Agenda

Advisory Committee on Rules of Civil Procedure

September 26, 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, introductions, principles of rulemaking, and Supreme Court letter.	Tab 1	Jonathan Hafen, Chair, Nancy Sylvester
Approval of minutes.	Tab 2	Jonathan Hafen
Rules 5 and 109. Review of comments.	Tab 3	Nancy Sylvester
Rule 73. Attorney Fees. Review of Clerk of Court comments.	Tab 4	Nancy Sylvester
Rule 58A and Appellate Rule 4.	Tab 5	Judge Amber Mettler, Nancy Sylvester
Rule 24: Incorporating the federal language.	Tab 6	Jim Hunnicutt, Nancy Sylvester
Rule 4. Standards for electronic acceptance of service: Subcommittee update and request for feedback.	Tab 7	Justin Toth (subcommittee chair), Judge Laura Scott, Lauren DiFrancesco, and Susan Vogel
Rule 26 Subcommittee Update		Rod Andreason (subcommittee chair), Tim Pack, Trystan Smith, Leslie Slaugh
Order to Show Cause Rule Subcommittee Update	Tab 8	Lauren DiFrancesco (subcommittee chair), Jim Hunnicutt, Judge Holmberg, Susan Vogel
Other business: Update on Labor Commission Petition		Jonathan Hafen, Nancy Sylvester

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

Meeting Schedule:

October 24, 2018

November 28, 2018

Tab 1

Catherine J. Dupont
Appellate Court Administrator

Nicole J. Gray
Clerk of Court

Supreme Court of Utah
450 South State Street
P.O. Box 140210
Salt Lake City, Utah 84114-0210

Appellate Clerks' Office
Telephone 801-578-3900
Email:supremecourt@utcourts.gov

Matthew B. Durrant
Chief Justice
Thomas R. Lee
Associate Chief Justice
Deno G. Himonas
Justice
John A. Pearce
Justice
Paige Petersen
Justice

June 27, 2018

Dear Advisory Committee Chairs,

We are contacting each Supreme Court advisory committee to inform you of two initiatives we are requesting each advisory committee to undertake.

Our first request concerns our efforts to try to make the judicial system more accessible to unrepresented individuals who often find our rules and processes confusing and daunting. In the course of reviewing your committee's rules and proposed amendments, we want to challenge your committee to consider the impact of the rule on the unrepresented party and whether there is a simpler process or clearer language that can be recommended. When you submit a proposed rule or amendment to the Court for approval, we are interested in hearing from you about your consideration of how the rule may impact the unrepresented party. We acknowledge that this additional inquiry creates work for the committee, however, we believe that the goal of improving access to the courts is compelling.

Our second initiative concerns a change to the Advisory Committee Notes published with the rules. We request that each advisory committee review their Advisory Committee Notes to determine the following:

- Are the advisory notes accurate based on existing case law? Should an advisory note be eliminated or revised based on case law or other reasons?
- Does the advisory note explain the intent of the rule? If so, can the language of the rule be clarified so that a note regarding intent is not necessary?
- Does the advisory note provide historical context for the rule or an example that explains the application of the rule? If not, what is the purpose of the advisory note?

We recognize that each advisory committee is working on many projects and there are limited resources for undertaking the evaluation of advisory committee notes.

Please discuss this project with your committee and create a plan for the evaluation that works for your committee, and then report back to us regarding the committee's plan.

Finally, we want to express our gratitude to the advisory committee members for the hours of dedicated work provided by them to the courts.

Respectfully,

Matthew B. Durrant
Chief Justice

Principles of Rulemaking

(1) Certainty

The rules should provide a predictable process.

(2) Clarity

The rules should be written using plain language principles, adopting the federal style amendments when appropriate.

(3) Comprehensiveness

The rules should provide complete answers to questions about procedures.

(4) Consistency

The rules should be internally consistent. There is value to state rules that conform to the federal rules. Lawyers practicing in both courts benefit from a uniform procedure. The state courts can rely on a large body of federal caselaw. The state rules should establish procedures different from the federal rule only when there is a sound reason for doing so.

(5) Improvement

An amendment should solve an identifiable problem.

(6) Input

Before the 45-day comment period, the committee should try to obtain comments and suggestions from lawyers and judges who might be particularly affected by an amendment. The committee will consider all comments.

(7) Priority

The committee will assign a priority to each request to amend the rules. Requests from the Legislature, Supreme Court and Board of District Court Judges will take priority over other priorities. Within a priority, the committee will consider the requests in the order in which they are made, unless combining requests will better address the matter.

(8) Simplicity

The process established by the rule should reach its outcome as simply as possible while allowing every party an equitable opportunity to investigate and present its case. Exceptions and options should be limited and clearly stated.

(9) Stability

The rules should not be amended unless there is sufficient need.

(10) Accessibility

To make the judicial system more accessible to unrepresented individuals who often find our rules and processes confusing and daunting. the committee will consider the impact of a proposed rule on the unrepresented party and whether there is a simpler process or clearer language that can be recommended.

(11) Advisory Notes

Wherever possible, advisory notes that explain the intent of the rule should be eliminated in favor of clear rule language. Advisory notes may be used to provide historical context, to provide an example that explains the application of the rule, or to explain the intent of the rule to the extent that the rule may not be further clarified without sacrificing the nuance or purpose of the rule. The advisory notes should be accurate based on existing case law.

Tab 2

UTAH SUPREME COURT ADVISORY COMMITTEE ON RULES OF CIVIL PROCEDURE

Meeting Minutes June 27, 2018

PRESENT: Chair Jonathan Hafen, Rod Andreason, Barbara Townsend, Judge Kate Toomey, Susan Vogel, Katy Strand (Recording Secretary), Judge Andrew Stone, Judge Amber Mettler, Judge Laura Scott, Judge Kent Holmberg, Leslie Slaugh, Trystan Smith, Paul Stancil, Dawn Hautamaki, Lauren DiFrancesco, Jim Hunnicutt, Judge Clay Stucki.

EXCUSED: Judge James Blanch, Michael Petrogeorge, Justin Toth, Lincoln Davies, Heather Snedden.

GUESTS: Chief Justice Matthew B. Durrant, Brent Johnson

STAFF: Nancy Sylvester

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(1) WELCOME AND REMARKS FROM CHIEF JUSTICE DURRANT.

Jonathan Hafen welcomed everyone to the meeting and turned the floor over to Chief Justice Matthew B. Durrant. Chief Justice Durrant thanked Barbara Townsend and Judge Kate Toomey for their service on the committee. Judge Toomey has served for 12 years, Ms. Townsend 10. He also stated the Court was consistently impressed with the results of the committee and expressed recognition for the work of the committee.

(2) APPROVAL OF MINUTES.

Mr. Hafen requested a motion on the May minutes. Judge Toomey moved to approve the minutes, Rod Andreason seconded and the motion passed.

(3) RULES 4, 11, 55 AND 63 REVIEW OF COMMENTS.

Mr. Hafen and Nancy Sylvester introduced the comments, which had been submitted on the above referenced rules. There were no comments on these rules as proposed. Judge Toomey questioned if they had correctly gone out, Ms. Sylvester confirmed they had. Leslie Slaugh pointed out that no votes were needed to approve the rules as they had been adopted on an expedited basis by the Court.

(4) Rules 101 and 105 review of comments.

Ms. Sylvester introduced the comments to the above referenced rules. She noted that the commenters addressed the policy behind the rules, which was legislatively created. The amendments were simply in conformity with that legislation. Jim Hunnicutt moved to approve Rules 101 and 105. Paul Stancil seconded and the motion passed.

(5) RULE 73 ATTORNEYS FEES, REVIEW OF COMMENTS.

Ms. Sylvester introduced the comments to Rule 73. She said that based on the comments, the committee appears to be on the right track. She noted the concerns, though with the cost of practicing law and the presumptive fee amounts in debt collection cases. Mr. Slaugh noted that the attorneys who have a large volume of these cases proposed these amounts and for the others, they still have the option of filing an affidavit. Judge Andrew Stone pointed out that if a large number of people are filing affidavits it may be worth revisiting later. Ms. Sylvester proposed reviewing the data next June.

Ms. Sylvester reported that several comments requested education of the courts and lawyers on the rule amendments. Dawn Hautamaki offered to take this to the clerks of court. Ms. Sylvester said there were also comments that the hearing requirement may be unnecessary. Susan Vogel expressed concerns that the summons appeared to require pro se litigants to answer the complaint, which may unnecessarily increase fees for litigants who don't have colorable defenses.

Regarding the need for hearing, Judge Andrew Stone noted that for efficient attorneys if there is no hearing there is little work in the undisputed case. He said the fees should be based upon efficient attorneys. Judge Clay Stucki said that $350 was the average attorney fee in his Court and noted that the filing of an answer is exceptionally rare. In the contested cases, he said the judge can help litigants understand the results and fees. He believed $350 was a fair amount, as the cost to get a judgment does not increase if the amount increases.

Judge Kent Holmberg reviewed the changes by Charles Stormont and Mark Olson. The first comment was to separate the rule at line 50 to clarify that the paragraph applied to any of the rules above. Mr. Olson proposed garnishments to a new employer should allow for an increased fee of $75. He proposed that the first line in the schedule of post judgment say: "Application for any writ under Rules 64, 64A, 64B, 64C, 64D, or 64E including 1st application for a writ under Rule 64D to any particular garnishee."

The committee reviewed several other comments in which commenters said the post judgment schedule did not allow for enough fees. The attorneys believed that the follow up calls were taking up significant time for which they should be compensated. Ms. Vogel noted that the Self-Help Center received many of these calls, and that she didn't believe the calls take much time. Mr. Hunnicutt said the first time a small employer receives a garnishment, they may have questions, but that it is uncommon. Ms. Sylvester pointed out that it is also possible in this situation to file an affidavit, just in case it is too far off. Mr. Hafen noted that although a number of the comments did not express approval of the rule, the ability to file an affidavit obviated many of the concerns expressed. Ms. Vogel also pointed out that over all defaults, the increased fees for low dollar cases would add over $3,971,000 in fees across the state and that this is not an insignificant increase.

Judge Toomey moved to make the changes proposed by Mr. Olson and Mr. Stormont. Judge Stone seconded and the motion passed.

(5) RULE 24 RESOLVING DIFFERENCES WITH URCRP 12 AND URAP 25A.

Mr. Slaugh introduced Rule 24. He said the amendments are designed to help clarify the ability to bring up constitutional questions. The rule in a uniform way provides for notice to be given to an

affected executive branch entity but does not create waivers of these claims for non-notice. Mr. Slaugh noted that the amendments meet the needs of the AG but doesn't run the risk of harming any litigant if they do it wrong, although it may slow them down pending reminder of the notification requirement. Judge Holmberg spoke with the AG's office and reported they were in support of this clarification. Ms. Vogel questioned if any pro se litigants were able to utilize this rule. Mr. Slaugh pointed out that this won't hurt their claims; judges will just reschedule the hearing as needed. Judge Toomey noted that the pro se litigants don't lose anything but time. Mr. Hunnicutt opined that most of these claims are unreasonable and typically unsuccessful, particularly in the domestic contest. He said that parties may claim constitutional issues but don't end up ultimately pursuing them.

Mr. Stancil questioned whether the committee should clarify that these are not federal statutes. This rule is mirrored on a federal statute, so this may need clarification. Mr. Hafen proposed changing the heading at paragraph (d) to "Constitutionality of Utah statutes and ordinances." Mr. Andreason expressed concern that because we do not use this term every time, this would open the door to an argument that we are referring to all statutes in every other instance. Mr. Slaugh argued that in most other areas the rules are referencing all the statutes, not only Utah statutes.

Ms. Vogel proposed editing line 12 to state "when a party to an action bases a claim or defense upon…" Mr. Andreason said the rule language is archaic, and that it should be improved. Ms. Sylvester questioned if the original language was based upon a statute. Mr. Hunnicutt proposed looking at the federal rule to more closely follow that language since it was recently revised.

Ms. Sylvester and Mr. Hafen proposed that Mr. Hunnicutt head a subcommittee to rewrite this rule for additional and clearer language using the federal rule as a template. They noted that this may also require reviewing the appellate and criminal rules.

(6) RULE 26 ASSIGNMENT OF SUBCOMMITTEE. DEADLINE FOR REPORT IS SEPTEMBER MEETING.

Mr. Hafen reported that there have been a number of requests to amend Rule 26, and since it has been 7 years since the rule overhaul, it may be a good time to reopen the rule. Mr. Slaugh pointed out that the proposed amendments are not about an overhaul, but just closing up some gaps in the rule. Judge Toomey said she believed this should be a high priority based upon the needs of the forms committee. Ms. Sylvester noted that other states have updated their discovery rules in the past 7 years.

Several members of the committee provided proposals on Rule 26. Trystan Smith, Tim Pack, and Mr. Slaugh volunteered for this committee. Mr. Andreason was assigned to chair the subcommittee. Mr. Hafen proposed asking the Bar for technical issues with Rule 26, but not to "open" the rule to the bar entirely. Mr. Hafen and Ms. Sylvester will work with the subcommittee on the language of the email to the BAr.

(7) ORDER TO SHOW CAUSE RULE: INTRODUCTION AND ASSIGNMENT OF SUBCOMMITTEE. DEADLINE FOR REPORT IS SEPTEMBER MEETING.

Mr. Hafen introduced the proposal of removing the requirement of Orders to Show Cause and turning it into general motion practice. Brent Johnson reported that there are problems with not having a consistent rule for order to show cause practice. This conflict will become an additional problem when the Licensed Paralegal Practitioner program begins. The Forms Committee attempted to create statewide forms for the LPPs to use, but there is not way to do it since the procedures statewide are inconsistent. The Forms Committee believed combining the 5th and 6th districts rules would make things more consistent. Judge Toomey pointed out that LPPs will start practicing in a year or two, and that this clarification will be essential for this new profession, as well as UVUs curriculum for this new profession. Ms. Vogel pointed out that this rule would create 2 hearings LPPs could not attend.

Mr. Slaugh is concerned with the entire idea of turning orders to show cause into motion practice, as orders to show cause are often used for non-parties over whom the court does not have jurisdiction. He does not believe a motion is the correct tool without a statutory change. Mr. Johnson pointed out that this was intended to be only to enforce existing orders. Mr. Hunnicutt expressed confusion about how this will work, as there is no notice of hearing clearly in the rule. Mr. Johnson stated this would be like motion practice, but Mr. Slaugh pointed out that the court would be required to serve notice of the hearing.

Mr. Hafen proposed creating a subcommittee to evaluate all these questions. Ms. Vogel, Mr. Hunnicutt and Judge Holmberg will be on the committee. Lauren DiFrancesco was assigned to chair the subcommittee.

(8) ADJOURNMENT.

The committee adjourned at 5:17 p.m. The next meeting will be held on September 26, 2018 in the Judicial Council Room of the Matheson Courthouse.

Tab 3

URCP Rules 5 and 109

URCP0005. Service and filing of pleadings and other papers. Amend. Paragraph (b)(3)(B) is amended to remove the requirement that a person must agree to accept service by email in order to be served by email. If a person provides an email address pursuant to Rule 10(a)(3) or Rule 76, the person may be served Rule 5 papers at that address.

Rule 5 comments: The comments to this rule fall into the following categories: 1) concerns about someone else providing a party's email address to the court or verifying the correct address; 2) who is responsible for creating the injunction; 3) too much use of email by the courts; 4) stylistic edits; and 5) support.

URCP0109. Automatic injunction in certain domestic relations cases. New. Provides that in certain domestic relations cases, an automatic injunction will enter upon the filing of the case. Its provisions address areas such as disposing of property, disturbing the peace of the other party, committing domestic violence, using the other party's identification to obtain credit, interfering with telephone or utility service, modifying insurance, and behavior around the minor children. The injunction is binding on the petitioner upon filing the initial petition and on the respondent after the filing of the initial petition and upon receipt of a signed copy of the injunction.

Rule 109 comments: The comments to this rule fall into the following categories: 1) concerns about the impact of this rule on domestic violence situations; 2) the ability to claw back" assets if a breaching spouse takes them; 3) clarification on travel with minor children: 4) the effective date of the injunction on the defendant (Rule 4 service?); 5) larger mental health policy issues surrounding domestic cases; 6) whether the necessities of life include attorney fees; and 7) support.

https://www.utcourts.gov/utc/rules-comment/2018/06/04/rules-of-civil-procedure-comment-period-closes-july-19-2018/

Comments

Lane Wood

I am extremely excited about proposed Rule 109. I think that this will save substantial time and cost in many divorce cases. I wish that Rule 109 would include a provision that expressly prohibits either party from relocating with the minor child(ren). Although this arguable constitutes "non-routine travel," I would like to see this spelled out. The exceptions to non-routine travel are too easy to get around for this to be the only thing prohibiting a relocation with the minor child.

Nancy's reply: This comment is in support of Rule 109 but requests clarification in the rule language regarding relocating with the minor children.

daniel irvin

June 4, 2018 at 11:20 pm Edit

I am not in agreement with an injunction being entered upon filing of a case as the other party may not know and then can and will be held in contempt for failing to comply with an order he had no knowledge of. We can dream that he will know or the court will be wise in the knowing part but that is only if it gets to trial or an evidentiary hearing. the injunction should enter upon either proof of service with a notice of the injuctions attached or an answer that has been filed, that way the non moving party is protected.

Nancy's reply: This comment appears to misunderstand when the injunction is effective as to the defendant in Rule 109 (" on the respondent after filing of the initial petition and upon receipt of a signed copy of the injunction"). But maybe this highlights the need to clarify the language in paragraph (d)(2).

Jeremy J.

Agreed. I think such injunctions would be useful, however they should be entered only after service is complete under Rule 4. Moreover, I believe additional notice should be required akin to the notice of disclosure requirements under Rule 26.1. Otherwise, I fear such injunctions will be deployed as traps, especially when service can be delayed for up to 120 days following filing of the divorce complaint (Rule 4(b)).

Nancy's reply: This comment also goes to when the injunction is effective and discusses problems associated with a delay in service of the complaint. This appears to highlight the need, again, for clarification at paragraph (d)(2).

Eric K. Johnson

These are both welcome changes to the Utah Rules of Civil Procedure.

Rule 5 simply brings the rules into harmony with modernity, and this will cut down on wasted time and money.

Rule 109 They will cut down on wastes of time and money on the part of the divorcing parties. This appears to be in part modeled after the California Family Codes "Automatic Temporary Restraining Orders (ATROS)", so it's not as though this is a weird or untested innovation.

Nancy's reply: This comment is in support of both rules.

mark allen

VERY IMPORTANT TO INCLUDE THIS IN FAMILY LAW.

I have had a front row seat to some of the problems associated with high conflict cases. I truly believe that it is imperative to protect the victim, but also that sometimes, the victim is actually the one using the system to victimize others. To provide remedy to the true victim, simply require all "victims" of abuse to sign "Under Penalty of Perjury" what they are attesting to is true.

The simple sentence “Under Penalty of Perjury I attest my testimony is true”, would provide recourse to those who become victimized by false allegations. In lieu of the perjury penalty, the perpetrator could then chose between mental health therapy or other agreed upon help.

I have been falsely accused by two women who had agendas. It has cost me my life savings, and its likely I will never be able to afford a house or to help my children financially. Neither women have had any monetary consequence nor have they received any mental health interventions- and so – another generation of children have to deal with emotional, verbal, and abandonment abuses and I end up paying the bill. It’s really uphill and expensive to fight false allegations, which when proven false, the court does nothing to remedy those wronged. This could easily provide recourse for those who have become the real victim of false allegations. This protects the real victims and provides a mechanism to dissuade lies from permeating family law. This alone could help speed up the backlog of court cases.

I would welcome the opportunity to shed more light on this, but truly a victim would be happy to sign a statement, and there is no penalty for those who speak truth. Family court is ripe with abuses of the system. This simple idea “Under Penalty of Perjury I attest this is true”, should be on police reports, should be on financial declarations, should be on any accusation levied against another individual.

Nancy’s reply: This comment discusses the challenges and problems associated with high conflict divorces and makes some interesting suggestions for improvements to the system. This is not quite the focus of the current inquiry surrounding Rule 109, but is something perhaps the Standing Committee on Children and Family Law should explore separately from this rule.

mark allen

After having been through the system in a High Conflict Divorce, and in hindsight as I audit mentally what took place, I believe there is an opportunity at the head end of every divorce to do something simple which could decrease court involvement and backlogging 60-80%.

The majority of High Conflict divorces are a result of mental health / personality disorders that have been undetected and untreated. The behaviors associated with this can be more readily made apparent to the court by simply designing with the assistance of a mental health practitioner- a template of “Temporary Orders”. In this template would be several orders that those with personality disorders would be likely to violate.

In the first month or two of a divorce, these “Temporary Orders” create an atmosphere for the parties to comply or not comply. If either party fails to abide by the temporary orders, its likely due to a narcisstic or borderline or sociopath personality.

In the family law system, the one who is most dysfunctional controls the costs and difficulty for the other party. Yet, if there were violated temporary orders, this would indicate to the Traditional Court that this case should be referred to a Mental Health Court, and / or, that the parties then submit to mental health screening.

The majority of cases I have been made aware of in the past 10 years post my own divorce, there are red flags from the onset that the court has not been looking for. As a result the court system gets bogged down with those with mental illness. Families are made poor. Attorneys are not made problem solvers, rather end up with a lot of billable hours, and those who need help, don't get it. The children end up suffering for decades since the family resources are consumed by the court system.

Establishing Mental Health Courts for Family Law would clean out the Traditional system by 60-80%.

Those with mental health problems could receive help. Family finances would end up benefiting children.

One other component which would not be popular for bad attorneys would be fee caps. Supposing there was a fee cap of $5k for a divorce. The attorneys then become problem solvers so each opposing attorney works hard with their clients and the system to resolve issues.

As it stands now, some attorneys stir the pot to increase billable hours. Its counterproductive and actually another form of abuse that families have to weather. The client with personality disorders can run bills up into the hundreds of thousands of dollars and destroy and make victims of the innocent.

Nancy's reply: This comment also discusses the challenges and problems associated with high conflict divorces and makes some interesting suggestions for improvements to the system. This is not quite the focus of the current inquiry surrounding Rule 109, but is something perhaps the Standing Committee on Children and Family Law should also explore separately from this rule.

Phil Casper

What if ex-wife (custody case) uses my old email address, or a fake for that matter and I am unaware of court proceedings, dont show up, and a judgement is made in my absence? How much harder to make things right after a judgement has already been made. This is not a good law. Unless the courts have a up to date (within one year) email address given by the account holder and authorized to be used at a service address, then this law just cannot be.

Nancy's reply: This comment appears to misunderstand the language of Rule 5 (b)(3)(B). Rule 4 service still applies when a case is initiated by ex-wife. Subsequent proceedings will provide for service by email, but only if the person receiving the email actually provides it. Under this language, "A paper is served under this rule by...

emailing it to the most recent email address provided by the person pursuant to Rule 10(a)(3) or Rule 76," ex-wife would not be able to provide the email address because the ex-husband would be providing his own email address in the caption or as an update to the clerk of court.

Steve Oliphant

Do "the necessities of life" include attorney fees? see Rule 109(b)(1).

Nancy's reply: This comment raises an interesting point about the ability to transfer property in order to pay for attorney fees. I suspect the commenter is implying the attorney fees associated with the domestic action. This is a question the committee should consider for clarification purposes.

Suzanne marelius

I support the proposed Rule 109 and would like included that no parent can use a child's image on social media blogs or promotions such as "Go Fund Me" accounts which directly links the child to the divorce conflict. I think Commissioner Patton has required this type of initial restraint in his Court for quite some time –its a good idea.

Nancy's reply: This comment is in support and suggests an addition with respect to using a child's image on social media or fundraising accounts in relation to the high conflict divorce. This is an interesting suggestion and appears to fall under paragraph (c). This is likely not a policy call for the Civil Rules Committee but should go back to the Standing Committee on Children and Family Law.

James Mcintyre

I support the concept, but I see a problem with implementation. Does this rule contemplate that each practitioner ,or pro se party, prepare an injunction in conformity with Rule 109 and send it to the court and serve it with the petition. Don't know if anyone else sees a potential problem, but my experience with pro se litigants and even some lawyers is lack of clarity and an unclear injunction simply can't be enforced. My proposal would be to have the committee draft a proposed form injunction to be used in every case and if we need more ask for it separately.

Nancy's reply: Both committees identified this issue and the clerks of court recently drilled down on it. The proposal at this point is to have a standing order signed by the presiding judge in each district that is generated when the petitioner files. The petitioner will then be responsible for providing that copy to the respondent.

Justin D. Caplin

I agree with this. There needs to be a standard form.

Nancy's reply: This comment agrees with the last and there appears to be a solution on the table as I mentioned above.

Thomas Rossa

Regarding RULE 5 Service by e mail without acknowledgment of receipt or authority to do so from the addressee leaves too much room for abuse by the sender. And it assumes too much. While in normal circumstances, the rule makes sense and should work well, the rule must recognize that there are unusual circumstances that will lead to difficulties and Rambo litigators that will look for ways to abuse the system and the recipient.

Nancy's reply: This comment makes an interesting suggestion with respect to the collection and use of email addresses under Rule 5. We may consider adding some language to paragraph (b)(3)(B) that requires verification of a litigants' email as follows: emailing it to the most recent *verified* 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."

J. Cannell

I support what Rule 109 is trying to accomplish, but I am concerned that the automatic entry of an injunction without the exercise of any judicial discretion is more substantive than being merely procedural and should be mirrored by legislation that makes the specific actions being prevented independently unlawful. In addition, It would be helpful to employ some type of "clawback" provision that allows the return of assets to the marital estate so that an innocent spouse has some resources available despite a breaching spouse wrongfully dissipating or encumbering marital property. This could be similar to how the bankruptcy process allows for recovery of fraudulent conveyances. I again see the need for Rule 109, but if it is not backed up with the ability to recover/restore property then it will end up much like other hollow judgments when no other assets are available to equalize among the parties.

Nancy's reply: Judge Cannell comments that an automatic injunction may be more substantive than procedural without the accompanying exercise of judicial discretion over its terms. He also comments that the injunction will be hollow or meaningless without some way for the innocent spouse to recover assets dissipated while it is in effect. These are both good points.

Ronni B Adams

I agree, this rule needs to have some teeth to support it, otherwise it won't do much good.

Nancy's reply: This comment agrees with Judge Cannell's about the recovery of assets.

Ronni B Adams

Please include something in this rule that states rent/house payments should be maintained as well.

Nancy's reply: This comment requests the addition of rent/house payments to Rule 109(b)(6). This is a good suggestion. I have proposed some language in the rule.

Nathan Whittaker

Regarding Rule 5:

Lines 39–40: Consider changing "pursuant to Rule 10(a)(3) or Rule 76" to "to the court", as it is more straightforward and simple—any email address provided to the court will necessarily comply with those rules. See Kimble, Guiding Principles for Restyling the Civil Rules, at xv & xvii (available at http://www.utcourts.gov/committees/civproc/Style%20Guidelines.pdf (pages 11–21)) (stating stylistic preference for minimizing cross-references, especially those that are redundant or self-evident).

Lines 39–40: If the committee prefers keeping the cross-references, consider changing "pursuant to" to "under". See Garner, Guidelines for Drafting and Editing Court Rules, 4.6. Also, possibly consider changing "Rule 10(a)(3) or Rule 76" to Rules 10(a)(3) or 76" as it is shorter.

Lines 39–41: Possibly consider breaking into subparts like so:

(b)(3)(B) emailing it to—

(b)(3)(B)(i) the most recent email address provided by the person to the court; or

(b)(3)(B)(ii) the email address on file with the Utah State Bar;

The following are not relevant to the amendment, but I just saw them as I was reviewing it and thought I'd mention them:

• The spelling of the word "email" is not consistent in the rules—it is "email" in rules 5, 7, and 58A, and "e-mail" in rule 76.

• On line 28, the word "if" should probably have a colon after it. While some authorities state that a colon should only be used in setting off a list if the clause preceding it is an independent clause (otherwise, an em-dash or nothing at all should be used), this convention is not followed by the federal rules or elsewhere in the state rules (see, e.g., line 36).

Nancy's reply: I have made the suggested stylistic edits to Rule 5 but used brackets to indicate where the committee should choose the best style among the choices given. Rule 76 should probably be updated to be consistent with the other rules that use the term "email."

Al Black

As for Rule 109, we should allow for rent and/or mortgage payments to not be disrupted until the parties have to time to have a hearing on it and knowing that financial abuse exists in up to 99% of all domestic violence cases.

Also, we should not restrict people's liberties to travel for safety reasons to their support systems and have the full faith and credit act for reasons to allow for this. There can be later hearings where custody orders can be ironed out and children need to be protected from domestic violence. It's common that abusers purposely isolate their victims from their support systems and take them away from those supports. Research shows time and again how much domestic violence impacts children.

Nancy's reply: This comment agrees with a prior one about adding rent/house payments to Rule 109(b)(6). I have proposed some language to address it. Regarding the ability to travel, I *think* this paragraph addresses the concern: "(g) Separate conflicting order. Any separate order governing the parties or their minor children will control over conflicting provisions of this injunction." This paragraph goes to a separate protective order, for example, which may discuss travel. The committee should discuss whether this is adequate to address the commenter's concern.

Emily Nuvan

Regarding Rule 109:

I was asked by some of the committee members to suggest that this rule also include a provision that would address the use of technology and smart home features that can be used to harass or intimidate partners in domestic disputes and divorces. Here is a link to an article from the NY Times that details how the rise in popularity of these types of products is also leading to a rise in their use in domestic abuse incidents.

https://www.nytimes.com/2018/06/23/technology/smart-home-devices-domestic-abuse.html

Nancy's reply: This comment was raised in a presentation to SJ Quinney Law students. I asked that Ms. Nuvan add it to the comments since it is relevant to this discussion. I have proposed some language in paragraph (b)(2) in response.

Gregory B. Wall

I receive anywhere from 50 to 100 emails per day. The last thing I need, and this reflects the opinion of everyone in our firm, is more emails. I am already annoyed that the court feels it okay to send out hearing notes by email instead of mailing them. Not all emails are able to be ready, or they get lost in another file, yet the court clerks send out important notices via email. Not acceptable. Is there some reason the court cannot use Judicial Link like everyone else? Now you want to add even more email to all of the junk that comes in. Again, not acceptable. Who came up with this idea? Just because such a thing as email exists doesn't mean it is an acceptable or the most efficient means of sending notices, pleadings, etc. Just because it exists doesn't mean it should be used for every purpose you can conceive of. This is a bad idea.

Nancy's reply: This comment raises concerns about the amount of email attorneys received. These concerns are well taken. All of us receive far too many emails

and it is difficult to stay on top of the most important items. It is my understanding that the CORIS group has been working to minimize the amount of redundant emails sent to attorneys. With respect to hearing notices being sent by email, there are ways to address the potential for them being buried by setting up good email filters. Judicial Link, by the way, is a private e-filing service provider.

With regard to the rule itself, the amendments in Rule 5 address pro se parties being served by email, not attorneys. The rule already captures attorneys in the current language, "A paper is served under this rule by emailing it to the email address on file with the Utah State Bar." Perhaps Mr. Wall's concerns also go to service of pro se parties by email, but it's not entirely clear from my reading of his comment.

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

(b)(3)(B)(i) the most recent email address provided by the person [to the court] [under Rule 10(a)(3) or Rule 76], or

(b)(3)(B)(ii) 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.

Advisory Committee Notes

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. The court may order a party who violates this provision to return the property to the marital estate.

(b)(2) Neither party may, through electronic or other means, disturb the peace of, ~~or~~ harass, or intimidate 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 mortgage or rent payments, 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 relocation or 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 [with the initial petition].

(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.

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: September 24, 2018
Re: Rule 73 and Attorney Fees

As you are aware, the committee recently amended Rule 73 and the Supreme Court approved its amendments effective November 1. But when I ran the rule by the clerks of court right after it was approved, they pointed out some concerns with paragraph (f)(3). They thought (f)(3)(B) should clarify that a motion filed with respect to attorney fees is pursuant to Rule 7. I don't think that's controversial per se. But in the next few lines, they had a concern with the term "augmented" with respect to judgments and attorney fees. There was a discussion about whether the language should be "augmented," "amended according to Rule 54(e)" or "modified." An email discussion on this is below. The committee should decide whether to amend the rule again or allow it to be adopted effective November 1 without further changes.

(f)(3) **Post Judgment Collections.** When a party has established its entitlement to attorney fees under any paragraph of this Rule, and subsequently:

(f)(3)(A) applies for any writ pursuant to Rules 64, 64A, 64B, 64C, 64D, *or* 64E*; or*

(f)(3)*(B) files a motion under Rule 7 pursuant to Rules 64(c)(2) or 58C or pursuant to Utah Code § -35A-4-314,*

a party may request as part of its application for the writ or motion that its judgment be ~~augmented~~amended/modified according to Rule 54(e) and the following schedule, and the clerk or the court shall allow such augmented attorney fees request without a supporting affidavit if it approves the writ or motion:

Email discussion

Charles Stormont

My initial reaction is that the proposed amendments are unnecessary, but also not controversial. If it allows buy-in and aids the clerks' ability to seamlessly consider requests to increase attorney's fees, that seems like an adjustment we should try to implement.

If Mark has other thoughts, I'm happy to consider those and weigh in. Thank you for passing this feedback on.

Nancy Sylvester

Judge Parker and I just spoke and it sounds like there has been some controversy with the term "augment" because the bench has gotten frequent requests for automatic augmentation of the judgment in post-judgment collection efforts and the bench is not inclined to grant those requests because of the lack of process. It seems like the clerks have the right idea by referring to Rule 54(e) and modification of the judgment in (f)(3). So as I understand it, the term "augment" as it's used under (f) would refer to pre-judgment attorney fees when an affidavit is submitted and "amend pursuant to Rule 54(e)" would refer to post-judgment attorney fees in (f)(3).

Mark Olson

I'm not necessarily opposed to the proposed change, but I don't think it is necessary.

Rule 54(e) appears to require that an amended judgment be filed after any award of attorney fees pursuant to Rule 73, including post-judgment awards. My understanding is that the rule is typically used in (and was probably intended to cover) situations where attorney fees are incurred pre-judgment, but not ascertained until after judgment is entered. I'm not sure anyone has considered the requirement to file and serve an amended judgment in this situation, but the requirement appears to already be there. I don't know that the proposed change adds anything.

As for attorneys requesting "automatic augmentation" I had no idea what you were referring to until I spoke to my partner. Apparently, some attorneys are adding language to the bottom of their judgments purporting to allow "automatic" augmentation. It has been a long-standing practice to include language indicating that a judgment may be augmented for post-judgment fees (primarily to put the judgment debtor on notice), but we were still required to file a motion pursuant to Rule 73 to have any fees granted. This is the first I have heard of attorneys slipping in the word "automatic." If those attorneys are subsequently adding and collecting post-judgment attorney fees without seeking approval from the court they are violating the rules.

If the proposed change is being made to address that situation, I feel it is the wrong approach. The situation could be fixed if judges would disallow any language purporting to allow "automatic" augmentation, just as they would not allow any other self-serving language that clearly has no statutory or rule-based justification.

As for your comments on the definition of "augment" in rule 73(f), I have a different understanding. I feel the term "augment" in Rule 73(f) clearly refers strictly to post-judgment fees, both by definition and by usage; i.e., it refers to augmentation of fees already awarded under the rule. In fact, it is that paragraph that provides grounds for relief anytime a party elects to file a post-judgment motion to augment in lieu of using the post-judgment fee schedule. Likewise, the word augment (if retained) in 73(f)(3) would also refer to post-judgment fees, those fees awarded under the post-judgment fee schedule.

Rule 73. Attorney fees.

(a) Time in which to claim. Attorney fees must be claimed by filing a motion for attorney fees no later than 14 days after the judgment is entered, except as provided ~~unless the party claims attorney fees in accordance with the schedule~~ in paragraph (f) of this Rule, or in accordance with Utah Code § ~~Section~~ 75-3-718, and no objection to the fee has been made.

(b) Content of motion. The motion must:

(b)(1) specify the judgment and the statute, rule, contract, or other basis entitling the party to the award;

(b)(2) disclose, if the court orders, the terms of any agreement about fees for the services for which the claim is made;

(b)(3) specify factors showing the reasonableness of the fees, if applicable;

(b)(4) specify the amount of attorney fees claimed and any amount previously awarded; and

(b)(5) disclose if the attorney fees are for services rendered to an assignee or a debt collector, the terms of any agreement for sharing the fee and a statement that the attorney will not share the fee in violation of Rule of Professional Conduct 5.4.

(c) Supporting affidavit. The motion must be supported by an affidavit or declaration that reasonably describes the time spent and work performed, including for each item of work the name, position (such as attorney, paralegal, administrative assistant, etc.) and hourly rate of the persons who performed the work, and establishes that the claimed fee is reasonable.

(d) Liability for fees. The court may decide issues of liability for fees before receiving submissions on the value of services. If the court has established liability for fees, the party claiming them may file an affidavit and a proposed order. The court will enter an order for the claimed amount unless another party objects within 7 days after the affidavit and proposed order are filed.

(e) Fees claimed in complaint. If a party claims attorney fees under paragraph (f), the complaint must state the basis for attorney fees~~, state the amount of attorney fees allowed by the schedule~~, cite the law or attach a copy of the contract authorizing the award, and~~, if the attorney fees are for services rendered to an assignee or a debt collector,~~ state~~a statement~~ that the attorney will not share the fee in violation of Rule of Professional Conduct 5.4.

(f) ~~Schedule of f~~Fees. Attorney fees awarded under ~~the schedule~~this Rule may be augmented ~~only for considerable additional efforts in collecting or defending the judgment and only after further order of the court~~upon submission of a motion and supporting affidavit meeting the requirements of paragraphs (b) and (c) of this Rule within a reasonable time after the fees were incurred, except as provided in paragraphs (f)(1), (f)(2) and (f)(3) of this Rule, and only where the augmented fees sought exceed those already awarded.

~~Amount of Damages, Exclusive of Costs, Attorney Fees and Post-Judgment Interest, Between~~	~~and:~~	~~Attorney Fees Allowed~~

~~0.00~~	~~1,500.00~~	~~250.00~~
~~1,500.01~~	~~2,000.00~~	~~325.00~~
~~2,000.01~~	~~2,500.00~~	~~400.00~~
~~2500.01~~	~~3,000.00~~	~~475.00~~
~~3000.01~~	~~3,500.00~~	~~550.00~~
~~3500.01~~	~~4,000.00~~	~~625.00~~
~~4,000.01~~	~~4,500.00~~	~~700.00~~
~~4,500.01~~	~~or more~~	~~775.00~~

(f)(1) Fees upon entry of uncontested judgment. When a party seeks a judgment~~-~~, the responding party does not contest entry of judgment by presenting at a hearing either evidence or argument, and the party seeking the judgment has complied with paragraph (e) of this Rule, the request for judgment may include a request for attorney fees, and the clerk or the court shall allow any amount requested up to $350.00 for such attorney fees without a supporting affidavit.

(f)(2) **Fees upon entry of judgment after contested proceeding.** When a party seeks a judgment, the responding party contests the judgment by presenting at a hearing either evidence or argument, and the party seeking the judgment has established its right to attorney fees, the request for judgment may include a request for attorney fees, and the clerk or the court shall allow any amount requested up to $750 for such attorney fees without a supporting affidavit.

(f)(3) **Post Judgment Collections.** When a party has established its entitlement to attorney fees under any paragraph of this Rule, and subsequently:

(f)(3)(A) applies for any writ pursuant to Rules 64, 64A, 64B, 64C, 64D, or 64E; or

(f)(3)(B) files a motion under Rule 7 pursuant to Rules 64(c)(2) or 58C or pursuant to Utah Code § -35A-4-314,

a party may request as part of its application for the writ or motion that its judgment be ~~augmented~~amended/modified according to Rule 54(e) and the following schedule, and the clerk or the court shall allow such augmented attorney fees request without a supporting affidavit if it approves the writ or motion:

Action	Attorney Fees Allowed
Application for any writ under Rules 64, 64A, 64B, 64C, or 64E, and 1st application for a writ under Rule 64D to any particular garnishee.~~Application for any writ under Rule 64, including 1st application for a writ under Rule 64D~~	$75.00
Any subsequent application for a writ under Rule 64D to the same garnishee	$25.00
Any motion filed with the court under Rule 64(c)(2), Utah Code	$75.00

Action	Attorney Fees Allowed
Application for any writ under Rules 64, 64A, 64B, 64C, or 64E, and 1st application for a writ under Rule 64D to any particular garnishee.~~Application for any writ under Rule 64, including 1st application for a writ under Rule 64D~~	$75.00
~~Ann~~ § 35A-4-314, or Rule 58C	
Any subsequent motion under Rule 64(c)(2), Utah Code § ~~Ann~~ 35A-4-314, or Rule 58C filed within 6 months of the previous motion	$25.00

(f)(4) **Fees in excess of the schedule.** If a party seeks attorney fees in excess of the amounts set forth in paragraphs (f)(1), (f)(2), or (f)(3) of this Rule, the party shall comply with paragraphs (a) through (c) of this Rule.

(f)(5) **Objections.** Nothing in this paragraph shall be deemed to eliminate any right a party may have to object to any claimed attorney fees.

Advisory Committee Notes.

To substitute the current Advisory Committee Notes:

2018 Advisory Committee Notes

An overwhelming number of cases filed in the courts, especially debt collection cases, result in the entry of an uncontested judgment. The work required in most cases to obtain an uncontested judgment does not typically depend on the amount at issue. As such, the prior schedule of fees based on the amount of damages has been eliminated, and instead replaced by a single fee upon entry of an uncontested judgment that is intended to approximate the work required in the typical case. A second amount is provided where the case is contested and fees are allowed, again in an effort to estimate the typical cost of litigating such cases. Where additional work is required to collect on the judgment, the revised rule provides a default amount for writs and certain motions and eliminates the “considerable additional efforts” limitation of the prior rule. It also recognizes that defendants often change jobs, and thus provides for such default amounts to vary depending on whether a new garnishee is required to collect on the outstanding amount of the judgment. Thus, the amended rule attempts to match the scheduled amounts to the work required of attorneys, rather than tying the scheduled amounts solely to the damages claimed. But the rule remains flexible so that when attorney fees exceed the scheduled amounts, a party remains free to file an affidavit requesting appropriate fees in accordance with the rule.

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: September 24, 2018
Re: Civil Rule 58A and Appellate Rule 4

At a meeting last spring with the Supreme Court, the Court initiated a discussion with Jonathan Hafen, Paul Burke, and staff to the Civil and Appellate Rules Committees regarding the interplay of Appellate Rule 4(b)(1)(F) and Civil Rule 58A(f) and the Court of Appeals' interpretation of those rules in *McQuarrie v. McQuarrie*, 2017 UT App 209.[1] A working group composed of Paul Burke, Judge Amber Mettler, Rod Andreason, and Alan Mouritsen drafted the attached Rule of Civil Procedure 58A and Rule of Appellate Procedure 4 in response. The following is background provided to the committee at our May 2018 meeting.

Background

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 Utah Court of Appeals dismissed the appeal. The court held that:

1. Under Appellate Rule 4(b)(1)(F), if a notice of appeal is filed after entry of a judgment but before the entry of an order resolving a post-judgment motion for attorney fees, the notice of appeal will relate forward to the date the motion for fees is resolved. Utah R. Civ. P. 58A(f) is meant to address those situations in which a party files a post-judgment motion for attorney fees.
2. But an order that by its own terms awards attorney fees with an amount to be determined at a later date is not final and appealable because it contemplates additional actions by the parties in order to resolve issues

[1] The Court of Appeals last week affirmed its interpretation of these rules in *Chaparro v. Torero*, 2018 UT App 181. This suggests a basis for recommending to the Supreme Court expedited adoption of draft Civil Rule 58A and Appellate Rule 4.

> still in dispute. There was no final, appealable order, so the Court did not have jurisdiction over the appeal.

As Mr. Burke put it to the Court, there currently exists "a trap for the diligent" in these two rules since, in a situation like *McQuarrie*, a party would have no choice but to appeal from the attorney fees order because it's not clear whether the time for appeal has started to run. The proposed solution to this issue is to clarify that "under Rule of Appellate Procedure 4, the time in which to file the notice of appeal runs from the disposition of the motion or claim if the court extends the time to appeal before the expiration of the time prescribed by Rule of Appellate Procedure 4."

A 2015 memo that discusses the genesis for the 2016 amendments to these two rules is found in the May committee materials under this topic.

Rule 58A. Entry of judgment; abstract of judgment.

(a) Separate document required. Every judgment and amended judgment must be set out in a separate document ordinarily titled “Judgment”—or, as appropriate, “Decree.”

(b) Separate document not required. A separate document is not required for an order disposing of a post-judgment motion:

(b)(1) for judgment under Rule 50(b);

(b)(2) to amend or make additional findings under Rule 52(b);

(b)(3) for a new trial, or to alter or amend the judgment, under Rule 59;

(b)(4) for relief under Rule 60; or

(b)(5) for attorney fees under Rule 73.

(c) Preparing a judgment.

(c)(1) Preparing and serving a proposed judgment. The prevailing party or a party directed by the court must prepare and serve on the other parties a proposed judgment for review and approval as to form. The proposed judgment shall be served within 14 days after the jury verdict or after the court’s decision. If the prevailing party or party directed by the court fails to timely serve a proposed judgment, any other party may prepare a proposed judgment and serve it on the other parties for review and approval as to form.

(c)(2) Effect of approval as to form. A party’s approval as to form of a proposed judgment certifies that the proposed judgment accurately reflects the verdict or the court’s decision. Approval as to form does not waive objections to the substance of the judgment.

(c)(3) Objecting to a proposed judgment. A party may object to the form of the proposed judgment by filing an objection within 7 days after the judgment is served.

(c)(4) Filing proposed judgment. The party preparing a proposed judgment must file it:

(c)(4)(A) after all other parties have approved the form of the judgment; (The party preparing the proposed judgment must indicate the means by which approval was received: in person; by telephone; by signature; by email; etc.)

(c)(4)(B) after the time to object to the form of the judgment has expired; (The party preparing the proposed judgment must also file a certificate of service of the proposed judgment.) or

(c)(4)(C) within 7 days after a party has objected to the form of the judgment. (The party preparing the proposed judgment may also file a response to the objection.)

(d) Judge's signature; judgment filed with the clerk. Except as provided in paragraph (h) and Rule 55(b)(1) all judgments must be signed by the judge and filed with the clerk. The clerk must promptly record all judgments in the docket.

(e) Time of entry of judgment.

(e)(1) If a separate document is not required, a judgment is complete and is entered when it is signed by the judge and recorded in the docket.

(e)(2) If a separate document is required, a judgment is complete and is entered at the earlier of these events:

(e)(2)(A) the judgment is set out in a separate document signed by the judge and recorded in the docket; or

(e)(2)(B) 150 days have run from the clerk recording the decision, however designated, that provides the basis for the entry of judgment.

(f) Award of costs or attorney fees. ~~A motion or claim for attorney fees does not affect the finality of a judgment for any purpose, but under Rule of Appellate Procedure 4, the time in which to file the notice of appeal runs from the disposition of the motion or claim~~ Ordinarily the entry of judgment is not delayed, nor is the time for appeal extended, by a claim for costs or motion for attorney fees. But the court may, upon motion or its own initiative, extend the time for appeal pursuant to Rule 4(b)(1)(F) of the Utah Rules of Appellate Procedure by acting before a notice of appeal has been filed and becomes effective.

(g) Notice of judgment. The party preparing the judgment shall promptly serve a copy of the signed judgment on the other parties in the manner provided in Rule 5 and promptly file proof of service with the court. Except as provided in Rule of Appellate Procedure 4(g), the time for filing a notice of appeal is not affected by this requirement.

(h) Judgment after death of a party. If a party dies after a verdict or decision upon any issue of fact and before judgment, judgment may nevertheless be entered.

(i) Judgment by confession. If a judgment by confession is authorized by statute, the party seeking the judgment must file with the clerk a statement, verified by the defendant, as follows:

(i)(1) If the judgment is for money due or to become due, the statement must concisely state the claim and that the specified sum is due or to become due.

(i)(2) If the judgment is for the purpose of securing the plaintiff against a contingent liability, the statement must state concisely the claim and that the specified sum does not exceed the liability.

(i)(3) The statement must authorize the entry of judgment for the specified sum.

The clerk must sign the judgment for the specified sum.

(j) Abstract of judgment. The clerk may abstract a judgment by a signed writing under seal of the court that:

(j)(1) identifies the court, the case name, the case number, the judge or clerk that signed the judgment, the date the judgment was signed, and the date the judgment was recorded in the registry of actions and the registry of judgments;

(j)(2) states whether the time for appeal has passed and whether an appeal has been filed;

(j)(3) states whether the judgment has been stayed and when the stay will expire; and

(j)(4) if the language of the judgment is known to the clerk, quotes verbatim the operative language of the judgment or attaches a copy of the judgment.

Rule 4. Appeal as of right: when taken.

(a) Appeal from final judgment and order. In a case in which an appeal is permitted as a matter of right from the trial court to the appellate court, the notice of appeal required by Rule 3 shall be filed with the clerk of the trial court within 30 days after the date of entry of the judgment or order appealed from. However, when a judgment or order is entered in a statutory forcible entry or unlawful detainer action, the notice of appeal required by Rule 3 shall be filed with the clerk of the trial court within 10 days after the date of entry of the judgment or order appealed from.

(b) Time for appeal extended by certain motions.

(b)(1) If a party timely files in the trial court any of the following, the time for all parties to appeal from the judgment runs from the entry of the dispositive order:

(b)(1)(A) A motion for judgment under Rule 50(b) of the Utah Rules of Civil Procedure;

(b)(1)(B) A motion to amend or make additional findings of fact, whether or not an alteration of the judgment would be required if the motion is granted, under Rule 52(b) of the Utah Rules of Civil Procedure;

(b)(1)(C) A motion to alter or amend the judgment under Rule 59 of the Utah Rules of Civil Procedure;

(b)(1)(D) A motion for a new trial under Rule 59 of the Utah Rules of Civil Procedure;

(b)(1)(E) A motion for relief under Rule 60(b) of the Utah Rules of Civil Procedure if the motion is filed no later than 28 days after the judgment is entered;

(b)(1)(F) A motion or claim for attorney fees under Rule 73, or a claim for costs under Rule 54 of the Utah Rules of Civil Procedure, but only if the district court extends the time for appeal under Rule 58A(f)of the Utah Rules of Civil Procedure; or

(b)(1)(G) A motion for a new trial under Rule 24 of the Utah Rules of Criminal Procedure.

(b)(2) A notice of appeal filed after announcement or entry of judgment, but before entry of an order disposing of any motion listed in paragraph (b), shall be treated as filed after entry of the order and on the day thereof, except that such a notice of appeal is effective to appeal only from the underlying judgment. To appeal from a final order disposing of any motion listed in paragraph (b), a party must file a notice of appeal or an amended notice of appeal within the prescribed time measured from the entry of the order.

(c) Filing prior to entry of judgment or order. A notice of appeal filed after the announcement of a decision, judgment, or order but before entry of the judgment or order shall be treated as filed after such entry and on the day thereof.

(d) Additional or cross-appeal. If a timely notice of appeal is filed by a party, any other party may file a notice of appeal within 14 days after the date on which the first notice of appeal was filed, or within the time otherwise prescribed by paragraphs (a) and (b) of this rule, whichever period last expires.

(e) Motion for extension of time.

(e)(1) The trial court, upon a showing of good cause, may extend the time for filing a notice of appeal upon motion filed before the expiration of the time prescribed by paragraphs (a) and (b) of this rule. Responses to such motions for an extension of time are disfavored and the court may rule at any time after the filing of the motion. No extension shall exceed 30 days beyond the prescribed time or 14 days beyond the date of entry of the order granting the motion, whichever occurs later.

(e)(2) The trial court, upon a showing of good cause or excusable neglect, may extend the time for filing a notice of appeal upon motion filed not later than 30 days after the expiration of the time prescribed by paragraphs (a) and (b) of this rule. The court may rule at any time after the filing of the motion. That a movant did not file a notice of appeal to which paragraph (c) would apply is not relevant to the determination of good cause or excusable neglect. No extension shall exceed 30

days beyond the prescribed time or 14 days beyond the date of entry of the order granting the motion, whichever occurs later.

(f) Motion to reinstate period for filing a direct appeal in criminal cases. Upon a showing that a criminal defendant was deprived of the right to appeal, the trial court shall reinstate the thirty-day period for filing a direct appeal. A defendant seeking such reinstatement shall file a written motion in the sentencing court and serve the prosecuting entity. If the defendant is not represented and is indigent, the court shall appoint counsel. The prosecutor shall have 30 days after service of the motion to file a written response. If the prosecutor opposes the motion, the trial court shall set a hearing at which the parties may present evidence. If the trial court finds by a preponderance of the evidence that the defendant has demonstrated that the defendant was deprived of the right to appeal, it shall enter an order reinstating the time for appeal. The defendant's notice of appeal must be filed with the clerk of the trial court within 30 days after the date of entry of the order.

(g) Motion to reinstate period for filing a direct appeal in civil cases.

(g)(1) The trial court shall reinstate the thirty-day period for filing a direct appeal if the trial court finds by a preponderance of the evidence that:

(g)(1)(A) The party seeking to appeal lacked actual notice of the entry of judgment at a time that would have allowed the party to file a timely motion under paragraph (e) of this rule;

(g)(1)(B) The party seeking to appeal exercised reasonable diligence in monitoring the proceedings; and

(g)(1)(C) The party, if any, responsible for serving the judgment under Rule 58A(d) of the Utah Rules of Civil Procedure did not promptly serve a copy of the signed judgment on the party seeking to appeal.

(g)(2) A party seeking such reinstatement shall file a written motion in the trial court within one year from the entry of judgment. The party shall comply with Rule 7 of the Utah Rules of Civil Procedure and shall serve each of the parties in accordance with Rule 5 of the Utah Rules of Civil Procedure.

(g)(3) If the trial court enters an order reinstating the time for filing a direct appeal, a notice of appeal must be filed within 30 days after the date of entry of the order.

Advisory Committee Note

Paragraph (f) was adopted to implement the holding and procedure outlined in Manning v. State, 2005 UT 61, 122 P.3d 628.

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: September 21, 2018
Re: Civil Rule 24

A subcommittee consisting of representatives from the Appellate, Criminal, and Civil Procedures Committees studied 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.

This committee approved the subcommittee's proposed amendments at its June 2018 meeting but put the rule on hold until September pending incorporation of federal rule 24's language, which has been streamlined.

The draft rule with the federal amendments incorporated is attached to this memorandum. The primary language differences between the federal rule and Utah's rule is that the federal rule requires intervention by motion, versus application in Utah, and replaces "shall" with "must" throughout.

Jim Hunnicutt and I have two questions for the committee:

1) In paragraph 2, how much of this language about federal law and executive orders should stay; and
2) Rule 4(d)(1)(F) et seq. provides a variety of rules for serving different types of governmental entities when commencing a lawsuit against them. Rule 24 never went into that level of detail, but should it? Is it possible that a school board, for example, might issue a rule that is unconstitutional and that rule is then challenged in the district court?

Rule 24. Intervention. (Paragraphs (a)-(c) include the federal language incorporated.)

(a) Intervention of right. ~~Upon.~~ On timely ~~application~~ motion, the court must permit anyone ~~shall be permitted~~ to intervene ~~in an action:~~ who:

(1) ~~when a statute confers~~ is given an unconditional right to intervene by a statute; or

(2) ~~when the applicant~~ claims an interest relating to the property or transaction ~~which~~that is the subject of the action, and ~~the applicant~~ is so situated that ~~the disposition~~disposing of the action may as a practical matter impair or impede the ~~applicant's~~movant's ability to protect ~~that~~its interest, unless ~~the applicant's interest is adequately represented by~~ existing parties adequately represent that interest.

(b) Permissive intervention. ~~Upon.~~

(1) In General. On timely ~~application~~ motion, the court may permit anyone ~~may be permitted~~ to intervene ~~in an action: (1) when a statute confers~~who:

(A) is given a conditional right to intervene by a statute; or ~~(2) when an applicant's~~

(B) has a claim or defense ~~and~~that shares with the main action ~~have~~ a common question of law or fact ~~in common. When a party to an action bases~~.

(2) By a Government Officer or Agency. On timely motion, the court may permit a federal or state governmental officer or agency to intervene if a party's claim or defense ~~upon any~~is based on:

(A) a statute or executive order administered by ~~a governmental~~the officer or agency; or ~~upon~~

(B) any regulation, order, requirement, or agreement issued or made ~~pursuant to~~under the statute or executive order~~, the officer or agency upon timely application may be permitted to intervene in the action.~~.

(3) Delay or Prejudice. In exercising its discretion, the court ~~shall~~must consider whether the intervention will unduly delay or prejudice the adjudication of the ~~rights of the~~ original ~~parties~~parties' rights.

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

(d) Constitutionality of Utah statutes and ordinances. [This paragraph is not in FRCP024.)

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

(d)(1)(A) **Form and Content**. The notice must (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 must 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 must 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

(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~~ must notify the district attorney, county attorney, or municipal attorney of such fact. The procedures will be as provided in paragraphs (d)(1)(A), (d)(1)(B), and (d)(1)(C) except that service must be on the individual county or municipality. The court ~~shall~~ must permit the county or municipality to be heard upon timely ~~application~~motion.

(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. It is the party's responsibility to find and use the correct email address for the relevant district attorney and county attorney or municipal attorney, or if circumstances prevent service by email, it is the party's responsibility to find and use the correct mailing address.

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: September 19, 2018
Re: Rules 4 and Acceptance of Service

The following is provided by Justin Toth, chairman of the Rule 4 subcommittee. The members comprising the subcommittee include Judge Laura Scott, Lauren DiFrancesco, and Susan Vogel.

> The subcommittee was asked to look at possible revisions to Utah Rule of Civil Procedure 4, including subsection (d)(1) (Personal service) and subsection (d)(3) (Acceptance of service). We have also sought input from certain process servers identified by Nancy Sylvester, although we have not heard back from them yet. The questions initially considered by the subcommittee included (1) whether electronic service should be treated as "personal service" under URCP 4(d)(1) and (2) whether and what types of electronic service would be permissible under URCP 4(d)(3).
>
> To begin, the subcommittee concluded that electronic service, by text, email or other social media, should not be recommended as an amendment to URCP 4(d)(1). After discussion and input from the members, the subcommittee concluded that electronic service of process should not be permitted as "personal service" because of the unreliability of establishing e-mail addresses, cell phone numbers, and social media accounts as points of delivery for process. The subcommittee observed that each of these electronic mediums are often cancelled (either voluntarily or involuntarily), changed or not regularly used to make them appropriate to assume that delivery to the electronic medium is actually delivery to the individual identified in the summons under URCP 4(c). The subcommittee believes that, if a putative defendant is avoiding service, or otherwise cannot be located, the preferred procedure for obtaining service through electronic mediums is to file a "motion for alternative service" with the court and obtain judicial approval for such

service on a case-by-case basis. To generally allow "electronic service" as personal service is subject to abuse by parties and process servers alike. It is also more like to have a disparate negative impact on low-income or ESL populations. The subcommittee wanted to bring this recommendation in front of the entire Advisory Committee for comment.

With regard to "acceptance of service," the subcommittee concluded that it is appropriate for a person to accept service by any electronic medium under URCP 4(d)(3). That acceptance, however, should reflect a knowing receipt of process and should provide information sufficient to establish proof of service under URCP 4(e). The subcommittee had concerns that communications from process servers and others not assume any imprimatur of the Utah courts or other governmental agency. We believe that is best addressed in the Advisory Committee notes, rather than amendment to URCP 4(d)(3) itself, but wanted more input from the entire Advisory Committee. Judge Scott observed that some other members of the judiciary may have differing views on this issue also and we should seek broader input before moving ahead.

Tab 8

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: September 24, 2018
Re: Orders to show cause subcommittee update

The Forms Committee proposed a change to the procedure for enforcing court orders by doing everything through regular motion practice. A subcommittee consisting of Lauren DiFrancesco (chair), Jim Hunnicutt, Judge Holmberg, and Susan Vogel have met to discuss the Forms Committee's proposal along with a 2016 new Rule 7A proposal and the 5th District's own CJA Rule 10-1-501. The subcommittee is still exploring this issue but is leaning toward a combination of the 5th District Rule and the 2016 version of new Rule 7A.

Rule 7A. Motion for order to show cause.

(a) Motion. To obtain an order to show cause for violation of an order or judgment, a party must file a motion for an order to show cause following the procedures of this rule.

(b) Affidavit or declaration. The motion must be accompanied by at least one affidavit, or declaration under Utah Code Section 78B-5-705, showing that the affiant or declarant is competent to testify on the matters set forth. At least one affidavit or declaration must state the title and date of entry of the order or judgment that the moving party seeks to enforce. Collectively, the affidavits or declarations must set forth facts that would be admissible in evidence and that would support a finding that the party has violated the order or judgment.

(c) Order to show cause. The motion must be accompanied by a proposed order to show cause, which must:

(c)(1) state the title and date of entry of the order or judgment that the moving party seeks to enforce;

(c)(2) state the relief sought by the moving party;

(c)(3) state whether the moving party has requested that the nonmoving party be held in contempt and, if that request has been made, state that the penalties for contempt may include, but are not limited to, a fine of up to $1000 and confinement in jail for up to 30 days.

(c)(4) order the nonmoving party to appear personally or through counsel at a specific date, time and place to explain whether the nonmoving party has violated the order or judgment;

(c)(5) state that no written response is required;

(c)(6) state that the hearing is not an evidentiary hearing, but is for the purpose of determining:

(c)(6)(A) whether the nonmoving party denies the claims made by the moving party;

(c)(6)(B) whether an evidentiary hearing is needed;

(c)(6)(C) the issues on which evidence needs to be submitted; and

(c)(6)(D) the estimated length of an evidentiary hearing.

(d) Service of the order. The moving party must have the order, the motion and all affidavits and declarations personally served on the nonmoving party in a manner provided in Rule 4 at least 7 days before the hearing. For good cause the court may order that service be made on the nonmoving party's counsel of record in a manner provided in Rule 5. The court may order less than 7 days' notice of the hearing if:

(d)(1) the motion requests an earlier date; and

(d)(2) it clearly appears from specific facts shown by affidavit or declaration that immediate and irreparable injury, loss, or damage will result to the moving party if the hearing is not held sooner.

(e) First hearing.

(e)(1) At the hearing, the court will determine:

(e)(1)(A)whether the nonmoving party denies the claims made by the moving party;

(e)(1)(B) whether an evidentiary hearing is needed;

(e)(1)(C) the issues on which evidence needs to be submitted; and

(e)(1)(D) the estimated length of an evidentiary hearing.

(e)(2) The court may enter an order regarding any claim that the nonmoving party does not deny. The court may order the parties to file memoranda before the evidentiary hearing. Memoranda must follow the requirements of Rule 7.

(f) Evidentiary hearing. The moving party bears the burden of proof on all claims made in the motion.

(g) Limitations. A motion for an order to show cause may not be used to obtain any order other than an order to show cause. This rule does not apply to an order to show cause issued by the court on its own initiative. A motion for an order to show cause presented to a court commissioner must follow Rule 101.

Advisory Committee Notes

Rule 7A only applies in civil actions; orders to show cause in criminal cases are governed by statute.

Rule 10-1-501. Orders to show cause.

Intent:

To describe the process for requesting an order to show cause.

Applicability:

This rule shall apply to the Fifth District Court.

Statement of the Rule:

(1) Motion. A party who seeks to enforce an order or a judgment of a court against an opposing party may file an ex parte motion for an order to show cause. The motion must be filed with the same court and in the same case in which that order or judgment was entered. The motion shall be made only on an ex parte basis, and the procedures of Rule 7 of the Utah Rules of Civil Procedure shall not apply.

(2) Affidavit. The motion for an order to show cause 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 or judgment which the moving party seeks to enforce.

(3) Order. The motion for an order to show cause must be accompanied by the proposed order to show cause, which shall:

(3)(A) state the title and date of entry of the order or judgment which the moving party seeks to enforce;

(3)(B) specify the relief sought by the moving party;

(3)(C) order the opposing party to make a first appearance in court at a specific date, time and place and, then and there, to explain why or whether the opposing party acted or failed to act in compliance with such order or judgment;

(3)(D) order the opposing party to appear personally or through legal counsel at the first appearance;

(3)(E) state that no written response to the motion and order to show cause is required;

(3)(F) state that the first appearance shall not be the evidentiary hearing, but shall be for the purpose of determining

(3)(F)(i) whether the opposing party contests the allegations made by the moving party,

(3)(F)(ii) whether an evidentiary hearing is necessary,

(3)(F)(iii) the specific issues to be resolved through an evidentiary hearing, and (iv) the estimated length of any such evidentiary hearing; and

(3)(G)state whether the moving party has requested that the opposing party be held in contempt and, if such a request has been made, recite that the sanctions for contempt may include, but are not limited to, a fine of $1000 or less and a jail commitment of 30 days or less.

(4) Service. If the court grants the motion and issues an order to show cause, the moving party must have the order, the motion and all supporting affidavits served upon the opposing party. Service shall be made 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. The date of the opposing party's first appearance on the order to show cause may not be sooner than five days after service thereof, unless

(4)(A) the motion requests an earlier first appearance date,

(4)(B) 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 first appearance is not held sooner than five days after service of the order to show cause, and

(4)(C) the court agrees to an earlier first appearance date.

(5) First Appearance. The opposing party's first appearance on the order to show cause, at the date, time and place stated therein, shall not be the evidentiary hearing. At the first appearance, the court shall determine

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

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

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

(5)(D) the estimated length of any such evidentiary hearing. The court may order the parties to file memoranda on legal issues before the 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.

(6) Evidentiary Hearing. At the evidentiary hearing on a contested order to show cause, the moving party shall bear the burden of proof on all allegations which are made in support of the order.

(7) Limitations. An order to show cause may not be requested in order to obtain an original order or judgment; for example, an order to show cause may not be used to obtain a temporary restraining order or to establish temporary orders in a divorce case. This rule shall apply only in civil actions, and shall not be applied to orders to show cause in criminal actions. This rule does not apply to an order to show cause issued by a court on its own initiative.