving party,

(6)(B) whether an evidentiary hearing is necessary,

(6)(C) the specific issues to be resolved through an evidentiary hearing, and

(6)(D) the estimated length of any such evidentiary hearing. If the opposing party does not contest the allegations made by the moving party, the court may proceed at the first appearance as the circumstances require.

(7) Evidentiary Hearing. At the evidentiary hearing on the motion, the moving party shall bear the burden of proof on all allegations that are made in support of the order.

(8) Limitations. A motion under this rule may not be used to obtain an original order or judgment. A motion under this rule may not be used to obtain a temporary restraining order or to establish temporary orders in a divorce case.