Agenda 2 of 2

Advisory Committee on Rules of Civil Procedure

October 24, 2018

5:00 to 7:00 p.m.

Scott M. Matheson Courthouse

450 South State Street

Education Room

Administrative Office of the Courts, Suite N31

Welcome, introductions, approval of minutes	Tab 1	Jonathan Hafen, Chair
Finality: Civil Rules 73, 58A and Appellate Rule 4.	Tab 2	Judge Amber Mettler, Nancy Sylvester
Rule 24: Incorporating the federal language.	Tab 3	Jim Hunnicutt, Nancy Sylvester
Rule 4. Standards for electronic acceptance of service: Subcommittee update and request for feedback.	Tab 4	Justin Toth (subcommittee chair), Judge Laura Scott, Lauren DiFrancesco, and Susan Vogel
Rule 26. General provisions governing disclosure and discovery (multiple requests for rule amendments).	Tab 5	Rod Andreason (subcommittee chair), Tim Pack, Trystan Smith, Leslie Slaugh
New Rule 7A. Motion for order to show cause	Tab 6	Lauren DiFrancesco (subcommittee chair), Jim Hunnicutt, Judge Holmberg, Susan Vogel
Other business: Committee Notes	Tab 7	Jonathan Hafen

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

Meeting Schedule:

November 28, 2018

Tab 1

UTAH SUPREME COURT ADVISORY COMMITTEE ON RULES OF CIVIL PROCEDURE

Meeting Minutes – September 26, 2018

PRESENT: Chair Jonathan Hafen, Judge Andrew Stone, Trevor Lee, Larissa Lee, Judge Laura Scott, James Hunnicutt, Rod Andreason, Susan Vogel, Barbara Townsend, Michael Petrogeorge, Leslie Slaugh, Lincoln Davies, Justin Toth, Dawn Hautamaki (remote), Judge Amber Mettler, Trystan Smith, Judge James Blanch, Judge Laura Scott, Katy Strand (Recorder)

EXCUSED: Heather Sneddon, Judge Kent Holmberg, Judge Clay Stucki, Lauren DiFrancesco, Paul Stancil, Timothy Pack

STAFF: Nancy Sylvester

GUESTS: Patricia Owen, Commissioner Michelle Blomquist

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(1) WELCOME, PRINCIPLES OF RULE MAKING, APPROVAL OF MINUTES.

Jonathan Hafen introduced new members (Larissa Lee and Trevor Lee) to the committee and had the members introduce themselves. Mr. Hafen then turned to a recent letter from the Supreme Court, in which the Court wrote about its concerns regarding the impact of the rules on unrepresented parties. The Court also requested that advisory committee notes remain up to date and only be used if necessary to clarify the rule or provide historical context. Mr. Hafen proposed taking half an hour each meeting to address these notes. Trystan Smith suggested dividing up rules by topic and taking a few at a time. Mr. Hafen and Nancy Sylvester plan to divide up the rules and assign them to subcommittees. Judge James Blanch stated that most of the notes were well thought out, and that perhaps cases should not be referenced as they can become obsolete. Judge Andrew Stone questioned if these notes will have to be put out for comment. Ms. Sylvester stated that she believed they should be sent out with notice of the changes.

Mr. Hafen asked for amendments to the June minutes. Susan Vogel wanted to clarify the section on follow-up calls to the Self-Help Center regarding garnishments by adding the words "from employers." Rod Andreason moved to approve the minutes as amended, Justin Toth seconded, and the motion passed unanimously. Michael Petrogeorge moved to adopt the principles of rulemaking amendments that were made in response to the Supreme Court's letter, and Mr. Andreason seconded. The motion passed unanimously.

(2) RULES 5 AND 109. REVIEW OF COMMENTS.

Ms. Sylvester introduced the comments to Rule 109. Commissioner Blomquist addressed the comments asking for more specificity on relocation. She said an original draft included more detail on relocation but had been edited down because the Rule creates an automatic order and more detail comes when the specific case is before the court on that question. The second comment questioned

when the injunction should be effective upon the respondent, implying a potential need for clarification. There was also a comment regarding a requirement for Rule 4 service. There was concern that the injunction could be in place when the petition has not been served on the respondent. Mr. Slaugh pointed out that the committee had considered this and decided against requiring Rule 4 Service. A further question was raised, asking if necessities of life included attorney fees. Commissioner Blombquist reported that the subcommittee wouldn't hold this to be a necessity of life, there are other rules relating to fees. The term "necessities of life" is not defined in the Rule. The committee did not believe this required clarification. Additional questions regarded using a minor child's image on social media and fundraising sites, which Commissioner Blomquist thought was overly specific for an automatic order. The committee agreed it was too specific.

Additional questions addressed the mechanisms for implementing the order. Mr. Slaugh had concerns with paragraph (a) stating the injunction "automatically enters," which implies that the order is not signed. Ms. Sylvester stated that this might also answer questions about when the injunction goes into effect. Judge Stone stated that the system needs to recognize that when a petition is filed, the system should produce a signed order. Trystan Smith questioned how other standing orders generally work. Mr. Slaugh stated that standing orders are often not placed in the file but exist for the court. Mr. Slaugh proposed amending the Rule at line 3 to state, "the court will enter." He believed this implied a signature would be required but would allow the court to determine the mechanics of the process. Mr. Slaugh stated that he believed this will be done through the system, but that the court must do something to create this order. Ms. Vogel continued to express concern that protective orders would stop the injunction from being delivered in a timely manner.

Another comment questioned whether this Rule created substantive law, rather than procedural. Mr. Slaugh believed this to be procedural, because the judge can change it. Lincoln Davies argued that this rule, in particular lines 9 and 10, could be substantive, although the rest might not be. He thought all of (b)(1) might be substantive. Mr. Slaugh argued it had substantive effect, but because a judge may overrule it, the Rule becomes procedural. Mr. Andreason did not believe that this was substantive. Judge Blanch questioned if keeping the status quo would be procedural. Ms. Blomquist pointed out that Colorado had evaluated this rule for constitutionality, and it was acceptable because it was a temporary order. Mr. Davies thought that the constitutionality was a separate question from the substantive nature of the rule. Judge Stone was also concerned that this may be substantive, and was not sure this is a fixable problem. He questioned if the issue should be sent to the Legislature. Mr. Davies agreed. Mr. Slaugh questioned if the Legislature could dictate an order; he believed they could only create an automatic stay. This would be less clear to pro se litigants. He does believe that, although it has a substantive effect, the rules are allowed to state how an order shall be entered. Mr. Davies stated that if a judge must sign it, then the substantive nature may be more acceptable. Judge Stone stated the Legislature could not require a standing order, but it could permit the standard order. He stated that he believed that this proposed rule changes the landscape of what a divorce means, and that automating this limits the discretion of the judges, and feels like legislating. He proposed the committee should study this question and evaluate where other states have done. Mr. Hunnicutt stated that California has an automatic stay that was done by a statute. Commissioner Blomquist stated that many people are expressing a need for this. Mr. Davies said he believes this would be acceptable if it were an order issued by a court, but not if it was a rule. Judge Stone proposed this be placed on the list of questions for the Legislature. Mr. Slaugh proposed adding a line, stating "unless the court otherwise orders." Mr.

Davies stated that he believes this would fix the problem because the judges would still be making the decision. Ms. Vogel questioned if a request would change it. Judge Stone continued to be concerned and requested that the court's Liaison Committee look into the question. Judge Stone mentioned that the Court could make this decision, so long as we mention the concern. Mr. Hafen asked if it was possible to create a rule to recommend while mentioning the concerns.

The same commenter also requested a clawback provision. Mr. Slaugh said he was uncomfortable adding a clawback to one small portion, because there is an inherent ability of the Court to remedy and the committee cannot limit this, so no list should be created.

Several comments asked to include house payments in the injunction. Mr. Hunnicutt said that any rent or mortgage would be substantive. The committee declined to add this topic.

The committee discussed editing (b)(2) to add "through electronic means," but Mr. Hunnicutt and Mr. Hafen stated that this would be overly specific, so it was amended to say "through electronic or other means." Mr. Hunnicutt also said that the comments on domestic violence were not relevant because protective orders are still available and would control over this order. Judge Stone proposed that paragraph (d) state, "as entered by the court" rather than "signed." Mr. Hafen thought this might also address the question of substantive language.

There were also comments that were not particularly relevant to the Rule itself, but expressed concerns about high-conflict divorces.

Ms. Vogel moved to recommend the Rule as it reads below but note the substantive versus procedural concerns to the Court. Mr. Anderason seconded. The motion passed unanimously.

Rule 109. Automatic injunction in certain domestic relations cases.

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

(b) General provisions.

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

(b)(2) Neither party may, 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 policy of health insurance, homeowner's or renter's insurance, automobile insurance, or life insurance without the written consent of the other party or pursuant to further order of the court.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

(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.

Ms. Sylvester then introduced the comments to Rule 5. The first comment was a concern regarding parties using incorrect email to serve. Ms. Sylvester explained that this was a misunderstanding of the Rule, as the email in question is provided by the party being served. The language proposed in

the comment clarified this issue. Others were concerned that this service would not be verified, and would allow for abuse. Mr. Hafen stated that verification would be unreasonable. The verification occurs when it is provided. Judge Stone believed that many of the comments were based upon a confusion between Rules 4 and 5. Ms. Vogel pointed out that OCAP requires an email, and so pro se litigants are providing emails. She proposed adding to the form to include a notice that the court will use the email to contact the litigant.

Additional comments requested that this Rule not reference additional rules. Mr. Petrogeorge preferred that the rules be referenced and the committee agreed.

Final comments related to a concern about the amount of email. The committee believed that this would not impact the volume of email.

Mr. Andreason moved to recommend the rule as it is written below to the Supreme Court. Trevor Lee seconded. The motion passed unanimously.

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.

(3) RULE 73. ATTORNEY FEES. REVIEW OF CLERK OF COURT COMMENTS.

Ms. Sylvester introduced this history of Rule 73's amendments. The day that the rule was adopted by the Court, the clerks of the court pointed out potential issues with paragraph (f)(3). They requested clarifying language regarding filing a motion under Rule 7. Mr. Slaugh did not think this was necessary. The clerks were also concerned about the term "augment," as judges sometimes get requests for automatic augmentation. The clerks suggested "amended" or "modified" instead. Mr. Slaugh noted that the language clearly does not permit automatic augmentation. Mr. Hunnicutt stated that "augment" is a term that is still used as a term of art. The committee elected not to make the change. Judge Stone pointed out that line 53 includes the word "shall," and "may" would be better to avoid any automatic increases. Mr. Andreason added that the clerk or the court could authorize the fees, which would be problematic as well. Judge Mettler stated that "the court shall" appears many times. Ms. Vogel noted that the other "shalls" were about the fees in the Rule, and "may" would be better there. Katy Strand believed that the "shall" was to allow the request, not to approve the request. Judge Stone was concerned that the "shall" avoided the clerks being given discretion, or adding to the judges' work load. He said (f)(5) also changed his view on the word "shall." The committee elected not to change this rule.

(4) RULE 58A AND UTAH RULE OF APPELLATE PROCEDURE 4.

Judge Mettler reported that the Finality Subcommittee had met several times and was proposing changes to these two rules to match the federal rules. Mr. Slaugh explained that he understood Rule 58A differently from the subcommittee's view, and that the judgement was final only if the judge extended the time to appeal attorney fees. That is different from the federal rules. Judge Mettler stated this was the same as the federal rule, although there are no cases to support this understanding. The Appellate Rules Committee will meet next week to discuss this rule as well. Ms. Vogel was concerned about the use of the word "ordinarily." Mr. Andreason agreed this was problematic. He proposed combining the two sentences in which that word appeared. Ms. Vogel agreed. Ms. Sylvester was concerned about the length of the sentence. She proposed making it into two sentences. Judge Blanch pointed out that the point of this change was to reverse the cases, so perhaps the committee should reference these cases in the advisory notes. Mr. Andreason agreed this would be required. Mr. Slaugh proposed keeping the Rule parallel to the federal rule. Ms. Vogel then said she was concerned about the word "acting" on line 55. Judge Mettler believed it was referencing "by extending the time for appeal" which would be redundant. Mr. Andreason continued to support the combination of the sentences as be believed it was more clear and specific, and could remove the "by acting" addressing Ms. Vogel's concern. Judge Mettler supported this change. Ms. Sylvester proposed a joint advisory note on both rules. Mr. Hafen proposed that the

advisory note could be created after the comment period. Ms. Sylvester said she thought the committee note needed to be included in the comment period and could be approved by acclamation over email. Larissa Lee moved to approve the Rule as follows, with the understanding that the note will be created and circulated via email. Mr. Toth seconded. The motion passed unanimously.

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. The entry of judgment is not delayed, nor is the time for appeal extended, by a claim for costs or motion for attorney fees unless the court, upon motion or its own initiative, extends the time for appeal pursuant to Rule 4(b)(1)(F) of the Utah Rules of Appellate Procedure 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.

(5) ADJOURNMENT.

The remaining matters were deferred, and the committee adjourned at 6:00 pm. The next meeting will be held on October 24, 2018 at 5:00 pm, with the location to be determined.

Tab 2

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: October 18, 2018
Re: Finality: Civil Rules 73 and 58A and Appellate Rule 4

The Finality Working Group, composed of representatives from both the Civil and Appellate Rules Committees, met on October 17 to discuss a solution to the Court of Appeals' interpretation of Civil Rules 58A and 73 and Appellate Rule 4 in *McQuarrie v. McQuarrie*, 2017 UT App 209.[1] The working group determined that the Court of Appeals' opinion that Rule 73 governs only post-judgment motions for attorney fees is the most problematic feature of the case. But the current language of Rule 73(b)(1) arguably creates a basis for that interpretation where it says, "The motion [for attorney fees] must…specify the judgment *and* the statute, rule, contract, or other basis entitling the party to the award…." (emphasis added).

To eliminate this interpretation and emphasize that all requests for attorney fees must go through Rule 73 no matter when they are raised, the working group amended paragraph (b)(1) as follows: "The motion must…specify the statute, rule, contract, *judgment*, or other basis entitling the party to the award…."(emphasis added). So "judgment" becomes just one potential basis for attorney fees, rather than being a mandatory part of any motion for fees.

In addition to amending Rule 73, the working group proposed two other potential solutions to the *McQuarrie* problem: 1) adopting the federal approach that motions for attorney fees never toll the time for appeal without leave of court; or 2) leaving Rules 58A and 4 in the default position of motions for attorney fees automatically tolling the time for appeal until the dispositive order on the motion is entered. The two potential solutions reflect different policy options, and because the working group is not sure which policy the Court supports, the working group recommends taking both options to the Supreme Court for its consideration.

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

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

Rule 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 in paragraph (f) of this rule, or in accordance with Utah Code § 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, judgment, 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, cite the law or attach a copy of the contract authorizing the award, and state that the attorney will not share the fee in violation of Rule of Professional Conduct 5.4.

(f) **Fees.** Attorney fees awarded under this rule may be augmented upon submission of a motion and supporting affidavit meeting the requirements of paragraphs (b) and (c) within a reasonable time after the fees were incurred, except as provided in paragraphs (f)(1), (f)(2) and (f)(3), and only where the augmented fees sought exceed those already awarded.

(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 pursuant to Rules 64(c)(2) or 58C or pursuant to Utah Code § 35A-4-314,

the party may request as part of its application for a writ or its motion that the party's judgment be augmented according to 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 first application for a writ under Rule 64D to any particular garnishee;	$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 § 35A-4-314, or Rule 58C;	$75.00
Any subsequent motion under Rule 64(c)(2), Utah Code § 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), 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

New 2019 Committee Note

Rule 73 has been amended in response to *McQuarrie v. McQuarrie*, 2017 UT App 209, and *Chaparro v. Torero*, 2018 UT App 181, to clarify that it applies to all motions for attorney fees, not just post-judgment motions.

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 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.

(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.

Advisory Committee Note

Effective November 1, 2016.

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 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.

Effective November 1, 2016.

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 in paragraph (f) of this rule, or in accordance with Utah Code § 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, judgment, 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, cite the law or attach a copy of the contract authorizing the award, and state that the attorney will not share the fee in violation of Rule of Professional Conduct 5.4.

(f) **Fees.** Attorney fees awarded under this rule may be augmented upon submission of a motion and supporting affidavit meeting the requirements of paragraphs (b) and (c) within a reasonable time after the fees were incurred, except as provided in paragraphs (f)(1), (f)(2) and (f)(3), and only where the augmented fees sought exceed those already awarded.

(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 pursuant to Rules 64(c)(2) or 58C or pursuant to Utah Code § 35A-4-314,

the party may request as part of its application for a writ or its motion that the party's judgment be augmented according to 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 first application for a writ under Rule 64D to any particular garnishee;	$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 § 35A-4-314, or Rule 58C;	$75.00
Any subsequent motion under Rule 64(c)(2), Utah Code § 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), 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

New 2019 Committee Note

Rule 73 has been amended in response to *McQuarrie v. McQuarrie*, 2017 UT App 209, and *Chaparro v. Torero*, 2018 UT App 181, to clarify that it applies to all motions for attorney fees, not just post-judgment motions.

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.~~ The entry of judgment is not delayed, nor is the time for appeal extended, by a claim for costs or motion for attorney fees unless the court, upon motion or its own initiative, extends the time for appeal pursuant to Rule 4(b)(1)(F) of the Utah Rules of Appellate Procedure 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.

Advisory Committee Note

[ADD 2018 NOTE]

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 3

Administrative Office of the Courts

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

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

MEMORANDUM

To: Civil Rules Committee
From: Nancy Sylvester
Date: 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 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 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

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

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.

Rule 4. Process.

(a) Signing of summons. The summons must be signed and issued by the plaintiff or the plaintiff's attorney. Separate summonses may be signed and issued.

(b) Time of service. Unless the summons and complaint are accepted, a copy of the summons and complaint in an action commenced under Rule 3(a)(1) must be served no later than 120 days after the complaint is filed, unless the court orders a different period under Rule 6. If the summons and complaint are not timely served, the action against the unserved defendant may be dismissed without prejudice on motion of any party or on the court's own initiative.

(c) Contents of summons.

(c)(1) The summons must:

(c)(1)(A) contain the name and address of the court, the names of the parties to the action, and the county in which it is brought;

(c)(1)(B) be directed to the defendant;

(c)(1)(C) state the name, address and telephone number of the plaintiff's attorney, if any, and otherwise the plaintiff's address and telephone number;

(c)(1)(D) state the time within which the defendant is required to answer the complaint in writing;

(c)(1)(E) notify the defendant that in case of failure to answer in writing, judgment by default will be entered against the defendant; and

(c)(1)(F) state either that the complaint is on file with the court or that the complaint will be filed with the court within 10 days after service.

(c)(2) If the action is commenced under Rule 3(a)(2), the summons must also:

(c)(2)(A) state that the defendant need not answer if the complaint is not filed within 10 days after service; and

(c)(2)(B) state the telephone number of the clerk of the court where the defendant may call at least 14 days after service to determine if the complaint has been filed.

(c)(3) If service is by publication, the summons must also briefly state the subject matter and the sum of money or other relief demanded, and that the complaint is on file with the court.

(d) Methods of service. The summons and complaint may be served in any state or judicial district of the United States. Unless service is accepted, service of the summons and complaint must be by one of the following methods:

(d)(1) Personal service. The summons and complaint may be served by any person 18 years of age or older at the time of service and not a party to the action or a party's attorney. If the person to be served refuses to accept a copy of the summons and complaint, service is sufficient if the person serving them states the name of the process and offers to deliver them. Personal service must be made as follows:

(d)(1)(A) Upon any individual other than one covered by paragraphs (d)(1)(B), (d)(1)(C) or (d)(1)(D), by delivering a copy of the summons and complaint to the individual personally, or by leaving them at the individual's dwelling house or usual place of abode with a person of suitable age and discretion who resides there, or by delivering them to an agent authorized by appointment or by law to receive process;

(d)(1)(B) Upon a minor under 14 years old by delivering a copy of the summons and complaint to the minor and also to the minor’s father, mother, or guardian or, if none can be found within the state, then to any person having the care and control of the minor, or with whom the minor resides, or by whom the minor is employed;

(d)(1)(C) Upon an individual judicially declared to be incapacitated, of unsound mind, or incapable of conducting the individual’s own affairs, by delivering a copy of the summons and complaint to the individual and to the guardian or conservator of the individual if one has been appointed; the individual’s legal representative if one has been appointed, and, in the absence of a guardian, conservator, or legal representative, to the person, if any, who has care, custody, or control of the individual;

(d)(1)(D) Upon an individual incarcerated or committed at a facility operated by the state or any of its political subdivisions, by delivering a copy of the summons and complaint to the person who has the care, custody, or control of the individual, or to that person's designee or to the guardian or conservator of the individual if one has been appointed. The person to whom the summons and complaint are delivered must promptly deliver them to the individual;

(d)(1)(E) Upon a corporation not otherwise provided for in this rule, a limited liability company, a partnership, or an unincorporated association subject to suit under a common name, by delivering a copy of the summons and complaint to an officer, a managing or general agent, or other agent authorized by appointment or law to receive process and by also mailing a copy of the summons and complaint to the defendant, if the agent is one authorized by statute to receive process and the statute so requires. If no officer or agent can be found within the state, and the defendant has, or advertises or holds itself out as having, a place of business within the state or elsewhere, or does business within this state or elsewhere, then upon the person in charge of the place of business;

(d)(1)(F) Upon an incorporated city or town, by delivering a copy of the summons and complaint as required by statute, or in the absence of a controlling statute, to the recorder;

(d)(1)(G) Upon a county, by delivering a copy of the summons and complaint as required by statute, or in the absence of a controlling statute, to the county clerk;

(d)(1)(H) Upon a school district or board of education, by delivering a copy of the summons and complaint as required by statute, or in the absence of a controlling statute, to the superintendent or administrator of the board;

(d)(1)(I) Upon an irrigation or drainage district, by delivering a copy of the summons and complaint as required by statute, or in the absence of a controlling statute, to the president or secretary of its board;

(d)(1)(J) Upon the state of Utah or its department or agency by delivering a copy of the summons and complaint to the attorney general and any other person or agency required by statute to be served; and

(d)(1)(K) Upon a public board, commission or body by delivering a copy of the summons and complaint as required by statute, or in the absence of a controlling statute, to any member of its governing board, or to its executive employee or secretary.

(d)(2) Service by mail or commercial courier service.

(d)(2)(A) The summons and complaint may be served upon an individual other than one covered by paragraphs (d)(1)(B) or (d)(1)(C) by mail or commercial courier service in any state or judicial district of the United States provided the defendant signs a document indicating receipt.

(d)(2)(B) The summons and complaint may be served upon an entity covered by paragraphs (d)(1)(E) through (d)(1)(I) by mail or commercial courier service in any state or judicial district of the United States provided defendant's agent authorized by appointment or by law to receive service of process signs a document indicating receipt.

(d)(2)(C) Service by mail or commercial courier service shall be complete on the date the receipt is signed as provided by this rule.

(d)(3) Acceptance of service.

(d)(3)(A) Duty to avoid expenses. All parties have a duty to avoid unnecessary expenses of serving the summons and complaint.

(d)(3)(B) Acceptance of service by party. Unless the person to be served is a minor under 14 years old or an individual judicially declared to be incapacitated, of unsound mind, or incapable of conducting the individual's own affairs, a party may accept service of a summons and complaint by signing a document that acknowledges receipt of the summons and complaint.

(d)(3)(C) Acceptance of service by attorney for party. An attorney may accept service of a summons and complaint on behalf of the attorney's client by signing a document that acknowledges receipt of the summons and complaint.

(d)(3)(D) Effect of acceptance, proof of acceptance. A person who accepts service of the summons and complaint retains all defenses and objections, except for adequacy of service. Service is effective on the date of the acceptance. Filing the acceptance of service with the court constitutes proof of service under Rule 4(e).

(d)(4) Service in a foreign country. Service in a foreign country must be made as follows:

(d)(4)(A) by any internationally agreed means reasonably calculated to give notice, such as those means authorized by the Hague Convention on the Service Abroad of Judicial and Extrajudicial Documents;

(d)(4)(B) if there is no internationally agreed means of service or the applicable international agreement allows other means of service, provided that service is reasonably calculated to give notice:

(d)(4)(B)(i) in the manner prescribed by the law of the foreign country for service in that country in an action in any of its courts of general jurisdiction;

(d)(4)(B)(ii) as directed by the foreign authority in response to a letter of request issued by the court; or

(d)(4)(B)(iii) unless prohibited by the law of the foreign country, by delivering a copy of the summons and complaint to the individual personally or by any form of mail requiring a signed receipt, addressed and dispatched by the clerk of the court to the party to be served; or

(d)(4)(C) by other means not prohibited by international agreement as may be directed by the court.

(d)(5) Other service.

(d)(5)(A) If the identity or whereabouts of the person to be served are unknown and cannot be ascertained through reasonable diligence, if service upon all of the individual parties is impracticable under the circumstances, or if there is good cause to believe that the person to be served is avoiding service, the party seeking service may file a motion to allow service by some other means. An affidavit or declaration supporting the motion must set forth the efforts made to identify, locate, and serve the party, or the circumstances that make it impracticable to serve all of the individual parties.

(d)(5)(B) If the motion is granted, the court will order service of the complaint and summons by means reasonably calculated, under all the circumstances, to apprise the named parties of the action. The court's order must specify the content of the process to be served and the event upon which service is complete. Unless service is by publication, a copy of the court's order must be served with the process specified by the court.

(d)(5)(C) If the summons is required to be published, the court, upon the request of the party applying for service by other means, must designate a newspaper of general circulation in the county in which publication is required.

(e) Proof of service.

(e)(1)The person effecting service must file proof of service stating the date, place, and manner of service, including a copy of the summons. If service is made by a person other than by an attorney, sheriff, constable, United States Marshal, or by the sheriff’s, constable’s or marshal's deputy, the proof of service must be by affidavit or unsworn declaration as described in Title 78B, Chapter 18a, Uniform Unsworn Declarations Act.

(e)(2) Proof of service in a foreign country must be made as prescribed in these rules for service within this state, or by the law of the foreign country, or by order of the court.

(e)(3) When service is made pursuant to paragraph(d)(4)(C), proof of service must include a receipt signed by the addressee or other evidence of delivery to the addressee satisfactory to the court.

(e)(4) Failure to file proof of service does not affect the validity of the service. The court may allow proof of service to be amended.

Advisory Committee Notes

Effective May 8, 2018 pursuant to CJA Rule 11-105(5)

Tab 5

KIRTON | McCONKIE

Rod N. Andreason
randreason@kmclaw.com
801.321.4853

MEMORANDUM

TO: Nancy Sylvester

FROM: Rod Andreason, Chair, URCP 26 Subcommittee

DATE: October 19, 2018

SUBJECT: URCP 26 Subcommittee Report and Proposed Changes

On June 27, 2018, at the regular monthly meeting of the Utah Supreme Court Advisory Committee on the Utah Rules of Civil Procedure, Chairman Jon Hafen formed a subcommittee consisting of Committee members Rod Andreason (chair), Leslie Slaugh, Trystan Smith, and Tim Pack to discuss and draft proposed changes to URCP 26. After soliciting input regarding potential problems with the Rule and meeting twice to discuss them, the subcommittee has decided to propose the following changes to the Rule, for the following reasons:

1. Add at the end of (a)(1), insert: "Rule 34 governs the form of producing all documents, data compilations, electronically stored information, tangible things, and evidentiary material pursuant to this Rule."

   Reason: Ensure compliance with URCP 34 in initial disclosure document production.

2. Revise (a)(2)(A) to: "by a plaintiff within 14 days after filing of the first answer to that plaintiff's complaint; and"

   Reason: There may be multiple plaintiffs, some of which may join the case at a later date.

3. Revise (a)(2)(B) to: "by a defendant within 42 days after filing of that defendant's first answer to the complaint."

   Reason: There may be multiple defendants; some of them may seek to file a motion to dismiss or similar motion after appearance that is not an answer, and such should not have to provide initial disclosures before such motion is resolved.

4. Revise (a)(4)(A) title to: "Disclosure of retained expert testimony."

   Reason: Clarity; this paragraph only pertains to this type of expert witness.

5. Revise (a)(4)(C)(i) to: "The party who bears the burden of proof on the issue for which expert testimony is offered shall serve on the other parties the information required by

paragraph (a)(4)(A) within 14 days after the close of fact discovery. Within seven days thereafter, the party opposing the expert may serve notice electing either a deposition of the expert pursuant to paragraph (a)(4)(B) and Rule 30, or a written report pursuant to paragraph (a)(4)(B). The deposition shall occur, or the report shall be served on the other parties, within 42 days after the election is served on the other parties. If no election is served on the other parties, then no further discovery of the expert shall be permitted."

Reason: Practitioners reportedly need more time for these actions.

6. Revise (a)(4)(C)(ii) to "The party who does not bear the burden of proof on the issue for which expert testimony is offered shall serve on the other parties the information required by paragraph (a)(4)(A) within 14 days after the later of (A) the date on which the disclosure under paragraph (a)(4)(C)(i) is due, or (B) receipt of the written report or the taking of the expert's deposition pursuant to paragraph (a)(4)(C)(i). Within seven days thereafter, the party opposing the expert may serve notice electing either a deposition of the expert pursuant to paragraph (a)(4)(B) and Rule 30, or a written report pursuant to paragraph (a)(4)(B). The deposition shall occur, or the report shall be served on the other parties, within 42 days after the election is served on the other parties. If no election is served on the other parties, then no further discovery of the expert shall be permitted."

   Reason: Practitioners reportedly need more time for these actions. Also, when the party bearing the burden fails to disclose an expert, the party who does not bear the burden currently has no triggering event for providing its expert disclosure.

7. Revise (a)(4)(C)(iii) to "(a)(4)(C)(iii) If the party who bears the burden of proof on an issue wants to designate rebuttal expert witnesses, it shall serve on the other parties the information required by paragraph (a)(4)(A) within 14 days after the later of (A) the date on which the election under paragraph (a)(4)(C)(ii) is due or (B) receipt of the written report or the taking of the expert's deposition pursuant to paragraph (a)(4)(C)(ii). Within seven days thereafter, the party opposing the expert may serve notice electing either a deposition of the expert pursuant to paragraph (a)(4)(B) and Rule 30, or a written report pursuant to paragraph (a)(4)(B). The deposition shall occur, or the report shall be served on the other parties, within 42 days after the election is served on the other parties. If no election is served on the other parties, then no further discovery of the expert shall be permitted."

   Reason: Practitioners reportedly need more time for these actions.

8. Revise (a)(4)(E) to: "If a party intends to present evidence at trial under Rule 702 of the Utah Rules of Evidence from any person other than an expert witness who is retained or specially employed to provide testimony in the case or a person whose duties as an employee of the party regularly involve giving expert testimony, that party must serve on the other parties a written summary of the facts and opinions to which the witness is expected to testify in accordance with the deadlines set forth in paragraph (a)(4)(C). Such a witness cannot be required to provide a report pursuant to (a)(4)(B). A deposition of such a witness may not exceed four hours. No further discovery of such a witness is permitted."

   Reason: Prohibit excessive discovery and expense in seeking testimony information from non-retained experts.

9. Revise (a)(5)(B) to "Disclosure required by paragraph (a)(5)(A) shall be served on the other parties at least 28 days before trial. Disclosures required by paragraph (a)(5)(A)(i) and (a)(5)(A)(ii) shall also be filed. At least 14 days before trial, a party shall serve and file any counter designations of deposition testimony and any objections and grounds for the objections to the use of any deposition, witness, or exhibit. Other than objections under Rules 402 and 403 of the Utah Rules of Evidence, objections not listed are waived unless excused by the court for good cause."

   Reasons: Judges reportedly want to see these items, although not all of the proposed trial exhibits (we would like judges' input and confirmation on this). Also, this section needs parallel reference to objections to witnesses as well as other disclosures. Although many objections to witnesses, as well as exhibits, must be considered within the scope of their offering at trial, this funnels down the scope of such potential objections. (If this is too demanding as to witnesses, it is likely too demanding for exhibits as well, requiring both to be removed).

10. Revise (c)(6)(A) to: "before the close of standard discovery and after reaching the limits of standard discovery imposed by these rules, a stipulated statement that extraordinary discovery is necessary and proportional under paragraph (b)(2) and, for each party represented by an attorney, a statement that the attorney consulted with the client about the request for extraordinary discovery."

Reason: The current requirement has been universally ignored and may be too onerous and expensive relative to its desired goal: ensuring that parties know that extraordinary discovery will result in additional expense.

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

    Reason: Language.

A redline of Rule 26 with these proposed changes is attached.

Rule 26. General provisions governing disclosure and discovery.

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

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

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

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

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

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

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

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

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

Rule 34 governs the form of producing all documents, data compilations, electronically stored information, tangible things, and evidentiary material pursuant to this Rule.

Comment [RNA1]: Reason: ensure compliance with URCP 34 in initial disclosure document production.

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

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

Comment [RNA2]: Reason: There may be multiple plaintiffs, some of who may join the case at a later date.

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

Comment [RNA3]: Reason: There may be multiple defendants; some of them may seek to file a motion to dismiss or similar motion after appearance that is not an answer, and such should not have to provide initial disclosures before such motion is resolved.

(a)(3) Exemptions.

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

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

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

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

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

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

(a)(4) Expert testimony.

(a)(4)(A) Disclosure of retained expert testimony. A party shall, without waiting for a discovery request, serve on the other parties the following information regarding any person who

Comment [RNA4]: Reason: Clarity; this paragraph only pertains to this type of expert witness.

may be used at trial to present evidence under Rule 702 of the Utah Rules of Evidence and who is retained or specially employed to provide expert testimony in the case or whose duties as an employee of the party regularly involve giving expert testimony: (i) the expert's name and qualifications, including a list of all publications authored within the preceding 10 years, and a list of any other cases in which the expert has testified as an expert at trial or by deposition within the preceding four years, (ii) a brief summary of the opinions to which the witness is expected to testify, (iii) all data and other information that will be relied upon by the witness in forming those opinions, and (iv) the compensation to be paid for the witness's study and testimony.

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

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

(a)(4)(C)(i) The party who bears the burden of proof on the issue for which expert testimony is offered shall serve on the other parties the information required by paragraph (a)(4)(A) within ~~seven~~ 14 days after the close of fact discovery. Within seven days thereafter, the party opposing the expert may serve notice electing either a deposition of the expert pursuant to paragraph (a)(4)(B) and Rule 30, or a written report pursuant to paragraph (a)(4)(B). The deposition shall occur, or the report shall be served on the other parties, within ~~28~~ 42 days after the election is served on the other parties. If no election is served on the other parties, then no further discovery of the expert shall be permitted.

(a)(4)(C)(ii) The party who does not bear the burden of proof on the issue for which expert testimony is offered shall serve on the other parties the information required by paragraph (a)(4)(A) within 14 ~~seven~~ days after the later of (A) the date on which the ~~election~~ disclosure under paragraph (a)(4)(C)(i) is due, or (B) receipt of the written report or the taking of the expert's deposition pursuant to paragraph (a)(4)(C)(i). Within seven days thereafter, the party opposing the expert may serve notice electing either a deposition of the expert pursuant to paragraph (a)(4)(B) and Rule 30, or a written report pursuant to paragraph (a)(4)(B). The deposition shall occur, or the report shall be served on the other parties, within ~~28~~ 42 days after the election is served on the other parties. If no election is served on the other parties, then no further discovery of the expert shall be permitted.

(a)(4)(C)(iii) If the party who bears the burden of proof on an issue wants to designate rebuttal expert witnesses, it shall serve on the other parties the information required by paragraph (a)(4)(A) within 14 ~~seven~~ days after the later of (A) the date on which the election under paragraph (a)(4)(C)(ii) is due~~,~~ or (B) receipt of the written report or the taking of the expert's deposition pursuant to paragraph (a)(4)(C)(ii). Within seven days thereafter, the party opposing the expert may serve notice electing either a deposition of the expert pursuant to paragraph (a)(4)(B) and Rule 30, or a written report pursuant to paragraph (a)(4)(B). The deposition shall occur, or the report shall be served on the other parties, within ~~28~~ 42 days after the election is served on the other parties. If no election is served on the other parties, then no further discovery of the expert shall be permitted.

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

(a)(4)(E) Summary of non-retained expert testimony. If a party intends to present evidence at trial under Rule 702 of the Utah Rules of Evidence from any person other than an

Comment [RNA5]: Reason: Practitioners reportedly need more time.

Comment [RNA6]: Reason: Practitioners reportedly need more time.

Comment [RNA7]: Reason: Practitioners reportedly need more time.

Comment [RNA8]: Reason: When the party bearing the burden fails to disclose an expert, the party who does not bear the burden currently has no triggering event for providing its expert disclosure.

Comment [RNA9]: Reason: Practitioners reportedly need more time.

Comment [RNA10]: Reason: Practitioners reportedly need more time.

Comment [RNA11]: Reason: Practitioners reportedly need more time.

expert witness who is retained or specially employed to provide testimony in the case or a person whose duties as an employee of the party regularly involve giving expert testimony, that party must serve on the other parties a written summary of the facts and opinions to which the witness is expected to testify in accordance with the deadlines set forth in paragraph (a)(4)(C). Such a witness cannot be required to provide a report pursuant to (a)(4)(B). A deposition of such a witness may not exceed four hours. No further discovery of such a witness is permitted.

(a)(5) Pretrial disclosures.

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

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

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

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

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

Comment [RNA12]: Reason: Judges reportedly want to see these items, although not all of the proposed trial exhibits (need judges' input/confirmation).

Comment [RNA13]: Reason: Need parallel reference to objections to witnesses as well as other disclosures. Although many objections to witnesses, as well as exhibits, must be considered within the scope of their offering at trial, this funnels down the scope of such potential objections. (If this is too demanding as to witnesses, it is likely too demanding for exhibits as well, requiring both to be removed).

(b) Discovery scope.

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

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

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

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

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

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

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

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

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

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

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

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

(b)(7) Trial preparation; experts.

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

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

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

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

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

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

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

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

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

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

(b)(8)(B) Information produced. If a party produces information that the party claims is privileged or prepared in anticipation of litigation or for trial, the producing party may notify any receiving party of the claim and the basis for it. After being notified, a receiving party must promptly return, sequester, or destroy the specified information and any copies it has and may not use or disclose the information until the claim is resolved. A receiving party may promptly present the information to the court under seal for a determination of the claim. If the receiving party disclosed the information before being notified, it must take reasonable steps to retrieve it. The producing party must preserve the information until the claim is resolved.

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

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

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

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

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

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

Tier	Amount of Damages	Total Fact Deposition Hours	Rule 33 Interrogatories including all discrete subparts	Rule 34 Requests for Production	Rule 36 Requests for Admission	Days to Complete Standard Fact Discovery
1	$50,000 or less	3	0	5	5	120

2	More than $50,000 and less than $300,000 or non-monetary relief	15	10	10	10	180
3	$300,00 or more	30	20	20	20	210

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

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

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

Comment [RNA14]: Reason: The current requirement has been universally ignored and may be too onerous and expensive relative to its desired goal: ensuring that parties know that extraordinary discovery will result in additional expense.

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

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

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

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

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

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

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

(f) Filing. Except as required by these rules or ordered by the court, a party shall not file with the court a disclosure, a request for discovery, or a response to a request for discovery, but shall file only the

certificate of service stating that the disclosure, request for discovery, or response has been served on the other parties and the date of service.

Advisory Committee Notes

Legislative Note

Tab 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: October 23, 2018
Re: New Rule 7A. Motion for order to show cause.

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 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 proposes its own new Rule 7A, which merges the 5th District Rule with the 2016 version of Rule 7A.

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

Rule 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 supporting affidavit or declaration under Utah Code Section 78B-18a-101, *et seq.*, based on personal knowledge and 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. 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 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, or Rule 101 if the hearing will be before a commissioner.

(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 also follow Rule 101, including all time limits set forth in Rule 101.

Advisory Committee Notes

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

Tab 7

Advisory Committe Notes Project

Civil Rules	Committee Note?	Subcommittee
Part I Scope of Rules - One Form of Action		**A**
Rule 1 General provisions.	Yes	
Rule 1 General provisions. (superseded 11/1/2011)	n/a	
Rule 2 One form of action.	No	
Part II Commencement of Action; Service of Process, Pleadings, Motions and Orders		**A**
Rule 3 Commencement of action.	Yes	
Rule 4 Process.	Yes	
Rule 5 Service and filing of pleadings and other papers.	Yes	
Rule 6 Time.	No	
Part III Pleadings, Motions, and Orders		**B**
Rule 7 Pleadings allowed; motions, memoranda, hearings, orders.	Yes	
Rule 8 General rules of pleadings.	Yes	
Rule 8 General rules of pleadings. (superseded 11/1/2011)	n/a	
Rule 9 Pleading special matters.	Yes	
Rule 9 Pleading special matters. (superseded 11/1/2011)	n/a	
Rule 10 Form of pleadings and other papers.	Yes	
Rule 11 Signing of pleadings, motions, and other papers; representations to court; sanctions.	Yes	
Rule 12 Defenses and objections.	No	
Rule 13 Counterclaim and cross-claim.	No	
Rule 14 Third-party practice.	No	
Rule 15 Amended and supplemental pleadings.	Yes	
Rule 16 Pretrial conferences.	Yes	
Rule 16 Pretrial conferences. (superseded 11/1/2011)	n/a	
Part IV Parties		**A**
Rule 17 Parties plaintiff and defendant.	Yes	
Rule 18 Joinder of claims and remedies.	No	

A	B
Lauren DiFrancesco	Prof. Lincoln Davies
Larissa Lee	Prof. Paul Stancil
Trevor Lee	Michael Petrogeorge
Susan Vogel	Judge Kent Holmberg
Dawn Hautamaki	Jim Hunnicut
C	**D**
Rod N. Andreason	Judge Andrew Stone
Leslie Slaugh	Judge James Blanch
Trystan Smith	Bryan Pattison
Tim Pack	Judge Laura Scott
	E
	Judge Amber Mettler
	Judge Clay Stucki
	Justin Toth
	Heather Sneddon

Rule 19 Joinder of persons needed for just adjudication.	No	
Rule 20 Permissive joinder of parties.	No	
Rule 21 Misjoinder and non-joinder of parties.	No	
Rule 22 Interpleader.	No	
Rule 23 Class actions.	No	
Rule 23A Derivative actions by shareholders.	No	
Rule 24 Intervention.	No	
Rule 25 Substitution of parties.	No	
Part V Depositions and Discovery		**C**
Rule 26 General provisions governing disclosure and discovery.	Yes (long)	
Rule 26 General provisions governing disclosure and discovery. (superseded 11/1/2011)	n/a	
Rule 26.1 Disclosure in domestic relations actions.	Yes	
Rule 26.2. Disclosures in personal injury actions.	Yes	
Rule 26.3. Disclosure in unlawful detainer actions.	No	
Rule 27 Depositions before action or pending appeal.	Yes	
Rule 28 Persons before whom depositions may be taken.	Yes	
Rule 29 Stipulations regarding disclosure and discovery procedure.	No	
Rule 29 Stipulations regarding disclosure and discovery procedure. (superseded 11/1/2011)	n/a	
Rule 30 Depositions upon oral questions.	No	
Rule 30 Depositions upon oral questions. (superseded 11/1/2011)	n/a	
Rule 31 Depositions upon written questions.	No	
Rule 31 Depositions upon written questions. (superseded 11/1/2011)	n/a	
Rule 32 Use of depositions in court proceedings.	Yes	
Rule 33 Interrogatories to parties.	No	
Rule 33 Interrogatories to parties. (superseded 11/1/2011)	n/a	
Rule 34 Production of documents and things and entry upon land for inspection and other purposes.	Yes	
Rule 34 Production of documents and things and entry upon land for inspection and other purposes. (superseded 11/1/2011)	n/a	

Rule 35 Physical and mental examination of persons.	Yes	
Rule 35 Physical and mental examination of persons. (superseded 11/1/2011)	n/a	
Rule 36 Request for admission.	Yes	
Rule 36 Request for admission. (superseded 11/1/2011)	n/a	
Rule 37 Statement of discovery issues; Sanctions; Failure to admit, to attend deposition or to preserve evidence.	Yes	
Rule 37 Discovery and disclosure motions; Sanctions. (superseded 11/1/2011)	n/a	
Part VI Trials		**D**
Rule 38 Jury trial of right.	No	
Rule 39 Trial by jury or by the court.	No	
Rule 40 Assignment of cases for trial; continuance.	No	
Rule 41 Dismissal of actions.	Yes	
Rule 42 Consolidation; separate trials.	No	
Rule 43 Evidence.	Yes	
Rule 44 Proof of official record.	No	
Rule 45 Subpoena.	Yes	
Rule 46 Exceptions unnecessary.	No	
Rule 47 Jurors.	Yes (long)	
Rule 48 Juries of less than eight - Majority verdict.	No	
Rule 49 Special verdicts and interrogatories.	No	
Rule 50 Judgment as a matter of law in a jury trial; related motion for a new trial; conditional ruling.	Yes	
Rule 51 Instructions to jury; objections.	No	
Rule 52 Findings by the court; correction of the record.	Yes	
Rule 53 Masters.	No	
Part VII Judgment		**E**
Rule 54 Judgments; costs.	Yes	
Rule 54 Judgments; costs. (superseded 11/1/2011)	n/a	
Rule 55 Default.	No	
Rule 56 Summary judgment.	Yes	
Rule 57 Declaratory judgments.	No	
Rule 58A Entry of judgment; abstract of judgment.	Yes (long)	
Rule 58B Satisfaction of judgment.	No	
Rule 58C Motion to renew judgment.	Yes	

Rule 59 New trials; amendments of judgment.	No	
Rule 60 Relief from judgment or order.	Yes	
Rule 61 Harmless error.	No	
Rule 62 Stay of proceedings to enforce a judgment.	Yes	
Rule 63 Disability or disqualification of a judge.	No	
Rule 63A Change of judge as a matter of right.	No	
Part VIII Provisional and Final Remedies and Special Proceedings		**E**
Rule 64 Writs in general.	No	
Rule 64A Prejudgment writs in general.	No	
Rule 64B Writ of replevin.	No	
Rule 64C Writ of attachment.	No	
Rule 64D Writ of garnishment.	No	
Rule 64E Writ of execution.	No	
Rule 64F REPEALED.	n/a	
Rule 64G REPEALED.	n/a	
Rule 65A Injunctions.	Yes	
Rule 65B Extraordinary relief.	Yes	
Rule 65C Post-conviction relief.	Yes	
Rule 66 Receivers.	No	
Rule 67 Deposit in court.	No	
Rule 68 Settlement offers.	Yes	
Rule 69 REPEALED.	n/a	
Rule 69A Seizure of property.	No	
Rule 69B Sale of property; delivery of property.	No	
Rule 69C Redemption of real property after sale.	No	
Rule 70 Judgment for specific acts; vesting title.	No	
Rule 71 Process in behalf of and against persons not parties.	No	
Rule 71B REPEALED.	n/a	
Rule 72 Property bonds.	No	
Part IX Attorneys		**B**
Rule 73 Attorney fees.	Yes	
Rule 74 Withdrawal of counsel.	No	
Rule 75 Limited appearance.	No	
Rule 76 Notice of contact information change.	No	
Part X District courts and clerks		**A**
Rule 77 District courts and clerks.	Yes	
Rule 78 REPEALED.	n/a	
Rule 79 REPEALED.	n/a	

Rule 80 REPEALED.	n/a	
Part XI General Provisions		**None**
Rule 81 Applicability of rules in general.	No	
Rule 82 Jurisdiction and venue unaffected.	No	
Rule 83 Vexatious litigants.	No	
Rule 84 REPEALED.	n/a	
Rule 85 Title.	No	
Part XII Family Law		**None**
Rule 100 Coordination of cases pending in district court and juvenile court.	No	
Rule 101 Motion practice before court commissioners.	No	
Rule 102 Motion and order for payment of costs and fees.	No	
Rule 103 REPEALED.	n/a	
Rule 104 Divorce decree upon affidavit.	No	
Rule 105. Shortening 30 day waiting period in divorce actions.	No	
Rule 106 Modification of final domestic relations order.	No	
Rule 107 Decree of adoption; Petition to open adoption records.	No	
Rule 108 Objection to court commissioner's recommendation.	No	
FAQs About Disclosure and Discovery		
Appendix Of Forms		