Agenda

Advisory Committee on Rules of Civil Procedure

August 28, 2019

4:00 to 6:00 p.m.

Scott M. Matheson Courthouse

450 South State Street

Judicial Council Room

Administrative Office of the Courts, Suite N31

Welcome and approval of minutes	4:00	Tab 1	Jonathan Hafen, Chair
Rule 4 and electronic acceptance of service	4:05	Tab 2	Guest: Lane Gleaves, Utah Court Services LLC Subcommittee: Justin Toth (chair), Judge Laura Scott, Lauren DiFrancesco, Susan Vogel
Service of subpoenas: discussion of need for service of supporting documents	4:30	Tab 3	Michael Drechsel
Licensed Paralegal Practitioners and the Civil Rules	4:50	Tab 4	Nancy Sylvester
Review comments to Rules 7A, 7, 100	5:30	Tab 5	Nancy Sylvester
Other business	5:55	Tab 6	Jonathan Hafen

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

2019 Meeting Schedule:

September 25, 2019

October 16, 2019

November 20, 2019

Tab 1

UTAH SUPREME COURT ADVISORY COMMITTEE ON RULES OF CIVIL PROCEDURE

Meeting Minutes – June 26, 2019

Committee members & staff	Present	Excused	Appeared by Phone
Jonathan Hafen, Chair	**X**		
Rod N. Andreason		**X**	
Judge James T. Blanch	**X**		
Lincoln Davies		**X**	
Lauren DiFrancesco	**X**		
Dawn Hautamaki		**X**	
Judge Kent Holmberg	**X**		
James Hunnicutt	**X**		
Larissa Lee	**X**		
Trevor Lee	**X**		
Judge Amber M. Mettler	**X**		
Timothy Pack	**X**		
Bryan Pattison		**X**	
Michael Petrogeorge		**X**	
Judge Clay Stucki	**X**		
Judge Laura Scott		**X**	
Leslie W. Slaugh		**X**	
Trystan B. Smith	**X**		
Heather M. Sneddon	**X**		
Paul Stancil	**X**		
Judge Andrew H. Stone		**X**	
Justin T. Toth	**X**		
Susan Vogel	**X**		
Katy Strand, Recording Secretary		**X**	
Nancy Sylvester, Staff	**X**		

(1) WELCOME AND APPROVAL OF MINUTES

Jonathon Hafen welcomed the committee and started with a brief overview of his meeting with the Utah Supreme Court last week. Mr. Hafen asked for approval of the minutes. Jim Hunnicutt moved to approve the minutes, as amended. Judge Clay Stucki seconded. The motion passed.

(2) RULE 4 AND ELECTRONIC ACCEPTANCE OF SERVICE

Justin Toth introduced the Rule 4 issues. The Utah Supreme Court has concerns with the inclusion of references to the Utah Code within the language of the proposed rule, so those references were removed. Judge James Blanch discussed concerns with inconsistencies in the application of the current rule and additional thoughts on removing the reference to the statute from the language of the rule, as well as the need to include in the rule both minimum requirements as well as limitations on the content of the acceptance form. Susan Vogel reminded the committee that what is being discussed would not satisfy Rule 4 service, but applies only to acceptance of service under Rule 4(d)(3). Judge Blanch also mentioned that electronic acceptance of service was extensively discussed at the 3rd District Bench meeting today and Judge Kent Holmberg said he expected to see more guarantees that the person who signed the acceptance was actually the party to be served. Paragraph (d)(3)(B)(i) was revised as follows: "If acceptance is obtained electronically, the proof of acceptance must demonstrate on its face that the party received and was able to retain readable copies of the summons and complaint prior to electronically signing the acceptance of service." The rule was sent back to the subcommittee with the request that the subcommittee look at what other states are doing, discuss the potential for accreditation of these providers and whether a reference to a Judicial Council form would work, and come back with another recommendation in August.

(3) ADVISORY COMMITTEE NOTES

Mr. Hunnicutt introduced the Group B subcommittee's recommendations on the advisory committee notes for Rules 8 through 16. The committee agreed with all of the subcommittee's recommendations; specifically, to delete the advisory committee notes to Rules 8, 10, 11, and 16, and make no changes to the note to Rule 15 (Rules 12-14 had no advisory committee notes). Also, a small technical change to the language Rule 16 was adopted to spell out ADR as "alternative dispute resolution." Tim Pack moved to adopt the foregoing changes; Tristan Smith seconded. The motion passed.

Judge Amber Mettler introduced the Group E subcommittee's recommendation on the advisory committee notes for Rules 54 through 72. The committee agreed with the subcommittee's recommendation to make no changes to the advisory committee notes to Rules 54 and 56, to adopt the recommendation for changes to Rule 58A (as amended, to also delete the sentence referencing the Appendix of Forms and not add the bracketed language), to delete the advisory committee notes to Rules 58C, 60, 62, 65A, 65B, 65C, and 68 (Rules 55, 57, 58B, 59, 61, 63, 63A, 64, 64A, 64B, 64C, 64D, 64E, 66, 67, 69A, 69B, 69C, 70, 71, and 72 had no advisory committee notes). The committee also discussed adding rule history and resource links to the end of each rule, as well as

changing the font size and style for the rules on the website. Judge Clay Stucki moved to adopt the foregoing changes; Lauren DiFrancesco seconded. The motion passed.

(4) Multidistrict Litigation Under Rule 42

A subcommittee consisting of Judge Kent Holmberg (chair), Rod Andreason, Tim Pack, Trevor Lee, Lauren DiFrancesco, and Judge Richard Mrazik was formed. The subcommittee will aim to have a recommendation for a proposed new rule ready by the September meeting.

(5) ADJOURNMENT.

The remaining issues were deferred until the next meeting. The fall meeting schedule was discussed. The committee will meet again in August; this may be in lieu of a November meeting, but the November meeting will stay on the schedule in case anything urgent comes up. The meeting adjourned at 5:25pm. The next meeting will be held August 28, 2019 at 4:00 pm.

Tab 2

Utah State Courts

Nancy Sylvester <nancyjs@utcourts.gov>

RE: Rule 4 -- Research on Other States' Rules on Acceptance of Electronic Service

Justin Toth <jtoth@rqn.com> Fri, Aug 23, 2019 at 2:20 PM

From: Justin Toth
Sent: Friday, August 23, 2019 11:29 AM
To: Judge Laura Scott; Lauren DiFrancesco E.H.; 'Susan Vogel'
Cc: 'Nancy Sylvester'
Subject: Rule 4 -- Research on Other States' Rules on Acceptance of Electronic Service

Rule 4 Subcommittee –

I have attached my research on "what other states are doing" as per the Committee's request.

Based on what I can find, it appears that Utah is on the cutting edge of this issue. The closest thing I could find are the rules for electronic filing in California. They might provide guidance. Attached is a zipped file containing rules recently adopted for electronic filing from other states; again, not terribly helpful but indicative of what is happening. Some states are just now piloting or implementing electronic filing; some like Massachusetts still require conventional service of "case initiating" documents; while others have only recently updated their rules to include electronic service under Rule 4, without consideration of acceptance of electronic service.

I searched court rules, statutes, proposed legislation and rule amendments, law reviews, journals, treatises, and the ABA but did not find anything helpful. Included in the attached file are a few articles on service of process through social media that provide historical and general discussions, but don't provide guidance on your question.

And finally, here is a link to website for process servers. Again, it doesn't really answer our question but provides an interesting perspective.

Service of Process via WhatsApp

Best,

JT

45 J. Marshall L. Rev. 459

John Marshall Law Review
Winter 2012

Comment
Svetlana Gitman [a1]

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(DIS)SERVICE OF PROCESS: THE NEED TO AMEND RULE 4 TO COMPLY WITH MODERN USAGE OF TECHNOLOGY

I. Rule 4 Is Doing a Dis-Service to the Federal Rules of Civil Procedure

> The legal profession is grounded in deep tradition. A major part of their tradition is to embrace new technologies at a snail's pace.
>
> Jim Klein, a spokesman for SCT, an e-filing software developer. [1]

When the e-filing system [2] was introduced to the federal circuits, the legal field was less than excited to embrace it. [3] One Dallas attorney was so upset with the new e-filing system that he filed a lawsuit in the Northern District of Texas alleging computer skills discrimination caused by mandatory federal e-filing in the ***460** cases he litigated. [4] Today, almost a decade after the introduction of e-filing to the federal court systems, e-filing is mandatory in almost all federal courts [5] and many state courts have also started implementing e-filing systems. [6] The legal field has finally embraced e-filing because of its efficiency. [7] Now that the legal field has accepted e-filing, this Comment encourages the legal field to adopt e-mail service of process so that parties are served at something faster than a snail's pace.

Part II of this Comment will give an overview of procedural due process and the notice requirement under Federal Rule of Civil Procedure 4. Part II will then explain how the concept of notice has evolved over time and will also discuss the legal system's skepticism, yet eventual acceptance, of advances in communication and technology with respect to service of process.

Part III will discuss the benefits of allowing e-mail service of process on defendants in certain situations without first having to attempt traditional methods. This part will illustrate how most courts thwart the purpose of the Federal Rules of Civil Procedure by mandating that traditional methods be attempted first. Therefore, Part IV will propose an amendment to Rule 4 to allow for service of process by e-mail, in limited situations, [8] without having to first attempt traditional methods. In certain situations, e-mail service of process is the most efficient method of service and best comports with the purpose of the Federal Rules of Civil Procedure even if personal or substitute service (as directed by the current Rule 4) is possible.

*461 II. New Communication Technologies Make Traditional Methods of Service Impracticable

A. Evolution of Service of (Due) Process

In order to formally commence a lawsuit, a plaintiff must notify the defendant of the pending action. [9] A defendant is given adequate notice when the summons and complaint are served in a method permitted by Rule 4 of the Federal Rules of Civil Procedure. [10] If service is not effectuated pursuant to Rule 4, the ***462** court does not have jurisdiction over the defendant because the defendant's constitutionally guaranteed due process rights have been offended. [11]

Historically, a defendant had to be physically within the jurisdiction of the court for the court's decision to be binding upon the defendant. [12] However, with rapid advances in technology and transportation, this concept became impractical. [13] In its 1945 International Shoe v. Washington decision, the Supreme Court held that a defendant only had to have certain minimum contacts within the state "such that the maintenance of the suit does not offend 'traditional notions of fair play and substantial justice.'" [14] ***463** Five years later, in Mullane v. Central Hanover Bank & Trust Company, the Supreme Court decided that, "at a minimum [the Due Process Clause] require[s] that deprivation of life, liberty or property by adjudication be preceded by notice and opportunity for hearing appropriate to the nature of the case." [15] Under these criteria, defendants' due process rights are protected when notice is "reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections." [16] In other words, notice must be effectuated in such a manner that it might reasonably inform the defendant of the pending lawsuit against him. [17]

Today, in order to meet the constitutional notice requirements ***464** set forth in Mullane, notice must be fair and reasonable. [18] The method of service may still be adequate and comport with traditional notions of due process even if the defendant does not actually receive the notice because, under the criteria established by the court in Mullane, notice need only be reasonably calculated to reach interested parties. [19]

B. Post-Mullane Advances in Notice Technologies

1. The Telex

One of the earliest instances of a court's willingness to adapt to new technology was in 1980, when the United States District Court for the Southern District of New York allowed a plaintiff to serve a defendant via telex. [20] In New England Merchants National Bank v. Iran Power Generation and Transmission Co., plaintiffs were unable to serve defendants by any of the statutorily permitted methods. [21] The district court allowed service via telex, holding that this method was reasonably calculated to reach the Iranian defendants since most defendants in their position had access to telex. [22] The court emphasized that:

> Courts . . . cannot be blind to changes and advances in technology. No longer do we live in a world where communications are ***465** conducted solely by mail carried by fast sailing clipper or steam ships. . . . No longer must process be mailed to a defendant's door when he can receive complete notice at an electronic terminal inside his very office, even when the door is steel and bolted shut. [23]

New England Merchants was a seminal case because it set the precedent that service of process through advanced communication and technological methods did not violate defendants' due process rights. [24]

2. Facsimile and E-mail

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In 2000, two decades after New England Merchants, the United States Bankruptcy Court for the Northern District of Georgia authorized service of process on a defendant by facsimile when the plaintiff had exhausted all acceptable methods of service. [25] In Broadfoot v. Diaz, the district court judge found that an evasive defendant was intentionally concealing his location. [26] The court authorized three forms of alternate service, including facsimile and e-mail, because the facts of the case suggested that the defendant preferred to receive all communications through either e-mail or facsimile. [27] The court reasoned that effectuating notice through the communication channels that defendant preferred adequately protected defendant's due process rights. [28] Similar to New England Merchants, Broadfoot recognized new ***466** communication technologies to effectuate notice. [29]

3. The Television

In 2001, one year after Broadfoot, the United States District Court for the Southern District of New York authorized service of process via another form of technology. [30] In Smith v. Islamic Emirate of Afghanistan, the court authorized service of process via television. [31] In Smith, the plaintiffs brought an action against defendants Osama bin Laden, [32] Al Qaeda, [33] the Taliban, [34] and the Islamic Emirate of Afghanistan, based on defendants' alleged involvement in the September 11 attacks on the World Trade Center. [35] Because some of the defendants' whereabouts were unknown, service by traditional methods was impossible and plaintiffs moved for service by alternative methods. [36] The court authorized service of process upon defendants bin Laden [37] and Al ***467** Qaeda [38] via newspaper publication and television broadcast [39] because it was virtually impossible to ascertain the location of these defendants. [40]

C. There Is No Need for Traditional Methods of Service if E-Mail Is More Efficient

In 2002, the Unites States Court of Appeals for the Ninth Circuit allowed a plaintiff to serve an evasive foreign defendant via e-mail. [41] More importantly, the Ninth Circuit held that Rule 4(f)(3), which authorizes any means of service not prohibited by international law, is not a fallback provision when traditional methods have failed, but rather is an equally viable option of service. [42] In Rio Properties v. Rio International Interlink, the plaintiff owned and operated a Las Vegas casino and held several ***468** registered trademarks in its name. [43] When plaintiff became aware that a Costa Rican company was operating an Internet gaming business under a similar name, plaintiff brought suit and contacted defendant demanding that defendant terminate its website. [44] Defendant did so, but almost immediately launched an identical sports gambling website, at which point plaintiff sued for trademark infringement. [45] After plaintiff showed that locating defendant in the United States or Costa Rica was impossible, as was serving process on the international courier defendant had designated, the district court ordered service via the e-mail address provided on defendant's website. [46] On appeal, the Ninth Circuit affirmed the lower court's decision to permit service of process by e-mail, explaining that e-mail service was appropriate because it was not prohibited by international agreement and was reasonably calculated to provide notice and an opportunity to respond. [47] Furthermore, e-mail service was acceptable because defendant's business was set up so that it could only be reached by e-mail. [48]

The Ninth Circuit paid particular attention to the language of Rule 4 when deciding whether e-mail service was warranted in this situation. [49] The court explained that the three provisions of Rule 4(f), which deal with service of process on individuals in a foreign country, are equally important and that there is no evidence that Congress preferred any one of the methods of service to another. [50] The court emphasized that, "no language in Rules 4(f)(1) or 4(f)(2) indicates their primacy, and certainly Rule 4(f)(3) includes no qualifiers or limitations which indicate its availability ***469** only after attempting service of process by other means." [51] In fact, the court emphasized that according to the advisory committee notes to Rule 4, "in cases of 'urgency' Rule 4(f)(3) may allow the district court to order a 'special method of service,' even if other methods of service remain incomplete or unattempted." [52]

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Nonetheless, the Ninth Circuit recognized the limitations of e-mail service of process and left it up to the discretion of the district courts to balance the "limitations of e-mail service against its benefits in any particular case." [53] Under the Rio standard, courts that have denied e-mail service of process have tended to do so because a defendant's e-mail address was used sporadically and informally, and therefore, there was insufficient proof that e-mail was reasonably calculated to reach the defendant. [54]

III. There Is No Room for Tradition in Rule 4

The Rio decision was significant because the Ninth Circuit allowed a plaintiff to serve a foreign defendant via e-mail without first making the plaintiff attempt every conventional method of service listed in Rule 4. [55] Most courts that have permitted service of process via e-mail have done so only after plaintiff has been unable to serve the defendant by traditional methods and e-mail was a method reasonably calculated to reach the defendant. [56] ***470** While courts outside the Ninth Circuit have recognized certain circumstances where e-mail is a method reasonably calculated to reach the defendant, those courts are thwarting the purpose of the Federal Rules of Civil Procedure by mandating that plaintiffs first attempt traditional methods even though those methods will almost certainly be inefficient. [57]

A. In Certain Situations, It Is Reasonable for Plaintiff to Attempt Traditional Methods of Service Before Attempting to Serve via E-mail

Service via one of the methods permitted in Rule 4 is appropriate when plaintiff has no reason to believe traditional service will be time-consuming, overly expensive, or unsuccessful. [58] Where the identity and location of defendant is easily ascertainable and a plaintiff has no reason to think personal or substitute service would be impracticable, traditional methods of service should be attempted first.

In D.R.I., Inc. v. Dennis, plaintiff attempted unsuccessfully to serve defendant at his last known address. [59] Although a search provided two addresses for defendant, one of which was the address listed with the Department of Motor Vehicles, plaintiff's service at these addresses were unsuccessful. [60] The court ordered plaintiff to attempt service by certified mail to defendant's last known addresses, by publication in a local newspaper, and by e-mailing a copy of the summons and complaint to the e-mail ***471** address that plaintiff stated defendant had used. [61] Accordingly, plaintiff was only allowed to serve defendant via e-mail if e-mail service was effectuated in conjunction with traditional methods of service set out in Rule 4. The court was correct in allowing e-mail service only in conjunction with traditional methods because there was a known address for defendant, plaintiff had continuous contact with defendant by telephone, and plaintiff had no reason to think defendant would be elusive. [62]

In Prediction Co., LLC v. Rajgarhia, the court allowed plaintiff to serve defendant by e-mail when plaintiff demonstrated that it "actively, though unsuccessfully, attempted to obtain" defendant's address in India. [63] Defendant's lawyer acknowledged ***472** that he was in contact with defendant about the lawsuit, but did not have defendant's current address in India and was not authorized to accept service on his client's behalf. [64] The court ultimately held that it was reasonably likely that an e-mail sent to defendant's recently used e-mail address, containing the summons and complaint, was reasonably calculated to reach the defendant. [65] Nonetheless, similar to D.R.I., it was reasonable for the plaintiff in Prediction to first attempt traditional methods of service because there was no reason to anticipate that defendant would be elusive, especially in light of defendant's constant contact with his lawyer, which made it likely that plaintiff could obtain an address for defendant to be served at via defendant's attorney. [66]

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B. In Situations When Defendant Is an Online Entity Operating Exclusively Online or Conducting a Substantial Amount of Its Business via the Internet, E-mail Service Should Be the Primary Method of Service

1. E-mail Is a Reliable Source of Communication

Currently, there are over 240 million Internet users in the United States. [67] Based on the total U.S. population, this means that more than seventy-five percent of the U.S. population uses the Internet. [68] More importantly, e-mail is the third most popular activity for Internet users in the United States and the most ***473** popular activity for mobile Internet users in the United States. [69] Furthermore, there are over two billion Internet users in the world. [70] Based on the world population, which is about 6.9 billion, about thirty percent of the world's population currently uses the Internet. [71] Because e-mail and Internet use has grown exponentially in the United States and worldwide, in certain circumstances e-mail seems to be a method reasonably calculated to reach a defendant without offending traditional notions of due process. [72]

2. E-mail Can Be the Most Efficient Way to Notify Defendant of a Pending Action

In certain situations, a plaintiff should not have to make a showing that all the prescribed methods of Rule 4 have failed before e-mail service is authorized. Where the defendant is either an online business entity with no physical presence that conducts its business primarily online or a business entity with a physical presence that does a substantial amount of business online, a plaintiff should be allowed to serve a defendant by e-mail without first attempting traditional methods. This is because in these instances, e-mail is the most efficient method of service, use of e-mail furthers the goal of the Rules, and it does not violate a defendant's due process rights. [73]

In Williams-Sonoma v. Friendfinder, defendants owned and operated various pornographic sites and made use of the POTTERY BARN trademark without consent from plaintiff, the trademark owner. [74] The court granted plaintiff permission to serve ***474** defendants via e-mail, finding that plaintiff had communicated with defendants via e-mail on a number of occasions and that e-mail communication would ensure that defendants had adequate notice of the action. [75] Although plaintiff filed the complaint in October 2006, the court did not grant permission to serve defendants via e-mail until April 2007. [76] The lawsuit was delayed by six months because the court forced the plaintiff to first attempt to serve the defendants through traditional methods of service. [77] Because all of the defendants were online entities that did all of their business online, e-mail service of process was reasonably calculated to reach defendants; permitting plaintiff to serve via e-mail would have avoided the six-month delay in effectuating service. [78] E-mail service of process would not only have been more efficient than traditional methods of service, but would have also been more in line with the overarching purpose of the Federal Rules of Civil Procedure: efficiency. [79]

Similar to Williams-Sonoma, the plaintiff in Popular Enterprises v. Webcom Media Group was allowed to serve the defendant, an online business, by e-mail only after other attempts to serve defendant failed. [80] Because the physical address registered to the internet domain did not belong to defendant, and e-mails previously sent to the domain did not bounce back and presumably reached the defendant, the court allowed e-mail ***475** service of process on defendant. [81] While the court eventually allowed plaintiff to serve defendant by e-mail, this was another situation where it would have been more efficient to serve defendant by e-mail without first attempting traditional methods. Since defendant was an online entity and plaintiff had only communicated with defendant via e-mail in the past, there should not have been any due process concerns as e-mail was reasonably calculated to reach the defendant. [82] More importantly, had plaintiff been allowed to serve defendant by e-mail as soon as its complaint was filed, the lawsuit could have been well under way by the point at which the court finally authorized e-mail service. [83]

In Philip Morris v. Veles, plaintiff once again had to attempt all accepted methods of service of process before being allowed to serve defendant by e-mail. [84] In Philip Morris, plaintiff alleged that defendant, an online store, was infringing on plaintiff's

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trademark. [85] Defendant was a foreign corporation of unknown citizenship and did not have a physical contact address posted on any of its websites. [86] Plaintiff demonstrated both the inadequacy of service on defendant by methods under Rule 4(f)(1)-(2) and the likelihood that e-mail service of process would succeed. [87] Plaintiff also showed that defendant conducted business almost exclusively through its websites and corresponded regularly with customers via e-mail. [88] As a result, the court permitted plaintiff to serve defendants by e-mail after making plaintiff attempt traditional ***476** methods first. [89]

While physical addresses for defendants existed in Williams-Sonoma, Popular, and Philip-Morris (even though those addresses did not always belong to defendants), it would have been far more efficient to serve defendants initially via e-mail because e-mail was defendants' preferred method of communication. [90] In these circumstances, where defendants were online entities conducting business primarily through e-mail, e-mail was the most efficient method of service and was truest to the overarching purpose of the Federal Rules of Civil Procedure. [91]

C. Previous Concerns About E-mail Service of Process Are No Longer Relevant

Although service via e-mail is not perfect, the benefits of e-mail service of process outweigh the drawbacks. One concern frequently raised by opponents of e-mail service is the inability to verify whether the e-mail reaches the defendant. [92] Today, however, many e-mail providers offer programs where senders are notified whether and when their e-mail was received and opened. [93] Moreover, there is no guarantee that a defendant served by traditional means will actually receive the notice. [94] Another drawback that opponents of e-mail service have often voiced is the ***477** difficulty in verifying the owner of an e-mail account. [95] Again, though, there is no guarantee that a summons and complaint left with an individual of suitable age and discretion, or served upon someone that has been authorized as an agent of the defendant, will actually reach the defendant either. [96]

Opponents of e-mail service of process will probably raise concerns over the credibility of e-signatures. [97] Yet, issues over electronic signatures should no longer be of concern due to the extensive use of electronic signatures and the fact that the Global and National Commerce Act of 2000 made e-signatures legally binding. [98] At the very least, e-mail service of process is a viable method that guarantees that a defendant will receive a higher level of due process than other recognized methods of service, such as service by publication. [99]

D. Other Technological Innovations Have Been Greeted with Hesitation

E-mail service of process is not the first technological advancement in legal procedure to be met with distaste. The e-filing system has become a huge success even though many courts were very hesitant to implement it. [100] The e-filing system has ***478** made more information available to more people in a faster and cheaper way. [101] E-filing also minimizes the use of paper and reduces the cost of fuel consumed in filing, serving, and retrieving hard copies of litigation papers. [102] In the case of e-filing, convenience and efficiency conquer tradition and the payoffs have been tremendous. The same is likely to be the case with more widespread use of e-mail service of process.

IV. Modifying Procedure to Adapt to Reality

The purpose of the Federal Rules of Civil Procedure is set out in Rule 1, which states that "[t]he Federal Rules of Civil Procedure] should be construed and administered to secure the just, speedy, and inexpensive determination of every action and proceeding." [103] If service of process is to comport with Rule 1, then Rule 4 should be administered in the most just, speedy,

and inexpensive fashion. Echoing Rio, in circumstances where the chances of reaching a defendant are best via e-mail, plaintiffs should be allowed to do so without first exhausting all other contemplated methods. [104]

If a defendant with limited or no physical location conducts over seventy percent of its business on the Internet, including through e-mail, a plaintiff should be allowed to serve defendant by e-mail. [105] For companies that operate primarily on the Internet, ***479** sending acknowledgements and confirmations via e-mail, e-mail is the primary form of communication and seventy percent is an easy threshold to meet. [106]

Similarly, if a defendant is a company with a physical location, but conducts a substantial amount (at least thirty-three percent) of its business through the Internet, including using e-mail to communicate with customers, suppliers, etc., a plaintiff should be allowed to serve that defendant by e-mail without first attempting traditional methods. [107] If a defendant conducts at least one-third of its business on the Internet, including via e-mail, e-mail is a method reasonably calculated to reach and notify defendant of the pending action. Whether the defendant conducts business primarily or substantially through the Internet, a plaintiff must be familiar with defendant's e-mail and Internet usage at the time of filing in order for the amendment to be applicable. [108]

Thus, the final portion of Rule 4(e)(2) and 4(f)(2)(C) should be amended to allow for service by e-mail in those situations outlined above, without having a plaintiff first attempt personal or substitute service even if personal or substitute service is possible. Therefore, following the amendment, Rule 4(e), Serving an Individual Within a Judicial District of the United States, would read as follows:

> Unless federal law provides otherwise, an individual . . . may be served in a judicial district of the United States by:
>
> (1) following state law for serving a summons in an action brought ***480** in courts of general jurisdiction in the state where the district court is located or where service is made; or
>
> (2) doing any of the following:
>
> (A) delivering a copy of the summons and of the complaint to the individual personally;
>
> (B) leaving a copy of each at the individual's dwelling or usual place of abode with someone of suitable age and discretion who resides there; or
>
> (C) delivering a copy of each to an agent authorized by appointment or by law to receive service of process[; or]
>
> (D) sending a copy of each by e-mail if defendant is an online business entity with no physical presence and conducts its business primarily via the internet, including by e-mail--where an e-mail address is posted on defendant's website or defendant has indicated its preference to be contacted at given e-mail address--and plaintiff attests to knowledge of defendant's internet and e-mail usage at the time of filing; or [109]

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> (E) sending a copy of each by e-mail if defendant is a business entity with a physical presence, but conducts a substantial portion of its business via the internet, including by e-mail--where an e-mail address is posted on defendant's website or defendant has indicated its preference to be contacted at given e-mail address--and plaintiff attests to knowledge of defendant's internet and e-mail usage at the time of filing. [110]

Similarly, Rule 4(f), Serving an Individual in a Foreign Country, would read as:

> Unless federal law provides otherwise, an individual . . . may be served at a place not within any judicial district of the United States:
>
> (1) by any internationally agreed means of service that is reasonably calculated to give notice, such as those authorized by the Hague Convention on the Service Abroad of Judicial and Extrajudicial Documents;
>
> (2) if there is no internationally agreed means, or if an international agreement allows but does not specify other means, by a method that is reasonably calculated to give notice:
>
> (A) as prescribed by the foreign country's law for service in that ***481** country in an action in its courts of general jurisdiction;
>
> (B) as the foreign authority directs in response to a letter rogatory or letter of request; or
>
> (C) unless prohibited by the foreign country's law, by:
>
> (i) delivering a copy of the summons and of the complaint to the individual personally; or
>
> (ii) using any form of mail that the clerk addresses and sends to the individual and that requires a signed receipt; or
>
> (iii) sending a copy of each by e-mail if defendant is an online business entity with no physical presence and conducts its business primarily via the internet, including by e-mail--where an e-mail address is posted on defendant's website or defendant has indicated its preference to be contacted at given e-mail address--and plaintiff attests to knowledge of defendant's internet and e-mail usage at the time of filing; [111] or

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> (iv) sending a copy of each by e-mail if defendant is a business entity with a physical presence, but conducts a substantial portion of its business via the internet, including by e-mail--where an e-mail address is posted on defendant's website or defendant has indicated its preference to be contacted at given e-mail address--and plaintiff attests to knowledge of defendant's internet and e-mail usage at the time of filing. [112]

The Advisory Committee Notes to Rule 4 reiterate the language of Rule 1 and emphasize a quick, efficient, and inexpensive process. [113] The fact that the Advisory Committee has created part (d) to Rule 4, which permits waiver of service in order to make service of process less expensive, suggests that e-mail service of process in the specific situations proposed above would be in line with the Committee's thinking. The waiver of service option suggests that the Rules Committee desired to make service of process faster and cheaper. This intent is further illustrated by incentives such as extended time to reply if service is waived and placing the burden on the plaintiff to pay for service of process if plaintiff failed to waive without a valid reason. [114] Furthermore, the Judicial Conference Rules Committee has previously discussed and recommended a change to Rule 4 to permit e-mail service of process. [115]

***482** Limiting e-mail service of process to the two specific situations mentioned is an excellent way to ease the legal community into a new form of technology without causing too much of a commotion. A 2009 article by Ronald J. Hedges, Kenneth N. Rashbaum, and Adam C. Losey proposed an amendment to Rule 4 that would allow for e-mail service of process on any individual. [116] The authors suggested adding or amending certain provisions of Rule 4 to allow for service of process "by electronic means." [117] Such proposals simply go too far by allowing service by e-mail on any defendant. [118] Moreover, concerns voiced by opponents to e-mail service cannot be as easily rebutted when any potential defendant can be served via e-mail. [119] Limiting e-mail service of process to the two specific situations proposed above is a step towards incorporating technological advances into legal procedure--a modest step the legal community would be ***483** more inclined to take when compared with the approach Hedges, Rashbaum, and Losey advocate.

V. E-mail Is the New Black

Rule 4 is outdated and needs to be amended to better comport with Rule 1 when looking at current technological trends. As technology advances, the legal field must adapt with it. [120] In situations where e-mail is reasonably calculated to reach a defendant and notify it of the pending action, e-mail service of process should be allowed without requiring plaintiff to demonstrate that all traditional methods of service have been exhausted. The purpose of the Federal Rules of Civil Procedure is to make the litigation process as efficient as possible. Making a plaintiff spend a significant amount of time and money to serve a defendant in a traditional manner runs counter to the purpose and spirit of the Rules. Thus, amending Rule 4 in the fashion proposed above will keep Rule 4 in service and in style.

Footnotes

a1 Svetlana Gitman graduated in 2012 from The John Marshall Law School in Chicago, Illinois, where she served as a Staff Editor on The John Marshall Law Review. This Comment was inspired by Svetlana's interest in technology and desire to improve the legal field through available technological advances. Svetlana would like to thank Professors Susan Brody and Mary Nagel for their assistance in helping her craft a unique proposal. She also wishes to thank her parents for being the best parents in the world and supporting her in everything she does.

1 Quoted in John Christian Hoyle, E-Filing Rides to Rescue and... Stumbles, Christian Sci. Monitor (June 3, 1999), http://www.csmonitor.com/1999/0603/p19s1.html.

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2 See generally Joseph H. Firestone & James C. Horsch, Are You Ready for E-Filing?, 84 Mi. Bar J. 22, 22-25 (Oct. 2005) (describing how the e-filing system works). An attorney logs into the court's website with a court-issued password and uploads all documents. Id. at 23. The attorney then receives a receipt of the filing and a notice of the filing is automatically sent to other parties in the case. Id. The e-filing system saves time in transmitting documents between parties, saves costs in printing and mailing, permits parties to view filed documents without leaving their offices, and allows for filing outside of the court's hours of operation. Id.

3 Mary Wahne Baker, Comment, Where There's a Will, There's a Way: The Practicalities and Pitfalls of Instituting Electronic Filing for Probate Procedures in Texas, 39 Tex. Tech. L. Rev. 423, 446 (2007) (explaining that transitions to the e-filling system have glitches, often come with a heftier price-tag than expected, and benefit clerks and legal support staff more than judges or attorneys).

4 Id. at 448.

5 About CM/ECF, United States Courts, http:// www.uscourts.gov/FederalCourts/CMECF/AboutCMECF.aspx (last visited Jan. 2, 2012). According to the federal judiciary, Case Management/Electronic Case Files (CM/ECF) systems are in use in every federal district court, all but one federal bankruptcy court, the Court of International Trade, the Court of Claims, and all but two federal appellate courts. Id. Today, more than thirty-seven million cases are on the CM/ECF systems, and more that 450,000 attorneys and others have used the system. Id.

6 Peter Mierzwa, File Your Pleadings Electronically: Saving Money on the Paperless Trail, 24 CBA Rec. 16, 16 (Jan. 2010). In 2007, the Illinois Supreme Court approved the Circuit Court of Cook County's application for their e-filing pilot project covering cases in the commercial litigation section of the Law Division. Id. In May of 2009, the e-filing system was launched. Id. Over 2600 users registered to e-file on the Clerk's system since the launch to January 2010. Id. See also Baker, supra note 3, at 431-39 (describing how Colorado, Florida, and Arizona state courts have started implementing e-filing systems).

7 Feature: Going Green: Texas Law Firms and Environmental Responsibility: The Environmental Impact of Electronic Filing, 72 Tex. B.J. 268 (Apr. 2009) (Interview by the Texas Bar Journal with David Maland, U.S. District Clerk for the Eastern District of Texas).

8 These specific situations are discussed in the Analysis, Part B.1.

9 See generally Adriana L. Shultz, Superpoked and Served: Service of Process Via Social Networking Sites, 43 U. Rich. L. Rev. 1497, 1499 (2009) (“As far as American law is concerned, notice is ‘a fundamental procedural component of commencing litigation.”’ (citing Aaron R. Chacker, Note, E-ffectuating Notice: Rio Properties v. Rio Interlink International, 48 Vill. L. Rev. 597, 599 (2003))).

10 Fed. R. Civ. P. 4(e)-(f). Rule 4(e)-(f) governs proper service. Rule 4(e) states that, in order to serve an individual within a judicial jurisdiction of the United States:
Unless federal law provides otherwise, an individual--other than a minor, an incompetent person, or a person whose waiver has been filed--may be served in a judicial district of the United States by:
(1) following state law for serving a summons in an action brought in courts of general jurisdiction in the state where the district court is located or where service is made; or
(2) doing any of the following:
(A) delivering a copy of the summons and of the complaint to the individual personally;
(B) leaving a copy of each at the individual's dwelling or usual place of abode with someone of suitable age and discretion who resides there; or
(C) delivering a copy of each to an agent authorized by appointment or by law to receive service of process.
Fed. R. Civ. P. 4(e).
Rule 4(f) states:
Unless federal law provides otherwise, an individual--other than a minor, an incompetent person, or a person whose waiver has been filed--may be served at a place not within any judicial district of the United States:
(1) by any internationally agreed means of service that is reasonably calculated to give notice, such as those authorized by the Hague Convention on the Service Abroad of Judicial and Extrajudicial Documents;
(2) if there is no internationally agreed means, or if an international agreement allows but does not specify other means, by a method that is reasonably calculated to give notice:
(A) as prescribed by the foreign country's law for service in that country in an action in its courts of general jurisdiction;
(B) as the foreign authority directs in response to a letter rogatory or letter of request; or

(C) unless prohibited by the foreign country's law, by:
i. delivering a copy of the summons and of the complaint to the individual personally; or
ii. using any form of mail that the clerk addresses and sends to the individual and that requires a signed receipt; or
(3) by other means not prohibited by international agreement, as the court orders.
Fed. R. Civ. P. 4(f).

11 See Matthew R. Schreck, Preventing "You've Got Mail" From Meaning "You've Been Served": How Service of Process By E-Mail Does Not Meet Constitutional Procedural Due Process Requirements, 38 J. Marshall L. Rev. 1121, 1123-25 (2005) (explaining that the phrase "due process of law" comes from an English statute and when the Framers adopted the phrase in the Fifth and Fourteenth Amendments, the intention was to prevent the government from encroaching on certain procedural rights). According to the Supreme Court, the purpose of procedural due process is to give parties a right to be heard when their rights under the Fifth or Fourteenth Amendments are at stake. Id. at 1124; see also Maria N. Vernace, E-Mailing Service of Process: It's a Shoe In!, 36 U. West. L.A. L. Rev. 274, 276 (2005) (explaining that due process rights are guaranteed to all citizens under the Fifth and Fourteenth Amendments of the United States Constitution). See, e.g., Grannis v. Ordean, 234 U.S. 385, 394 (1914) (stating that notice must reasonably convey the required information); Roller v. Holly, 176 U.S. 398 (1900) (stating that notice must give a defending party a reasonable time to make objections).

12 Pennoyer v. Neff, 95 U.S. 714, 733 (1877). See also Int'l Shoe Co. v. Wash., 326 U.S. 310, 316 (1945) (explaining that "[h]istorically the jurisdiction of courts to render judgment in personam is grounded on their de facto power over the defendant's person."). In other words, a defendant's presence within the territorial jurisdiction of a court was required in order for the judgment to bind the defendant.

13 See generally Jeremy A. Colby, You've Got Mail: The Modern Trend Towards Universal Electronic Service of Process, 51 Buffalo L. Rev. 337, 340-44 (2003) (noting that the quick rate at which the nation was expanding geographically in the nineteenth and early twentieth centuries made service of process in the forum difficult and courts were forced to develop modern standards to permit personal jurisdiction over defendants outside the forum).

14 Int'l Shoe, 326 U.S. at 317 (quoting Milliken v. Meyer, 311 U.S. 457, 463 (1940)). A court could assert jurisdiction over a defendant when the defendant's activities were continuous and systematic and gave rise to the liabilities underlying the lawsuit. Id. See, e.g., Pa. Lumbermen's Mut. Fire Ins. Co. v. Meyer, 197 U.S. 407, 414-15 (1905) (holding that the Court had jurisdiction over the defendant when nearly one-third of the amount of defendant's total fire risks were in New York and the provisions of the contract at issue clearly contemplated the presence of an agent of the company at the place of the loss after it has occurred); Conn. Mut. Life Ins. Co. v. Spratley, 172 U.S. 602, 610-11 (1899) (holding that defendant, Connecticut Mutual Life Insurance Company, was doing business within Tennessee at the time of the service because it had many agents therein and had issued policies of insurance to citizens of Tennessee); St. Clair v. Cox, 106 U.S. 350, 355 (1882) (holding that when a corporation sends its officers to do business in a different state, the corporation is, in effect, as much represented in the new state as in the state it is incorporated in).

15 Mullane v. Cent. Hanover Bank & Trust Co., 339 U.S. 306, 313 (1950). The Court noted that the right to be heard is worthless if a defendant is not notified of the pending action. Id. See also Schreck, supra note 11, at 1129 (explaining that a method of service that is permissible and does not offend due process requirements under one set of facts may not be permissible under a different set of facts). Schrek suggests that courts have to look to the facts of each case closely to determine whether the method of service used is the most likely to reach the defendant. Id.

16 Mullane, 339 U.S. at 314. In Mullane, the only notice required (according to New York banking law) was through a newspaper publication stating only the "name and address of the trust company, the name and the date of establishment of the common trust fund, and a list of all participating estates, trusts or funds." Id. at 310. The Court held that this form of service was not reasonably calculated to notify those with an interest in the pending action because it was not reasonably calculated to reach known beneficiaries. Id. at 319. The Court noted that, for those beneficiaries whose names were known, a mailed notice would have been sufficient. Id.

17 Vernace, supra note 11, at 279; see also Mullane, 339 U.S. at 314. The Court stated:
The means employed must be such as one desirous of actually informing the absentee might reasonably adopt to accomplish it. The reasonableness and hence the constitutional validity of any chosen method may be defended on the ground that it is in itself reasonably certain to inform those affected,... or, where conditions do not reasonably permit such notice, that the form chosen is not substantially less likely to bring home notice than other of the feasible and customary substitutes. It would be idle to pretend that publication alone... is a reliable means.... Chance alone brings to the attention of even a local resident an advertisement in small type

inserted in the back pages of a newspaper.... The chance of actual notice is further reduced when... the notice required does not even name those whose attention it is supposed to attract....
Id. at 315. The Court reasoned that because the trust company had been able to give mailed notice to known beneficiaries at the time the common trust fund was formed, this indicated that postal notification was possible. Id. at 319.

18 Vernace, supra note 11, at 280 (citing Yvonne A. Tamayo, Are you Being Served?: E-mail and (Due) Service of Process, 51 S.C. L. Rev. 227, 232 (2000)).

19 Mullane, 339 U.S. at 318-19. The Court never mentions whether the defendant must actually receive the notice, only that the notice is reasonably calculated to reach interested parties. Id. See also U. S. Aid Funds, Inc. v. Espinosa, 130 S. Ct. 1367, 1372 (2010) (holding that Mullane is still good law).

20 New Eng. Merch. Nat'l Bank v. Iran Power Generation & Transmission Co., 495 F. Supp. 73, 81-82 (1980). Telex is a form of telegraph service that links "one typewriter keyboard to another that prints, copies, [and] enables subscribers to send messages and data directly to other subscribers throughout the world." Chacker, supra note 9, at 605 n.46.

21 New Eng. Merch., 495 F. Supp. at 75. Plaintiff brought suit against defendants during the Iranian hostage crisis. Id.

22 Id. at 81 n.4. The court, concerned with service under the provision of the Foreign Sovereign Immunities Act (FSIA), 28 U.S.C. §1602 et seq., held that serving the Iranian defendants would be nearly impossible in a time when diplomatic ties with Iran were severed. Id. at 78. However, FSIA provides that if other methods are unavailable, the court may fashion a mode of service "consistent with the law of the place where service is to be made." 28 U.S.C. §1608(b)(3)(C) (2011). FSIA only requires that the mode of service allowed by the court not be prohibited under the law of the foreign state, that the defendant receives notice of the action, and that the defendant has an adequate opportunity to defend the case. New Eng. Merch., 495 F. Supp. at 79-80. The court mentioned that it investigated the availability of telecommunication services between the United States and Iran and found at least two companies that offered service of process via telex. Id. at 81 n.4. As a result, the court held that telecommunications remained a sound method to notify defendants of the pending action. Id. at 81.

23 New Eng. Merch., 495 F. Supp. at 81.

24 Chacker, supra note 9, at 604-07.

25 Broadfoot v. Diaz (In re Int'l Telemedia Assocs.), 245 B.R. 713, 722 (Bankr. N.D. Ga. 2000).

26 Id. at 718. The court described defendant as "a 'moving target,' making it virtually impossible for the Trustees to find him and effect service by any of the traditional means specified in the Federal Rules of Civil Procedure." Id. The court explained that plaintiff spoke with defendant by telephone six to ten times trying to establish a location where service of process could be sent to, but all mail sent to the addresses defendant provided was refused. Id.

27 Id. Defendant had provided plaintiff with a permanent facsimile number, and an e-mail address. Id. In a letter sent in March 1999, defendant also instructed plaintiff to use the new permanent facsimile number for any future correspondence. Id. Defendant specifically stated in the letter that "the received FAXes are forwarded to me and stored on my E-mail" and "[f]rom now on, you may contact me by FAX." Id. Based on these correspondences, the court determined that defendant preferred to be reached by facsimile and e-mail. Id.
A facsimile is "a method or device for transmitting documents... or the like, by means of radio or telephone for exact reproduction elsewhere." Random House Webster's Unabridged Dictionary 690 (2d ed. 2001).

28 Broadfoot, 245 B.R. at 721 (suggesting that "[i]f any methods of communication can be reasonably calculated to provide a defendant with real notice, surely those communication channels utilized and preferred by the defendant himself must be included among them. Moreover, communication by facsimile transmission and electronic mail have now become commonplace in our increasingly global society.").

29 Id. at 722. "A defendant should not be allowed to evade service by confining himself to modern technological methods of communication not specifically mentioned in the Federal Rules. Rule 4(f)(3) appears to be designed to prevent such gamesmanship by a party." Id.

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30 Smith v. Islamic Emirate of Afg., Nos. 01 Civ. 10132(HB), 01 Civ. 10144(HB), 2001 U.S. Dist. LEXIS 21712 (S.D.N.Y. Dec. 20, 2001).

31 Id.; see also Chacker, supra note 9, at 610 (noting that this is the only known decision assessing the constitutional sufficiency of notice by television).

32 Osama Bin Laden was a wealthy Saudi businessman known worldwide for financing terrorism. Osama bin Laden (1957-2011), N.Y. Times, http:// topics.nytimes.com/topics/reference/timestopics/people/b/osama_bin_ laden/index.html (last updated Mar. 30, 2012). Bin Laden was most associated with funding the bombings of embassies in Africa in 1998, destroying the U.S.S. Cole in 1999, and the September 11 attacks. Id.

33 Al-Qaeda is an international terrorist group, founded by Osama bin Laden, determined to eradicate Muslim countries of western influence and instill a fundamentalist Islamic regime. Jayshree Bajoria & Greg Bruno, Al-Qaeda, Council on Foreign Relations, http:// www.cfr.org/publication/9126/alqaeda_aka_alqaida_alqaida.html (last updated Aug. 29, 2011).

34 The Taliban is a Muslim fundamentalist group that took control of Afghanistan's government in 1996. Jayshree Bajoria, The Taliban in Afghanistan, Council on Foreign Relations, http://www.cfr.org/publication/10551/taliban_in_ afghanistan.html (last updated Oct. 6, 2011). In 2001, the Taliban was ousted in a U.S. led invasion of Afghanistan. Id.

35 Smith, 2001 U.S. Dist. LEXIS 21712, at *1-2. Plaintiffs, the administrators of the estates of those killed in the events of September 11, 2001, brought suit seeking damages for their relatives' deaths. Id.

36 Id. at *2-3 (explaining that plaintiffs sought to serve defendants by alternative means of service including personal service and publication because the preferred methods of service, codified in Fed. R. Civ. P. 4(f)(1)-(2), were ineffective).

37 Id. at *5-6. The court permitted service on bin Laden by publication, stating that bin Laden is "the subject of an international manhunt" and his whereabouts are unknown until he can be captured. Id. at *9. The court reasoned that it would be unfair to make plaintiffs wait to commence their lawsuit until bin Laden was captured. Id. at *9-10. Moreover, if bin Laden was never captured or was killed, plaintiffs would have a very difficult time going after his estate in Saudi Arabia, where he was no longer a citizen, or in Afghanistan, where the legal system was in turmoil. Id.

38 Id. at *12-13. The court decided that serving Al Qaeda in one of the methods permitted by Rule 4 would be just as difficult as serving bin Laden. Id. at *12. While some Al Qaeda members had been captured in Afghanistan, none were high-ranking enough that they could accept service on behalf of Al Qaeda. Id. The court feared that if service by publication was prohibited, plaintiffs would not be able to pursue their lawsuit against Al Qaeda in the event that Al Qaeda dissolved before any officials capable of accepting service were captured or surrendered. Id.

39 Smith v. Islamic Emirate of Afg., 262 F. Supp. 2d 217, 220 n.2 (2003). Plaintiffs effectuated notice on Al Qaeda and Osama bin Laden by publishing notice on six consecutive weekends in March and April of 2002 in the Afghani newspapers Hewad, Anis, Kabul News, and Kabul Times, and in the Pakistani newspaper Wahat. Id. Additionally, plaintiffs broadcast notice on Al Jazeera, Turkish CNN, BBC World, American Radio Network, and ADF. Id. In 2003, plaintiffs initiated this subsequent action seeking damages under the Antiterrorism Act of 1991 and the Foreign Sovereign Immunities Act. Id. at 220-22. The court implied that service of process via publication on Al Qaeda and Osama bin Laden and via personal service on the Taliban and the Islamic Emirate of Afghanistan was proper by holding that all defendants were liable for the damages. Id. at 240-41. However, the court dismissed the claim against Saddam Hussein and the Republic of Iraq because a U.S. president would have diplomatic immunity in a similar situation. Id. at 226.

40 Smith, 2001 U.S. Dist. LEXIS 21712, at *13-14. Although the court allowed service by publication on bin Laden and Al Qaeda, the court ordered service on the Taliban via personal service on a high-ranking official and service on the Islamic Emirate of Afghanistan via personal service upon Ambassador Abdul Salaam Zaeef. Id. The court determined that the Taliban and the Islamic Emirate of Afghanistan were "not entirely hidden from view" and with the help of international investigators, personal service was possible. Id.

41 Rio Props. v. Rio Int'l Interlink, 284 F.3d 1007 (9th Cir. 2002).

42 Id. at 1015. The Ninth Circuit held that alternative service of process by e-mail was proper since defendant actively evaded traditional means of service attempted by plaintiff. Id. at 1013.

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43 Id. at 1012. Plaintiff owns the RIO All Suite Casino Resort. Id. The casino consists of Rio Race & Sports Book, which allows customers to wager on professional sports. Id. In order to protect its exclusive rights to the "RIO" name, plaintiff registered a number of trademarks with the United States Patent and Trademark Office. Id. Plaintiff also registered the domain name, www.playrio.com. Id.

44 Id.

45 Id. After shutting down the original site, riosports.com, defendant almost immediately launched www.betrio.com. Id.

46 Id. at 1013. Defendant designated IEC as its international courier, but IEC was not authorized to accept service on defendant's behalf. Id.

47 Id. at 1014. There is no international agreement between Costa Rica and the United States prohibiting service of process by e-mail. Id.

48 Id. at 1017-18. The court explained, "[i]f any method of communication is reasonably calculated to provide [the defendant] with notice, surely it is email--the method of communication which [defendant] utilizes and prefers." Id. at 1018.

49 Id. at 1016.

50 Id. at 1015. The court stated, "Rule 4(f)(3) is one of three separately numbered subsections in Rule 4(f), and each subsection is separated from the one previous merely by the simple conjunction 'or.' Rule 4(f)(3) is not subsumed within or in any way dominated by Rule 4(f)'s other subsections...." Id.

51 Id.

52 Id.

53 Id. at 1018.

54 See Ronald J. Hedges, Kenneth N. Rashbaum & Adam C. Losey, Electronic Service of Process at Home and Abroad: Allowing Domestic Electronic Service of Process in the Federal Courts, 2009 Fed. Cts. L. Rev. 55, 62-64 (2009) (explaining that courts refusing to allow e-mail service of process do so based on lack of evidence of defendants' e-mail use, rather than on the theory that e-mail service of process is per se unreliable).
After Rio was decided, courts that have denied e-mail service of process have not held that e-mail is an ineffective method of communication, but rather that under the specific facts of the given case, e-mail was not accessed by defendant enough to be considered the best way to reach the defendant. See, e.g., Jimena v. UBS AG Bank, No. CV-F-07-367 OWW/SKO, 2010 U.S. Dist. LEXIS 57359, at *20-21 (E.D. Cal. June 10, 2010) (holding that e-mail service of process was improper because plaintiff made no showing that the e-mail account belonged to defendant); Ehrenfeld v. Mahfouz, 04 Civ. 9641 (RCC), 2005 U.S. Dist. LEXIS 4741, at *9 (S.D.N.Y. Mar. 23, 2005) (holding that e-mail service of process did not meet the constitutional standards because, in this situation, the e-mail address was only used for informal requests for information, not for "important business communications"); Pfizer, Inc. v. Domains By Proxy, Civil Action No. 3:04cv741 (SRU), 2004 U.S. Dist. LEXIS 13030, at *3-4 (D. Conn. July 13, 2004) (holding that e-mail was not reasonably calculated to reach the defendant because the court could not locate either of defendant's internet domains associated with the e-mail addresses plaintiff provided).

55 Rio, 284 F.3d at 1015-16.

56 See infra text accompanying notes 75, 82, and 88 for an explanation of when courts have determined that e-mail service of process is the most efficient method of service calculated to reach the defendant.

57 Rule 1 of the Federal Rules of Civil Procedure states, "[t]hese rules govern the procedure in all civil actions and proceedings in the United States district courts, except as stated in Rule 81. They should be construed and administered to secure the just, speedy, and inexpensive determination of every action and proceeding." Fed. R. Civ. P. 1.

58 If plaintiff has no reason to suspect that service by traditional methods will fail, and defendant has not indicated that e-mail is the preferred method of communication, there is no reason to think that traditional methods will be inefficient.

59 D.R.I., Inc. v. Dennis, No. 03 Civ. 10026 (PKL), 2004 U.S. Dist. LEXIS 22541, at *1 (S.D.N.Y. June 2, 2004). D.R.I. is a corporation existing under New York law whom defendant hired to provide financial, marketing, and promotional services for his national step-dancing show. D.R.I., Inc. v. Dennis, No. 03 Civ. 10026 (PKL)(KNF), 2006 U.S. Dist. LEXIS 85170, at *4 (S.D.N.Y. Aug. 3, 2006).

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In D.R.I., the plaintiff was promised one-third of the gross revenue generated by the shows in exchange for his services. Id. Plaintiff purchased advertising material in order to market and promote defendant's shows. Id. at *5. Close to the time of the first performance, plaintiff discovered that a show had already been performed. Id. Defendant refused to share any of the revenue from the show(s) or to reimburse plaintiff for the costs it had incurred in marketing and promoting the show up to that point. Id.

60 D.R.I., 2004 U.S. Dist. LEXIS 22541, at *1.

61 Id. at *3-4. The court held that plaintiff has shown "that service is impracticable.... Plaintiff has attempted... to serve defendant Dennis at his last known addresses. Plaintiff has performed searches for defendant Dennis's address.... [T]hese diligent efforts have proved unsuccessful." Id.

62 Id. Plaintiff had no reason to believe defendant would be elusive because defendant was an Internet company that had an address registered with the Department of Motor Vehicles, and plaintiff had no problems contacting defendant in the past by telephone. Id. at *1. As a result, there was no reason to suspect that personal or substitute service under Rule 4 of the Federal Rules of Civil Procedure and New York Civil Practice Law and Rules §308 (as they are almost identical) would be impracticable. Id. at *1-2.
New York Civil Practice Law and Rules §308 states:
Personal service upon a natural person shall be made by any of the following methods:
1. by delivering the summons within the state to the person to be served; or
2. by delivering the summons within the state to a person of suitable age and discretion at the actual place of business, dwelling place or usual place of abode of the person to be served and by either mailing the summons to the person to be served at his or her last known residence or by mailing the summons by first class mail to the person to be served at his or her actual place of business...
3. by delivering the summons within the state to the agent for service of the person to be served as designated under rule 318...
4. where service under paragraphs one and two cannot be made with due diligence, by affixing the summons to the door of either the actual place of business, dwelling place or usual place of abode within the state of the person to be served and by either mailing the summons to such person at his or her last known residence or by mailing the summons by first class mail to the person to be served at his or her actual place of business...
5. in such manner as the court, upon motion without notice, directs, if service is impracticable under paragraphs one, two and four of this section.
N.Y. C.P.L.R. 308 (Consol. 2010).

63 Prediction Co., LLC v. Rajgarhia, No. 09 Civ. 7459 (SAS), 2010 U.S. Dist. LEXIS 26536, at *5 (S.D.N.Y. Mar. 22, 2010). Defendant was plaintiff's former employee. Brief for Plaintiff at 1, Prediction Co., LLC v. Rajgarhia, 2010 U.S. Dist. LEXIS 26536 (S.D.N.Y. Mar. 22, 2010) (No. 09 Civ. 7459 (SAS)). Plaintiff was a financial trading company. Id. Plaintiff alleged that defendant continued to use plaintiff's "highly valuable and confidential proprietary quantitative trading strategy" while employed at other companies. Id.

64 Prediction, 2010 U.S. Dist. LEXIS 26536, at *1.

65 Id. at *6. The court reasoned that, although counsel for defendant did not know defendant's address, it appeared as though the two were in contact (based on the complaint submitted by plaintiff's attorney), which strongly indicated to the court that counsel for defendant would succeed in forwarding the summons and complaint to defendant and that it was reasonably likely that defendant would receive the summons and complaint. Id.

66 Here, more efficient is used to mean less time consuming and less expensive. In some situations, traditional methods will be the only viable way to serve the defendant. Fed. R. Civ. P. 1. The Advisory Committee Notes from 1993 state that "[t]he purpose of this revision... is to recognize the affirmative duty of the court to exercise the authority... fairly, but also without undue cost or delay." Id.

67 Internet Usage and Population Statistics for North America, Internet World Stats, http://www.internetworldstats.com/stats14.htm#north (last updated Mar. 22, 2012).

68 See U.S. & World Population Clocks, U.S. Census Bureau, http:// www.census.gov/main/www/popclock.html (last visited Jan. 3, 2012) (showing that the U.S. population is over three hundred million).

69 What Americans Do Online: Social Media and Games Dominate Activity, NielsonWire (Aug. 2, 2010), http://blog.nielsen.com/nielsenwire/online_ mobile/what-americans-do-online-social-media-and-games-dominate-activity/.

70 Internet Usage Statistics, Internet World Stats, http:// www.internetworldstats.com/stats.htm (last visited Jan. 3, 2012).

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71 See U.S. & World Population Clocks, U.S. Census Bureau, http:// www.census.gov/main/www/popclock.html (last visited Jan. 3, 2012).

72 If all business is done online, including by e-mail, it is safe to assume that this is defendant's preferred method of communication and the method most likely to reach it.

73 In fact, in some situations, e-mail service of process best safeguards defendants' due process rights. See generally Rachel Cantor, Comment, Internet Service of Process: A Constitutionally Adequate Alternative, 66 U. Chi. L. Rev. 943, 964-65 (1999) (stressing that "internet service may be the alternative method of service most likely to result in actual notice."). Therefore, Cantor argues that e-mail service exceeds the constitutional standard when the parties' sole contact is an e-mail address, especially in situations where a defendant's physical address is unknown, personal service is impossible, and e-mail service is the only cost effective means of informing the defendant of the pending action. Id. at 966.

74 Williams-Sonoma, Inc. v. Friendfinder, Inc., No. C 06-6572 JSW (MEJ), 2007 U.S. Dist. LEXIS 98118, at *2-3 (N.D. Cal. Dec. 6, 2007).

75 Id. at *12 n.3. The court permitted e-mail service of process along with other methods when plaintiff presented evidence that it was impossible to locate physical addresses for a number of the named defendants. Williams-Sonoma, Inc. v. Friendfinder, Inc., No. C 06-6572 JSW, 2007 U.S. Dist. LEXIS 31299, at *4-5 (N.D. Cal. Apr. 17, 2007). Plaintiff also established that it had previously communicated with defendants via the e-mail accounts defendants provided. Id. Therefore, e-mail was an effective means of communication, ensuring that defendants would receive adequate notice of the pending action and would have an opportunity to be heard. Id. at *5.

76 Id. at *1.

77 Plaintiff filed suit on October 20, 2006. Id. at *2-3. After six months of attempting to serve defendant by traditional methods, plaintiff asked the court for permission to serve defendant by e-mail. Id. The court approved the request on April 17, 2007. Id.

78 Id. at *5. Plaintiff established that e-mail was an effective means of communicating with defendants. Id. According to plaintiffs, the named defendants were located in the Ukraine, Czech Republic, Israel, Switzerland, Philippines, Norway, Canada, India, and England. Id. Thus, based on the geographic locations of defendants it would be most efficient to serve all via e-mail.

79 See discussion of Rule 1, supra note 57 (emphasizing that Rule 1 stresses speed and minimal expense).

80 Popular Enters., LLC v. Webcom Media Grp., Inc., 225 F.R.D. 560, 563 (E.D. Tenn. 2004). Defendant is an Internet marketing group with a registered address in Belarus. Webcom Media, http://www.webcom-media.com/ (last visited Jan. 3, 2012). Plaintiff claimed defendant infringed upon its trademark and directed users to numerous pornographic sites. Popular, 225 F.R.D. at 561.

81 Id. at 562.

82 Id. The court recounted plaintiff's numerous attempts at trying to contact defendant by e-mail. Id. The court determined that, because some e-mails sent to defendant bounced back, those that did not should be presumed to have reached the defendant. Id. Most importantly, the court stated that "[Rule 4] is expressly designed to provide courts with broad flexibility in tailoring methods of service to meet the needs of particularly difficult cases." Id. The court went on to quote the Ninth Circuit in Rio, which stated that "when faced with an international e-business scofflaw, playing hide-and-seek with the federal court, e-mail may be the only means of effecting service of process." Id. at 563.

83 Plaintiff filed suit in October 2003. Id. at 562. The court authorized e-mail service in November 2004. Id. at 563. It took thirteen months for plaintiff to serve defendant.

84 Philip Morris USA, Inc. v. Veles, Ltd., No. 06 CV 29988 (GBD), 2007 U.S. Dist. LEXIS 19780, at *5-9 (S.D.N.Y. Mar. 12, 2007).

85 Id. at *1-2.

86 Id. at *2.

87 Id. at *4.

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88 Id. at *3. Plaintiff, in its Memorandum for Leave, stated that defendants' online business appeared to be "conducted entirely through electronic communications." Id. Defendants took and confirmed customer orders through their websites and gave shipping notices via e-mail. Id. Plaintiff also stated that e-mail "sent to e-mail addresses on defendants' websites were successfully transmitted." Id.

89 Id. at *4 n.3.

90 In all three cases mentioned in Analysis Part B.1, the fact that defendants conducted most of their business via the Internet, including by e-mail, signifies that e-mail is their preferred method of conduct. See supra notes 78, 82, and 88.

91 Fed. R. Civ. P. 1. According to the plain language of Rule 1, supra note 57, service must be given in the most efficient manner. In these cases, e-mail is cheaper, quicker, and more likely to give notice to defendants of the pending action because defendants demonstrated that e-mail was their preferred method of communication. In these circumstances, taking a lot of time to locate a physical address for these online entities and then spending a lot of money to effectuate service by traditional methods is anything but efficient. By the time defendants were served in the above mentioned cases, the lawsuits could have been well underway.

92 Frank Conley,:-) Service with a Smiley: The Effect of E-mail and Other Electronic Communications on Service of Process, 11 Temp. Int'l & Comp. L.J. 407, 424 (1997).

93 See Tamayo, supra note 18, at 255 (explaining that private companies offer software that provides "return receipt" confirmation of the document delivery to an electronic addressee by tracking not only when the message is delivered, but when the recipient "opens" the e-mail). But see Schreck, supra note 11, at 1135-36 (noting that a return receipt merely confirms that someone opened an e-mail message, but does not provide the identity of the individual that actually opened the e-mail message).

94 See Vernace, supra note 11, at 302-03 (explaining that documents delivered by e-mail remain "in the recipient's mailbox until opened, compared to documents delivered by substituted service, which may be subject to post arrival movement and misplacement" (citing Tamayo, supra note 18, at 256)).

95 See Schreck, supra note 11, at 1136-40 (describing that "it is not uncommon for an e-mail to be opened by someone other than the registered individual, including by an unknown stranger, namely a hacker.").

96 Id.

97 If opponents of e-mail service of process are concerned about someone other than the defendant receiving the notice, they are likely to be concerned about someone other than the defendant signing. Nonetheless, electronic signatures are a substitute for handwritten signatures and have become a part of our daily lives. See Jeff Hynick, Comment, May I Borrow Your Mouse? A Note on Electronic Signatures in the United States, Argentina and Brazil, 12 Sw. J.L. & Trade Am. 159, 160 (2005) (demonstrating the various ways e-signatures are used today from entering a PIN number at the ATM to using a credit card to buy things online).

98 See generally Michael J. Hays, Note, The E-Sign Act of 2000: The Triumph of Function Over Form in American Contract Law, 76 Notre Dame L. Rev. 1183, 1186-87 (2001) (explaining that digital signatures have become legally binding signatures). See also Cantor, supra note 73, at 965 (suggesting that digital signatures employed in e-mails are harder to forge than written signatures).

99 See Adam Liptak, How To Tell Someone She's Being Sued, Without Really Telling Her, N.Y. Times, Nov. 19, 2007, http://www.nytimes.com/2007/11/19/us/19bar.html (explaining how notice by publication hardly ever notifies a defendant of a pending lawsuit). See also Jessica Klander, Recent Minnesota Supreme Court Decisions: Case Note: Civil Procedure: Facebook Friend or Foe?: The Impact of Modern Communication on Historical Standards for Service of Process - Shamrock Development v. Smith, 36 Wm. Mitchell L. Rev. 241, 245 (2009) (cautioning against the overuse of service by publication because it is not always reasonably calculated to reach interested parties).

100 See supra text accompanying note 5.

101 See Feature: Going Green, supra note 7, at 268-70 (illustrating that operating costs have been reduced in a number of areas and less money is being spent on postage, copiers, and fax machines as a result of e-filing). Overall utilization of space, computer equipment, and people also improved with the use of the e-filing system. Id.

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102 Ann Pfau, E-Filing: Then and Now, L. Tech. News, Jan. 26, 2010, http://www.law.com/jsp/lawtechnologynews/PubArticleLTN.jsp?id=1202439497847. Having documents in electronic form allows lawyers to access and file documents from anywhere in the world. Id.

103 Fed. R. Civ. P. 1.

104 There are specific situations in which e-mail is the quickest and most cost-effective method of notifying defendant of a pending action. For example, when defendant is a company without a physical presence, conducting its business primarily via the Internet, including by e-mail, e-mail service of process is most efficient. "Primary" should be taken to mean first or highest in rank, quality, or importance. The American Heritage Dictionary 1438 (3d ed. 1992).

105 It is counterintuitive and inefficient to make a plaintiff go through the methods of service permitted by Rule 4 and attempt to serve defendant personally, or by substitute method, when e-mail is a defendant's preferred method of service and serving said defendant by e-mail would avoid the hassle of tracking down a physical address. Even after a physical address is obtained, there is no guarantee that the specific address actually belongs to a defendant. Moreover, with the recent rise in the amount of companies conducting business exclusively online, it is certainly most compatible with the Federal Rules of Civil Procedure that these types of defendants be served by e-mail.
"Research show[s] that an estimated 400,000 U.S. small businesses sold their products and services on e-business sites in 1998, and that number jumped 50 percent to 600,000 in 1999." Brahm Canzer, E-business: Strategic Thinking and Practice 17 (Houghton Mifflin Co., 2nd ed. 2006). "During the same period, online transactions and purchases grew more than 1,000 percent, rising from $2 billion to $25 billion...." Id. Today, online activity continues to grow as 66 percent of small businesses have already implemented the Internet as a tool to help them run their business. Id.

106 This amendment will be particularly useful if defendant is considered an "Internet pure play." Businesses that do not conduct business outside the Internet have come to be known as Internet pure plays. Jeremy Horey, Pure Plays Leave Old Ways Behind, The Australian, May 25, 1999, at C08. In other words, Internet pure plays are companies formed solely to take advantage of online opportunities. Id.

107 "Substantial" should be taken to mean considerable in importance, value, degree, amount, or extent. The American Heritage Dictionary 1791 (3d ed. 1992).

108 Plaintiff must attest that, at the time of filing, plaintiff has had e-mail contact with defendant within six months prior to the date of filing and further attest that e-mail is a method used consistently by defendant in the course of defendant's business. Plaintiff will be responsible for filing an affidavit attesting that plaintiff is familiar with defendant's e-mail and Internet usage at the time of filing, such that would lead plaintiff to believe that e-mail is defendant's preferred method of communication.

109 An Advisory Committee Note should follow the amendment, explaining that the definition of "primarily" would mean that a business must conduct at least seventy percent of its business online to be considered a business that primarily conducts business online, including through usage of e-mail.

110 An Advisory Committee Note should follow the amendment, explaining that the definition of "substantial" would mean that a business must conduct at least thirty percent of its business online to be considered a business that conducts a substantial portion of its business online, including through usage of e-mail.

111 See supra note 109 and accompanying text.

112 See supra note 110 and accompanying text.

113 Fed. R. Civ. P. 4. The 1993 amendment to Rule 4 states that "the revised rule clarifies and enhances the cost-saving practice of securing the assent of the defendant.... The aims of the provision [authorizing waiver of service] are to eliminate the costs of service...." Id.

114 Fed. R. Civ. P. 4(d).

115 See WAWA, Inc. v. Christensen, No. 99-1454, 1999 U.S. Dist. LEXIS 11510, at *4 (E.D. Pa. July 27, 1999) (explaining that a change permitting e-mail service of process had been discussed and recommended, but never implemented).

116 Hedges, Rashbaum & Losey, supra note 54, at 74-75.

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117 Id. at 75-77. Hedges, Rashbaum, and Losey propose that Rule 4(d)(1)(g), which allows for plaintiffs to request a waiver of service from defendant, should be amended to include the phrase "including electronic means to a location previously accessed by the defendant within 60 days before the request is sent." Id. at 75. The authors also propose that Rule 4(e)(2), which sets out the methods for serving an individual within a Judicial District of the United States, should be amended to allow plaintiff to serve defendant by "delivering a copy of [summons and complaint] by electronic means at a location previously accessed by the individual within 60 days before the copy is delivered." Id. Finally, they also propose that Rule 4(f)(2)(C), which prescribes the method of service on individuals in a foreign country, should be amended to add a new section which states that individuals in foreign countries can be served by "delivering a copy of the summons and of the complaint by electronic means at a location previously accessed by the individual within 60 days before the summons and complaint are delivered." Id. at 76.

118 According to the changes proposed by Hedges, Rashbaum, and Losey, a plaintiff only has to prove that defendant has used e-mail sixty days prior to the filing of the lawsuit. Id. at 75-77. In that sense, the authors propose that any defendant, including private individuals, can be served by e-mail as long as the defendant has accessed the e-mail account plaintiff sends notice to within sixty days prior to the notice being sent.

119 Allowing e-mail service on anyone with an e-mail address raises legitimate concerns. When the defendant is a business entity that has specified an e-mail address on its website (rather than a phone number or physical address), a defendant business is indicating that e-mail is its preferred method of contact and e-mail is therefore reasonably calculated to reach it and notify it of the pending action. This is not the same type of situation when an individual creates an e-mail address. An individual does not necessarily indicate that e-mail is the preferred method of communication by simply having an e-mail address. As a result, concerns over whether e-mail is reasonably calculated to reach an individual carry more weight than concerns over e-mail service on a business that operates primarily or substantially via the Internet.

120 A recent Hofstra University Law Review article discussing the need for service by publication to evolve because print newspapers are slowly becoming extinct illustrates the need to amend Rule 4 to conform to modern technology. See Lauren A. Rieders, Note, Old Principles, New Technology, and the Future of Notice in Newspapers, 38 Hofstra L. Rev. 1009, 1013 (2010) (advocating for states to amend their publication statutes to require that where notice by newspaper is acceptable, such notices must be posted in online newspapers rather than solely in print newspapers or elsewhere on the Internet). Rieders highlights the shocking rate at which newspapers have gone out of business and the alarming rate at which well-established newspapers have stopped printing newspapers and now publish their content online only. Id. at 1028-29.

45 JMARLR 459

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Chapter 17: E-Government

§ 17.06 LEGAL FUNCTIONS ONLINE

A growing number of courts, regulatory agencies, law enforcement authorities, and legislatures apply the Internet and other modern information technology to make their operations more effective and efficient. Courts, like virtually every other institution and organization, seek to use advanced information and communications technologies to make their operations more efficient, transparent, and convenient. Court systems in jurisdictions around the world are increasingly active users of emerging technologies. For example, courts in the District of Columbia, federal courts in the Northern District of California, and specialty courts (e.g., the federal tax court and bankruptcy courts) are all actively expanding their online operations. [1] One of the busiest federal courts in the United States, the U.S. District Court for the Southern District of New York, is phasing in an all electronic system. [2] Regulatory agencies at the state and local level now make active use of the Internet for both their rule-making and enforcement functions.

This element of e-government has a direct impact on the practice of law. Legal professionals should thus monitor this aspect of e-government very carefully. As these initiatives expand, a variety of legal issues and law practice issues are underscored. For example, as more court proceedings and records move online, issues of information privacy become more visible. The privacy issues are now under careful review by the Administrative Office of the U.S. Courts, as that body works to develop electronic systems that can be both efficient and secure. [3] Privacy for judicial communications has become a volatile issue, particularly among some judges in the federal court's Ninth Circuit, who have vigorously objected to a computer monitoring system widely used in the administration of the federal courts. [4] Expect an increasing array of law and policy issues as e-government activities that affect the administration of justice proliferate.

Court procedures and rules continue to evolve to accommodate growing reliance on electronic documents, records, and communications. For example, in 2006 new procedural rules for the U.S. federal courts went into effect to ensure necessary access to information stored in electronic form. [5] The new rules integrate information in digital form, such as electronic documents and e-mail messages, into the mandatory discovery and disclosure rules of the rules of procedure for the federal courts. It is important that organizations have access to software that can effectively search and manage all of their electronic documents and records. The U.S. Federal Rules of Civil Procedure require organizations to be able to search and produce requested electronic records and documents on a timely basis as part of discovery requests in litigation. [6] Compliance with these federal rules for production of electronic evidence is an important aspect of operations management at all organizations. In addition to effective software tools, all organizations should develop and implement plans for management and production of all of their electronic files. E-mail and the growing range of electronic records and documents is transforming the litigation

process. Accordingly, those electronic materials are dramatically changing the operations, process, and rules of both civil and criminal courts.

Electronic systems are increasingly accepted by courts and other legal authorities for key functions such as service or process. For example, in 2016, Federal Magistrate Judge Laurel Beeler in San Francisco permitted use of social media (Twitter) for service of process on a resident of Kuwait who was an active Twitter user and was unreachable using traditional service methods. [7] Judge Beeler noted that other courts had previously authorized service of process using Facebook and Linkedin, thus she concluded that social media platforms can provide valid service of process under certain circumstances.

An initiative of particular interest is the "cybercourt" project under way in Michigan. That state has created an entirely online court to handle business and commercial cases involving disputes valued at more than $25,000. [8] When fully operational, all cases in the Michigan cybercourt are to be decided by judges, and all of the judges handling cases on that court are to be volunteers. Cases in the cybercourt can be removed to Michigan circuit courts and they can be appealed to the Michigan Court of Appeals. Practice in the cybercourt is to be governed by special rules to be adopted by the Michigan Supreme Court. Other jurisdictions are considering electronic court systems. One example is Brazil and its Electronic Court Project. [9]

A variety of initiatives are underway attempting to apply information technology to automate the dispute resolution process. For example, Court Innovations provides an automated online system to resolve traffic violations in Michigan, [10] helping to reduce the burden on traditional traffic court systems. Modria offers an online system in use to resolve a variety of small, relatively minor legal disputes, including arbitration associated with automobile accidents and tax assessment disputes. [11] These automated systems seem to work best in contexts where disputes are generally standardized and the issues associated with case resolution are relatively simple. It seems likely that these automated systems will be applied for a growing number of legal disputes as they offer processes that can be quicker, less expensive, and more transparent to the parties involved.

Information technology provides both opportunities and challenges for effective management of trial activities. One challenge involves increasingly widespread use of computing and communications technology by jurors during trials. For example, courts frequently find it difficult to prevent jurors from participating in social media during trials. In some instances, inappropriate social media activity by jurors can taint jury decisions and serve as a basis for throwing out a verdict or finding a mistrial. [12]

The Internet and a range of information and communications technologies are commonly used as part of alternative dispute resolution processes. Arbitration and mediation systems now integrate online components with in-person meetings. For example, the online arbitration system offered by Cybersettle, Inc. and used by major companies including General Electric, uses an online system starting with blind bidding by the parties to determine if they can agree on a settlement, followed by online intervention by an arbitrator if they cannot. [13] These online dispute resolution systems are increasingly attractive as they help to reduce the cost of dispute resolution while also speeding up the process.

The Internet is increasingly integrated into the practice of law. One indication of that expanding integration is the widespread use of electronic media in legal communications. However, that use takes many forms. One of the most interesting of those forms is the broad use of electronic mail for legal communications. That use has become so widespread that a federal court has accepted e-mail service of process as a method of service that satisfies the requirements of the alternate service of process rule. [14] Integration of a wide range of online activities into the traditional legal process is taking place in many jurisdictions. For instance, the Australian Capital Territory Court has accepted service of process through the Facebook social-networking website as a valid service mechanism. [15]

Reliance on more sophisticated technology in the courtroom to assist in presentations is another highly visible aspect of legal technology. Companies such as DOAR, Array Technology Group, and On The Record assist lawyers in the application of

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information technology to litigation and courtroom presentations. [16] More advanced information technology is increasingly relied upon to help make litigation more effective and efficient.

Information technology plays a key role in litigation document review and management functions. In an effort to reduce the often substantial costs associated with litigation, lawyers, clients, and courts are increasingly willing to use computers to replace lawyers for appropriate functions such as document content review. An example of this apparent trend toward automation of document review and management is the growing popularity of "predictive coding." Predictive coding applies software that uses algorithms to assess the relevance of documents, based on identification of key words, to a targeted subject matter. [17] Predictive coding software is, in effect, a form of artificial intelligence, and it requires initial human preparation, "training," to customize the software for use in each individual case context.

The discovery process associated with litigation is made substantially more complex as a result of the need to manage substantial collections of electronic records and materials effectively. A substantial set of guides and other resource material is now widely available to assist practitioners as they attempt to manage electronic documents in compliance with the expanding range of rules and requirements associated with electronic records in litigation. [18]

The Internet and other information technology also have a positive impact on the management of law office operations and general practice. Effective use of information technology enables lawyers to run their practices more efficiently. One helpful resource for smaller law offices is a company called, Virtual Law Office Technology (VLOT). VLOT provides very useful and user-friendly online services that assist small law offices to use information technology to improve the productivity of their operations. VLOT is an excellent example of the ways in which information technology can be applied to improve law office management.

Lawyers and law firms continue to apply a wide range of Internet and other information technologies to their operations. For example, law firms make active use of the Internet to gather evidence for litigation and they use social networking systems to help market their services. [19] Litigators commonly review social media content presented by potential jurors as part of the jury selection process. [20]

The Internet and information technology can be every bit as disruptive for the legal profession as they have proven to be for other industries and markets. One example of this impact is the rise of international outsourcing of legal services. Just as the Internet and computer technology advances have made it practical for companies to outsource services to people and businesses in diverse parts of the world, so too has that trend affected legal services. Legal services are now commonly outsourced by U.S. law firms and companies to legal professionals in other countries. Patent application preparation, for example, is a legal service now outsourced by U.S. organizations to businesses in India and New Zealand, among other places. Companies such as Pangea3 now focus on facilitating international outsourcing of legal services. [21]

Lawyers must exercise caution in their use of information technology to ensure that they comply with their requirements for professional responsibility and ethics. One area of confidentiality concern is associated with the confidentiality of attorney-client electronic communications processed through e-mail accounts provided by third parties, such as Yahoo. [22] Reasonable standards of care for information confidentiality and security, for instance, continue to evolve as technology advances and users' experience and sophistication increase. Similar concerns for the security and privacy of communications with clients are present in all forms of electronic communications, including social media post. The prospects of malpractice liability for lawyers based on negligent use of computer and communications systems continue to increase. Thus, for example, a lawyer who is responsible for inadvertently infecting a client's computer system with a virus might, under some circumstances, be liable for malpractice. Similarly, a careless lawyer who loses electronic records could face liability. Another intriguing potential source of liability involves the so-called "metadata," information that chronicles changes made in electronic documents. Metadata can be mined from electronic documents, sometimes without the knowledge of the party who created the document. Information included in the metadata can include material that has been deleted from previous drafts of the document. Metadata information can also

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include information regarding the identity of parties who had access to the document and the timing of that access. All of this metadata information can be available to the parties with whom a lawyer shares electronic documents. In some instances, such sharing of the metadata information could constitute malpractice.

The American Bar Association has identified several key issues associated with effective metadata management by legal professionals. The ABA focuses on the following three metadata management issues: 1) the sender's duty to manage metadata in content distributed electronically; 2) recipient access to any metadata transmitted; and 3) notification to the sender from the recipient if metadata are accessible. As of 2013, the ABA concluded that there is no specific duty regarding metadata management by the sender of content, however, the sender is required to protect client confidentiality, and the ABA also determined that the recipient of metadata may mine and use that data, and the recipient should advise the sender of its receipt of metadata only in those cases when the recipient should reasonably have known that the transmission of the metadata was inadvertent.[23] The ABA also provides summary information regarding state bar approaches regarding metadata management.[24] The ABA reports that as of 2013 approximately 15 state bar organizations required legal professionals to use reasonable care regarding metadata use, including use of reasonably available software to remove (scrub) metadata. The ABA also reports that as of 2013, six state bar organizations authorized recipients to use metatdata, nine found such use to be impermissible, and two addressed the matter on a case-by-case basis. According to the ABA, by 2013, 13 state bar organizations found a duty to inform senders of metadata accessibility when there was reason to believe the disclosure was inadvertent and two bars concluded no disclosure was required.

Issues surrounding confidentiality of attorney-client communications, including electronic mail and other electronic documents, are under review in jurisdictions in addition to the United States. For example, the European Union is considering changes to its attorney-client privilege rules. Currently, confidentiality is afforded only to communications between outside counsel and corporate staff, not communications with in-house counsel. The European Union is considering expanding the scope of that privilege. Consideration of this issue was inspired by a European Commission request for documents, including e-mail messages, as part of an antitrust investigation of Akzo Nobel NV.[25]

Legal professionals are also expanding their use of information technology services provided by outside parties. For example, lawyers now routinely make widespread use of mobile apps accessed through smartphones, tablets, and other devices in support of their legal work.[26] They also extensively use cloud computing services provided by external service providers, which are increasingly attractive to law firms and other legal practitioners. These services can potentially help lawyers to operate more efficiently and effectively. Cloud computing platforms can assist lawyers, for example, to access necessary software applications through shared “software as a service” (SaaS) offerings, which often provide a more economical and effective method to access software than the traditional purchase of software for installation on the computers of end users. Cloud systems can also provide vital data storage and back-up functions for lawyer, helping them to guard against data loss due to equipment or system failures.[27]

Along with the potential benefits of cloud computing and other externally provided information technology services, however, legal professionals must recognize and reflect on the fact that those services also carry potential ethical challenges. To the extent that confidential material is stored, accessed, and processed using information technology and applications provided by external parties, care must be exercised to ensure that those external activities enable the lawyers involved to meet their ongoing ethical responsibility to protect the secrecy of the confidential material. Effectively meeting these ethical obligations can be more difficult in an environment in which outside parties control the material in question.

The threats to the security and integrity of attorney data and communications are very real. Those threats arise from malicious parties, mistakes and inadvertent actions, and government spying. For example, it has been reported that in Britain, the government intelligence agencies have been operating under policies that granted them broad permission to monitor confidential attorney-client communications for a period of several years.[28] Reportedly, that authorization included permission to share confidential material collected with other parties, including opposing counsel. Such surveillance presents a clear violation of

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attorney-client privilege. It also underscores the extent to which some data security threats are beyond the ability of lawyers to address on their own. Widespread government surveillance of communications and collected data in numerous jurisdictions poses a major threat to the ability of counsel to meet basic ethical requirements of confidentiality and non-disclosure. In the current government surveillance environment, it is virtually impossible for a lawyer to ensure that all communications with clients are secure against the surveillance and monitoring of efforts of all governments. The situation in the U.K. suggests that the problems posed by expansive government surveillance present a critical challenge to the ethical requirements of the legal community.

The Internet also has a noteworthy impact on legal strategies applied by businesses and individuals. For example, a growing number of small and mid-size businesses now tap the Internet for support when they are involved in litigation, just as they make use of the Internet for their daily business operations. Smaller businesses involved in litigation with larger companies that have more resources now commonly attempt to extend their own resources by launching appeals for support on the Internet. This strategy is illustrated by the case of TerraCycle, Inc., a small natural fertilizer company that was involved in litigation with Scotts Miracle Grow Company. With limited resources, TerraCycle created a website focusing on the litigation and used that online presence to raise funds for its legal defense, encourage public support, and increase its product sales. These funding sites essentially apply the "crowdsourcing" model now popular for a range of projects. Through crowdsourcing, a specific online appeal is made soliciting funds for a project. In some instances, that project may involve some form of litigation. Through crowdsourcing, an appeal for funding can be presented immediately to the entire universe of Internet users. Through that appeal, many donors may each make relatively small contributions, but collectively the contributions can total a substantial amount.

The Internet can help individuals and small businesses that have severely limited resources to obtain counsel they might not have been able to access without online opportunities. For example, the Electronic Frontier Foundation and several universities collaborated to establish the organization, Chilling Effects (www.chillingeffects.org). This organization operates an online forum where individuals and small organizations can seek help from legal professional for issues that they have encountered as a result of their online activities. Chilling Effects helps users to identify and understand their legal issues. The organization also helps connect the individual clients with legal service providers who have agreed to offer service on a pro bono or reduced fee basis through an online network known as, the Online Media Legal Network (www.omln.org).

Footnotes

1 *The Tax Court Takes Another Step Into Cyberspace*, Wall St. J., May 16, 2001, at A1.

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West's Annotated California Codes
Code of Civil Procedure (Refs & Annos)
Part 2. Of Civil Actions (Refs & Annos)
Title 14. Of Miscellaneous Provisions
Chapter 5. Notices, and Filing and Service of Papers (Refs & Annos)

West's Ann.Cal.C.C.P. § 1013b

§ 1013b. Proof of electronic service

Effective: January 1, 2019
Currentness

(a) Proof of electronic service may be made by any of the following methods:

(1) An affidavit setting forth the exact title of the document served and filed in the cause, showing the name and residence or business address of the person making the service, showing that he or she is a resident of or employed in the county where the electronic service occurs, and that he or she is over the age of 18 years.

(2) A certificate setting forth the exact title of the document served and filed in the cause, showing the name and business address of the person making the service, and showing that he or she is an active member of the State Bar of California.

(3) An affidavit setting forth the exact title of the document served and filed in the cause, showing (A) the name and residence or business address of the person making the service, (B) that he or she is a resident of, or employed in, the county where the electronic service occurs, (C) that he or she is over the age of 18 years, (D) that he or she is readily familiar with the business' practice for filing electronically, and (E) that the document would be electronically served that same day in the ordinary course of business following ordinary business practices.

(4) In case of service by the clerk of a court of record, a certificate by that clerk setting forth the exact title of the document served and filed in the cause, showing the name of the clerk and the name of the court of which he or she is the clerk.

(b) Proof of electronic service shall include all of the following:

(1) The electronic service address and the residence or business address of the person making the electronic service.

(2) The date of electronic service.

(3) The name and electronic service address of the person served.

(4) A statement that the document was served electronically.

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(c) Proof of electronic service shall be signed as provided in subparagraph (B) of paragraph (2) of subdivision (b) of Section 1010.6.

(d) Proof of electronic service may be in electronic form and may be filed electronically with the court.

Credits

(Added by Stats.2017, c. 319 (A.B.976), § 4, eff. Jan. 1, 2018. Amended by Stats.2018, c. 776 (A.B.3250), § 8, eff. Jan. 1, 2019.)

West's Ann. Cal. C.C.P. § 1013b, CA CIV PRO § 1013b
Current with urgency legislation through Ch. 161 of the 2019 Reg.Sess. Some statute sections may be more current, see credits for details.

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West's Annotated California Codes
Code of Civil Procedure (Refs & Annos)
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Chapter 5. Notices, and Filing and Service of Papers (Refs & Annos)

West's Ann.Cal.C.C.P. § 1010.6

§ 1010.6. Electronic service of documents; local rules for electronic filing; uniform rules

Effective: January 1, 2019
Currentness

(a) A document may be served electronically in an action filed with the court as provided in this section, in accordance with rules adopted pursuant to subdivision (e).

(1) For purposes of this section:

(A) “Electronic service” means service of a document, on a party or other person, by either electronic transmission or electronic notification. Electronic service may be performed directly by a party or other person, by an agent of a party or other person, including the party or other person's attorney, or through an electronic filing service provider.

(B) “Electronic transmission” means the transmission of a document by electronic means to the electronic service address at or through which a party or other person has authorized electronic service.

(C) “Electronic notification” means the notification of the party or other person that a document is served by sending an electronic message to the electronic address at or through which the party or other person has authorized electronic service, specifying the exact name of the document served, and providing a hyperlink at which the served document may be viewed and downloaded.

(2)(A)(i) For cases filed on or before December 31, 2018, if a document may be served by mail, express mail, overnight delivery, or facsimile transmission, electronic service of the document is not authorized unless a party or other person has agreed to accept electronic service in that specific action or the court has ordered electronic service on a represented party or other represented person under subdivision (c) or (d).

(ii) For cases filed on or after January 1, 2019, if a document may be served by mail, express mail, overnight delivery, or facsimile transmission, electronic service of the document is not authorized unless a party or other person has expressly consented to receive electronic service in that specific action or the court has ordered electronic service on a represented party or other represented person under subdivision (c) or (d). Express consent to electronic service may be accomplished either by (I) serving a notice on all the parties and filing the notice with the court, or (II) manifesting affirmative consent through electronic means with the court or the court's electronic filing service provider, and concurrently providing the party's electronic address with that consent for the purpose of receiving electronic service. The act of electronic filing shall not be construed as express consent.

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(B) If a document is required to be served by certified or registered mail, electronic service of the document is not authorized.

(3) In any action in which a party or other person has agreed or provided express consent, as applicable, to accept electronic service under paragraph (2), or in which the court has ordered electronic service on a represented party or other represented person under subdivision (c) or (d), the court may electronically serve any document issued by the court that is not required to be personally served in the same manner that parties electronically serve documents. The electronic service of documents by the court shall have the same legal effect as service by mail, except as provided in paragraph (4).

(4)(A) If a document may be served by mail, express mail, overnight delivery, or facsimile transmission, electronic service of that document is deemed complete at the time of the electronic transmission of the document or at the time that the electronic notification of service of the document is sent.

(B) Any period of notice, or any right or duty to do any act or make any response within any period or on a date certain after the service of the document, which time period or date is prescribed by statute or rule of court, shall be extended after service by electronic means by two court days, but the extension shall not apply to extend the time for filing any of the following:

(i) A notice of intention to move for new trial.

(ii) A notice of intention to move to vacate judgment under Section 663a.

(iii) A notice of appeal.

(C) This extension applies in the absence of a specific exception provided by any other statute or rule of court.

(5) Any document that is served electronically between 12:00 a.m. and 11:59:59 p.m. on a court day shall be deemed served on that court day. Any document that is served electronically on a noncourt day shall be deemed served on the next court day.

(6) A party or other person who has provided express consent to accept service electronically may withdraw consent at any time by completing and filing with the court the appropriate Judicial Council form. The Judicial Council shall create the form by January 1, 2019.

(7) Consent, or the withdrawal of consent, to receive electronic service may only be completed by a party or other person entitled to service or that person's attorney.

(8) Confidential or sealed records shall be electronically served through encrypted methods to ensure that the documents are not improperly disclosed.

(b) A trial court may adopt local rules permitting electronic filing of documents, subject to rules adopted pursuant to subdivision (e) and the following conditions:

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(1) A document that is filed electronically shall have the same legal effect as an original paper document.

(2)(A) When a document to be filed requires the signature of any person, not under penalty of perjury, the document shall be deemed to have been signed by the person who filed the document electronically.

(B) When a document to be filed requires the signature, under penalty of perjury, of any person, the document shall be deemed to have been signed by that person if filed electronically and if either of the following conditions is satisfied:

(i) The person has signed a printed form of the document before, or on the same day as, the date of filing. The attorney or other person filing the document represents, by the act of filing, that the declarant has complied with this section. The attorney or other person filing the document shall maintain the printed form of the document bearing the original signature until final disposition of the case, as defined in subdivision (c) of Section 68151 of the Government Code, and make it available for review and copying upon the request of the court or any party to the action or proceeding in which it is filed.

(ii) The person has signed the document using a computer or other technology pursuant to the procedure set forth in a rule of court adopted by the Judicial Council by January 1, 2019.

(3) Any document received electronically by the court between 12:00 a.m. and 11:59:59 p.m. on a court day shall be deemed filed on that court day. Any document that is received electronically on a noncourt day shall be deemed filed on the next court day.

(4) The court receiving a document filed electronically shall issue a confirmation that the document has been received and filed. The confirmation shall serve as proof that the document has been filed.

(5) Upon electronic filing of a complaint, petition, or other document that must be served with a summons, a trial court, upon request of the party filing the action, shall issue a summons with the court seal and the case number. The court shall keep the summons in its records and may electronically transmit a copy of the summons to the requesting party. Personal service of a printed form of the electronic summons shall have the same legal effect as personal service of an original summons. If a trial court plans to electronically transmit a summons to the party filing a complaint, the court shall immediately, upon receipt of the complaint, notify the attorney or party that a summons will be electronically transmitted to the electronic address given by the person filing the complaint.

(6) The court shall permit a party or attorney to file an application for waiver of court fees and costs, in lieu of requiring the payment of the filing fee, as part of the process involving the electronic filing of a document. The court shall consider and determine the application in accordance with Article 6 (commencing with Section 68630) of Chapter 2 of Title 8 of the Government Code and shall not require the party or attorney to submit any documentation other than that set forth in Article 6 (commencing with Section 68630) of Chapter 2 of Title 8 of the Government Code. Nothing in this section shall require the court to waive a filing fee that is not otherwise waivable.

(7) A fee, if any, charged by the court, an electronic filing manager, or an electronic filing service provider to process a payment for filing fees and other court fees shall not exceed the costs incurred in processing the payment.

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(c) If a trial court adopts rules conforming to subdivision (b), it may provide by order that all parties to an action file and serve documents electronically in a class action, a consolidated action, a group of actions, a coordinated action, or an action that is deemed complex under Judicial Council rules, provided that the trial court's order does not cause undue hardship or significant prejudice to any party in the action.

(d) A trial court may, by local rule, require electronic filing and service in civil actions, subject to the requirements and conditions stated in subdivision (b), the rules adopted by the Judicial Council under subdivision (f), and the following conditions:

(1) The court shall have the ability to maintain the official court record in electronic format for all cases where electronic filing is required.

(2) The court and the parties shall have access to more than one electronic filing service provider capable of electronically filing documents with the court or to electronic filing access directly through the court. The court may charge fees of no more than the actual cost of the electronic filing and service of the documents. Any fees charged by an electronic filing service provider shall be reasonable. The court, an electronic filing manager, or an electronic filing service provider shall waive any fees charged if the court deems a waiver appropriate, including in instances where a party has received a fee waiver.

(3) The court shall have a procedure for the filing of nonelectronic documents in order to prevent the program from causing undue hardship or significant prejudice to any party in an action, including, but not limited to, unrepresented parties. The Judicial Council shall make a form available to allow a party to seek an exemption from mandatory electronic filing and service on the grounds provided in this paragraph.

(4) Unrepresented persons are exempt from mandatory electronic filing and service.

(5) Until January 1, 2021, a local child support agency, as defined in subdivision (h) of Section 17000 of the Family Code, is exempt from a trial court's mandatory electronic filing and service requirements, unless the Department of Child Support Services and the local child support agency determine it has the capacity and functionality to comply with the trial court's mandatory electronic filing and service requirements.

(e) The Judicial Council shall adopt uniform rules for the electronic filing and service of documents in the trial courts of the state, which shall include statewide policies on vendor contracts, privacy, and access to public records, and rules relating to the integrity of electronic service. These rules shall conform to the conditions set forth in this section, as amended from time to time.

(f) The Judicial Council shall adopt uniform rules to permit the mandatory electronic filing and service of documents for specified civil actions in the trial courts of the state, which shall include statewide policies on vendor contracts, privacy, access to public records, unrepresented parties, parties with fee waivers, hardships, reasonable exceptions to electronic filing, and rules relating to the integrity of electronic service. These rules shall conform to the conditions set forth in this section, as amended from time to time.

(g)(1) The Judicial Council shall adopt uniform rules to implement this subdivision as soon as practicable, but no later than June 30, 2019.

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(2) Any system for the electronic filing and service of documents, including any information technology applications, Internet Web sites, and Web-based applications, used by an electronic service provider or any other vendor or contractor that provides an electronic filing and service system to a trial court, regardless of the case management system used by the trial court, shall satisfy both of the following requirements:

(A) The system shall be accessible to individuals with disabilities, including parties and attorneys with disabilities, in accordance with Section 508 of the federal Rehabilitation Act of 1973 (29 U.S.C. Sec. 794d), as amended, the regulations implementing that act set forth in Part 1194 of Title 36 of the Code of Federal Regulations and Appendices A, C, and D of that part, and the federal Americans with Disabilities Act of 1990 (42 U.S.C. Sec. 12101 et seq.).

(B) The system shall comply with the Web Content Accessibility Guidelines 2.0 at a Level AA success criteria.

(3) A vendor or contractor that provides an electronic filing and service system to a trial court shall comply with paragraph (2) as soon as practicable, but no later than June 30, 2019. Commencing on June 27, 2017, the vendor or contractor shall provide an accommodation to an individual with a disability in accordance with subparagraph (D) of paragraph (4).

(4) A trial court that contracts with an entity for the provision of a system for electronic filing and service of documents shall require the entity, in the trial court's contract with the entity, to do all of the following:

(A) Test and verify that the entity's system complies with this subdivision and provide the verification to the Judicial Council no later than June 30, 2019.

(B) Respond to, and resolve, any complaints regarding the accessibility of the system that are brought to the attention of the entity.

(C) Designate a lead individual to whom any complaints concerning accessibility may be addressed and post the individual's name and contact information on the entity's Internet Web site.

(D) Provide to an individual with a disability, upon request, an accommodation to enable the individual to file and serve documents electronically at no additional charge for any time period that the entity is not compliant with paragraph (2) of this subdivision. Exempting an individual with a disability from mandatory electronic filing and service of documents shall not be deemed an accommodation unless the person chooses that as an accommodation. The vendor or contractor shall clearly state in its Internet Web site that an individual with a disability may request an accommodation and the process for submitting a request for an accommodation.

(5) A trial court that provides electronic filing and service of documents directly to the public shall comply with this subdivision to the same extent as a vendor or contractor that provides electronic filing and services to a trial court.

(6)(A) The Judicial Council shall submit four reports to the appropriate committees of the Legislature relating to the trial courts that have implemented a system of electronic filing and service of documents. The first report is due by June 30, 2018; the

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second report is due by December 31, 2019; the third report is due by December 31, 2021; and the fourth report is due by December 31, 2023.

(B) The Judicial Council's reports shall include all of the following information:

(i) The name of each court that has implemented a system of electronic filing and service of documents.

(ii) A description of the system of electronic filing and service.

(iii) The name of the entity or entities providing the system.

(iv) A statement as to whether the system complies with this subdivision and, if the system is not fully compliant, a description of the actions that have been taken to make the system compliant.

(7) An entity that contracts with a trial court to provide a system for electronic filing and service of documents shall cooperate with the Judicial Council by providing all information, and by permitting all testing, necessary for the Judicial Council to prepare its reports to the Legislature in a complete and timely manner.

Credits

(Added by Stats.1999, c. 514 (S.B.367), § 1. Amended by Stats.2001, c. 824 (A.B.1700), § 10.5; Stats.2005, c. 300 (A.B.496), § 5; Stats.2010, c. 156 (S.B.1274), § 1; Stats.2011, c. 296 (A.B.1023), § 40; Stats.2012, c. 320 (A.B.2073), § 1; Stats.2016, c. 461 (A.B.2244), § 1, eff. Jan. 1, 2017; Stats.2017, c. 17 (A.B.103), § 5, eff. June 27, 2017; Stats.2017, c. 319 (A.B.976), § 2, eff. Jan. 1, 2018; Stats.2018, c. 504 (A.B.3248), § 1, eff. Jan. 1, 2019.)

Editors' Notes

OFFICIAL FORMS

2019 Electronic Update

<Mandatory and optional Forms adopted and approved by the Judicial Council are set out in West's California Judicial Council Forms Pamphlet.>

Notes of Decisions (4)

West's Ann. Cal. C.C.P. § 1010.6, CA CIV PRO § 1010.6
Current with urgency legislation through Ch. 161 of the 2019 Reg.Sess. Some statute sections may be more current, see credits for details.

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West's Annotated California Codes
California Rules of Court (Refs & Annos)
Title 2. Trial Court Rules (Refs & Annos)
Division 3. Filing and Service (Refs & Annos)
Chapter 2. Filing and Service by Electronic Means (Refs & Annos)

Cal.Rules of Court, Rule 2.251
Formerly cited as CA ST TRIAL CT Rule 2060; CA ST TR COURT Rule 2.260

Rule 2.251. Electronic service

Currentness

(a) Authorization for electronic service

When a document may be served by mail, express mail, overnight delivery, or fax transmission, the document may be served electronically under Code of Civil Procedure section 1010.6 and the rules in this chapter.

(b) Electronic service by express consent

(1) A party or other person indicates that the party or other person agrees to accept electronic service by:

(A) Serving a notice on all parties and other persons that the party or other person accepts electronic service and filing the notice with the court. The notice must include the electronic service address at which the party or other person agrees to accept service; or

(B) Manifesting affirmative consent through electronic means with the court or the court's electronic filing service provider, and concurrently providing the party's electronic service address with that consent for the purpose of receiving electronic service.

(C) A party or other person may manifest affirmative consent under (B) by:

(i) Agreeing to the terms of service agreement with an electronic filing service provider, which clearly states that agreement constitutes consent to receive electronic service electronically; or

(ii) Filing *Consent to Electronic Service and Notice of Electronic Service Address* (form EFS-005-CV).

(2) A party or other person that has consented to electronic service under (1) and has used an electronic filing service provider to serve and file documents in a case consents to service on that electronic filing service provider as the designated agent for service for the party or other person in the case, until such time as the party or other person designates a different agent for service.

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(c) Electronic service required by local rule or court order

(1) A court may require parties to serve documents electronically in specified actions by local rule or court order, as provided in Code of Civil Procedure section 1010.6 and the rules in this chapter.

(2) A court may require other persons to serve documents electronically in specified actions by local rule, as provided in Code of Civil Procedure section 1010.6 and the rules in this chapter.

(3) Except when personal service is otherwise required by statute or rule, a party or other person that is required to file documents electronically in an action must also serve documents and accept service of documents electronically from all other parties or persons, unless:

(A) The court orders otherwise, or

(B) The action includes parties or persons that are not required to file or serve documents electronically, including self-represented parties or other self-represented persons; those parties or other persons are to be served by non-electronic methods unless they affirmatively consent to electronic service.

(4) Each party or other person that is required to serve and accept service of documents electronically must provide all other parties or other persons in the action with its electronic service address and must promptly notify all other parties, other persons, and the court of any changes under (g).

(d) Additional provisions for electronic service required by court order

(1) If a court has adopted local rules for permissive electronic filing, then the court may, on the motion of any party or on its own motion, provided that the order would not cause undue hardship or significant prejudice to any party, order all parties in any class action, a consolidated action, a group of actions, a coordinated action, or an action that is complex under rule 3.403 to serve all documents electronically, except when personal service is required by statute or rule.

(2) A court may combine an order for mandatory electronic service with an order for mandatory electronic filing as provided in rule 2.253(c).

(3) If the court proposes to make any order under (1) on its own motion, the court must mail notice to any parties that have not consented to receive electronic service. The court may electronically serve the notice on any party that has consented to receive electronic service. Any party may serve and file an opposition within 10 days after notice is mailed, electronically served, or such later time as the court may specify.

(4) If the court has previously ordered parties in a case to electronically serve documents and a new party is added that the court determines should also be ordered to do so under (1), the court may follow the notice procedures under (2) or may order the party to electronically serve documents and in its order state that the new party may object within 10 days after service of the order or by such later time as the court may specify.

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(e) Maintenance of electronic service lists

A court that permits or requires electronic filing in a case must maintain and make available electronically to the parties and other persons in the case an electronic service list that contains the parties' or other persons' current electronic service addresses, as provided by the parties or other persons that have filed electronically in the case.

(f) Service by the parties and other persons

(1) Notwithstanding (e), parties and other persons that have consented to or are required to serve documents electronically are responsible for electronic service on all other parties and other persons required to be served in the case. A party or other person may serve documents electronically directly, by an agent, or through a designated electronic filing service provider.

(2) A document may not be electronically served on a nonparty unless the nonparty consents to electronic service or electronic service is otherwise provided for by law or court order.

(g) Change of electronic service address

(1) A party or other person whose electronic service address changes while the action or proceeding is pending must promptly file a notice of change of address electronically with the court and must serve this notice electronically on all other parties and all other persons required to be served.

(2) A party's or other person's election to contract with an electronic filing service provider to electronically file and serve documents or to receive electronic service of documents on the party's or other person's behalf does not relieve the party or other person of its duties under (1).

(3) An electronic service address is presumed valid for a party or other person if the party or other person files electronic documents with the court from that address and has not filed and served notice that the address is no longer valid.

(h) Reliability and integrity of documents served by electronic notification

A party or other person that serves a document by means of electronic notification must:

(1) Ensure that the documents served can be viewed and downloaded using the hyperlink provided;

(2) Preserve the document served without any change, alteration, or modification from the time the document is posted until the time the hyperlink is terminated; and

(3) Maintain the hyperlink until either:

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(A) All parties in the case have settled or the case has ended and the time for appeals has expired; or

(B) If the party or other person is no longer in the case, the party or other person has provided notice to all other parties and other persons required to receive notice that it is no longer in the case and that they have 60 days to download any documents, and 60 days have passed after the notice was given.

(i) When service is complete

(1) Electronic service of a document is complete as provided in Code of Civil Procedure section 1010.6 and the rules in this chapter.

(2) If an electronic filing service provider is used for service, the service is complete at the time that the electronic filing service provider electronically transmits the document or sends electronic notification of service.

(j) Proof of service

(1) Proof of electronic service shall be made as provided in Code of Civil Procedure section 1013b.

(2) Under rule 3.1300(c), proof of electronic service of the moving papers must be filed at least five court days before the hearing.

(3) If a person signs a printed form of a proof of electronic service, the party or other person filing the proof of electronic service must comply with the provisions of rule 2.257(a).

(k) Electronic service by or on court

(1) The court may electronically serve documents as provided in Code of Civil Procedure section 1010.6 and the rules in this chapter.

(2) A document may be electronically served on a court if the court consents to electronic service or electronic service is otherwise provided for by law or court order. A court indicates that it agrees to accept electronic service by:

(A) Serving a notice on all parties and other persons in the case that the court accepts electronic service. The notice must include the electronic service address at which the court agrees to accept service; or

(B) Adopting a local rule stating that the court accepts electronic service. The rule must indicate where to obtain the electronic service address at which the court agrees to accept service.

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Credits

(Formerly Rule 2060, adopted, eff. Jan. 1, 2003. Renumbered Rule 2.260 and amended, eff. Jan. 1, 2007. As amended, eff. Jan. 1, 2008; Jan. 1, 2009; July 1, 2009; Jan. 1, 2010. Renumbered Rule 2.251 and amended, eff. Jan. 1, 2011. As amended, eff. July 1, 2013; Jan. 1, 2016; Jan. 1, 2017; Jan. 1, 2018; Jan. 1, 2019.)

Editors' Notes

OFFICIAL FORMS

2019 Electronic Update

<Mandatory and optional Forms adopted and approved by the Judicial Council are set out in West's California Judicial Council Forms Pamphlet.>

ADVISORY COMMITTEE COMMENT

Subdivisions (c)-(d). Court-ordered electronic service is not subject to the provisions in Code of Civil Procedure section 1010.6 requiring that, where mandatory electronic filing and service are established by local rule, the court and the parties must have access to more than one electronic filing service provider.

Cal. Rules of Court, Rule 2.251, CA ST TR COURT Rule 2.251

California Rules of Court, California Rules of Professional Conduct, and California Code of Judicial Ethics are current with amendments received through June 1, 2019. California Supreme Court, California Courts of Appeal, Guidelines for the Commission of Judicial Appointments, Commission on Judicial Performance, and all other Rules of the State Bar of California are current with amendments received through June 1, 2019.

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Comment
Christopher M. Finke [aa1]

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FRIENDS, FOLLOWERS, CONNECTIONS, LEND ME YOUR EARS: A NEW TEST FOR DETERMINING THE SUFFICIENCY OF SERVICE OF PROCESS VIA SOCIAL MEDIA [a1]

I. INTRODUCTION

The emergence of social media as a driving force in modern society has brought it to the forefront of legal discussion in all areas of law. [1] Fields of study such as evidence, ethics, and constitutional law are all currently wrestling with how social media ought to be handled. [2] In particular, courts have attempted to determine whether service of process (or simply "service") should be satisfied by the use of communication through social media. [3]

Since 1950, courts have relied upon the same test, regardless of the method used, to determine the sufficiency of service: the *Mullane* test. [4] *Mullane* as currently applied, however, does not sufficiently scrutinize service via social media in a manner conducive to ***140** understanding the peculiarities of this method of communication. [5] This Comment will not attempt to determine whether the use of social media to effect service of process is constitutional. [6] Rather, it will show how the current application of the *Mullane* standard leads courts to categorically accept or reject service as effected, and, therefore, a new test ought to be adopted to measure the individual social media communication method used to attempt service. [7] This test ought to be utilized to determine whether a particular use of a specific social media platform has fulfilled the constitutional requirements for service, vis-à-vis *Mullane*. [8]

This Comment will begin by examining the standard for sufficient service of process established by the Supreme Court in *Mullane*, followed by the cases expanding that decision; in particular *Greene v. Lindsey, Mennonite Board of Missions v. Adams*, and *Jones v. Flowers*. [9] This Comment will also survey the technological advancements that have affected courts' determinations regarding service. [10] It will then observe how foreign courts have treated issues of electronic service, as well as review the development of this issue in the United States. [11] Finally, this Comment will scrutinize current methods of service, propose a new test that courts ought to use to determine the sufficiency of service effected via social media, and compare the test's advantages to the current test. [12]

II. *MULLANE* AND ITS PROGENY

A. *Define: Service of Process*

Service of process is the system by which common law courts give defendants notice of the proceeding pending against them. [13] When a suit is filed in a United States District Court, the plaintiff has a short ***141** amount of time in which he must notify

the defendant. [14] The procedure for giving this notice in federal courts is governed by Rule 4 of the Federal Rules of Civil Procedure. [15] For state suits, the procedures are governed by local law or rules similar to the Federal Rules of Civil Procedure. [16] The Constitution requires that a certain floor be established for any process of supplying notice to be sufficient. [17]

There are various types of service that have been acceptable, but two bear mentioning. First, when a defendant is handed a set of service papers by someone else, that is termed "personal service" and it is preferable to nearly all other forms of service. [18] Sending notice by certified mail has been almost universally accepted, [19] whereas service by publication (i.e., publishing a notice in a newspaper over the period of a few weeks) has been acceptable only under certain circumstances. [20] Any type of service not expressly enumerated by the federal or state rules of procedure is labeled "alternative service." [21]

B. ***Providing Notice in the World Before Mullane***

The Supreme Court has long hinted that notice requirements may be an issue of constitutional rights. [22] These ideas, however, have been tied to a confusing and unhelpful categorization of types of actions. [23] Actions in rem had different service requirements than an ***142** action in personam. [24] As law became more "settled," the categories became more unsettling, with actions that clearly fit into in rem or in personam categories being distinguished from those "sometimes termed in rem, or more indefinitely quasi in rem, or more vaguely still, 'in the nature of a proceeding in rem.'" [25] Such classifications were later determined unnecessary, as the demands of the Fourteenth Amendment are independent from the categorization of the claim being brought. [26]

C. ***Mullane v. Central Hanover Bank & Trust Co.***

The Supreme Court's 1950 decision in *Mullane v. Central Hanover Bank & Trust Co.* melded prior notions of notice into a single coherent rule. [27] The litigation in *Mullane* involved the notice requirements of a New York statute regulating the creation of common trust funds. [28] The increasing costs of administering a small trust became overly burdensome during and following World War ii, leading many states to allow the pooling of many small trusts into a single common trust fund to be administered by a single entity. [29] The New York statute allowed the creation of a common fund, pending approval of a state board, from any number of smaller trusts held by a single trustee. [30] A judicial settlement would establish the assets of ***143** each individual owner to determine how much each investor should gain from the investment. [31]

Central Hanover Bank and Trust established a common fund in 1946. [32] The following year, it petitioned the New York courts for settlement. [33] One hundred thirteen small trusts were to be added to the common pool, with total investment dollars valued at approximately three million. [34] The Court noted that the record was unclear as to how many individual beneficiaries there were and where those beneficiaries resided. [35]

Notice to the beneficiaries of the petition was provided in compliance with the statute; [36] the banking law required that notice be made to beneficiaries by publishing "the name and address of the trust company, the name and date of establishment of the common trust fund, and a list of all participating estates, trusts or funds" in a newspaper once a week for four weeks. [37] In addition to the statutory demands, Central Hanover Bank mailed notices to the beneficiaries for which it readily had names and addresses. [38] Mullane objected to the service of process as insufficient under the Fourteenth Amendment. [39] The New York Surrogate Court presiding over the matter overruled the objection. [40] On appeal, the Appellate Division and the Court of Appeals affirmed in turn. [41]

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Mullane argued to the Supreme Court that, under the doctrines of *Pennoyer v. Neff*,[42] the trial court lacked jurisdiction.[43] No property ***144** was under contest in the settlement of the common trust;[44] the proceeding would have disposed of the beneficiaries' right to sue the trustee of the common fund for negligence or breach of trust.[45] Without actual property under contest, the case would be categorized as an in personam proceeding, requiring the parties to have been notified via personal service.[46] The Court, however, determined that "the requirements of the Fourteenth Amendment to the Federal Constitution do not depend upon a classification for which the standards are so elusive and confused generally ...."[47]

Instead of relying on these unstable and inconsistent rules, the Court stated that constitutional notice requirements must meet a balance between two values: the interest of the state in resolving fiduciary issues and the interest of the individual as defined under the Fourteenth Amendment.[48] The Court held that because the foundation of due process rights are in the right to be heard, notice is necessarily an element of due process, as it allows a person to "choose for himself whether to appear or default, acquiesce or contest."[49] The Court undertook the task of building an effective test to determine whether service was constitutionally sufficient.[50]

The Supreme Court determined that for service of process to comport with the Fourteenth Amendment, the method of notice must be "reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an ***145** opportunity to present their objections."[51] The analysis came in two parts. First, the notice must reasonably convey the information necessary for the defendant to respond.[52] Second, the notice must be received in such time as to give the defendant time to respond.[53] And with that, the old demarcations between proceeding types and notice requirements were gone.[54] This test remains the test used today.[55]

Ultimately, the Court held that notice was sufficient regarding the beneficiaries who could not be found with reasonable diligence.[56] Because contact information for those individuals could not be found, it was reasonable under the circumstances that publication would be the most effective method to convey the information about the settlement proceeding.[57] For those beneficiaries for whom Hanover Central did have contact information, however, it was determined that service was not sufficient.[58] The known beneficiaries could have been contacted by mail to alert them of the settlement of the trusts, just as they had been notified a few years earlier to alert them of the creation of the common trust.[59]

The *Mullane* test was meant to be flexible.[60] The Court explicitly considered the practical considerations of a strict test and rejected it for those same reasons.[61] This flexibility is not unlimited, as "a mere gesture is not due process."[62] Yet, a party is only required to provide notice to the extent "that the form chosen is not substantially less likely to bring home notice than other of the *feasible and customary* ***146** *substitutes*."[63] This element of reasonableness allows for various methods of service to find use and to be considered equally with other methods.[64]

D. ***Service Through the Years Since Mullane***

Because the test laid down in *Mullane* was meant to be flexible,[65] development of service jurisprudence was necessary.[66] The contours of what would, or would not, sufficiently effect service would become a point of discussion for the court over a series of cases through the next few decades.[67] The Court created this task for itself by rejecting a stricter test.[68] This element of reasonableness, however, allowed the Court with room enough to accept new methods of service, while protecting the rights of defendants.[69]

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1. The Development of Service Jurisprudence

The Court explored the contours of the test it laid down in the years to follow. [70] The *Mullane* test, however, did not face its first true challenge until a string of cases reached the Supreme Court in the early 1980s. [71] Evictions, along with other real estate related financial ***147** issues, pressed the Court to explore the deeper meaning of the *Mullane* test. [72]

In *Greene v. Lindsey*, the Court was faced with the eviction of various inhabitants of apartments operated by the Housing Authority of Louisville, Kentucky. [73] The Housing Authority began detainer actions for repossession in 1975. [74] If the defendant could not be found by the local police to effect personal service, state law directed the police to leave a copy of the notice with someone in the residence or post a copy "in a conspicuous place on the premises." [75] The evicted tenants alleged never to have seen the postings or even have learned of the eviction until a default judgment had already been entered against them. [76]

The district court dismissed Lindsey's case on cross-motions for summary judgment because of a Sixth Circuit Court of Appeals case, which predated the *Mullane* test. [77] On review, the Court of Appeals reversed based on *Mullane* [78] Greene argued that because the action sits under the in rem category, notice by public posting is adequate under *Pennoyer*. [79] The Supreme Court determined this argument to be inapposite and agreed with the Court of Appeals. [80]

The Supreme Court again rejected the notion that questions of service ought to be determined by the property or person categorization of the case. [81] While the Court noted that posting notice of eviction would generally be enough to satisfy due process, [82] this particular reliance on posting notices did not satisfy constitutional requirements. [83] The Court stated that these *particular process servers* were well aware that such notices were often ***148** removed by other people in the common areas in which the notices were posted. [84]

The Court combined this information with other factors to grade the reasonableness test outlined in *Mullane*. [85] A more reasonably calculated method to give notice would have been to send the notice by mail. [86] Mailing the notice would be "efficient and inexpensive" and was a method "upon which prudent men will ordinarily rely in the conduct of important affairs." [87] Ultimately, the Court held that, "where an inexpensive and efficient mechanism ... is available to enhance the reliability of an otherwise unreliable notice procedure," ***149** continued reliance upon the ineffective means does not meet the *Mullane* standard for sufficiency of notice. [88]

About a year later, the Supreme Court once again set out to explore the due process requirements of service of process. [89] In *Mennonite Board of Missions v. Adams*, a tax sale gave rise to the issue of service. [90] The Mennonite Board of Missions (MBM) sold a parcel of land to Alfred Jean Moore on mortgage. [91] According to the terms of the agreement, Moore was to pay the taxes on the land; [92] she failed to do so and the property went to sale. [93] The county initiated the procedure for the tax sale, posted and published notice, and sent notice via certified mail to Moore. [94] Without a response from Moore, the property was sold to Adams at an auction. [95] MBM, although the owner of the property, was never notified of the impending tax sale. [96]

When MBM finally found out about the tax sale, the redemption period had already run, leaving litigation as the only option to regain the property. [97] When MBM contended that notice was not sufficient, the trial court rejected the argument and upheld the state statute requiring the outlined notice process. [98] Indiana's highest court affirmed that decision, but the Supreme Court reversed. [99]

The Court again rejected the use of service by publication because a more reliable means of communication was available. [100] The state's failure to utilize an effective, yet reasonable, means of notice ***150** invoked the ire of the Court: "[I]t does not follow that the [s]tate may forego even the relatively modest administrative burden of providing notice by mail to parties who are particularly resourceful." [101] Furthermore, "a State must provide 'notice reasonably calculated, under all circumstances, to apprise the interested parties of the pendency of the action and afford them an opportunity to present their objections.'" [102] The county's use of publication, when direct mail to the owner of the property is still "an inexpensive and efficient mechanism," [103] led the Court to hold that the local government did not demonstrate the intended desire to actually inform the party of the proceedings. [104]

The Court also rejected the contention that a party must take steps to "safeguard its interests." [105] The Court stated that even a sophisticated party, such as MBM, is not required to go out of their own way to protect their property interests; [106] rather, it is the responsibility of the party providing notice to do so in accordance with due process requirements. [107] The county's easy access to tax records-and hence MBM's mailing address-made it clear to the Court that the "minimum constitutional precondition" of notice was not satisfied. [108]

Adams, however, went beyond the mere affirmance of the *Mullane* rule. [109] The Court in *Adams* clarified that the accuracy of the delivery of service and intent of the delivering party are factors to be considered in the analysis. [110] The reasonableness of the method of ***151** service, therefore, was to include both objective factors [111] and subjective factors. [112]

The passing of years has not relegated the *Mullane* test to collect dust on law library shelves. [113] A situation of divorce allowed the Supreme Court the chance to halt the extension of the *Mullane* test in 2006. [114] The plaintiff, Jones, moved out of his Arkansas home and into an apartment in Little Rock. [115] Nevertheless, he continued to pay the mortgage for the home, and the mortgagor would in turn pay the property taxes for the home every year. [116] After thirty years the mortgage was paid off, leaving the property taxes to the responsibility of the owner. [117] Three years later, the state sent a letter to the home to notify Jones that the property taxes for the home were delinquent. [118] The letter would have informed Jones that the property would be sold if the taxes remained unpaid for two more years; [119] unfortunately, no one was present at the home to receive the letter and it was returned as "unclaimed." [120] Shortly before the date of the sale, the state published a notice of the public sale in a local newspaper. [121] Flowers negotiated a purchase for barely a quarter of the market value of the house. [122] The state sent another notice to the home in an attempt to contact Jones, but the letter was again returned unclaimed. [123]

Jones filed suit for the state's failure to provide notice and deprivation of property without due process of law. [124] On cross-motions for summary judgment, the trial court concluded that the state's actions were proper, denying Jones's motion and granting Flowers's motion. [125] The Arkansas Supreme Court affirmed the trial court's judgment that the state tax sale statute complied with due ***152** process requirements regarding service. [126] The Supreme Court, however, reversed. [127]

In a "new wrinkle," the Court noted that precedent clearly required state governments to take action beyond what is normally required when it is known that the notice failed to reach the intended recipient. [128] The Court found that since the state's certified letter was returned unclaimed, it would be proper for the Court to inquire "what the State does when a notice letter is returned unclaimed" before determining the reasonability of the notice. [129]

The Court held that the state's lack of further conduct was unreasonable. [130] Prior to the sale of the land, the state learned that its method of notice had *actually* failed. [131] The Court analogized the returned letter to the state officer handing a stack of

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letters to a postman, see that postman drop the letters down a storm drain, and do nothing. [132] "Failure [,]" wrote Chief Justice Roberts, "to follow up would be unreasonable, despite the fact that the letters were reasonably calculated to reach their intended recipients when delivered to the postman." [133] Failure to take additional action demonstrated that the state was not "desirous of actually informing" the defendant Jones. [134]

Just as in *Adams*, the state in *Jones* argued that ignorance of the law is no excuse: the owner of property should know that a tax sale ensues from a failure to pay taxes. [135] Again, the Court rejected this argument because it was the state's burden to serve the opposing party. [136]

The Court further held that there were viable alternatives to the use of certified mail. [137] The use of regular mail would allow the letter "to ***153** be examined at the end of the day" rather than only "retrieved from the post office." [138] The state, however, was not required to check local income tax rolls or other records. [139] Requiring this would place too great a burden with little return, because a certified letter marked "unclaimed" denotes only that no one was home, not that it was the wrong address. [140]

Jones defined how broadly the actual knowledge of a party may be drawn out. [141] The reasonably calculated notice may be reasonably calculated when it was used, but if it is shown that actual notice was not effected, a follow up of some kind is required on risk of failing to demonstrate a desire to effect service. [142]

2. Bringing New Technology into the Fold

Courts generally have to play "catch up" with the application of legal doctrines regarding service due to the ever-changing technological landscape. [143] As discussed above, the Supreme Court readily accepted the use of both regular and certified mail as acceptable methods of service. [144] Generally, the acceptance of other methods of service has been left to lower courts to decide. [145] Federal trial courts accepted the use of telex machines during the Iranian crises of the 1980s to serve businesses whose assets were being attached for suit. [146] Likewise, federal courts have also allowed fax communication when that method was provided by a defendant as the primary method of communication. [147] The defendant in *Broadfoot* was adamant that all communication between him and the plaintiff ***154** was to be conducted through fax. [148] In the use of these two technologies, courts were spared from considering a dueling of method reliability because telex or fax were "the only means of communication" available between the two parties. [149] Because of the unique circumstances and limited availability of alternative methods of communication, and thus methods by which to serve process, both courts held service to be sufficient. [150]

Electronic mail (email) was incorporated in *Rio Properties v. Rio International Interlink*, a groundbreaking case decided by the Ninth Circuit Court of Appeals in 2002. [151] That court allowed service via email, a holding noted by the court to be "upon untrodden ground." [152] No prior decision by a federal appeals court had ever addressed service of process by email. [153] The Ninth Circuit's analysis of the facts relied heavily on the defendant's structuring of its business "such that it could be contacted *only* via its email address." [154] Therefore, the courts were again spared from grappling with dueling service options. [155] The Ninth Circuit recognized that email had its limitations: proof of receipt problems, compatibility issues, and "[i]mprecise imaging technology" making official documents difficult to read. [156] Nevertheless, the appeals court trusted in a district court's ability to "balance the limitations of email service against its benefits in any particular case," and declared the service sufficient. [157]

Some courts have gone to the extreme to provide service to a defendant. [158] In July 2015, the Domestic Violence Unit of the D.C. Superior Court engineered an interesting solution to a defendant attempting to evade service. [159] The defendant had managed

to evade ***155** more than twelve service attempts of varying methods. [160] The judge determined the numerous attempts to be demonstrative of the plaintiff's diligence. [161] The court decided the best, and perhaps only, way to effect service via a means reasonably calculated to provide notice was to send the notice via a text message. [162]

Social media has become the next layer of technology to be used to effect service of process. [163] Facebook, [164] Twitter, [165] LinkedIn, [166] and other websites all sit within this realm of digital interaction. Facebook boasts 1.71 billion monthly active users who can interact with other users through pictures, video, text, documents, webpage hyperlinks, etc. [167] Facebook also offers flexibility in that it can be connected to various platforms or even other social media services. [168] Twitter users are more limited in their communication as messages are restricted to one hundred forty characters or less. [169] Even still, the so-called "microblogging service" nets more than three hundred million users. [170] LinkedIn, while very similar to other services, garnered more than four hundred million users due to its different ***156** purpose. [171] LinkedIn acts as a way to create professional relationships, search for jobs, or replace hard copy résumés. [172]

III. CURRENT TREATMENT OF SERVICE VIA SOCIAL MEDIA

A. *International Treatment*

Nations around the world have been dealing with the issue of service via social media for years. [173] The United Kingdom, Australia, New Zealand, and Canada have all approved service via social media in certain cases. [174] Of note, the Australian decision allowed service of a default judgment via Facebook where the biographical information of an account matched prior known biographical information of the defendants. [175] Each of the decisions held concerns for accuracy, but every time the court allowed service via social media because of the parties' inability to contact the defendant. [176]

B. *Domestic Treatment*

Courts in the United States have been lukewarm to the idea of effecting service via social media. [177] They have not, however, entirely rejected the idea. [178] In *Baidoo v. Blood-Dzraku*, a New York trial court examined the possibility of service via Facebook. [179] The plaintiff had attempted to serve her husband with a divorce summons, but he refused to meet and his last known address had been empty for ***157** years. [180] With the defendant evading service and no accurate address to send a letter to, the court had few other choices. [181] The court, citing New York rules that allow other methods of service provided that the method can be shown to satisfy the *Mullane* test, [182] allowed the plaintiff to follow through with her proposed method of service--sending the summons to the defendant's Facebook account via a private message. [183] Just as *Rio Properties* noted that email service was "untrodden ground," [184] the court in *Baidoo* stated that allowing social media service would be "beyond the safe harbor of statutory prescription." [185] Even so, the trial judge found that, because the plaintiff was able to show with reasonable certainty that the account was used by the defendant and that publication was less likely to reach the defendant, the use of Facebook to provide service passed constitutional due process requirements. [186]

In *FTC v. PCCare247*, the federal district court wrestled with whether service by both email and social media would be sufficient for a foreign defendant. [187] The defendants were alleged to have run a fraudulent business charging Americans for "fixing" problems with their computers. [188] Even though a different Federal Rule of Civil Procedure applies to international defendants, [189] both analyses must look to whether due process is satisfied by the method of service. [190] Service by Facebook message alone would bring a "substantial question" for consideration, particularly because of the ability to fake profile

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information. [191] The plaintiff's use, however, of email and significant facts which demonstrated that the targeted account would be the correct one, assuaged the court's fears. [192] Notably, the court stated that "courts must remain open to considering requests to ***158** authorize service via technological means of then-recent vintage." [193] This was especially important to the court because as defendants become more involved in modern technology, it more closely "comports with due process to serve them by those means." [194]

Likewise, the court in *Who'sHere, Inc. v. Orun* dealt with a foreign defendant. [195] The plaintiff alleged that the defendant infringed upon its trademark. [196] The defendant was in contact with the plaintiff, but only through electronic means. [197] The plaintiff asked the court to allow service by both email and social media. [198] This time, however, the court recognized that any of the individual methods of service would likely have been sufficient. [199] The various factual supports, such as cross-references of the name and email from the account with information provided by the defendant, led the court to hold that service via social media was sufficient. [200]

Not all courts have been as open-minded regarding service. [201] In *Fortunato v. Chase Bank*, the court was concerned with the accuracy of the targeted account. [202] The court declared social media service "unorthodox" and remained "skeptical" that delivery of the notice would actually apprise the recipient account of the proceedings against the party. [203] Even though the defendant went through various other attempts to effect service, the court was leery of the defendant's desire to actually provide notice. [204] The court ordered service by publication in local newspapers. [205]

In the only case on point to be opined upon by a jurisdiction's highest court, the Supreme Court of Oklahoma declared that service via social media-- Facebook in particular--categorically cannot be sufficient to provide service on par with constitutional requirements. [206] An adoption case, *Andrews*, dealt with a father's ***159** loss of custody rights. [207] The Oklahoma Supreme Court held that notice via Facebook does not comport with constitutional requirements. [208] Even though the court could have created a narrow holding that there were other more reasonable methods of effecting service, [209] the court decided to boldly state that "[t]his Court is unwilling to declare notice via Facebook alone sufficient to meet the requirements [of the federal and state constitutions] because ... [i]t is ... a mere gesture." [210] The court flatly rejected Facebook, and likely all other social media platforms, as a viable means of effecting service. [211]

C. *Future Proposals*

Ultimately, courts around the nation have decided the issue fairly evenly. [212] Because of this disparity of answers, even in similar factual situations, some have called for changes to the way courts view the issue. [213] Legislative enactments could be used to explicitly allow for service by electronic communication. [214] Other advocates state that because electronic communication methods are reliable, traditional service should be dispensed with as "time-consuming, overly expensive, or unsuccessful." [215] The efficiency of electronic communication, combined with modern society's reliance on such communication, often allows it to be a more reasonable method than traditional methods. [216] At the very least, some scholars have noted that courts should use particular sets of factors to determine if a particular use of social media is sufficient. [217] Often included are: (1) the nature of the media platform in relation to the needs of effective service; (2) the existence of corroborative evidence to verify accuracy ***160** in the targeted account; and (3) the existence of evidence that the targeted account is actually used. [218]

IV. THE TEST

A. *Failures of Prior Tests*

The *Mullane* test's flexibility allows it to move with the changing times. [219] The various courts' application of that test is not always as flexible as intended. [220] The use of the three factors outlined above is strongly advocated when a court allows service by social media. [221] These factors alone, however, do not delve deeply enough into an understanding of the discrete particularities of each social media platform. [222] Likewise, flat statements rejecting social media as always failing to comport with constitutional requirements tends to show a lack of understanding of the systems and their ever-increasing use in modern communication. [223] Therefore, more detail is needed and more factors should be considered when examining the individual methods of communication. [224]

B. *New Test*

A new, more detailed test should make it evident as to whether the use of social media can be reasonably calculated to effect service. [225] The test proposed here should take the following factors into consideration. First, are the broader means of communication publicly accessible? Second, is the direct method to be used private to the defendant? Third, is the communication directly targeted to the defendant? Fourth, is there corroborative evidence that the targeted ***161** user is the correct one, and further, that the account is active? Fifth, are there terms of service requirements that force users to display their actual identifying information? Sixth and finally, do the broader means and the specific method of communication have the ability to transmit entire documents? These factors, taken together, would give courts a better understanding of whether service by social media can be reasonably calculated to apprise the other party of proceedings against them. [226]

1. Public Means

The means by which notice is given should be public. Just as anyone has access to a person walking in public, the mail, or even a newspaper, notice should only be allowed through electronic means to which anyone has access. [227] This would exclude means such as private forum sites, where joining the forum requires a screener who has the option to accept or deny you. [228] A private forum may exclude anyone it chooses. [229] Rather, a public means would include most major social networks, such as Facebook or Twitter, which require only that the proper information be provided with no other delay or option to deny at the time of registration. [230] Forcing a party to provide notice via public means would protect most individuals' access to justice and keep the goals of service consistent: protecting the due process rights of individuals. [231] Anyone with internet access ***162** (or even a local library) would have the ability to serve their opponent. [232]

2. Private Method

While the means of serving process should be public, the specific method of contact should be private. Courts have attempted to protect privacy where possible. [233] While anyone has access to the mail, only the intended recipient is allowed to open and read the contents of the letter. [234] This would ensure that only the targeted individual is the most likely to be served. [235] A standard Facebook post, or even a post on someone's page would not be private. [236] Only a post viewable solely by the recipient or a direct message would provide both reasonable notice and actual information to the intended recipient. [237]

3. Direct Communication

In order to ensure that the intended recipient of the communication actually receives the communication, the notice should be targeted directly to the intended user.[238] Because sufficient service requires reasonable efforts to effect service, an indirect communication (such as a tweet) is no better than publication.[239] Indirect communication is ***163** offered in the hopes that, if the intended recipient does not see the notice, someone who knows the intended recipient will realize that the notice should be passed along.[240] Electronic communication should be directed at the recipient to avoid the various, and well-documented, problems that come along with publication.[241]

4. Corroborating Evidence to Prove Accuracy and Activity

Currently, courts examine the likelihood of a targeted user account being the correct user.[242] That analysis should continue. *Mullane* requires that notice be reasonably likely to apprise the opponent of the suit.[243] For service to be effective, the plaintiff must have some evidence to show that the notice was served on the correct user's account.[244] There may be fifty different men named David Johnson in any given metro locale; the plaintiff must use corroborating indicators to show that the account served belongs to the correct David Johnson.[245] Digital interactions such as events, pictures, or "check-in" locations, coupled with date and time stamps, can be used to show that the intended user owns and operates the account being served.[246]

Furthermore, just as the correct user account should be corroborated, so too should some proof be given to show that the account is actually used.[247] Proof of actual use would safeguard the *Mullane* requirements.[248] This evidence is not difficult to attain from ***164** most social networks.[249] Any post would show activity, but many social media platforms and email services also allow for some form of read receipt.[250] These receipts would allow the sender to confirm that the account was actually in use and provide reasonable assurance that the intended target was served.[251]

5. Terms of Service Requirements

Ensuring accuracy is a must when determining whether service of process was sufficient.[252] Under current law, the primary inquiry for electronic service is to determine whether the account is correct.[253] While that inquiry should continue, courts should not end the analysis there; they should also consider the terms of service for the social media platform being used for service.[254] Some social media platforms have terms of service that require the user to provide accurate identifying information when registering under pain of being banned from using the platform.[255] Others, especially forums created for a small club or group, may be allowed or even encouraged to hide their true identity.[256] Because of the low reliability of the information provided and stored by these platforms, they should be excluded from providing sufficient service of process if it is found that the terms of service for the webpage: (a) do not require correct information or (b) do not have the penalty of expulsion for failing to provide the correct information.[257] This would include nearly all major social media ***165** platforms and provide some assurance that the information used to determine whether the account is the correct one is accurate.[258]

6. Ability to Transmit the Entire Document

Every examination into sufficiency of process must examine the contents of the alleged notice.[259] An examination into service via social media is no different.[260] The court should examine whether the method of contact allows the sender to provide documentation, which would prove to the reader that the information is true.[261] One of the problems with electronic service is its believability.[262] If a Facebook user looks to his or her account and sees a direct message that states: "You are hereby notified that your presence in X Court will be required on Y Date," the user is likely to be suspicious as to its authenticity.[263]

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If, however, that same user were to receive a message from someone he or she knows and that message had official documents attached with the same information and the seal of the court and/or the signature of the clerk, that message would be more likely to be believed. [264]

This requirement would somewhat limit the technology capable of being used to provide sufficient service. [265] Not every platform allows a user to send a scanned or photographed copy of a document to another user. [266] Nevertheless, this requirement would allow a ***166** plaintiff to send accurate and official information to the targeted user with a much higher probability that the receiving user would believe the information to be accurate. [267]

7. Proof of Actual Receipt

The final note, though not a factor, is, in reality, a sufficiency of evidence analysis. The court should examine whether the method of contact within the social media platform includes some indication of a proof of receipt. [268] For example, a direct message to a Facebook user shows when the user viewed it, even if that person does not reply to the message. [269] Not all platforms, however, currently display when another person reads your message (e.g., Twitter being one of these). [270] This requirement should act as a method of weeding out weak evidence that a user has had the opportunity to see the notice. [271] if there is little or no activity on the account and there is no way to tell if the message has been received, such information tends to show a lack of notice. [272] Conversely, if there is either little activity but a read receipt or much activity and no read receipt, the court should slide the scale in the direction of allowing service. [273]

***167** C. *Comparative Improvements*

If this test had been used by the courts in *Fortunato* and *Andrews*, the reasoning of those two decisions, if not the holding themselves, would likely have been different. [274] In *Fortunato*, the plaintiff failed to place any facts before the court to show whether the targeted user was the correct one. [275] The court's general skepticism was born out in its holding, [276] but if this new test had been considered the court would be forced to recognize that while this particular instance of service may have lacked sufficient facts and evidence, the practice of providing notice via social media can be constitutionally sufficient. [277]

Likewise, the Supreme Court of Oklahoma's broad holding in *Andrews* would have been significantly narrower, if not flipped. The court relied on the possibility that no notification would pass to the actual user. [278] This fact, however, excluded any analysis as to whether the account was actually used or if the plaintiff attained a read receipt. [279] Such an analysis may have forced the court to further examine the workings of communication by social media rather than flatly reject it.

V. CONCLUSION

Many courts' quick dismissal of social media service because of the “unorthodoxy” of new methods will push courts into further inefficiencies. [280] The movement of both state and federal courts to digital filing systems has demonstrated how efficient electronic methods may be. [281] The next step in the litigation process to go ***168** digital should be service. This is born out in the progression of technological inclusion in service jurisprudence. [282]

This new test may not create a universal method of determining service sufficiency. Its use in a court's analysis, however, would force the court to interact with the digital world and manipulate digital communication methods within the existing realm of service jurisprudence. [283] That manipulation turns into wider use of digital communication; the use turns into stronger jurisprudence and a better understanding of the due process rights belonging to citizens of the United States.

Footnotes

a1 *See* WILLIAM SHAKESPEARE, JULIUS CAESAR act 3, sc. 2.

aa1 J.D. Candidate, University of Baltimore School of Law, 2017. Special thanks to my wife for putting up with the craziness that is law school life, and to my parents for the opportunities they gave me by choosing homeschooling.

1 *See generally* Keely Knapp, Comment, *#Serviceofprocess @Socialmedia: Accepting Social Media for Service of Process in the 21st Century*, 74 LA. L. REV. 547 (2014) (arguing that "[b]ecause of social media's pervasiveness, the legal system would be doing itself an injustice to ignore this new technology as a means to effectuate service when other methods fail").

2 *See, e.g.*, Laura E. Diss, *Whether You "Like" It or Not: The Inclusion of Social Media Evidence in Sexual Harassment Cases and How Courts Can Effectively Control It*, 54 B.C. L. REV. 1841, 1846 (2013) (discussing the role of social media evidence in sexual harassment cases); *Ethical Obligations for Attorneys Using Social Media*, PA. BAR ASS'N (2014), http://www.danieljsiegel.com/Formal_2014-300.pdf (discussing problems of legal ethics arising from the use of social media); Tehrim Umar, Comment, *Total Eclipse of the Tweet: How Social Media Restrictions on Student and Professional Athletes Affect Free Speech*, 22 JEFFREY S. MOORAD SPORTS L.J. 311, 312-313 (2015) (discussing social media in the field of constitutional law and arguing social media platforms are protected by the First Amendment).

3 *See* Baidoo v. Blood-Dzraku, 5 N.Y.S.3d 709, 711 (N.Y. Sup. Ct. 2015); Andrews v. McCall (*In re* Adoption of K.P.M.A.), 341 P.3d 38, 51 (Okla. 2014).

4 *See infra* Section II.C.

5 *See infra* Section IV.A.

6 That is, constitutional by way of application of current service jurisprudence. For further discussion about the constitutionality, see William Wagner & Joshua R. Castillo, *Friending Due Process: Facebook as a Fair Method of Alternative Service*, 19 WIDENER L. REV. 259, 263-264 (2013).

7 *See infra* Sections IV.A-IV.B.

8 *See infra* Section IV.B.

9 *See infra* Sections II.A-II.D.

10 *See infra* Section II.D.2.

11 *See infra* Part III.

12 *See infra* Sections IV.A-IV.C.

13 *See* James Weinstein, *The Federal Common Law Origins of Judicial Jurisdiction: Implications for Modern Doctrine*, 90 VA. L. REV. 169, 195 (2004).

14 FED. R. CIV. P. 4(m) (requiring defendants to be served within ninety days from the filing of the lawsuit).

15 *See* FED. R. CIV. P. 4(c)-(m).

16 *See generally* U.S. CONST. amend. X (stating that powers not delegated to the Federal Government are delegated to the States or to the people).

17 *See* Mullane v. Cent. Hanover Bank & Tr. Co., 339 U.S. 306, 313-14 (1950) (declaring service of process a due process concern).

18 *See* Matthew R. Schreck, *Preventing "You've Got Mail"™ from Meaning "You've Been Served": How Service of Process by E--Mail Does Not Meet Constitutional Procedural Due Process Requirements*, 38 J. MARSHALL L. REV. 1121, 1129 (2005).

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19 *See id.* at 1144 n.175.

20 *See Mullane*, 339 U.S. at 314 (holding that service is sufficient provided the notice is "reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action").

21 Wagner & Castillo, *supra* note 6 at 263-264.

22 *See In re* The Mary, 13 U.S. (9 Cranch) 126, 144 (1815) ("[I]t is a principle of natural justice, of universal obligation, that before the rights of an individual be bound by a judicial sentence, he shall have notice, either actual or implied, of the proceedings against him.").

23 *Id.* (noting differences between notice of actions in personam and in rem); *see also* Pennoyer v. Neff, 95 U.S. 714, 733-34 (1877) (describing claims that are only "in the nature of a proceeding *in rem"* rather than actually in rem, and allowing alternative service for such claims in particular circumstances). The distinctions created by courts "concerned the presence of a person or thing and the type of notice required" to sustain that type of action. RESTATEMENT (SECOND) OF JUDGMENTS § 5 (AM. LAW INST. 1982). In personam actions required that the court have jurisdiction over, and notice be given to, a particular person. *See id.* In rem actions, by contrast, would impose legal liability only upon the physically present property which was the subject of the lawsuit. *Id.* Notice was given for this type of action when property was seized. *See id.* Notice was formerly, therefore, a facet of personal jurisdiction. *See id.* With the various types of actions subsumed into the same set of requirements, these categories are effectively eliminated in personal jurisdiction analysis, *Shaffer v. Heitner*, 433 U.S. 186, 212 n.39 (1977), and service of process analysis, *see Mullane*, 339 U.S. at 312-13.

24 *See Pennoyer*, 95 U.S. at 733-34.

25 *Mullane*, 339 U.S. at 312.

26 *See id.* at 312-13.

27 *Id.* at 314. For a general history of *Mullane* as well as the statute that the Supreme Court overturned, see John Leubsdorf, *Unmasking* Mullane: *Due Process, Common Trust Funds, and the Class Action Wars*, 66 HASTINGS L.J. 1693, 1694 (2015).

28 *Mullane*, 339 U.S. at 307.

29 *Id.* at 307-08.

30 *Id.* at 308-09.

31 *Id.* at 309.

32 *Id.*

33 *Id.*

34 *Id.*

35 *Id.*

36 *Id.*

37 *Id.* at 309-10.

38 *Id.* at 310.

39 *Id.* at 310-11. Mullane was appointed by the New York Surrogate Court to represent all persons known and unknown who had an interest in the income of the common trust fund. *Id.* at 310. Mullane was joined by James Vaughan, who represented those who had an interest in the principle. *Id.*

40 *Id.* at 311.

41 *Id.*

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42 *Pennoyer v. Neff*, 95 U.S. 714, 720 (1878), held that service of process for in rem proceedings where the property is owned by a non-resident is only sufficient where the non-resident owner is given personal service. In that case, the failure to provide personal service deprived the state court jurisdiction over the proceeding. *Id.*

43 *Mullane*, 339 U.S. at 311-12. It was clear some of the beneficiaries were not residents of New York. *Id.* at 309.

44 *Id.* at 313.

45 *Id.* at 311.

46 *See Pennoyer*, 95 U.S. at 727.

47 *Mullane*, 339 U.S. at 312.

48 But the vital interest of the State ... can be served only if interests or claims of individuals who are outside of the State can somehow be determined. A construction of the Due Process Clause which would place impossible or impractical obstacles in the way could not be justified. Against this interest of the State we must balance the individual interest sought to be protected .... "The fundamental requisite of due process of law is the opportunity to be heard." This right to be heard has little reality or worth unless one is informed that the matter is pending ....
Id. at 313-14 (citations omitted).

49 *Id.* at 314.

50 *Id.* ("The Court has not committed itself to any formula achieving a balance between these interests ...."); *see also* Jo-Leo W. Carney-Waterton, Note, *The Postman Must Always Ring Twice: When Preliminary Attempts at Notice Are Unsuccessful, Is the State Obligated to Take Additional Reasonable Steps to Ensure That a Person Receives Adequate Notice?*, 34 S.U. L. REV. 65, 79 (2007) (describing *Mullane* as "a seminal, if not watershed, case in the historical succession of cases on the issue of service").

51 *Mullane*, 339 U.S. at 314.

52 *Id.*; *see also* Brody v. Vill. of Port Chester, 434 F.3d 121, 130 (2d Cir. 2005).

53 *Mullane*, 339 U.S. at 314; *see also* Oneida Indian Nation v. Madison Cty., 665 F.3d 408, 434-35 (2d Cir. 2011).

54 *Mullane*, 339 U.S. at 315 ("The criterion is not the possibility of conceivable injury, but the just and reasonable character of the requirements, having reference to the subject with which the statute deals." (quoting American Land Co. v. Seiss, 219 U.S. 47, 67 (1911))). *But see* Greene v. Lindsey, 456 U.S. 444, 450-51 (1982).

55 *See* Jones v. Flowers, 547 U.S. 220, 226 (2006).

56 *Mullane*, 339 U.S. at 317.

57 *Id.* at 317-18. The Court explained that only "ordinary standards of diligence" would apply. *Id.* at 317. Even this diligence would be seen through the context "of the character of the proceedings and the nature of the interests ... involved ...." *Id.*

58 *Id.* at 318.

59 *Id.* at 319.

60 *See id.* at 315 ("The criterion is not the possibility of conceivable injury but the just and reasonable character of the requirements, having reference to the subject with which the statute deals." (quoting Am. Land Co. v. Zeiss, 219 U.S. 47, 67 (1911))).

61 *Id.* at 314-15.

62 *Id.* at 315.

63 *Id.* (emphasis added). The Court faced a similar issue in *Walker v. Hutchinson City*, 352 U.S. 112, 115-16 (1956).

64 *See Mullane*, 339 U.S. at 317, 319.

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65 *See supra* note 60 and accompanying text.

66 *See* Jones v. Flowers, 547 U.S. 220, 223 (2006)

67 *See infra* note 71.

68 *Mullane*, 339 U.S. at 314-15.

69 *See id.*

70 *See* Memphis Light, Gas & Water Div. v. Craft, 436 U.S. 1, 13-14, n.13 (1978); Schroeder v. New York, 371 U.S. 208, 211, 212-13 (1962); Walker v. City of Hutchinson, 352 U.S. 112, 115-16, 116 n.5 (1956). The Court in *Walker* rejected notice by publication for condemnation proceedings. 352 U.S. at 117. *Schroeder*, relying on *Walker* and *City of New York v. New York, New Haven & Hartford R.R. Co.*, 344 U.S. 293, 296 (1952), rejected the use of a town paper and signs posted around town (but not on the property in question) to provide notice to a landowner during proceedings to divert a river when the landowner's name and address could have easily been ascertained from town records. 371 U.S. at 211. Finally, in *Craft*, the court entered into a lengthy discussion of due process to determine that the "final notice" mailed to the Crafts was sufficient to alert them that the gas and electricity supplies would be terminated, but not that the Crafts had the opportunity to object to the billing. 436 U.S. at 13. Therefore, the Crafts' rights in this regard were not foreclosed. *Id.*

71 *See* Mennonite Bd. of Missions v. Adams, 462 U.S. 791, 795-96 (1983); Greene v. Lindsey, 456 U.S. 444, 447, 448-50 (1982); Logan v. Zimmerman Brush Co., 455 U.S. 422, 428-29 (1982); Texaco, Inc. v. Short, 454 U.S. 516, 517 (1982). *Greene* and *Adams* hold the most regard of the four, and therefore, only those two cases will be discussed here.

72 *See* Jones v. Flowers, 547 U.S. 220, 223 (2006) (tax sale); *Adams*, 462 U.S. at 792-93 (tax sale); *Greene*, 456 U.S. at 447 (eviction).

73 *Greene*, 456 U.S. at 446.

74 *Id.*

75 *Id.* (quoting KY. REV. STAT. § 454.030 (1975)).

76 *Id.* at 446-47.

77 *Id.* at 447 (citing Weber v. Grand Lodge of Ky., F. & A. M., 169 F. 522 (6th Cir. 1909)).

78 *Id.* at 448-49.

79 *See id.* at 450; *see also supra* note 23 and accompanying text.

80 *Greene*, 456 U.S. at 456.

81 *Id.* at 450 (citing Mullane v. Cent. Hanover Bank & Tr. Co., 339 U.S. 306, 312 (1950)).

82 *Id.* at 452.

83 *Id.* at 453.

84 *Id.* at 453-54. Evidence in the record demonstrated that the individuals charged with posting notice had personal knowledge that children from the apartment complex often removed similar postings at the location of the eviction. *Id.* Footnote 7 of the opinion includes the following exchange during a deposition:
The children-we had problems with children. They would take [the writs] off. They never took them off when we were present, but we, you know, assume-the Housing Authority told us that they would take them off, so we always put them up high.
Q. Did you ever see kids pulling them off?
A. Yes.
Q. You did?
A. Uh-huh.
Q. Did you see many?

A. No, not too many. I did see it in one place over there.
Q. Where was that?
A. Village West.
Q. How many times did you see that happen?
A. Well, probably a couple of times.
Q. ... Were you aware of there being any problem with children ripping the Writs off?
A. Oh, we had plenty of trouble.
Q. You had trouble?
A. With kids, yeah. Yeah.
Q. Did you ever see kids ripping them off?
A. Yeah. I have seen them take them off of the door and I would go back and tell them to put it back. They don't know. They didn't know. They just-
Q. Were there any particular places where you saw kids ripping them off the doors?
A. Well most of that was in Village West.
Id. at 453 n.7 (citations omitted).

85 *Id.* at 454 (citing *Mullane*, 339 U.S. at 315).

86 *See id.* at 455-56.

87 *Id.* at 455 (quoting *Mullane*, 339 U.S. at 319).

88 *Id.* at 455-56 (citing *Mullane*, 339 U.S. at 319).

89 *See* Mennonite Bd. of Missions v. Adams, 462 U.S. 791, 794-95 (1983).

90 *Id.* at 795.

91 *Id.* at 792.

92 *Id.*

93 *Id.* at 794.

94 *See id.* Moore was the mortgagee and therefore, not the actual owner of the property. *Id. at* 792. Note, however, that this case, decided only a year after *Greene*, incorporated the method of service expressly held in *Greene* to be an acceptable alternative to posting.

95 *Id.* at 794.

96 *Id.*

97 *Id.* at 794-95.

98 *Id.* at 795.

99 *Id.*

100 *Id.* at 799. The Court did not address the use of certified mail for notice because the letter would have only given Moore the required notice. Because MBM was the owner of the property, it was entitled to the notice. *See id.* at 792. Moore was a mere mortgagee. *Id.* The certified mail would have no effect on service requirements for MBM. Ergo, only the publication remained for the Court to consider. *See id.* at 793 (illustrating that certified mail should have been sent to the owner of the property, not the resident). The mailed notice was sent to Moore. *Id.* at 794.

101 *Id.* at 799-800.

102 *Id.* at 795 (quoting Mullane v. Cent. Hanover Bank & Tr. Co., 339 U.S. 306, 314 (1950)). Even though the parcel was occupied by Moore, her use of the land was based upon a mortgage. Under Indiana law at the time, the mortgagee still retained a property interest

in the parcel. *Id.* at 798. Therefore, due process protections are triggered, including service of process requirements. *See Mullane*, 339 U.S. at 314.

103 *Adams*, 462 U.S. at 799 (quoting Greene v. Lindsey, 456 U.S. 444, 455 (1982)).

104 *Id.* (citing *Mullane*, 339 U.S. at 315).

105 *Id.*

106 *Id.*

107 *Id.* at 799-800.

108 *Id.* at 800.

109 *Compare id.* at 799-800 (expanding the *Mullane* analysis by discussing the accuracy of and the intent behind service of process), *with Mullane*, 339 U.S. at 314-15 (establishing a flexible service of process test which requires the method of service to be reasonable).

110 *Adams*, 462 U.S. at 799-800 (emphasizing that particular methods of service do not demonstrate a desire to provide notice to a party and that accuracy of service is essential despite the sophistication of the party).

111 *See id.* at 799.

112 *See id.*; Greene v. Lindsey, 456 U.S. 444, 453-54 (1982).

113 *See* Jones v. Flowers, 547 U.S. 220, 238 (2006).

114 *Id.* at 238.

115 *Id.* at 223.

116 *Id.*

117 *Id.*

118 *Id.*

119 *Id.*

120 *Id.* at 223-24.

121 *Id.* at 224.

122 *Id.* Flowers negotiated for approximately twenty-one thousand dollars. *Id.*

123 *Id.*

124 *Id.*

125 *Id.*

126 *Id.* at 225.

127 *Id.* at 239.

128 *Id.* at 227, 230 ("In *Robinson v. Hanrahan*, we held that notice ... was inadequate when the State knew that the property owner was in prison .... In *Covey v. Town of Somers*, we held that notice of foreclosure by mailing, posting, and publication was inadequate when town officials knew that the property owner was incompetent and without a guardian's protection.") (citations omitted).

129 *Id.* at 227, 231.

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130 *See id.* at 234-35.

131 *Id.* at 223-24.

132 *Id.* at 229.

133 *Id.*

134 *Id.* at 230.

135 *See id.* at 231-32; Mennonite Bd. of Missions v. Adams, 462 U.S. 791,799 (1983).

136 *See Jones*, 547 U.S. at 233 (using *Miranda* rights as an example of well-known rights that must still be respected by government actors).

137 *See id.* at 234-35.

138 *Id.* at 235.

139 *Id.* at 236.

140 *Id.*

141 *See id.* at 225.

142 *See id.* at 230.

143 *See, e.g.*, Broadfoot v. Diaz (*In re* Int'l Telemedia Assocs.), 245 B.R. 713, 721 (Bankr. N.D. Ga. 2000). The court allowed service via fax machine decades after the creation of the first commercially available fax machine. *Id.; see The History of Fax-from 1843 to Present Day*, FAX AUTHORITY, http://faxauthority.com/fax-history/ (last visited Oct. 31, 2016).

144 *See supra* Section II.D.1.

145 *See generally* New Eng. Merchs. Nat'l Bank v. Iran Power Generation & Transmission Co., 495 F. Supp. 73, 78 (S.D.N.Y. 1980) ("[T]he [Foreign Sovereign Immunities Act] provides that if the other methods of service are unavailable, the court may fashion a mode of service 'consistent with the law of the place where service is to be made.'" (quoting 28 U.S.C. § 1608 (1976))).

146 *Id.* at 81.

147 *Broadfoot*, 245 B.R. at 721.

148 *See id.* at 718 ("From now on, you may contact me by FAX ...." (alteration in original) (quoting the Pl.'s Aff. ¶ 11)).

149 *Id.* at 718-20; *see New Eng. Merchs. Nat'l Bank*, 495 F. Supp. at 74.

150 *See New Eng. Merchs. Nat'l Bank*, 495 F. Supp. at 74; *Broadfoot*, 245 B.R. at 719.

151 284 F.3d 1007 (9th Cir. 2002).

152 *Id.* at 1017.

153 *Id.*

154 *Id.* at 1018.

155 *See id.*

156 *Id.*

157 *Id.* at 1018-19.

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158 *See infra* notes 159-62 and accompanying text.

159 *See* Anonymous v. Anonymous, Case No. 2015-CPO 002, at *1-3 (D.C. Super. Ct. July 29, 2015) (order granting temporary protective order), https://s3.amazonaws.com/lawgical/assets/data/2730/original.pdf, *noted in* Kimberly Faber, *Defendant Served Temporary Protective Order via Text Message*, SERVE NOW (July 29, 2015), http://www.serve-now.com/articles/2112/defendant-served-temporary-protective-order-via-text-message.

160 *Id.* at *2-3.

161 *Id.* at *4-5.

162 *See id.* at *5-6.

163 *See* Lisa McManus, *Service of Process Through Facebook*, LEXISNEXIS (Nov. 9, 2011), https://www.lexisnexis.com/legalnewsroom/lexis-hub/b/legal-technology-and-social-media/archive/2011/11/09/service-of-process-through-facebook.aspx?Redirected=true; *Service of Process via Social Media Becoming a Reality?*, BLOOMBERG BNA (Mar. 18, 2013), http://bna.com/service-process-via-b17179872848/. Social media is defined as any form of electronic communication through which people interact with one another through various communications and communities. *See Social Media*, MERRIAM-WEBSTER, http://www.merriam-webster.com/dictionary/social%20media (last visited Oct. 31, 2016).

164 FACEBOOK, http://www.facebook.com (last visited Oct. 31, 2016).

165 TWITTER, http://www.twitter.com (last visited Oct. 31, 2016).

166 LINKEDIN, http://www.linkedin.com (last visited Oct. 31, 2016).

167 *Number of Monthly Active Facebook Users Worldwide as of 2nd Quarter 2016 (in Millions)*, STATISTA, http://www.statista.com/statistics/264810/number-of-monthly-active-facebook-users-worldwide/ (last visited Oct. 31, 2016).

168 *See id.*

169 *Number of Monthly Active Twitter Users Worldwide from 1st Quarter 2010 to 2nd Quarter 2016 (in Millions)*, STATISTA, http://www.statista.com/statistics/282087/number-of-monthly-active-twitter-users/ (last visited Oct. 31, 2016).

170 *Id.*

171 *See Number of Monthly Active LinkedIn Members from 1st Quarter 2009 to 2nd Quarter in 2016 (in Millions)*, STATISTA, http://www.statista.com/statistics/274050/quarterly-numbers-of-linkedin-members/ (last visited Oct. 31, 2016).

172 *Id.*

173 *See Court Order Served over Twitter*, BBC NEWS, http://news.bbc.co.uk/2/hi/technology/8285954.stm (last updated Oct. 1, 2009, 17:44 GMT).

174 Michael C. Lynch, *You've Been 'Poked'! 'PCCare247' and Service of Process by Social Media*, 249 N.Y. L.J. (2013), http://www.kelleydrye.com/publications/articles/1728/_res/id=Files/index=0/1728.pdf.

175 *Id.*

176 *See* Pedram Tabibi, *Facebook Notification--You've Been Served: Why Social Media Service of Process May Soon Be a Virtual Reality*, 7 PHX. L. REV. 37, 40-41 (2013).

177 *See* Andrews v. McCall (*In re* Adoption of K.P.M.A.), 341 P.3d 38, 50-51 (Okla. 2014); Fortunato v. Chase Bank USA, N.A., No. 11 Civ. 6608(JFK), 2012 WL 2086950, at *2-3 (S.D.N.Y. June 7, 2012).

178 *See* FTC. v. PCCare247 Inc., 12 Civ. 7189(PAE), 2013 WL 841037, at *5-6 (S.D.N.Y. Mar. 7, 2013); Baidoo v. Blood-Dzraku, 5 N.Y.S.3d 709, 713-14, 716 (N.Y. Sup. Ct. 2015).

179 5 N.Y.S.3d at 713-14, 716.

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180 *Id.* at 712.

181 *See id.* at 713.

182 *Id.* at 712.

183 *Id.* at 715.

184 Rio Props. v. Rio Int'l Interlink, 284 F.3d 1007, 1017 (9th Cir. 2002).

185 *Baidoo*, 5 N.Y.S.3d at 713.

186 *Id.* at 715-16.

187 *See* FTC v. PCCare247 Inc., 12 Civ. 7189(PAE), 2013 WL 841037, at *2 (S.D.N.Y. Mar. 7, 2013).

188 *Id.*

189 FED. R. CIV. P. 4(f) (rules of service for international defendants); FED. R. CIV. P. 4(e) (rules of service for domestic defendants).

190 *See PCCare247*, 2013 WL 841037, at *2 (quoting SEC v. Anticevic, No. 5 CV 6991 (KMW), 2009 WL 361739, at * 3 (S.D.N.Y. Feb. 13, 2009) (citation omitted)).

191 *Id.* at *5.

192 *Id.* at *5-6.

193 *Id.* at *5.

194 *Id.*

195 WhosHere, Inc. v. Orun, No. 1:13-cv-00526-AJT-TRJ, 2014 WL 670817, at *1 (E.D. Va. Feb. 20, 2014).

196 *Id.*

197 *Id.*

198 *Id.* at *2.

199 *Id.* at *4.

200 *Id.* at *4-5.

201 *See* Fortunato v. Chase Bank USA, N.A., No. 11 Civ. 6608(JFK), 2012 WL 2086950, at *1 (S.D.N.Y. June 7, 2012).

202 *Id.* at *2-3.

203 *Id.*

204 *Id.*

205 *Id.* at *3.

206 *See* Andrews v. McCall (*In re* Adoption of K.P.M.A.), 341 P.3d 38, 51 (Okla. 2014).

207 *Id.* at 40-41.

208 *Id.* at 50 (quoting Mullane v. Cent. Hanover Bank & Tr. Co., 339 U.S. 306, 315 (1950)).

209 The two parents had been in physical contact with one another during the proceeding and were even on speaking terms. *Id.* at 51.

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210 *Id.* (first citing Booth v. McKnight, 70 P.3d 855, 862-63 (Okla. 2003); then citing *Mullane*, 339 U.S. at 315).

211 *Id.*

212 *See supra* Section III.B.

213 *See* Tabibi, *supra* note 176, at 39.

214 *See id.* at 52-56.

215 Svetlana Gitman, Comment, *(Dis)Service of Process: The Need to Amend Rule 4 to Comply with Modern Usage of Technology*, 45 J. MARSHALL L. REV. 459, 470 (2012).

216 *See id.* at 472-74.

217 *See* Knapp, *supra* note 1 at 575-76.

218 *Id.* at 576.

219 *See supra* note 60 and accompanying text.

220 *Compare* Rio Props. v. Rio Int'l Interlink, 284 F.3d 1007, 1016-17 (9th Cir. 2002) (quoting Mullane v. Cent. Hanover Bank & Tr. Co., 339 U.S. 306, 314 (1950)) (allowing email as a form of service under the same *Mullane* test), *with* Andrews v. McCall (*In re* Adoption of K.P.M.A.), 341 P.3d 38, 50-51 (Okla. 2014) (first citing Booth v. McKnight, 70 P.3d 855, 862 (Okla. 2003); then citing *Mullane*, 339 U.S. at 314-15) (denying email as a form of service under *Mullane*).

221 *See* Baidoo v. Blood--Dzraku, 5 N.Y.S.3d 709, 714-16 (N.Y. Sup. Ct. 2015).

222 *See Rio Props.*, 284 F.3d at 1018 (calling into question limitations on service of process by email, such as lack of receipt confirmation, limited use of electronic signatures, system compatibility issues, and imprecise imaging technology); *Andrews*, 341 P.3d at 54 (Winchester, J., dissenting) (noting that Facebook has two types of message formats).

223 *See Andrews*, 341 P.3d at 51.

224 *See id.*; *see also Rio Props.*, 284 F.3d at 1017-18.

225 *See supra* Section IV.A.

226 *Cf.* Mullane v. Cent. Hanover Bank & Tr. Co., 339 U.S. 306, 314-15 (1950). The old *Mullane* test was "notice reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action ...." *Id.* Compare this with the proposed 5-factor test.

227 Knapp, *supra* note 1, at 576.

228 *Compare About Facebook*, FACEBOOK, https://www.facebook.com/facebook/info?tab=page_info (last visited Oct. 31, 2016) (an example of a public website that anyone can access), *with About*, DRUPAL, https://www.drupal.org/about (last visited Oct. 31, 2016) (a private forum with a screening process).

229 *See, e.g., Private Forums and Member-Only Sites*, DRUPAL (Jan. 22, 2007), https://www.drupal.org/node/111576 ("A private forum is one which is only available to registered members, or to only a certain class of users (or 'members').").

230 Registration for either Facebook or Twitter requires only the input of identifying and contact information. *See How Do I Sign Up for Facebook?*, FACEBOOK, https://www.facebook.com/help/188157731232424 (last visited Oct. 31, 2016); *Signing Up with Twitter*, TWITTER, https://support.twitter.com/articles/100990 (last visited Oct. 31, 2016).

231 *See* Knapp, *supra* note 1, at 549-50.

232 Libraries serve a particularly important part of communities where affluence is uncommon. *U.S. Public Libraries Provide Critical Access to Internet Services*, AM. LIBR. ASS'N, http://www.ala.org/research/sites/ala.org.research/files/content/initiatives/plftas/

issuesbriefs/connectivitybrief_2009_10_final.pdf (last visited Oct. 31, 2016) ("Nearly all of America's 16,604 public library buildings offer free public access to computers, to the Internet and to trained staff equipped to help ....").

233 *See generally* Planned Parenthood v. Casey, 505 U.S. 833, 901 (1992) (upholding a woman's right to privacy); Griswold v. Connecticut, 381 U.S. 479, 486 (1965) (recognizing privacy rights in a marriage and holding government interference with that privacy right to be unconstitutional).

234 18 U.S.C. § 1702 (2012).

235 *See id.*

236 Creating a standard Facebook post merely publishes the content to any number of your social connections on the site. *See* FACEBOOK, http://www.facebook.com (last visited Oct. 31, 2016). Posting directly to another user's "Timeline" will notify them of the publication, but will be viewable by anyone visiting that user's page. *Id.*

237 *See How Do I Send a Private Message to a Page?*, FACEBOOK, https://www.facebook.com/help/142031279233975 (last visited Oct. 31, 2016).

238 *See* Knapp, *supra* note 1, at 576.

239 *See* Mullane v. Cent. Hanover Bank & Tr. Co., 339 U.S. 306, 315 (1950) ("Chance alone brings to the attention of even a local resident an advertisement in small type inserted in the back pages of a newspaper, and if he makes his home outside the area of the newspaper's normal circulation the odds that the information will never reach him are large indeed. The chance of actual notice is further reduced when as here the notice required does not even name those whose attention it is supposed to attract, and does not inform acquaintances who might call it to attention."). The statement made in *Mullane* holds true today for the public posting of social media content as it did in the mid-twentieth century for newspapers. *See id.*

240 Such intent is a hallmark of failure to provide sufficient notice. *See supra* notes 130-134 and accompanying text.

241 *See Mullane*, 339 U.S. at 315-17.

242 *See* FTC v. PCCare247 Inc., 12 Civ. 7189(PAE), 2013 WL 841037, at *4 (S.D.N.Y. Mar. 7, 2013) ("Service by email alone comports with due process where a plaintiff demonstrates that the email is likely to reach the defendant." (citing Gurung v. Malhotra, 279 F.R.D. 215, 220 (S.D.N.Y. 2011))).

243 *Mullane*, 339 U.S. at 314 (citing Milliken v. Meyer, 311 U.S. 457, 463 (1940); Grannis v. Ordean, 234 U.S. 385, 394 (1914); Priest v. Board of Trs., 232 U.S. 604, 613 (1914); Roller v. Holly, 176 U.S. 398, 404 (1900)).

244 *See* Knapp, *supra* note 1, at 575-76; Wagner & Castillo, *supra* note 6, at 276-77.

245 *See* Knapp, *supra* note 1, at 576.

246 *See id.*

247 *Id.*

248 *Mullane*, 339 U.S. at 314-15 (chosen method of service must "reasonably" inform the defendant of the suit); *see* Wagner & Castillo, *supra* note 6, at 277-78 (following service via Facebook, the defendant's activity on his or her account would indicate whether or not there was proof of service).

249 *See* Knapp, *supra* note 1, at 575-76; Wagner & Castillo, *supra* note 6, at 277-78.

250 *See* Wagner & Castillo, *supra* note 6, at 277-78; *see also Send Messages*, FACEBOOK, https://www.facebook.com/help/487151698161671/?helpref=hc_fnav (last visited Oct. 31, 2016).

251 *See* Knapp, *supra* note 1, at 575-76 (citing Philip Morris USA Inc. v. Veles Ltd., No. 06 CV 2988(GBD), 2007 WL 725412 (S.D.N.Y. Mar. 12, 2007)); Wagner & Castillo, *supra* note 6, at 277-78.

252 *See* Knapp, *supra* note 1, at 576; Wagner & Castillo, *supra* note 6, at 276-77.

253 Baidoo v. Blood-Dzraku, 5 N.Y.S.3d 709, 714-15 (N.Y. Sup. Ct. 2015).

254 *See* Wagner & Castillo, *supra* note 6, at 276 (acknowledging during a discussion of account authenticity that "Facebook's Statement of Rights and Responsibilities requires users to provide real names and accurate, up-to-date information on their profile" and the Australian Capital Territory Supreme Court accepted that "information on the defendant's Facebook profile matched birth dates, lists of friends, and email addresses provided by defendant ....").

255 *See id.* Even though there is little to stop someone from using a fake identity, any encouragement to aid societal decisions is helpful.

256 *See* Michael E. Lackey, Jr. & Joseph P. Minta, *The Ethics of Disguised Identity in Social Media*, 24 ALB. L.J. SCI. & TECH. 447, 457-59 (2014).

257 *See id.*

258 *See id.* (discussing social media sites which do not require the use of true identities and those which purposefully provide anonymity); *see also* Wagner & Castillo, *supra* note 6, at 276-77.

259 *See* Mullane v. Cent. Hanover Bank & Tr. Co., 339 U.S. 306, 314-15 (1950) (quoting Am. Land Co. v. Zeiss, 219 U.S. 47, 67 (1911)).

260 *See id.* (citing Milliken v. Meyer, 311 U.S. 457, 463 (1940); Grannis v. Ordean, 234 U.S. 385, 394 (1914); Priest v. Board of Trs., 232 U.S. 604, 613 (1914); Roller v. Holly, 176 U.S. 398, 404 (1900)); Knapp *supra* note 1, at 563.

261 *See Mullane*, 339 U.S. 306, 314; Knapp, *supra* note 1, at 563, 576.

262 So-called "spam" emails have created a culture where anything claiming to be "official" is subject to scrutiny by the reader. *See* Arik Hesseldahl, *Why the Spam Keeps Coming*, FORBES (Nov. 19, 2004, 10:00 AM), http://www.forbes.com/2004/11/19/cx_ah_1119tentech.html. By attaching a copy of the actual official document, the reader would be far more likely to believe the contents. *See* Knapp, *supra* note 1, at 576.

263 *See* Hesseldahl, *supra* note 262.

264 *See id.*; Knapp, *supra* note 1, at 576.

265 Knapp, *supra* note 1, at 576.

266 Twitter does not support full documentation, forcing users to rely on third-party services to do so. Jason Kincaid, *TwitDoc: Proving that Every File Format Will Eventually Be Shareable over Twitter*, TECHCRUNCH (May 8, 2009), https://techcrunch.com/2009/05/08/twitdoc-proving-that-every-file-format-will-eventually-be-shareable-over-twitter/; *see, e.g.*, TWITDOC, http://twitdoc.com/ (last visited Oct. 31, 2016). Because of this, service via Twitter would be unlikely to comport with the test propounded here. Decisions like *St. Francis Assisi v. Kuwait Fin. House*, No. 3:16-CV-3240-LB, 2016 U.S. Dist. LEXIS 136152 (N.D. Cal. Sept. 30, 2016), though dealing with an international defendant, would likely be reversed, or at least require a deeper analysis than was offered.

267 *See* Mullane v. Cent. Hanover Bank & Tr. Co., 339 U.S. 306, 314 (1950) (citing Milliken v. Meyer, 311 U.S. 457, 463 (1940); Grannis v. Ordean, 234 U.S. 385, 394 (1914); Priest v. Board of Trs., 232 U.S. 604, 613 (1914); Roller v. Holly, 176 U.S. 398, 404 (1900)); Knapp *supra* note 1, at 563, 576.

268 *See* Wagner & Castillo, *supra* note 6, at 277-78.

269 *See Help Center*, FACEBOOK, http://www.facebook.com/help/ (last visited Oct. 31, 2016).

270 *See* David Nield, *Can You See if a DM Has Been Read on Twitter?*, TECH IN OUR EVERYDAY LIFE, http://techin.oureverydaylife.com/can-see-dm-read-twitter-2123.html (last visited Oct. 31, 2016).

271 *See* Wagner & Castillo, *supra* note 6, at 278 ("[C]ourts must order the alternative notice most reasonably calculated to provide notice ....").

272 *Cf. id.* at 277-78 (discussing how posting on one's Facebook wall tends to provide notice).

273 *See id.* (discussing that posting on a Facebook wall is an example of "alternative service" that "present[s] an increasingly high probability of providing notice in today's tech-driven society"); *see also* Knapp, *supra* note 1, at 575-76 (quoting Philip Morris USA Inc. v. Veles Ltd., No. 06 CV 2988(GBD), 2007 WL 725412, at *2 (S.D.N.Y. Mar. 12, 2007)).

274 Fortunato v. Chase Bank USA, N.A., No. 11 Civ. 6608(JFK), 2012 WL 2086950, at *3 (S.D.N.Y. June 7, 2012) (denying Defendant's application to serve third-party complaint by email, Facebook, and delivery to Plaintiff, but granting application for alternate service by publication); Andrews v. McCall (*In re* Adoption of K.P.M.A.), 341 P.3d 38, 50-51 (Okla. 2014) (holding that a message sent by mother to putative father via a social networking website did not provide putative father with notice (first citing Booth v. McKnight, 70 P.3d 855; then citing Mullane v. Cent. Hanover Bank & Tr. Co., 339 U.S. 306, 315 (1950))).

275 *Fortunato*, 2012 WL 2086950, at *2.

276 *Id.* at *2-3.

277 *See* Baidoo v. Blood--Dzraku, 5 N.Y.S.3d 709, 715-16 (N.Y. Sup. Ct. 2015).

278 *See Andrews*, 341 P.3d at 51 (first citing *Booth*, 70 P.3d at 865; then citing *Mullane*, 339 U.S. at 315).

279 *See id.*

280 *See Fortunato*, 2012 WL 2086950, at *2.

281 *See* Knapp, *supra* note 1, at 562.

282 *See supra* Part II.

283 *See supra* Part IV.

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End of Document

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2019 IDAHO COURT ORDER 0005 (C.O. 0005)

COURT RULES

NOTICE: Rules and related materials supplied by the courts are included inthis database. Because all changes may not have been supplied, thecourt clerk should be consulted to determine current rules.Pub. Note: Additions are indicated by **Text**; deletions by~~Text~~ .Stricken material is indicated by ~~**Text**~~ .

ID ORDER 0005
C.O. 0005
COURT RULES

Effective: Effective July 1, 2019 to Effective July 1, 2019

STATE OF IDAHO
IN RE: ADOPTION OF IDAHO RULES FOR ELECTRONIC FILING AND SERVICE

Effective July 1, 2019

In the Supreme Court of the State of Idaho

IN RE: ADOPTION OF IDAHO RULES FOR ELECTRONIC FILING AND SERVICE

ORDER

The Court, having received a recommendation to replace the single rule on electronic filing and service with a new set of Idaho Rules for Electronic Filing and Service, and having reviewed that recommendation:

NOW THEREFORE IT IS ORDERED THAT:

The existing rule on Electronic Filing and Service that appears on the Idaho Supreme Court website is rescinded, and the attached "Idaho Rules for Electronic Filing and Service" are hereby approved and adopted.

IT IS FURTHER ORDERED that this order shall be effective July 1, 2019.

IT IS FURTHER ORDERED that notice of this order shall be published in one issue of The Advocate.

DATED this 15 day of April, 2019.

By Order of the Supreme CourtRoger S. Burdick, Chief Justice
ATTEST:

Clerk

<< ID R EFS Rule 1 >>

Rule 1. Applicability of These Rules
These rules, which will be known as the "Idaho Rules for Electronic Filing and Service", govern the electronic filing and service of documents in the Idaho courts. These rules supersede other Idaho procedural rules in such matters as filing, format and

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service, and in case of any conflict these rules prevail. Idaho Court Administrative Rule 32 prevails on the issue of access to court records,

<< ID R EFS Rule 2 >>

Rule 2. Definitions
The following definitions apply to this chapter:

(a) "Conventional filing" means a process whereby a filer files a paper document with the court.

(b) "Document" means a pleading, a paper, a motion, a declaration, an application, a request, a brief, a memorandum, an exhibit, or other instrument submitted by a filer, including any exhibit or attachment referred to in the instrument. Depending on the context, as used in this chapter, "document" may refer to an instrument in either paper or electronic form.

(c) "Electronic filing" means the process whereby a filer electronically transmits documents to a court in an electronic form to initiate an action or to be included in the court file of an action.

(d) "Electronic filing system" means the systems provided by the Idaho Supreme Court for the electronic filing (File and Serve and Guide and File) and the electronic service of a document via the Internet, excluding the electronic filing of criminal citations by a method approved of by the Administrative Office of the Supreme Court.

(e) "Electronic service" means the electronic transmission of a notice of filing by the electronic filing system to the electronic mail (email) address of a party who has consented to electronic service per Rule 17(a)(1). The notice will contain a hyperlink to access a document that was filed electronically for the purpose of accomplishing service. When the serving entity is the court, electronic service may be completed through the electronic filing system or through conventional email.

(f) "Filer" means a person registered with the electronic filing system who submits a document for filing with the court and/or submits a document for service through the electronic filing system. The filer may be an attorney representing a party in the case, a party, or anyone authorized to submit documents for filing on their behalf. The filer may also be a third party tasked with submitting reports, evaluations, or other communications for filing as directed by the court or required by law.

(g) "Service contact" means any party and their email address designated for electronic service between the parties through the electronic filing system.

(h) "Other service contact" means any person associated with the filer for purposes of an action whom the filer wishes to receive email notification from the electronic filing system of documents electronically served in the action. An "other service contact" includes another attorney, administrator, or staff from the filer's place of business, or another person who is associated with the filer regarding the action or otherwise has a legitimate connection to the action.

(i) "Accept" refers to the determination that a document electronically filed has met the standards set forth in the rules below. The court has the discretion to later reject such a filing if it deems it appropriate to do so.

(j) "Confidential" in reference to a document or information means the document or information will not be accessible to the public because it is exempt from public disclosure pursuant to Idaho Court Administrative Rule 32 or it has been sealed by court order pursuant to Idaho Court Administrative Rule 32 or it contains information barred from disclosure to the public under federal or state law. The information or document that is confidential may be accessible to certain court personnel and where applicable, to certain governmental entities as authorized by law, court rule, or court order.

(k) "Conventionally signed document" means a paper document with a handwritten signature.

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(l) “Envelope” is a filing and/or service of documents submitted to the court through the electronic filing system. An envelope can contain one or more documents submitted to the court or others for the same case.

<< ID R EFS Rule 3 >>

Rule 3. Official Court Record

(a) The official court record for a case filed or maintained in accordance with these rules is the electronic case file maintained by the court, as well as any paper filings and other conventional filings maintained by the court in accordance with these rules.

(b) If a court digitizes, records, scans or otherwise reproduces a document that is filed in paper into an electronic record, document or image for entry in the court's case file, the court's electronic record, document or image is the official court record of the filed document.

<< ID R EFS Rule 4 >>

Rule 4. Use of electronic filing system

(a) Filers Required to Electronically File and Serve. Filers identified below, must electronically file documents, except for those documents that must or may be filed conventionally pursuant to Rule 5.

(1) Attorneys

(2) Government agencies or departments (including but not limited to those on contract)

(3) Court approved mediators, coordinators, or evaluators (including, but not limited to, those identified in a judicial roster on the Idaho Supreme Court website)

(4) Filers who are compensated for the preparation and submission of reports / evaluations

(5) Business entities filing in small claims actions

(b) Self–Represented Parties Using File and Serve. Self–represented parties who are individuals and not attorneys may elect to electronically file documents through File and Serve but are not required to do so. Those who elect not to utilize electronic filing, and who require paper / mail service from the court must identify the physical address for service in the certificate of service and pay designated mail service fees to the court clerk at the time of filing. With the exception of an initial electronic filing of a petition for a civil protection order made by a victim advocate on behalf of a self-represented party through File and Serve, a self-represented party who elects to electronically file and serve documents through the electronic filing system must continue to do so for the life of the case unless a court has granted a motion to withdraw from electronic filing and service. Once a self-represented party withdraws from electronic filing and service he or she may not return to this practice for the life of the case.

(c) Self–Represented Using Guide and File. Self–represented parties (who are individuals) who utilize Guide and File to file Court Assistance Office forms are not required to submit subsequent filings through the electronic filing system. Similarly, an initial case filing of a petition for a civil protection order made by a victim advocate on behalf of a self-represented party through Guide and File does not require the party to submit subsequent filings through the electronic filing system. Businesses filing in small claims actions may utilize Guide and File to file Court Assistance Office forms if available. Other documents must be filed through File and Serve.

<< ID R EFS Rule 5 >>

Rule 5. Exceptions to electronic filing of documents

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The documents identified in this rule are exceptions to the requirement for electronic filing.

(a) Probate / Wills. Probate matters must be filed electronically; however, any original will, along with any pleading to which it is attached, must be filed both electronically and conventionally. The conventional filing must be made no more than seven business days, excluding legal holidays, from the date of electronic filing.

(b) Warrants. A document delivered to the court to secure an arrest warrant pursuant to Idaho Criminal Rule 4 or an initial juvenile detention order pursuant to Idaho Juvenile Rule 7 must be filed conventionally. A document delivered to the court to secure a search warrant pursuant to Idaho Criminal Rules 41 may be filed conventionally.

(c) Limits on Exhibits. A demonstrative or oversized exhibit must be filed conventionally. Trial exhibits must not be filed unless or until they are offered by a party to be admitted into evidence.

(d) Grand Jury Material. Grand jury materials, which should also be accompanied by a disk or CD–ROM containing the documents in .pdf format, if possible, must be filed conventionally.

(e) Charging Documents. Charging documents in a criminal action including complaints and indictments must be filed conventionally unless filed through an electronic system approved by the Supreme Court.

(f) Federally Restricted Storage. A document or image that is barred from electronic storage must be filed conventionally, including but not limited to sexually explicit images of a minor.

(g) Document Submitted for *In Camera* Inspection. A document submitted for *in camera* inspection must be filed conventionally.

(h) Motion to Seal Document. A motion to seal by court order and the document that is the subject of the motion (which is treated as sealed until the court rules on the motion), must be filed conventionally. After a court has ordered documents sealed they may be electronically filed as part of or exhibits to subsequent pleadings. Electronic submissions that include documents sealed by the court must comply with Rule 6(b)(2)(B).

(i) Foreign Subpoena. A foreign subpoena submitted to an Idaho court must be filed conventionally.

(j) Law Enforcement Documents. Law enforcement, including state police, sheriff's offices, police departments, and probation and parole officers, may file the following documents conventionally:

- documents for which no case number exists at the time of filing;
- documents related to a court event scheduled for the same day as the filing;
- bonds and accompanying documents received at the jail, and
- documents pertaining to an arrest for one or more offenses where at least one of the offenses is a new filing with no existing case number.

(k) Other Documents that cannot be Filed Electronically. Any document or thing that cannot be scanned or otherwise converted to a Portable Document Format (.pdf) format must be filed conventionally. Upon a showing of good cause, the court may accept for conventional filing a document that would otherwise be required to be filed through the electronic filing system.

<< ID R EFS Rule 6 >>

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Rule 6. Format and Size of Documents Filed Electronically

(a) Electronic Format and Limited Size.

(1) A document, other than those excluded in subsections (2) and (3) below, submitted electronically to the court must be in the form of a text-searchable Portable Document Format (PDF) or a text-searchable Portable Document Format/A (PDF/A) file, be directly converted to PDF rather than scanned (if possible), and not exceed 50 megabytes. A document that exceeds the size limit must be broken down and submitted as separate files that do not exceed 50 megabytes each. Separate files under this section must include in the "Comments to Court" field for each submission a description that clearly identifies the part of the document that the file represents, for example, "Motion for Summary Judgment, part 1 of 2."

(2) A document that is an attachment or exhibit (not motion, brief, memorandum, etc.) that is a scanned image of its original form, may be in standard PDF format and need not be text searchable as required in subsection (1) above.

(3) Current Court Assistance Office forms approved by the Idaho Supreme Court may be filed in Portable Document Format (.pdf) and need not be text searchable as required in subsection (1) above.

(b) Supplemental Attachments.

(1) Subject to the exceptions in (2) below, a document that includes attachments must be submitted as a unified single PDF file to the extent practicable. An electronic filing submitted under this section that exceeds 50 megabytes must comply with subsection (a) of this rule.

(2) The documents listed below should be filed as a separate document. A filer submitting separate documents under this subsection must include in the Filing Description field a description that clearly identifies each document. For each separate document submitted, the detailed caption title, filing description in the electronic filing system, and .pdf file title must be substantially identical.

(A) A proposed order, judgment, or other document that requires court signature must be submitted as a separate document.

(B) An attachment that is exempt from public disclosure or previously ordered sealed must be submitted through the electronic filing system as a separate document. A filer submitting a document must identify the document in the "Comments to Court" field as confidential.

(C) An application for fee waiver must be submitted as a separate document.

(c) Multiple Documents Submitted in Same Envelope. Documents that pertain to the same case filed and / or served through the electronic filing system at approximately the same time must be submitted in the same envelope. An envelope cannot exceed 100 megabytes. A filer may submit multiple envelopes at the same time if a singular submission would exceed 100 megabytes. Separate envelopes under this section must include in the "Comments to Court" field for each submitted envelope a description that clearly identifies the fact that the documents are being submitted in multiple envelopes due to document size, for example, "Documents submitted in multiple envelopes due to size, this is envelope 1 of 2."

(d) Additional Technical Format Requirements. Documents filed with the court must comply with the additional technical and format requirements contained in the Court's approved Electronic Filing Guide. Note, however, that documents that are exhibits will not be rejected for format requirements as described above in subsection (a)(2).

<< ID R EFS Rule 7 >>

Rule 7. Sealed and Confidential Documents

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If a filer identifies a document as “confidential,” in the “Comments to Court”, the court will verify that designation and after review may modify the designation of any document incorrectly identified as “confidential.” Once the designation as “confidential” is confirmed, the document will not be accessible to the public, but will be accessible to court staff and, where applicable, to certain governmental entities as authorized by law, court rule, or court order.

<< ID R EFS Rule 8 >>

Rule 8. Party Information

When submitting an electronic filing that creates a new action or adds a party to an existing action, the filer must:

- enter into the “Add Party” screen the names of all known parties or all parties being added;
- enter party names in proper case, for example, “John Doe” and not “JOHN DOE” and should include all known name information, including middle name and suffix;
- enter the address and phone number of all parties, if known;
- select the “Party is a Business” indicator if the party is not an individual; and
- identify the filing party's attorney of record if represented by an attorney.

<< ID R EFS Rule 9 >>

Rule 9. Electronic Signatures

(a) Forms of Electronic Signature. A document may be electronically signed by:

(1) inserting a digital image of the signing party's handwritten signature into the document; or

(2) scanning the individual's handwritten signature after the document has been signed; or

(3) using a signature block that includes the typed name of the individual preceded by a “/s/” in the space where the signature would otherwise appear. An example of a signature block with “/s/” is:

/s/ John Q. Smith

JOHN Q. SMITH

If the person signing is not either an attorney representing a party in the case or a party in the case and the document is signed using the person's name preceded by “/s/,” a duplicate of the document must be conventionally signed by the person signing and maintained by the attorney or party submitting the document until the expiration of the time to appeal or the determination of the appeal, whichever is longer.

(b) Judge's Signature. All electronically filed documents signed by the court must be scanned or otherwise electronically produced so the judge's original signature or a digital image of the judge's signature is shown.

(c) Conventionally Signed Documents. To file a document that was conventionally signed, the filer must either:

(1) scan and OCR (Optical Character Recognition) the document; or

(2) create a Word document that substitutes the /s/ signature block in place of the handwritten signature(s) and convert that document to a PDF. If the signature replaced is that of opposing counsel or a third party then the filer who submitted the

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document must maintain the conventionally signed document or a scanned copy of the conventionally signed document until the expiration of the time for appeal or determination of the appeal.

(3) A notary public's signature and stamp may be submitted pursuant to the process outlined in subsection (c)(2) above. The version submitted electronically by the filer may replace the actual notary seal stamp with either the electronic image of their seal or "[Notary Seal]." The filer who submitted the document must maintain the conventionally signed document or a scanned copy of the conventionally signed document until the expiration of the time for appeal or determination of the appeal.

<< ID R EFS Rule 10 >>

Rule 10. Payment and Fee Waiver

(a) Payment Due on Filing. A filer must pay the fees for filing a document electronically at the time of electronic filing. Acceptance of the document triggers payment to be captured. In the event the payment funds are not available, at the time of filing or the acceptance, the filing will be rejected.

(b) Fee Waivers and Deferrals. A filer may apply for a waiver of the filing fee by submitting an application for waiver with the document to be filed.

(1) *If Fee Waiver Granted—Date of Filing.* If the filer's fee waiver application is granted, the document is deemed to have been filed on the date of the original submission.

(2) *If Fee Waiver Denied.* If the filer's fee waiver application is denied, the document will be rejected and deemed to have not been filed. Notice of fee waiver application denial will be forwarded to the filer per Rule 13. The applicable statute of limitations will therefore continue to run unless the filer resubmits the document with payment as described below.

(A) Resubmitting a document with full payment within 3 business days (excluding legal holidays) of the date of notice of denial of fee waiver application denial, will result in the filing date related back to the date of the original submission to meet filing requirements.

(B) A filer who resubmits a document under this subsection must copy the existing envelope and include in the "Comments to Court" field notification for an electronic resubmission the following words: "Resubmission of filing with payment after denial of fee waiver, request filing relate back to _____, the date of original submission."

(c) Notice of Appeal to Supreme Court and Request for Filing Fee Waiver. All notices of appeal to the Supreme Court must be file stamped with the date of original submission. The appellant may apply for a waiver of the filing fee by submitting an application for a fee waiver. The application must be first submitted to the district court for entry of an order recommending waiver or no waiver. The notice of appeal, application for fee waiver and district court order recommending waiver or denial of waiver must be forwarded to the Supreme Court.

<< ID R EFS Rule 11 >>

Rule 11. Manner of Filing

(a) Electronic Filing. A document will be considered filed when:

(1) the document has been electronically submitted to the court's electronic filing system; and

(2) the submission has been acknowledged and the document accepted for filing.

(b) Converting Conventional Filing to Electronic Format. The court may digitize, record, scan, or otherwise reproduce a document that is filed conventionally into an electronic record, document, or image.

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<< ID R EFS Rule 12 >>

Rule 12. Time of Filing
(a) File Date.

(1) For purposes of filing by electronic transmission, a "day" begins at 12:01 a.m. and ends at midnight in the time zone where the court is located on the day the document must be filed. If electronic transmission of a document is submitted and received before midnight it will be considered filed on that day, unless that date is a Saturday, Sunday, or legal holiday, in which case it is deemed filed on the next available business day. For any questions of timeliness, the time and date registered by the electronic filing system will be determinative. For documents electronically filed, the date and time that the filer submits the electronic filing will serve as the filing date and time for purposes of meeting the statute of limitations or any other filing deadlines, even if placed into an error queue for additional processing.

(2) If the document is accepted for filing, the date and time of filing entered in the register of actions relate back to the date and time the electronic filing system received the document. When the document is accepted for filing, the electronic filing system will affix the date and time of submission on the document as the date and time of filing of the document. When the document is accepted for filing, the electronic filing system will electronically notify the filer.

(b) Proposed Orders._A proposed order is not file-stamped unless it is signed by the judge after review.

<< ID R EFS Rule 13 >>

Rule 13. Request for Correction; Rejected Filing; Relief
(a) Rejected Documents. Documents that do not comply with this rule, or the requirements of the aforementioned Electronic Filing Guide or court policy, may be returned to the filer for correction. If the document is not corrected as requested within the time frame provided for in subsections (b) and (c) of this rule, the document will be deemed to have not been filed.

(b) Request for Correction. If a document submitted electronically for filing is not accepted, the electronic filing system will send notification to the filer that explains why the document was rejected or will describe an error or irregularity and request correction and resubmission by the filer.

(c) Resubmission of Rejected Filing; Relief. A filer who resubmits a document within 3 business days (excluding legal holidays) of the date of the request for correction under this section may request, as part of the resubmission, that the date of filing of the resubmitted document relate back to the date of submission of the original document to meet filing requirements. If the third day following request for correction is not a judicial day, then the filer may resubmit the filing with a request under this subsection on the next judicial day. A filer who resubmits a document under this subsection must copy the existing envelope and include in the "Comments to Court" field notification for an electronic resubmission the following words: "Resubmission of corrected filing, request filing relate back to _____, the date of original submission."

<< ID R EFS Rule 14 >>

Rule 14. Technical Error; Relief
(a) Technical Error. Any party may obtain relief if the electronic filing system is temporarily unavailable or if an error in the transmission of the document or other technical problem prevents the electronic filing system from receiving a document. Upon satisfactory proof of such an occurrence, the court must permit the filing date of the document to relate back to the date the filer first attempted to file the document to meet filing requirements. If appropriate, the court may adjust the schedule for responding to these documents or the court's hearing, or provide other relief.

(b) Resubmission of Document; Relief. A filer who resubmits a document under this Rule:

(1) Must include in the "Comments to Court" field notification for an electronic resubmission the following words: "Resubmission of filing, submission unsuccessful, request filing date relate back to _____, date of original submission."

(2) Must also provide the date of the original attempted submission, the date the filer was notified the submission was not successful, and explain the reason for requesting that the date of filing relate back to the original submission. The request for original filing date must be resubmitted within 7 business days (excluding legal holidays) of the date the filer was notified the submission was not successful. If the seventh day following notice of error is not a judicial day, then the filer may resubmit the filing with a request under this subsection on the next judicial day.

(3) May also include supporting exhibits that substantiate the system malfunction together with the resubmission

<< ID R EFS Rule 15 >>

Rule 15. Privacy Protections for Filings Made with the Court

(a) Responsibility of Filer. It is the responsibility of the filer to ensure that protected personal data identifiers are omitted or redacted from documents before the documents are filed. This responsibility exists whether the documents are filed electronically or conventionally, and even if the filer did not create the document. The responsibility to redact also applies to documents that are initially exempt from disclosure but later become public pursuant to court rule. The clerk of the court will not review filings to determine whether appropriate omissions or redactions have been made. Counsel is strongly urged to share this information with all clients so that an informed decision about the inclusion of certain materials may be made.

(b) Personal Data Identifiers to be Redacted. Personal data identifiers should not be included in any document filed with the court unless such inclusion is required by the court, by statute or court rule, or is material to the proceedings. If the identifiers must be included, then the following personal data identifiers must be partially redacted from the document, including exhibits:

(1) *Social Security Numbers.* If an individual's social security number must be included, only the last four (4) digits of that number are used.

(2) *Names of Minor Children.* If the involvement of a minor child must be mentioned, only the initials of that child are used.

(3) *Dates of Birth.* If an individual's date of birth must be included, only the year is to be used and the date specified in the following format: XX/XX/1998.

(4) *Financial Account Numbers.* If financial account numbers are relevant, only the last four digits of these numbers are to be used and the number specified in substantially the following format: XXXXX1234.

(5) *Driver's License Numbers and State–Issued Personal Identification Card Numbers.* If an individual's driver's license number or state issued personal identification card number must be referenced, only the last four digits of that number are to be used and the number specified in substantially the following format: XXXXX350F.

(6) *Employer or Taxpayer Identification Number.* If an employer identification number or business' taxpayer identification number must be included, only the last four (4) digits of that number are used.

(7) *Home Addresses.* If a home address is relevant, only the city and state are to be used; however, this rule does not apply to information required to be in the caption of a pleading or in a certificate of service.

(c) Exceptions to Redaction Requirement.

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(1) The redaction requirement does not apply to the record of a court, tribunal, administrative or agency proceeding if that record was filed before the effective date of this rule.

(2) The redaction requirement does not apply to documents that are exempt from public disclosure pursuant to Idaho Court Administrative Rule 32.

(3) The redaction requirement of an individual's date of birth does not apply to charging documents or judgments in criminal cases.

(d) Options When Personal Data Identifiers are Necessary. A party filing a redacted document need not also file an unredacted version of the document; however, where inclusion of the unredacted personal data identifiers is required by the court, by statute or court rule, or is material to the proceedings in a document that is open to the public the party must choose the most appropriate option below:

(1) File the redacted document together with a reference list that identifies each item of redacted information and specifies an appropriate identifier that uniquely corresponds to each item listed. The list must be clearly identified as a reference list filed pursuant to this rule and may be amended as of right. Any reference in the action to a listed identifier will be construed to refer to the corresponding item of information. The reference list is exempt from public disclosure pursuant to Idaho Court Administrative Rule 32; however, courts will share the reference list with other government agencies as required or allowed by law without court order or application for purposes of the business of those agencies.

(2) File the redacted document together with an unredacted copy of the document. The unredacted copy must be clearly identified as an unredacted copy filed pursuant to this rule. The unredacted copy is exempt from public disclosure pursuant to Idaho Court Administrative Rule 32; however, courts will share the unredacted copy with other government agencies as required or allowed by law without court order or application for purposes of the business of those agencies.

Regardless of which option is selected, the filer must file the exempt from public disclosure document in compliance with Rule 6(b)(2)(B).

(e) Unredacted Document Inadvertently Submitted. If an unredacted document is inadvertently submitted without a reference list or redacted copy, then the filer must submit a redacted copy as soon as possible. In the “Comments to Court” the filer must identify the original unredacted document, the date it was submitted, and request that the original unredacted document be marked as exempt from disclosure.

(f) Parties to Use Caution. Parties should exercise caution when filing papers that contain private or confidential information, including, but not limited to, the information covered above and listed below:

(1) Medical records, treatment and diagnosis;

(2) Employment history;

(3) Individual financial information;

(4) Insurance information;

(5) Proprietary or trade secret information;

(6) Information regarding an individual's cooperation with the government; and

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(7) Personal information regarding the victim of any criminal activity.

(g) Sanctions. Failure to comply with this rule is grounds for contempt. If a party knowingly publicly files documents that contain or disclose confidential information in violation of these rules, the court may, upon its own motion or that of any other party or affected person, impose sanctions against the filing party.

<< ID R EFS Rule 16 >>

Rule 16. Privacy Protection in Orders, Judgments, and Decrees

(a) Protection of Unredacted Court Orders, Judgments and Decrees. If possible, the court must refrain from including in a court order, judgment, or decree, the personal data identifiers set forth in Rule 15(b). If unredacted personal data identifiers are required by statute or court rule, or are material to the proceedings and must be included in an order, judgment, or decree that is open to the public then the unredacted document will be protected from public access. Copies of the unredacted document must be served on the parties and must be available to the parties and other government agencies without court order for purposes of the business of those agencies. A redacted copy of the order, judgment or decree must be available to the public; however, no redacted copy must be prepared until there is a specific request for the document, in which case the document should be redacted in the manner specified in Rule 15(b).

(b) Exception. The court may include unredacted personal data identifiers in documents that are exempt from public disclosure pursuant to Idaho Court Administrative Rule 32.

<< ID R EFS Rule 17 >>

Rule 17. Service

(a) Consent to Electronic Service, Withdrawal of Consent.

(1) A party who electronically appears in the action by filing a document through the File and Serve electronic filing system, that the court has accepted, is deemed to have given consent to accept electronic service of any document filed by any other registered filer in this action or the court, except for any document that requires personal service, pursuant to Idaho court rules. Service by electronic means upon this filer through their designated service contact is thereafter mandatory unless exempted by rule or court order.

(2) A filer who is dismissed as a party from the action or withdraws as an attorney of record in the action, may withdraw consent to electronic service in that specific action.

(b) Service When Using Guide and File. Businesses filing in small claims actions or self-represented parties (who are individuals) who utilize Guide and File to file Court Assistance Office forms are not required to exchange service between the parties through the electronic filing system. The electronic service requirements of this subparagraph are applicable, however, if they utilize File and Serve to electronically file or serve documents. Courts may utilize email for service upon Guide and File users.

(c) Service by Conventional Means. Service may be accomplished by conventional means:

(1) in cases where an attorney or party has failed to designate a service contact;

(2) where the party being served is a self-represented litigant who has opted not to utilze the electronic filing system;

(3) where service is upon a party who has not appeared in the lawsuit; or

(4) where service is upon a third party who has not designated an “Other Service Contact.”

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(d) Contact Information.

(1) At the time of preparing the party's first electronic filing in the action through File and Serve, a party must enter the name and service email address designated as a service contact on behalf of the party in the action. This service contact must be utilized for service between the parties through the electronic filing system. If an attorney represents more than one party, it is permissiable to designate a service contact(s) for a single party to be utilized for service upon all parties represented by that attorney. Service through the system is accomplished through the party's designated service contact. Valid legal service is not accomplished by utilizing the system's "Courtesy Copy" feature.

(2) A party described in subsection (a)(1) of this rule may enter in the electronic filing system, as an "other service contact" in the action:

(A) an alternative email address for the party; and

(B) the name and email address of any additional person whom the party wishes to receive electronic notification of documents electronically served in the action, as defined in Rule 2(h). If an attorney enters a client's name and contact information as an "other service contact" under this subsection, then the attorney is deemed to have consented for purposes of Rule of Professional Conduct 4.2 to delivery to the client of documents electronically served by other filers in the action.

(3) A party is responsible for updating any contact information for any person whom the party has entered in the electronic filing system as either a service contact for a party or as an "other service contact" in an action.

(4) A party in the action may seek court approval to remove a person entered by another party in the action as an "other service contact" in an action if the person does not qualify as an "other service contact" under Rule 2(h).

(e) Selecting Service Contacts and Other Service Contacts. When preparing an electronic filing submission through File and Serve with electronic service, a filer is responsible for selecting:

(1) The appropriate service contacts in the action, for the purpose of accomplishing electronic service as required by law of any document being electronically filed; and

(2) The appropriate other service contacts in the action, if any, for the purpose of delivering an electronic copy of any document being electronically filed.

(3) Filers must not create or designate service contacts for other parties unless selected from the Public Service Contact list derived from submissions to the Idaho State Bar or loaded by the Idaho Supreme Court.

(f) Court Notification and Transmission Constituting Service. When the filer submits, and again when the document is accepted for filing under Rule 11, the electronic filing system sends an email to the email address of the filer who submitted the document through the electronic filing system. The email contains a hyperlink to access the document or documents that have been filed electronically. Transmission of the email by the electronic filing system to the selected service contacts in the action constitutes service.

(g) Completion and Time of Service. Electronic service is complete when the electronic filing system sends the email to the selected service contacts in the action.

(h) Additional Time after Late Service. If electronic service is accomplished by a party after 5:00 p.m. local time on the day of service, one (1) additional day will be added to the prescribed period.

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(i) Service of Discovery Documents. Formal responses to discovery must be served through the electronic filing system. Production of documents responsive to formal discovery may be served conventionally or through the electronic filing system.

(j) Service by Other than Electronic Means. The filing party is responsible for accomplishing service in any manner permitted by the applicable Idaho court rules and for filing a proof of service with the court for the following documents:

(1) A document required to be filed conventionally under this chapter;

(2) A document that cannot be served electronically on a party who is listed in the action; and

<< ID R EFS Rule 18 >>

Rule 18. Service of documents by the court

(a) Idaho State Bar Members. All active members of the Idaho State Bar must designate and submit a single email address to the Idaho State Bar for the purpose of service of documents from the courts to that attorney. The email address designated may be either a general office address or an individual's address. That same designated email address must appear in the caption of all pleadings and in the certificate of service used on all proposed pleadings for the court's review, signature, and service. The courts must use this designated email address for service of all notices or orders generated and served by the court. It is the attorney's responsibility to ensure that the correct email address is provided as required by Idaho Bar Commission Rule 303.

(b) All Others Users. Registered users, who are not members of the Idaho State Bar, must furnish in the caption of all pleadings a single email address which will be used for the purpose of service of documents from the courts to the user. That same email address must appear in all pleadings for that case and must be in the certificate of service used on all proposed pleadings for the court's review, signature, and service. The courts must use this designated email address for service of all notices or orders generated and served by the court. It is the registered user's responsibility to ensure that the correct email address is provided and it may only be changed upon notice to the court and parties.

(c) Submission of Proposed Documents. Filers who submit (whether conventionally or electronically) proposed documents for the court's review, signature, and service, (such as an order, notice of hearing, judgment, decree, etc.) must:

(1) include a certificate of service that identifies the email addresses necessary for the court to complete electronic service of those parties who have electronically appeared in the action; and / or

(2) for those parties who have not electronically appeared and require paper / mail service, the filer must identify the physical address for service in the certificate of service and pay designated service fees. If submitted through the electronic filing system those fees are found in “Optional Services.” If submitted conventionally, those fees must be paid to the court clerk at the time of filing.

(3) summons, subpoenas, writs, and abstract judgments do not require a certificate of service as they will be executed by the clerk who reviews electronic filings and submitted back to the filer through the File and Serve and Guide and File systems.

(4) must have a signature date line in the following format:

Date: _____

Do not use a format such as “On the ___ day of ___ 20 ___” as this format does not allow for the courts electronic date annotation.

<< ID R EFS Rule 19 >>

Rule 19. Protected information

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The use of information contained in a document filed electronically or information accessed through the electronic filing system must be consistent with state and federal law.

<< ID R EFS Rule 20 >>

Rule 20. Appeals to the Supreme Court

(a) Notice of Appeal and Cross–appeal. The notice of appeal and cross-appeal must be filed in compliance with Idaho Appellate Rules 17 and 18, except that transcripts must be requested in electronic format or both electronic format and hard copy.

(b) Clerk or Agency Record on Appeal.

(1) *Clerk's Record.* The clerk of the district court must prepare the designated record in electronic format as follows:

(A) Arrangement and Numbering. Except for pre-scanned bulk files, all pleadings, documents, and papers required to be in the clerk's record must be in chronological order as indicated by the date of filing. Each page of the clerk's record must be numbered consecutively at the bottom of the page. The numbering must include every page included in the record even if it was not a filed document, such as the title page, the index, the case summary and any register of actions.

(B) Bookmarks. The record must contain electronic bookmarks that link to each document in the electronic record.

(C) Time for preparation. The clerk of the district court must prepare the record and have it ready for service on the parties with 28 days of the filing of the notice of appeal.

(D) Clerk's Fee. The clerk of the district court must charge and collect a fee for preparation of the record in the sum of $0.65 a page. Any party may request an additional copy of the record on CD upon payment of $20.00 to the clerk of the district court. Payment of the estimated fee and waiver of the clerk's fee is in accord with Idaho Appellate Rule 27.

(2) *Agency Record.* Agency records, including transcripts and exhibits, must be submitted in electronic format. The record must contain bookmarks that link to each document in the electronic record.

(c) Transcripts.

(1) *Designation and Preparation.* All transcripts must be designated in the notice of appeal or cross-appeal in accord with Idaho Appellate Rules 17 and 18. Transcripts must be provided in electronic format, but each party may request one hard copy from the reporter at no additional cost. The transcripts must be prepared in accord with Idaho Appellate Rules 24, 25, and 26.

(2) *Filing.* Upon completion of the transcript, the reporter must lodge an electronic version of the transcript with the clerk of the district court or administrative agency.

(3) *Service of Transcript and Clerk or Agency's Record on Appeal on the Parties.* Upon completion of the reporter's transcript, the reporter must lodge the electronic transcript with the clerk of the district court or administrative agency, and file a notice of lodging with the district court clerk. Upon receipt of the transcript and upon completion of the clerk or agency's record, the clerk of the district court or clerk of the administrative agency must serve one copy of the transcript and record on the appellant and one copy on the respondent. The clerk of the district court must accomplish this service electronically; however, if the record and transcripts are too large for a party to accept electronically then the record and transcripts may be placed on a CD and served.

(d) Settlement of Record on Appeal. Once the record on appeal has been served on the parties, the parties have 28 days to object. Any objection must be accompanied by a notice setting the objection for hearing and must be heard and determined by the district court or administrative agency from which the appeal is taken. After a determination is made, the record on appeal is deemed settled as ordered by the district court or administrative agency. The record on appeal may also be settled by stipulation of all affected parties.

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(e) Filing Transcript and Record with Supreme Court. Upon settlement of the reporter's transcript and clerk's or agency's record, the clerk of the district court or administrative agency must, within seven days, file the electronic copy of the transcript and clerk's or agency's record with the Clerk of the Supreme Court. The Clerk of the Supreme Court must notify all attorneys of record, or self-represented parties, of the date of filing and also state when the briefs of the parties are required to be filed.

(f) Briefing. Briefing in all case types must be submitted electronically to the Supreme Court and served on the parties in compliance with this rule. Otherwise, briefing must be in compliance with the Idaho Appellate Rules.

<< ID R EFS Rule 21 >>

Rule 21. Filing Original Petitions, Motions and Memorandum of Costs with the Supreme Court
All original petitions, motions and memorandum of costs must be filed electronically with the Supreme Court and served in compliance with this rule. Otherwise, original petitions, motions and memorandum of costs must be in compliance with the Idaho Appellate Rules.

ID ORDER 19-0005

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2018 KANSAS COURT ORDER 0003 (C.O. 0003)

COURT RULES

NOTICE: Rules and related materials supplied by the courts are included inthis database. Because all changes may not have been supplied, thecourt clerk should be consulted to determine current rules.Pub. Note: Additions are indicated by **Text**; deletions by~~Text~~ .Stricken material is indicated by **~~Text~~** .

KS ORDER 0003
C.O. 0003
COURT RULES

Effective: Effective June 25, 2018 to Effective June 25, 2018

STATE OF KANSAS
SUPREME COURT RULES
RULES OF THE SUPREME COURT

Effective June 25, 2018

IN THE SUPREME COURT OF THE STATE OF KANSAS

ORDER

RULES RELATING TO DISTRICT COURTS

Supreme Court Rule 122 is hereby amended, effective June 25, 2018.

<< KS R DIST CT Rule 122 >>

RULE 122. ELECTRONIC FILING AND~~ TRANSMISSION OF DISTRICT COURT DOCUMENTS~~ **SERVICE BY ELECTRONIC MEANS**

~~(a) District Court May Require Electronic Filing.~~ ~~A district court may require filing by electronic means if:~~

~~(1) the district court's electronic filing system is consistent with standards for electronic filing approved by the Supreme Court; and~~

~~(2) the Supreme Court approves the system.~~

(a) District Court Electronic Filing System.

(1) *Approved District Court Electronic Filing System.* The Supreme Court approves for electronic filing in the district courts the Kansas Courts Electronic Filing System (Kansas Courts eFiling system) and the Johnson County District Court Electronic Filing System (Johnson County eFiling system).

(2) *Filing User.* A Kansas-licensed attorney who is permitted to practice law under Rule 208(a) must register as a filing user with the approved district court electronic filing system prior to filing a document with a district court.

(b) Electronic Filing Required; Exceptions. A Kansas-licensed attorney who is permitted to practice law under Rule 208(a) must electronically file any document submitted to a district court through the approved district court electronic filing system, unless:

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(1) a judge of the district court grants permission for a document, including an exhibit, to be filed by paper when the unique characteristics of the document require review or preservation of the document in its original form;

(2) the procedures adopted by the judicial administrator under subsection (g) permit a document to be filed by paper; or

(3) the provisions of subsection (e) apply.

~~(b)~~ **(c) Service by Electronic Means.** ~~Service of papers under K.S.A. 60 205 by electronic means is authorized in a proceeding in a district court that has implemented an approved electronic filing system.~~ **The following provisions apply to service by electronic means under K.S.A. 60–205(b)(2)(F).**

(1) ***Parties Who Consent to Service by Notice of Electronic Filing.***

(A) A party consents to service by electronic means under K.S.A. 60–205(b)(2)(F) when an attorney who is a filing user enters an appearance on behalf of the party.

(B) The notice of electronic filing automatically generated by the approved district court electronic filing system is an acceptable form of service by electronic means.

(2) ***Parties Who Are Unable to Consent to Service by Notice of Electronic Filing.*** **An attorney must serve an unrepresented party by a manner authorized under K.S.A. 60–205(b).**

(d) Certificate of Service. An electronically filed document must include a certificate of service. A certificate of service must include: the name of the party served, the manner in which service was made, the signature of the attorney making the submission, and if service is obtained in a manner other than transmission of the notice of electronic filing, the date on which service was made. If service is obtained by the transmission of the notice of electronic filing, the date of service is the date reflected in the file stamp on the document.

(e) Procedure When Electronic Filing Fails.

(1) ***Unavailability of the Electronic Filing System.*** **The provisions of K.S.A. 60–206 apply if the district court clerk's office is inaccessible because the approved district court electronic filing system is unavailable. An attorney whose filing is untimely made due to the unavailability of the system may seek relief from the court.**

(2) ***Failure of Attorney's Technology.*** **If a document cannot be electronically filed by the filing deadline because of a failure of the filing attorney's technology, the attorney may file the document by fax or by paper and must accompany the filing with a motion to accept the document. The motion must state the specific technology failure that prevented the document from being electronically filed with the district court. The attorney must file this motion no later than noon on the first day the district court clerk's office is open for business following the original filing deadline. The court may order filing of the document nunc pro tunc as of the date the attorney's technology failed if the filing occurs after the filing deadline. If the court orders filing of the document nunc pro tunc, the response time runs from the date the nunc pro tunc order is entered.**

~~(c)~~ **(f) Fees.** The Supreme Court may approve reasonable fees to support the expenses associated with the electronic filing system.

~~(d)~~ **(g) Standard Operating Procedures.** The judicial administrator is authorized to adopt standard operating procedures consistent with this rule to facilitate the **electronic filing** process ~~of electronic filing~~ in district courts. In developing these procedures, the judicial administrator will consult with stakeholders, as appropriate.

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BY ORDER OF THE COURT, this 9 day of May, 2018.

FOR THE COURT:Lawton R. NussChief Justice

KS ORDER 18-0003

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2018 MASSACHUSETTS COURT ORDER 0021 (C.O. 0021)

COURT RULES

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MA ORDER 0021
C.O. 0021
COURT RULES

Effective: Effective September 1, 2018 to Effective September 1, 2018

COMMONWEALTH OF MASSACHUSETTS
RULES OF THE SUPREME JUDICIAL COURT

Effective September 1, 2018

COMMONWEALTH OF MASSACHUSETTS

At the Supreme Judicial Court holden at Boston within and for said Commonwealth on the seventh day of June, in the year two thousand and eighteen:

present,

HON. RALPH D. GANTS	)	Chief Justice
	)	
HON. BARBARA A. LENK	)	
	)	
	)	
HON. FRANK M. GAZIANO	)	Justices
	)	
	)	
HON. DAVID A. LOWY	)	
	)	
	)	
HON. KIMBERLY S. BUDD	)	
	)	

HON. ELSPETH B. CYPHER

HON. SCOTT L. KAFKER

ORDERED: That Chapter One of the Rules of the Supreme Judicial Court is hereby amended as follows:

Rule 1:25	By inserting the new Rule 1:25, Massachusetts Electronic Filing Rules, as attached hereto.

The Interim Massachusetts Electronic Filing Rules are hereby repealed.

The amendments accomplished by this order shall take effect on September 1, 2018.

ORDERED:

RALPH D. GANTS

Chief Justice

BARBARA A. LENK

FRANK M. GAZIANO

Justices

DAVID A. LOWY

KIMBERLY S. BUDD

ELSPETH B. CYPHER

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SCOTT L. KAFKER)

S.J.C. Rule 1:25. Massachusetts Rules of Electronic Filing

<< MA R S CT EFILE Rule 1, Rule 2, Rule 3, Rule 4, Rule 5, Rule 6, Rule 7, Rule 8, Rule 9, Rule 10, Rule 11, Rule 12, Rule 13, Rule 14, Rule 15 >>

<< MA R S CT RULE 1:25 EFILE Rule 1 >>

Rule 1. Scope

(a) Scope. These Rules of Electronic Filing (E–Filing Rules) shall govern the general procedures of electronic filing and service of documents in the participating Massachusetts trial and appellate courts, as supplemented by any procedures specified by a court or a court department relating to its particular case types and requirements. To the extent that any Massachusetts Court Rules and Orders concerning conventional filing methods are inconsistent with these rules, the E–Filing Rules shall govern.

(b) Court Record. The official court record in a case shall include electronic records pertaining to that case, together with any documents and exhibits filed under the conventional method.

(c) Use of These Rules. All filers shall become familiar with these E–Filing Rules and all training and documentation materials provided for use by the Provider or the court(s).

<< MA R S CT RULE 1:25 EFILE Rule 2 >>

Rule 2. Definitions

“Clerk” shall refer to the clerk, clerk magistrate, recorder, or register of any court, as well as his/her respective assistants or deputies.

“Conventional method” shall refer to court rules and procedures that would apply in the absence of electronic filing. Parties or counsel who are ordered or opt to proceed “conventionally,” as provided in these E–Filing Rules, must follow the appropriate Massachusetts Court Rules and Orders.

“Electronic record” shall refer to the electronic record maintained on a court's case management and document management systems.

“Electronic filing,” “e-filing,” or “electronically filed” shall refer to the submission of documents through the e-filing system for purposes of filing in a case. E-mailing or sending a document by facsimile does not constitute “e-filing” a document.

“Electronic filing system” or “e-filing system” shall refer to the Provider's system of electronic filing and electronic service of documents via the internet.

“Electronic service” or “e-service” shall refer to the electronic transmission of a notice of filing to the electronic mail (e-mail) address of a party who has consented to electronic service through the Provider. The notice will contain a hyperlink to access the document that was filed electronically for the purpose of accomplishing service. E-service according to these E–Filing Rules shall be deemed in compliance with the Massachusetts Court Rules and Orders that govern service and notice. Service of process or summons to gain jurisdiction over persons or property may not be made by e-service.

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"Electronic signature" or "electronically signed" shall mean a signature from a User, judge, or clerk, that complies with the requirements set forth in Rule 13, below.

"Envelope" shall refer to a submission containing one or more filings to be filed in a single case by a filing User.

"Massachusetts Court Rules and Orders" shall mean the Rules of Civil, Criminal, and Appellate Procedure, the Rules of the Supreme Judicial Court, Appeals Court, and Trial Court, the Rules of the various Trial Court Departments, and the Rules Governing Time Standards and Case Management, together with all Standing Orders.

"Non–Registered Participant" shall mean a party to a case who has not registered with the Provider.

"PDF" shall mean "portable document format," the file format compatible with the latest version of Adobe Reader. Types of PDFs include electronically converted PDFs and scanned PDFs.

Electronically converted PDFs are created from an electronic source (MS Word, WordPerfect, etc.) using Adobe Acrobat or similar software. They are text searchable, accessible, and their file size is small. Electronically converted PDFs are preferred.

Scanned PDFs are created from documents run through an optical scanner. Scanned PDFs have a larger file size and lower quality image and should be avoided when possible. Pursuant to Rule 9(a), scanned PDFs must contain optical character recognition of text.

"Provider" shall refer to the Electronic Filing Service Provider designated by the courts.

"Provider Notification" shall mean a provider-generated notice acknowledging activity within the e-filing system.

"Public access terminal" shall mean a publicly accessible computer provided by a court for the purposes of allowing e-filing and viewing public electronic court records. The public access terminal shall be located at the courthouse and will be available during normal business hours.

"Service Contact" shall mean an individual to be served electronically by the electronic filing system.

"User" shall refer to a participant in a case who has properly registered with the e-filing system.

"User ID" shall refer to the e-mail address provided during registration that is used to login to the e-filing system.

"Waiver Account" shall refer to a method whereby court and provider fees may be waived. The acceptance of any document filed under a waiver account shall be subject to the court's determination that use of the account is appropriate, given the nature of the filing.

<< MA R S CT RULE 1:25 EFILE Rule 3 >>

Rule 3. Eligibility and conditions of registration

(a) Eligibility. Participation in the Electronic Filing Program shall be determined by order of the particular department or court. In general, registration for the Electronic Filing Program may include:

(1) Attorneys who are members of the Massachusetts Bar.

(2) Attorneys who are admitted to practice in a Massachusetts court *pro hac vice*.

(3) Self-represented parties.

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(4) Any non-party who is seeking or has obtained permission of the court to participate in the case (e.g., a witness seeking a protective order, an intervenor, amicus curiae, or court investigator).

(b) Registration. Registration is accomplished by completing the online e-filing system registration, a link to which is available on the Provider's website. An e-mail address will be required for registration.

(1) Attorneys who are members of the Massachusetts Bar shall register for a firm account and furnish their primary business e-mail address on file with the Board of Bar Overseers, and shall keep their account e-mail up to date.

(2) Non-attorneys who are representing themselves and attorneys who are not members of the Massachusetts Bar shall register for a self-represented account, unless otherwise ordered.

(3) An attorney representing him or herself shall register for a self-represented account with a unique e-mail address.

(c) Law Firm or Agency Registration. The Provider shall allow a firm or agency administrator to register a central account profile on behalf of a firm or agency's multiple Users. Once an administrator has completed this central registration, the administrator can add additional Users to that account.

(d) Conditions of Registration. By registering, the User acknowledges that:

(1) Registration shall constitute consent to receipt of Provider notifications, electronic court notifications, and e-service in all cases.

(2) It is the User's responsibility to ensure that the court and the Provider have the User's correct e-mail address at all times. Users shall update the Provider within 7 days of any change in the information provided at registration.

(e) User ID. The e-mail address provided during registration will serve as a unique User ID.

(f) User Password. At registration the User must designate a unique password in accordance with the specifications given by the Provider. Users may reset their password for the e-filing system at any time.

(g) Confidentiality of User ID and Password. The combination of the User ID and password shall be used only by the User and any other person that the User authorizes. Use of the User ID and password shall be deemed authorized by the User. Users should contact the court if they believe a filing was submitted falsely under their User ID.

<< MA R S CT RULE 1:25 EFILE Rule 4 >>

Rule 4. Electronic filing procedures

(a) E-filing Through the Provider. E-filing shall be performed only through the Provider's e-filing system. The Provider shall receive electronic filings 24 hours per day except when undergoing maintenance or repair.

(b) Receipt of Provider Notifications. Whenever a User submits a document to the court through the e-filing system, a Provider Notification will automatically generate and transmit to the User, acknowledging the submission. Provider notifications shall also be sent at the time the court accepts or rejects any submitted document.

(c) Determination of Date of Filing and Commencement of Civil Action.

(1) *Date of Filing.* Any document submitted through the e-filing system by 11:59 P.M. on a business day shall be deemed filed on that date, unless it is rejected by the court. See Rule 4(d). A document submitted on a Saturday, Sunday, or legal holiday shall be considered filed the next business day, unless it is subsequently rejected by the court.

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(2) *Commencement of Civil Action.* The date of filing provided in Rule 4(c)(1) shall constitute the date of filing of any case initiating document or entry fee when determining the commencement of an action under Mass. R. Civ. P. 3.

(d) Clerk's Review of Electronically Filed Documents. Prior to entry upon the docket, the clerk shall review each document submitted through the e-filing system for compliance with these E-filing Rules, the court's Electronic Filing Program, and the Massachusetts Court Rules and Orders. Upon the clerk's acceptance, the document shall be considered "filed" with the court at the time the original submission to the e-filing system was complete, as stated on the Provider Notification transmitted pursuant to Rule 4(b), subject to Rule 4(c), and a Provider Notification of the acceptance will be transmitted. If a filing is rejected, the filing User will receive notice from the Provider, which shall note the rejection and the court's reason(s) therefore.

(e) Correction of Errors. Upon the discovery of any error made during the e-filing process, the User may cancel the transaction while the cancel option is available in the e-filing system. The cancel option is not available once the court begins the review process pursuant to Rule 4(d). After this period, the User should abide by the Massachusetts Court Rules and Orders for correcting filings containing errors.

(f) Exchange of Discovery and Other Materials. The e-filing system may be used for the electronic exchange of discovery materials and other communications between the parties that are not intended to be filed with the court. Use of the e-filing system for these purposes should be decided by the parties.

<< MA R S CT RULE 1:25 EFILE Rule 5 >>

Rule 5. Rejection of electronic documents for technical nonconformance with the rules of court

The clerk may reject any document filed electronically for any technical nonconformance with the Rules of Court and may identify the error to be corrected and may state a deadline for the party to resubmit the document in a conforming format. This rule shall not, however, extend the mandatory or statutory time, including any statute of limitations, for the filing of such document.

<< MA R S CT RULE 1:25 EFILE Rule 6 >>

Rule 6. Electronic filing and service of civil case initiating documents

(a) Filing of Case Initiating Documents. Where permitted by a court, case initiating documents, such as a complaint or petition, may be submitted for filing through the e-filing system, accompanied by electronic payment of the required filing fee. Motions to waive fees may be submitted through the e-filing system in accordance with Rule 8(d).

(b) Court Action Upon Acceptance of Case Initiating Document. Upon acceptance of a case initiating document for filing, a case number will be assigned and the document will be processed. If the case initiating document is rejected, the User will be informed as provided in Rule 4(d).

(c) Service of Case Initiating Documents Shall Be By Conventional Methods. Unless otherwise determined by the court, or unless the responding party has consented in writing to accept electronic service or service by some other method, case initiating documents shall be served by conventional methods, together with a notice to the responding party stating that the case has been electronically commenced.

<< MA R S CT RULE 1:25 EFILE Rule 7 >>

Rule 7. Service of electronically filed documents

(a) All Documents E-filed Must Be Served. Except as otherwise provided in the Massachusetts Court Rules and Orders, or as otherwise ordered by the court, all electronically filed documents must be served on all other parties. Any document filed

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through the e-filing system must include a certificate of service. Subject to a court's specific requirement, the certificate of service may appear as a part of the document being filed or may be filed as a separate document.

(b) Electronic Service Accomplished Through the Electronic Filing Service Provider; Conventional Service Required for Non–Registered Participants. All Users in a case may be served electronically through the e-filing system, even when the parties to a case comprise both Users and Non–Registered Participants. When the parties to a case comprise both Users and Non–Registered Participants, the User submitting the document for filing through the e-filing system is responsible for serving a copy of the document to all parties who are Non–Registered Participants in accordance with other Massachusetts Court Rules and Orders.

(c) Conventional Service Required If Electronic Service Notification Is Undeliverable. If a filing User receives notice that electronic service on any party was undeliverable, the filing User shall then serve the document on that party by conventional methods.

(d) Electronic Notification Shall Signal Completion of Electronic Service. Electronic service shall be deemed complete at the time of transmission to the e-mail account of the Service Contact.

(e) Calculation of Time To Respond. For the purpose of computing time to respond to documents electronically filed, whenever a User has the right or is required to do some act within a prescribed period after the completion of electronic service of a notice or other documents upon him/her and the notice or document is either served upon him/her by electronic means, or the document was filed electronically and served by conventional methods, three days shall be added to the prescribed period.

<< MA R S CT RULE 1:25 EFILE Rule 8 >>

Rule 8. Payment of fees

(a) Provider May Charge Fee for Civil Filings. The e-filing Provider may charge a fee per envelope for its services related to filings in civil cases, in an amount approved by the Supreme Judicial Court. The Provider will provide for one or more methods of electronic payment.

(b) Provider May Charge Fee for Non–Indigent Criminal Defendant Filings. The e-filing Provider may charge a fee for its services related to filings in criminal cases only when counsel is not appointed pursuant to S.J.C. Rule 3:10 and the defendant is not indigent.

(c) Payments Shall Be Made at Time of Filing. All applicable fees are due and payable at the time of e-filing unless waived by the court. Failure to timely pay a required fee may cause the document submitted to be refused by the clerk under Rule 4(d) or stricken by the court. The payment will be debited when the clerk accepts the document.

(d) Payments Shall Be Transmitted Through the E–Filing System. Users shall make any payment due to the clerk through the e-filing system unless otherwise ordered by the court.

(e) Request to Waive Court Fees. Where permitted by the court, Users may submit a motion for waiver of court fees accompanied by a separate affidavit of indigency through the e-filing system. If the court allows a waiver of a court fee, any related Provider fee shall also be waived.

(f) Request to Waive Provider Fees. Upon request, the court shall waive a Provider fee upon a showing the filing party is indigent or is represented by court-appointed counsel. Upon request, the court may waive a Provider fee for multiple envelopes simultaneously submitted in the same case.

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(g) Recoverable Costs. The cost of any convenience fees and other administrative fees levied for the ability to pay fees or costs by credit card or other means, including, but not limited to, Provider fees for electronic filing of documents or pleadings with the court, may be recovered pursuant to any applicable Massachusetts Court Rules and Orders.

<< MA R S CT RULE 1:25 EFILE Rule 9 >>

Rule 9. Format and content of documents

(a) Documents Shall Be Filed in Searchable PDF. Except where specifically provided, all documents submitted for e-filing must be in searchable Portable Document Format (PDF). Documents should be submitted as electronically converted PDFs rather than scanned PDFs whenever possible. Scanned PDFs shall be made searchable using optical-character-recognition software, such as Adobe Acrobat. Documents shall not be locked or otherwise password protected.

(b) Documents Shall Be Formatted in Compliance with Massachusetts Court Rules and Orders. Users shall format all documents in accordance with the Massachusetts Court Rules and Orders governing formatting of paper documents, including page limits and font style and size, unless a deviation has been allowed by court order.

(c) Internal Links Are Allowed. Each document submitted for e-filing may contain electronic links, but only to navigate within the same document.

(d) Paper Filing Required. Each court may identify documents that must be filed by conventional methods in paper form only.

<< MA R S CT RULE 1:25 EFILE Rule 10 >>

Rule 10. File size limitations and legibility

(a) File Size Limitations. The Provider has set a maximum megabyte size for each document, and a maximum envelope size for all documents contained in one envelope. A User must limit the size of each electronically filed document, and the total size of all the documents filed within one envelope, to comply with the maximum file size and envelope size permitted by the Provider. Documents exceeding those limits cannot be transmitted by the Provider.

(b) Submission of Oversized Documents. Documents or envelopes larger than the maximum allowed file size may be submitted for e-filing if they are broken up into separate segments, each of which complies with the Provider's size restrictions. The User shall indicate in the document “Description” field that a filing is part of multiple parts (for example, “Volume 1 of 2”). The additional envelopes necessary to submit multiple parts may be filed under a waiver account, subject to review by the court.

(c) Scan Settings for Text Documents. To minimize file size, Users must configure their scanners to scan text documents at 200 dpi and in black and white rather than in color.

(d) Color and High Resolution Images. For documents that consist of images beyond text, such documents shall be scanned at sufficient resolution to ensure a legible and accurate representation of the image. Black and white images should be scanned in grayscale. Images should only be scanned in color if color is relevant, such as color photographs used as an exhibit.

(e) Users Must Verify Document Legibility and Orientation. A PDF produced under these rules must be of high quality sufficient to ensure a legible and accurate reading of the entire document. A User must verify the legibility and orientation of scanned documents before submitting them for e-filing.

<< MA R S CT RULE 1:25 EFILE Rule 11 >>

Rule 11. Filing of impounded information

(a) Filing of Impounded Documents. Except as otherwise provided, impounded documents should be filed in hard copy with the clerk's office. Such documents must be clearly labeled as impounded, with the appropriate accompanying notice of

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impoundment or motion to impound pursuant to the Uniform Rules of Impoundment Procedure, and any other applicable Massachusetts Court Rules and Orders.

(b) Electronic Filing of Impounded Documents. When permitted by a court, impounded documents may be e-filed through the e-filing system. The User shall identify the document as impounded at the time of filing.

(c) Identification of Impounded Documents By User. Where an impounded document is submitted through the e-filing system, the User shall mark the cover or first page of the document as impounded.

(d) Motions to Impound. A User may submit for e-filing a motion to file an impounded document. If the motion is granted, the User shall then submit by conventional methods the impounded document to the clerk's office for filing. A paper copy of the order granting the motion must be attached to documents so filed and delivered to the clerk.

(e) Confidentiality. The confidentiality of an electronic record or an electronic or paper copy thereof is equivalent to that of a paper record. Where an impounded document is scanned or otherwise placed in the e-filing system, access may be permitted only to the extent provided by law.

<< MA R S CT RULE 1:25 EFILE Rule 12 >>

Rule 12. Protection of personal identifying information

Publicly accessible documents filed with the court shall conform to Supreme Judicial Court Rule 1:24, Protection of Personal Identifying Information in Publicly Accessible Court Documents. A User is responsible for redacting personal identifying information. The clerk will not review filed documents for compliance. See S.J.C. Rule 1:24, § 7.

<< MA R S CT RULE 1:25 EFILE Rule 13 >>

Rule 13. Electronic signature

(a) Attorneys. An attorney's use of the e-filing system to file documents shall serve as the attorney's signature for purposes of Mass. R. Civ. P. 11 and for all other purposes under the Massachusetts Court Rules and Orders. In addition, all documents submitted for e-filing must include either a scan of the individual's handwritten signature, an electronically inserted image intended to substitute for a signature, or a "/s/ name of signatory" block, which shall have the same validity and effect as a handwritten signature, and must set forth the attorney's name, Board of Bar Overseers number, address, telephone number, and e-mail address.

When using the "s" option, the name of the User must be preceded by an "/s/" and typed in the space where the signature would otherwise appear. For example:

/s/ John A. Smith

John A. Smith

BBO#123456

123 Main Street

Boston, MA 02210

617–123–4567

jasmith@internetprovider.com

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(b) Self–Represented Litigants. All documents submitted for e-filing must include either a scan of the individual's handwritten signature, an electronically inserted image intended to substitute for a signature, or a "/s/ name of signatory" block, which shall have the same validity and effect as a handwritten signature, and must set forth the individual's name, address, telephone number and e-mail address. When using the "s" option, the "/s/" must be typed in the space where the signature would otherwise appear. For example:

/s/ John B. Doe

John B. Doe

123 Main Street

Boston, MA 02210

617–123–4567

johnbdoe@isp.com

(c) Multiple Signatories. A User who submits a document for e-filing that bears more than one signature (e.g., stipulations, joint motions, joint status reports, etc.) must ensure that all signatures comply with Rule 13(a) and (b).

(d) Signature of Notary; Retention of Original. Notarized documents containing a handwritten signature and physical seal may be submitted for e-filing. The User shall submit a scanned copy of the notarized document through the e-filing system, and the court shall maintain the scanned document as the official court record. The court may require the User to produce the original paper document. The User shall retain the original for future production, if necessary, until two years after the conclusion of the case, including any appeal.

(e) Summons and Complaint. A summons and complaint, petition, or other case initiating document that is signed in compliance with this Rule bears a sufficient signature under any applicable Massachusetts Court Rules and Orders.

<< MA R S CT RULE 1:25 EFILE Rule 14 >>

Rule 14. Orders and judgments

(a) Orders and Judgments May Be Electronically Signed. The assigned judge or clerk may electronically sign all orders, judgments, and notifications.

(b) Electronic Signatures Shall Have the Force of Conventional Signatures. Any order signed electronically has the same force and effect as if the judge or clerk had affixed his/her signature to a paper copy of the order and it had been entered on the docket in the conventional method.

(c) Clerk May Enter Orders By Text–Only Entry. A clerk may enter orders, issued by a judge or clerk as the case may be, by a text-only entry upon the docket. The text-only entry shall constitute the court's only order on the matter.

(d) Notification. All Users and Non–Registered Participants of record in the case will receive notification either electronically or by conventional methods.

<< MA R S CT RULE 1:25 EFILE Rule 15 >>

Rule 15. Technological failures and timeliness of filing

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(a) Technological Failure of the Provider May Excuse Untimely Filing. A User whose filing is made untimely as a result of a technological failure of the Provider may seek appropriate relief from the court. The court may enter an order permitting the document to be deemed filed or served as of the date it was first attempted to be transmitted electronically. If appropriate, the court may adjust the schedule for responding to these documents or for the court's hearing, or provide other relief.

(b) Scheduled Maintenance Will Not Excuse Untimely Filing. Notice of known system outages or maintenance will be posted by the Provider in advance on the User login screen. The notice will be posted as soon as the scheduled date and time is confirmed. Users will also receive e-mail notification of the upcoming downtime. Scheduled maintenance will not constitute a technological failure under these E–Filing Rules nor excuse an untimely filing.

(c) User Error Will Not Excuse Untimely Filing. Problems on the User's end, e.g., problems with the User's Internet Service Provider (ISP), hardware, or software problems, will not constitute a technological failure under these E–Filing Rules nor excuse an untimely filing,

<< MA R S CT RULE 1:25 EFILE Rule 16 >>

Rule 16. Title

These rules may be known and cited as the Massachusetts Rules of Electronic Filing (Mass. R. E. F.).

MA ORDER 18-0021

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2019 South Dakota Laws Ch. 225 (SCR 19-04)

SOUTH DAKOTA 2019 SESSION LAWS

2019 REGULAR SESSION OF THE 94TH LEGISLATURE

Additions are indicated by **Text**; deletions by
~~Text~~ .
Vetoes are indicated by ~~Text~~ ;
stricken material by ~~**Text**~~ .

Ch. 225 (SCR 19–04)

West's No. 227

IN THE SUPREME COURT OF THE STATE OF SOUTH DAKOTA

* * * *

IN THE MATTER OF THE AMENDMENT SDCL 15–26C–4

RULE 19–04

A hearing was held on February 20, 2019, at Pierre, South Dakota, relating to the amendment of SDCL 15–26C–4 and the Court having considered the proposed amendment and being fully advised in the premises, now, therefore, it is

ORDERED that SDCL 15–26C–4 be and it is hereby amended to read in its entirety as follows:

<< SD ST § 15–26C–4 >>

15–26C–4. Electronic service

(1) All documents filed electronically must be served electronically through the Odyssey® system except for documents served on or by self-represented litigants. On a showing of good cause, an attorney may be granted leave by the Supreme Court to serve paper documents or to be exempt from receiving electronic service.

(2) Electronic service is not effective if the party making; service learns that the attempted service did not reach the person to be served.

~~(1) After January 1, 2014, any attorney not exempt from electronic filing or a party filing electronically must designate an email address for accepting electronic service and for receiving electronic service with the supreme court clerk. On a showing of good cause, an attorney may be granted leave of court to serve paper documents or to be exempt from receiving electronic service.~~

~~(2) If a party files a document by electronic means, the party must serve the document by electronic means unless the recipient of service has not designated an email address for receiving electronic service.~~

~~(3) Electronic service is not effective if the party-making service learns that the attempted service did not reach the person to be served.~~

~~(4) If a recipient cannot accept electronic service of a document, service under another means specified by § 15–6–5 (b) is required.~~

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~~(5) Any party effectuating service electronically must include a certificate of service specifying the items electronically served.~~

~~(6) Documents served electronically may be in portable document format (.pdf), with the exception of those documents to be filed with the Supreme Court if approved word processing format as previously specified herein.~~

~~(7) The Supreme Court may electronically file and serve on registered attorneys and parties any decisions, orders, notices, remittiturs or other documents prepared by the court in such cases provided the attorney or party to be served has designated an email address for receiving electronic service.~~

IT IS FURTHER ORDERED that this rule become effective upon further order of the Supreme Court entered after July 1, 2019.

DATED at Pierre, South Dakota, this 25th day of February, 2019.

End of Document

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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, unless the minor is under 14 years old, 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;

Comment [NS1]: This is fixed based on section 75-5-207. Plus, it made no sense to serve both an infant and their parent. What is a baby going to do with a summons and complaint? This was raised by the State Court Admininstrator.

(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)(B)(i) Content of proof of electronic acceptance. If acceptance is obtained electronically, the proof of acceptance must demonstrate on its face ~~compliance with Utah Code § 46-4-105(2)(a)-(b), § 46-4-202(1)(a)-(b) and § 46-4-203(a)(1)-(2)~~that the party received and was able to retain readable copies of the summons and complaint prior to electronically signing the acceptance of service.

(d)(3)(B)(ii) Duty to avoid deception. A request to accept service ~~must comply with Utah Code Sections 76-8-512 and 76-8-513 and~~ must not [falsely] state or imply that the request to accept service originates with a judicial officer or court.

(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 and include current, valid contact information for the person effectuating service.

(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.

Comment [NS2]: From Judge Lawrence: I wanted to bring to your attention an issue with Rule 4 that I think is problematic. Rule 4(e) now allows service by persons other than attorneys, sheriffs or constables. In such cases, the only thing that needs to be filed is proof of service by declaration. No address or any other contact information is required. In fact, there really is no way of knowing whether the person who allegedly signed the return even exists. For attorneys, sheriffs or constables, their service always has some sort of identifying information such that we could, if needed, verify whether service actually occurred. In the case of others, there is no way to make such a determination. I would suggest simply requiring that the return of service be required to contain an address or email or other contact person for the server and verification by a notary (to make sure the person is who they say they are.

(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

Tab 3

Utah State Courts

Nancy Sylvester <nancyjs@utcourts.gov>

Possible Advisory Committee on Civil Rules Agenda Item

2 messages

Michael Drechsel <michaelcd@utcourts.gov> Mon, Jul 22, 2019 at 8:00 AM
To: Nancy Sylvester <nancyjs@utcourts.gov>

Hi Nancy! I met with the Board of District Court Judges today on an issue brought to the Courts by a legislator. I've attached the materials that were in the Board's materials packet to give you an idea of the issue. In essence, the legislator is wondering whether we have reached a point with technology and internet capable devices that the rule of procedure could require a party to provide an informational URL instead of a full packet of boilerplate printed materials when a subpoena is served. Currently, Rule 45 of the Utah Rules of Civil Procedure requires that "Every subpoena shall . . . (a)(1)(E) include a notice to persons served with a subpoena in a form substantially similar to the approved subpoena form." Currently, the form requires that "The following records and forms must be attached to this Subpoena and served with it:

Notice to Persons Served with a Subpoena
Objection to Subpoena
Declaration of Compliance with Subpoena

While the form is under the purview of the Forms Committee, it seemed to the Board of District Court Judges (especially Judge Stone, who specifically invited this) that the civil rules committee should weigh in on the substance of the proposed change.

Happy to discuss with you in person. The legislator is Rep. Walt Brooks from Washington County. We are wondering if the civil rules committee would have time to discuss this at one of the next few meetings (August, September, October, etc.).

Thanks!

==========
MICHAEL C. DRECHSEL
Assistant State Court Administrator
Legislative Liaison
Administrative Office of the Courts
450 South State Street
P.O. Box 140241
Salt Lake City, Utah 84114-0241
michaelcd@utcourts.gov
(801) 578-3821
==========

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1180K

Nancy Sylvester <nancyjs@utcourts.gov> Mon, Jul 22, 2019 at 9:45 AM
To: Michael Drechsel <michaelcd@utcourts.gov>

Thanks for the heads up, Mike. Most people have a phone with internet access these days and the courts' website has a lot of information on it, so I think the committee would be in favor of this. If we are headed for a rule change, I might be in favor of creating alternative language about the URL rather than completing foreclosing the possibility of providing the supporting documents. Just thinking aloud here, we would need to make sure that whatever information is provided to the subpoena respondent is accurate and helpful, especially with respect to our lowest common denominator respondents. The nice thing about the website is that it is organic and can be amended quickly if necessary. I'll pass this along to Civil Rules at its August meeting.

[Quoted text hidden]

--

Nancy J. Sylvester
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Utah State Courts

Amber Stubbings <ambers@utcourts.gov>

Fwd: Possible Item for Board of District Court Judges

Fri, Jun 28, 2019 at 8:15 AM

---------- Forwarded message ---------
From: **Michael Drechsel** <michaelcd@utcourts.gov>
Date: Tue, Jun 25, 2019 at 5:29 PM
Subject: Possible Item for Board of District Court Judges
To: Shane Bahr <shaneb@utcourts.gov>
Cc: Representative Walt Brooks <wbrooks@le.utah.gov>

Hello Shane.
I've copied Representative Walt Brooks on this email. I received a great call from Representative Brooks today regarding service of subpoenas. As you know, many subpoenas are served by local sheriffs around the state. One challenge that the sheriffs have faced is assembling / printing out all of the required boilerplate materials that accompany a subpoena. Representative Brooks has been told that this has created inefficiencies. Printing costs (including the challenge of having a functional printer in a motor vehicle), difficulty sending the packet to other officers for more convenient / efficient service, and waste from service that can't be effectuated are all reasons given for why change might be appropriate to review the current subpoena form and its requirement to deliver with the subpoena a hard copy of the supplemental materials. Providing a hard copy of these materials is perhaps less necessary than it once was, in light of access to mobile devices, near ubiquitous internet availability, and increased technological literacy. One thought was that perhaps the form subpoena that is approved by the Board of District Court Judges could be modified to include a URL to the supplemental subpoena materials (the "Notice to Persons Served with a Subpoena," "Objection to Subpoena," "Declaration of Compliance with Subpoena," etc.). The actual materials would not need to be included with the subpoena. This would simplify service of the subpoena, while still providing the guidance contemplated within the supplemental materials.
Representative Brooks is exploring possible legislation in this area, but recognizes that subpoenas are the realm of the judiciary and are governed by court rules (Utah Rule of Civil Procedure 45 and Utah Rule of Criminal Procedure 14) and court forms. As a result, he wants to explore the possibility of the courts taking action in this area. He told me he would be happy to participate in the process in any way that would be helpful to the Board. At this point in time, it doesn't appear that there needs to be a change to the underlying rules (URCP 45 or URCrP 14), but only a modification to the Board-approved subpoena form.
Representative Brooks is hopeful that the Board will consider making a review of this issue. I'd be happy to answer any questions.
When you can, please let us know what the Board would like to do with this. We know the Board is extremely busy and appreciate any time they devote to considering this matter.
Thank you!

==========
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==========

Rule 45. Subpoena.

(a) Form; issuance.

(a)(1) Every subpoena shall:

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

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

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

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

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

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

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

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

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

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

(b) Service; fees; prior notice.

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

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

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

(c) Appearance; resident; non-resident.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

(f) Duties in responding to subpoena.

(f)(1) A person commanded to copy and mail or deliver documents or electronically stored information or to produce documents, electronically stored information or tangible things shall serve on the party or attorney responsible

for issuing the subpoena a declaration under penalty of law stating in substance:

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

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

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

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

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

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

(f)(4) If the information produced in response to a subpoena is subject to a claim of privilege or of protection as trial-preparation material, the person making the claim may notify any party who received the information of the claim and the basis for it. After being notified, the party must promptly return, sequester, or destroy the specified information and any copies of it 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 the information. The person who produced the information must preserve the information until the claim is resolved.

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

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

(i) Procedure when witness is an inmate. If the witness is an inmate as defined in Rule 6(e)(1), a party may move for an order to examine the witness in the institution or to produce the witness before the court or officer for the purpose of being orally examined.

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

Advisory Committee Notes

Effective May 1, 2018

Rule 14. Subpoenas.

(a) **Subpoenas requiring the attendance of a witness or interpreter and production or inspection of records, papers, or other objects.**

(a)(1) A subpoena to require the attendance of a witness or interpreter before a court, magistrate or grand jury in connection with a criminal investigation or prosecution may be issued by the magistrate with whom an information is filed, the prosecuting attorney on his or her own initiative or upon the direction of the grand jury, or the court in which an information or indictment is to be tried. The clerk of the court in which a case is pending shall issue in blank to the defendant, without charge, as many signed subpoenas as the defendant may require. An attorney admitted to practice in the court in which the action is pending may also issue and sign a subpoena as an officer of the court.

(a)(2) A subpoena may command the person to whom it is directed to appear and testify or to produce in court or to allow inspection of records, papers or other objects, other than those records pertaining to a victim covered by Subsection (b). The court may quash or modify the subpoena if compliance would be unreasonable.

(a)(3) A subpoena may be served by any person over the age of 18 years who is not a party. Service shall be made by delivering a copy of the subpoena to the witness or interpreter personally and notifying the witness or interpreter of the contents. A peace officer shall serve any subpoena delivered for service in the peace officer's county.

(a)(4) Written return of service of a subpoena shall be made promptly to the court and to the person requesting that the subpoena be served, stating the time and place of service and by whom service was made.

(a)(5) A subpoena may compel the attendance of a witness from anywhere in the state.

(a)(6) When a person required as a witness is in custody within the state, the court may order the officer having custody of the witness to bring the witness before the court.

(a)(7) Failure to obey a subpoena without reasonable excuse may be deemed a contempt of the court responsible for its issuance.

(a)(8) Whenever a material witness is about to leave the state, or is so ill or infirm as to afford reasonable grounds for believing that the witness will be unable to attend a trial or hearing, either party may, upon notice to the other, apply to the court for an order that the witness be examined conditionally by deposition. Attendance of the witness at the deposition may be compelled by subpoena. The defendant shall be present at the deposition and the court shall make whatever order is necessary to affect such attendance.

(b) **Subpoenas for the production of records of victim.**

(b)(1) No subpoena or court order compelling the production of medical, mental health, school, or other non-public records pertaining to a victim shall be issued by or at the request of the defendant unless the court finds after a hearing, upon notice as provided below, that the defendant is entitled to production of the records sought under applicable state and federal law.

(b)(2) The request for the subpoena or court order shall identify the records sought with particularity and be reasonably limited as to subject matter.

(b)(3) The request for the subpoena or court order shall be filed with the court as soon as practicable, but no later than 28 days before trial, or by such other time as permitted by the court. The request and notice of any hearing shall be served on counsel for the victim or victim's representative and on the prosecutor. Service on an unrepresented victim shall be made on the prosecutor.

(b)(4) If the court makes the required findings under subsection (b)(1), it shall issue a subpoena or order requiring the production of the records to the court. The court shall then conduct an in camera review of the records and disclose to the defense and prosecution only those portions that the defendant has demonstrated a right to inspect.

(b)(5) The court may, in its discretion or upon motion of either party or the victim or the victim's representative, issue any reasonable order to protect the privacy of the victim or to limit dissemination of disclosed records.

(b)(6) For purposes of this rule, "victim" and "victim's representative" are used as defined in Utah Code § 77-38-2(2).

(c) **Applicability of Rule 45, Utah Rules of Civil Procedure.** The provisions of Rule 45, Utah Rules of Civil Procedure, shall govern the content, issuance, and service of subpoenas to the extent that those provisions are consistent with the Utah Rules of Criminal Procedure.

Effective November 1, 2015

Advisory Committee Notes

Name

Address

City, State, Zip

Phone

Email

Check your email. You will receive information and documents at this email address.

I am [ ] Plaintiff/Petitioner [ ] Defendant/Respondent
[ ] Plaintiff/Petitioner's Attorney [ ] Defendant/Respondent's Attorney (Utah Bar #:_____)

In the [ ] District [ ] Juvenile [ ] Justice Court of Utah

_____ Judicial District _____ County

Court Address _____

	Subpoena
_____ Plaintiff/Petitioner v. _____ Defendant/Respondent	_____ Case Number _____ Judge _____ Commissioner

Instructions:

- You must complete this form before you file it. Court staff cannot complete this form for you.
- Keep a copy of all documents for your records.
- Attend all court hearings.
- The following records and forms must be attached to this Subpoena and served with it.
  - Notice to Persons Served with a Subpoena.
  - Objection to Subpoena.
  - Declaration of Compliance with Subpoena.
  - Witness fee.
  - Application for Subpoena under the Utah Uniform Interstate Depositions and Discovery Act with attachments (for cases from states in which the Uniform Act applies).
  - Notice of Deposition and Request for Subpoena in Case Pending Out of State (for cases from states in which the Uniform Act does not apply).
  - A statement describing the matters on which examination is requested (if the conditions of Paragraph (5) are met).

To:

_____

Name and Address

_____

Name and Address

1. [ ] You must appear at:

Courthouse Address (Dirección del tribunal):

_____

Date (Fecha): _____ Time (Hora): _____ [ ] a.m. [ ] p.m.

Room (Sala): _____

Judge or Commissioner (Juez o Comisionado): _____

To: (Choose all that apply.)

[ ] testify at a trial or hearing.

Interpretation. If you do not speak or understand English, the court will provide an interpreter. Contact court staff immediately to ask for an interpreter.

Interpretación. Si usted no habla ni entiende el Inglés el tribunal le proveeré un intérprete. Contacte a un empleado del tribunal inmediatamente para pedir un intérprete.

ADA Accommodation. If you need an accommodation, including an ASL interpreter, contact court staff immediately to ask for an accommodation.

Adaptación o Arreglo en Caso de Discapacidad. Si usted requiere una adaptación o arreglo, que incluye un intérprete de la lengua de signos americana, contacte a un empleado del tribunal inmediatamente para pedir una adaptación.

[ ] testify at a deposition.

[ ] permit inspection of the premises.

[ ] produce the following documents or tangible things:

_____

_____

_____

2. [ ] You must copy the following documents and to mail or deliver the copies to the person at the address at the top of the first page of this Subpoena. You must comply no later than _____. (date)

_____

_____

3. Notice to Persons Served with a Subpoena must be served with this Subpoena. The Notice explains your rights and obligations. If you are commanded to appear at a trial, hearing or deposition, a one-day witness fee must be served with this Subpoena. A one-day witness fee is $18.50 plus $1.00 for each 4 miles you have to travel over 50 miles (one direction).

4. You may object to this Subpoena for any of the reasons listed in paragraph 6 of the Notice by serving a written objection upon the person listed at the top of the first page of this Subpoena. You must comply with any part of the Subpoena to which you do not object.

5. [ ] This subpoena is being served on a corporation, partnership, association or governmental agency, and the attached statement describes the matters on which examination is requested. Under URCP 30, you are required to designate one or more persons who will testify on your behalf. You may set forth, for each person designated, the matters on which the person will testify. Those persons must testify to matters known or reasonably available to the organization. (Attach a statement describing the matters on which examination is requested.)

6. [ ] * This Subpoena incorporates by reference all of the terms of the attached Subpoena issued by the state of _____. The terms of the foreign Subpoena are as applicable as if entered by this court.

_____ Signature ► _____

Date

Printed name

* Court Clerk [ ]

* Attorney for the Plaintiff/Petitioner [ ]

* Attorney for the Defendant/Respondent [ ] _____

* Under the Utah Uniform Interstate Depositions and Discovery Act, Utah Code Section 78B-17-201, only the court clerk may issue a Utah Subpoena based on a Subpoena from another state.

Certificate of Service

I certify that I filed with the court and am serving a copy of this Subpoena on the following people.

Person's Name	Service Method	Service Address	Service Date
	[ ] Mail [ ] Hand Delivery [ ] E-filed [ ] Email [ ] Left at business (With person in charge or in receptacle for deliveries.) [ ] Left at home (With person of suitable age and discretion residing there.)		
	[ ] Mail [ ] Hand Delivery [ ] E-filed [ ] Email [ ] Left at business (With person in charge or in receptacle for deliveries.) [ ] Left at home (With person of suitable age and discretion residing there.)		
	[ ] Mail [ ] Hand Delivery [ ] E-filed [ ] Email [ ] Left at business (With person in charge or in receptacle for deliveries.) [ ] Left at home (With person of suitable age and discretion residing there.)		

______________________________ Signature ► ______________________________

Date

Printed Name ______________________________

Tab 4

Administrative Office of the Courts

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

Hon. Mary T. Noonan
State Court Administrator
Catherine J. Dupont
Deputy Court Administrator

MEMORANDUM

To: Civil Rules Committee
From: Nancy Sylvester
Date: August 23, 2019
Re: LPP's and Civil Rules

Attached to this memo are the Supreme Court's instructions to the Civil Rules Committee regarding LPP's along with a number of proposed rule amendments. Several questions had remained to be answered based on these amendments, but I now have some responses to them from the LPP Committee:

1) Should a blanket term like "legal professionals" be used to describe attorneys and LPP's? Although that could be cleaner in some areas (see, e.g., Rule 73), it also doesn't do much to highlight the differences between the two license types and there are simply areas where LPP's need to be carved away from attorneys (see also Rule 73).
   a. Answer: The LPP Committee proposed the following amendment to Rule 1: "The terms 'attorney' and 'counsel' refer to legal professionals, which include attorneys and licensed paralegal practitioners, in the practice areas for which licensed paralegal practitioners are authorized to practice. Those practice areas are set forth in Utah Special Practice Rule 14-802 unless specifically carved out in these rules."
2) In a similar vein, how should we deal with the term "counsel?" Are LPP's counsel? Arguably they do act as legal counsel. I've attempted to deal with this in an amendment to Rule 1.
   a. Answer: See 1a.
3) In Rule 75, appearance of limited counsel, can LPP's be involved in discovery? The Supreme Court's letter suggests yes and no. Arguably a carve-out in Rule 26 for LPP's would signal limited involvement in the discovery process.
   a. Answer: LPP's will be involved in only limited discovery, as provided in the attached amendments to Rule 26, et seq.
4) Speaking of Rule 26, the Civil Rules Committee has had some limited discussions already on these carve-outs. One suggestion that has been

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made is to have a form LPP's could use to flag to the other party and the court when the initial disclosures required by Rules 26, 26.1, and 26.3 have not been provided. Another suggestion was made to better spell out the consequences of not providing the initial disclosures. Rule 26.1(f)-(h) already provides some version of this but perhaps an amendment would also be helpful in Rules 26 and 26.3. I've added in those amendments to the end of each rule and also added a requirement to Rule 26 regarding debt collection initial disclosures.

a. Answer: The LPP Committee had no further comments on these proposals.

Supreme Court of Utah

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Justice
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November 26, 2018

Jonathan O. Hafen
Chair, Advisory Committee on Utah Rules of Civil Procedure
PARR BROWN GEE & LOVELESS
101 SOUTH 200 EAST SUITE 700
SALT LAKE CITY UTAH 84111

Dear Jonathan:

The rules regulating the practice for Licensed Paralegal Practitioners take effect November 1, 2018. We anticipate having Licensed Paralegal Practitioners practicing by fall of 2019. In anticipation of this new type of legal professional, we are asking our Advisory committees to review rules that may need to be amended to respond to the new legal professional. The LPP Steering Committee identified Rules of Civil Procedure that should be reviewed by your committee. The rules were identified because the rule includes the word "attorney", and the rule relates to one of the three areas of practice for Licensed Paralegal Practitioners: 1) temporary separation, divorce, parentage, cohabitant abuse, civil stalking, and custody and support; 2) forcible entry and detainer and unlawful detainer; and 3) debt collection matters. Your committee may identify other rules that should be amended.

The Court requests that your committee review the Rules of Civil Procedure and propose amendments to the rules that you think are appropriate to incorporate LPPs into the three practice areas and within the limited scope of practice authorized in Rule 14-802. As a starting point, the rules that were identified by the LPP Steering Committee are:

Rule 4	Process
Rule 5	Service and Filling of Pleadings and other papers
Rule 10	Form of Pleading and other paper
Rule 11	Signing of Pleadings, Motions and Affidavits and other papers
Rule 53	Masters
Rule 56	Summary Judgement
Rule 58B	Satisfaction of Judgement

Rule 65A	Injunctions
Rule 74	Withdrawal of Counsel
Rule 75	Limited Appearance (should an LPP always file this document to provide notice to the parties and the court that a LPP is involved in the case for limited legal representation?)
Rule 76	Notice of Contact Information change

We also request that you evaluate Rule 26 regarding required disclosures for debt collection and landlord tenant cases for which an LPP may represent a party. Rule 14-802 does not permit an LPP to conduct discovery. The Court is concerned that if appropriate documentation in debt collection or landlord tenant cases is not filed by the Plaintiff, the LPP will not be able to compel the disclosure of those documents through a discovery request. One solution suggested by the LPP Steering Committee is to amend Rule 26 to specifically require the disclosure of documents in debt collection and landlord tenant cases. The LPP Steering Committee suggested determining which documents are most commonly required and including those documents in Rule 26. We ask that your committee consider this issue.

Sincerely,

Matthew B. Durrant
Chief Justice

Copy: Nancy Sylvester, Staff

Rule 1. General provisions.

Scope of rules. These rules govern the procedure in the courts of the state of Utah in all actions of a civil nature, whether cognizable at law or in equity, and in all statutory proceedings, except as governed by other rules promulgated by this court or statutes enacted by the Legislature and except as stated in Rule 81. They shall be liberally construed and applied to achieve the just, speedy, and inexpensive determination of every action. These rules govern all actions brought after they take effect and all further proceedings in actions then pending. If, in the opinion of the court, applying a rule in an action pending when the rule takes effect would not be feasible or would be unjust, the former procedure applies.

The terms “attorney” and “counsel” refer to legal professionals, which include attorneys and licensed paralegal practitioners, in the practice areas for which licensed paralegal practitioners are authorized to practice. Those practice areas are set forth in Utah Special Practice Rule 14-802 unless specifically carved out in these rules.

Advisory Committee Notes

Rule 4. Process.

(a) Signing of summons. The summons must be signed and issued by the plaintiff or the plaintiff's attorney or licensed paralegal practitioner. 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 or licensed paralegal practitioner, 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 or licensed paralegal practitioner. 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 <u>or licensed paralegal practitioner</u> for party. An attorney <u>or licensed paralegal practitioner</u> may accept service of a summons and complaint on behalf of the attorney's <u>or licensed paralegal practitioner's</u> 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, licensed paralegal practitioner, 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

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. If a party is represented by a licensed paralegal practitioner, a paper served under this rule must be served upon the party and the licensed paralegal practitioner. Service must be made upon the attorney and the party if

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

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

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

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

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

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

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

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

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

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

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

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

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

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

(b)(5)(B) every paper prepared by the court will be served by the court.

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

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

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

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

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

(d) Certificate of service. A paper required by this rule to be served, including electronically filed papers, must include a signed certificate of service showing the name of the document served, the date and manner of service and on whom it was served. Except in the juvenile court, this paragraph does not apply to papers required to be served under paragraph (b)(5)(B) when service to all parties is made under paragraph (b)(3)(A).

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

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

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

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

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

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

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

Advisory Committee Notes

Rule 10. Form of pleadings and other papers.

(a) Caption; names of parties; other necessary information.

(a)(1) All pleadings and other papers filed with the court must contain a caption setting forth the name of the court, the title of the action, the file number, if known, the name of the pleading or other paper, and the name, if known, of the judge (and commissioner if applicable) to whom the case is assigned. A party filing a claim for relief, whether by original claim, counterclaim, cross-claim or third-party claim, must include in the caption the discovery tier for the case as determined under Rule 26.

(a)(2) In the complaint, the title of the action must include the names of all the parties, but other pleadings and papers need only state the name of the first party on each side with an indication that there are other parties. A party whose name is not known must be designated by any name and the words "whose true name is unknown." In an action in rem, unknown parties must be designated as "all unknown persons who claim any interest in the subject matter of the action."

(a)(3) Every pleading and other paper filed with the court must state in the top left hand corner of the first page the name, address, email address, telephone number and bar number of the attorney, licensed paralegal practitioner, or party filing the paper, and, if filed by an attorney or licensed paralegal practitioner, the party for whom it is filed.

(a)(4) A party filing a claim for relief, whether by original claim, counterclaim, cross-claim or third-party claim, must also file a completed cover sheet substantially similar in form and content to the cover sheet approved by the Judicial Council. The clerk may destroy the coversheet after recording the information it contains.

(b) Paragraphs; separate statements. All statements of claim or defense must be made in numbered paragraphs. Each paragraph must be limited as far as practicable to a single set of circumstances; and a paragraph may be adopted by reference in all succeeding pleadings. Each claim founded upon a separate transaction or occurrence and each defense other than denials must be stated in a separate count or defense whenever a separation facilitates the clear presentation of the matters set forth.

(c) Adoption by reference; exhibits. Statements in a paper may be adopted by reference in a different part of the same or another paper. An exhibit to a paper is a part thereof for all purposes.

(d) Paper format. All pleadings and other papers, other than exhibits and court-approved forms, must be 8½ inches wide x 11 inches long, on white background, with a top margin of not less than 1½ inches and a right, left and bottom margin of not less than 1 inch . All text or images must be clearly legible, must be double spaced, except for matters customarily single spaced, must be on one side only and must not be smaller than 12-point size.

(e) Signature line. The name of the person signing must be typed or printed under that person’s signature. If a proposed document ready for signature by a court official is electronically filed, the order must not include the official’s signature line and must, at the end of the document, indicate that the signature appears at the top of the first page.

(f) Non-conforming papers. The clerk of the court may examine the pleadings and other papers filed with the court. If they are not prepared in conformity with paragraphs (a) -(e), the clerk must accept the filing but may require counsel to substitute properly prepared papers for nonconforming papers. The clerk or the court may waive the requirements of this rule for parties appearing pro se. For good cause shown, the court may relieve any party of any requirement of this rule.

(g) Replacing lost pleadings or papers. If an original pleading or paper filed in any action or proceeding is lost, the court may, upon motion, with or without notice, authorize a copy thereof to be filed and used in lieu of the original.

(h) No improper content. The court may strike and disregard all or any part of a pleading or other paper that contains redundant, immaterial, impertinent or scandalous matter.

(i) Electronic papers.

(i)(1) Any reference in these rules to a writing, recording or image includes the electronic version thereof.

(i)(2) A paper electronically signed and filed is the original.

(i)(3) An electronic copy of a paper, recording or image may be filed as though it were the original. Proof of the original, if necessary, is governed by the Utah Rules of Evidence.

(i)(4) An electronic copy of a paper must conform to the format of the original.

(i)(5) An electronically filed paper may contain links to other papers filed simultaneously or already on file with the court and to electronically published authority.

Advisory Committee Notes

Rule 11. Signing of pleadings, motions, affidavits, and other papers; representations to court; sanctions.

(a) Signature.

(a)(1) Every pleading, written motion, and other paper must be signed by at least one attorney or licensed paralegal practitioner of record, or, if the party is not represented, by the party.

(a)(2) A person may sign a paper using any form of signature recognized by law as binding. Unless required by statute, a paper need not be accompanied by affidavit or have a notarized, verified or acknowledged signature. If a rule requires an affidavit or a notarized, verified or acknowledged signature, the person may submit an unsworn declaration as described in Title 78B, Chapter 18a, Uniform Unsworn Declarations Act. If an affidavit or a paper with a notarized, verified or acknowledged signature is filed, the party must comply with Rule 5(f).

(a)(3) An unsigned paper will be stricken unless omission of the signature is corrected promptly after being called to the attention of the attorney, licensed paralegal practitioner, or party.

(b) Representations to court. By presenting a pleading, written motion, or other paper to the court (whether by signing, filing, submitting, or advocating), an attorney, licensed paralegal practitioner, or unrepresented party is certifying that to the best of the person's knowledge, information, and belief, formed after an inquiry reasonable under the circumstances,

(b)(1) it is not being presented for any improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation;

(b)(2) the claims, defenses, and other legal contentions are warranted by existing law or by a nonfrivolous argument for the extension, modification, or reversal of existing law or the establishment of new law;

(b)(3) the allegations and other factual contentions have evidentiary support or, if specifically so identified, are likely to have evidentiary support after a reasonable opportunity for further investigation or discovery; and

(b)(4) the denials of factual contentions are warranted on the evidence or, if specifically so identified, are reasonably based on a lack of information or belief.

(c) Sanctions. If, after notice and a reasonable opportunity to respond, the court determines that paragraph (b) has been violated, the court may, subject to the conditions stated below, impose an appropriate sanction upon the attorneys, licensed paralegal practitioners, law firms, or parties that have violated paragraph (b) or are responsible for the violation.

(c)(1) How initiated.

(c)(1)(A) By motion. A motion for sanctions under this rule must be made separately from other motions or requests and must describe the specific conduct alleged to violate paragraph (b). It must be served as provided in Rule 5, but may not be filed with or presented to the court unless, within 21 days after service of the motion (or such other period as the court may prescribe), the challenged paper, claim, defense, contention, allegation, or denial is not withdrawn or appropriately corrected. If warranted, the court may award to the party prevailing on the motion the reasonable expenses and attorney or licensed paralegal practitioner fees incurred in

presenting or opposing the motion. In appropriate circumstances, a law firm may be held jointly responsible for violations committed by its partners, members, and employees.

(c)(1)(B) On court's initiative. On its own initiative, the court may enter an order describing the specific conduct that appears to violate paragraph (b) and directing an attorney, licensed paralegal practitioner, law firm, or party to show cause why it has not violated paragraph (b) with respect thereto.

(c)(2) Nature of sanction; limitations. A sanction imposed for violation of this rule must be limited to what is sufficient to deter repetition of such conduct or comparable conduct by others similarly situated. Subject to the limitations in paragraphs (c)(2)(A) and (c)(2)(B), the sanction may consist of, or include, directives of a nonmonetary nature, an order to pay a penalty into court, or, if imposed on motion and warranted for effective deterrence, an order directing payment to the movant of some or all of the reasonable attorney or licensed paralegal practitioner fees and other expenses incurred as a direct result of the violation.

(c)(2)(A) Monetary sanctions may not be awarded against a represented party for a violation of paragraph (b)(2).

(c)(2)(B) Monetary sanctions may not be awarded on the court's initiative unless the court issues its order to show cause before a voluntary dismissal or settlement of the claims made by or against the party which is, or whose attorneys or licensed paralegal practitioners are, to be sanctioned.

(c)(3) Order. When imposing sanctions, the court will describe the conduct determined to constitute a violation of this rule and explain the basis for the sanction imposed.

Advisory Committee Notes

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, including in debt collection actions a copy or proof of the agreement giving rise to the action and an itemized calculation of collection costs incurred;.

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

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

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

(a)(3) Exemptions.

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

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

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

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

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

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

(a)(4) Expert testimony.

(a)(4)(A) Disclosure of expert testimony. A party shall, without waiting for a discovery request, serve on the other parties the following information regarding any person who may be used at trial to present evidence under Rule 702 of the Utah Rules of Evidence and who is retained or specially employed to provide expert testimony in the case or whose duties as an employee of the party regularly involve giving expert testimony: (i) the expert's name and qualifications, including a list of all publications authored within the preceding 10 years, and a list of any other cases in which the expert has testified as an expert at trial or by deposition within the preceding four years, (ii) a brief summary of the opinions to which the witness is expected to testify, (iii) all data and other information that will be relied upon by the witness in forming those opinions, and (iv) the compensation to be paid for the witness's study and testimony.

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

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

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

(a)(4)(C)(ii) The party who does not bear the burden of proof on the issue for which expert testimony is offered shall serve on the other parties the information required by paragraph (a)(4)(A) within seven days after the later of (A) the date on which the election under paragraph (a)(4)(C)(i) is due, or (B) receipt of the written report or the taking of the expert's deposition pursuant to paragraph (a)(4)(C)(i). Within seven days thereafter, the party opposing the expert may serve notice electing either a deposition of the expert pursuant to paragraph (a)(4)(B) and Rule 30, or a written report pursuant to paragraph (a)(4)(B). The deposition shall occur, or the report shall be served on the other parties, within 28 days after

the election is served on the other parties. If no election is served on the other parties, then no further discovery of the expert shall be permitted.

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

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

(a)(4)(E) Summary of non-retained expert testimony. If a party intends to present evidence at trial under Rule 702 of the Utah Rules of Evidence from any person other than an expert witness who is retained or specially employed to provide testimony in the case or a person whose duties as an employee of the party regularly involve giving expert testimony, that party must serve on the other parties a written summary of the facts and opinions to which the witness is expected to testify in accordance with the deadlines set forth in paragraph (a)(4)(C). A deposition of such a witness may not exceed four hours.

(a)(5) Pretrial disclosures.

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

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

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

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

(a)(5)(B) Disclosure required by paragraph (a)(5) shall be served on the other parties at least 28 days before trial. At least 14 days before trial, a party shall serve and file counter designations of deposition testimony, objections and grounds for the objections to the use of a deposition and

to the admissibility of exhibits. Other than objections under Rules 402 and 403 of the Utah Rules of Evidence, objections not listed are waived unless excused by the court for good cause.

(b) Discovery scope.

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

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

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

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

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

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

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

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

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

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

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

mental impressions, conclusions, opinions, or legal theories of an attorney or other representative of a party.

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

(b)(7) Trial preparation; experts.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

	$50,000 and less than $300,000 or non-monetary relief					
3	$300,000 or more	30	20	20	20	210

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

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

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

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

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

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

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

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

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

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

the rule, the court, upon motion or upon its own initiative, may take any action authorized by Rule 11 or Rule 37(b).

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

(g) Failure to comply. Failure of a party to comply with this rule does not preclude any other party from obtaining a default judgment, proceeding with the case, or seeking other relief from the court.

(h) Notice of requirements. Notice of the requirements of this rule must be served on the defendant and all joined parties with the initial petition.

Advisory Committee Notes

Legislative Note

Rule 26.3. Disclosure in unlawful detainer actions.

(a) Scope. This rule applies to all actions for eviction or damages arising out of an unlawful detainer under Title 78B, Chapter 6, Part 8, Forcible Entry and Detainer.

(b) Plaintiff's disclosures.

(b)(1) Disclosures served with complaint and summons. Instead of the disclosures and timing of disclosures required by Rule 26(a), and unless included in the complaint, the plaintiff must serve on the defendant with the summons and complaint:

(b)(1)(A) any written rental agreement;

(b)(1)(B) the eviction notice that was served;

(b)(1)(C) an itemized calculation of rent past due, damages, costs and attorney fees at the time of filing;

(b)(1)(D) an explanation of the factual basis for the eviction; and

~~(b)(1)(E) notice to the defendant of the defendant's obligation to serve the disclosures required by paragraph (c).~~

(b)(2) Disclosures for evidentiary hearing.

(b)(2)(A) If the plaintiff requests an evidentiary hearing under Section 78B-6-810, the plaintiff must serve on the defendant with the request:

(b)(2)(A)(i) any document not yet disclosed that the plaintiff will offer at the hearing; and

(b)(2)(A)(ii) the name and, if known, the address and telephone number of each fact witness the plaintiff may call at the evidentiary hearing and, except for an adverse party, a summary of the expected testimony.

(b)(2)(B) If the defendant requests an evidentiary hearing under Section 78B-6-810, the plaintiff must serve the disclosures required by paragraph (b)(2)(A) on the defendant no less than 2 days before the hearing. The plaintiff must serve the disclosures by the method most likely to be promptly received.

(c) Defendant's disclosures for evidentiary hearing.

(c)(1) If the defendant requests an evidentiary hearing under Section 78B-6-810, the defendant must serve on the plaintiff with the request:

(c)(1)(A) any document not yet disclosed that the defendant will offer at the hearing; and

(c)(1)(B) the name and, if known, the address and telephone number of each fact witness the defendant may call at the evidentiary hearing and, except for an adverse party, a summary of the expected testimony.

(c)(2) If the plaintiff requests an evidentiary hearing under Section 78B-6-810, the defendant must serve the disclosures required by paragraph (c)(1) on the plaintiff no less than 2 days before the hearing. The defendant must serve the disclosures by the method most likely to be promptly received.

(d) Pretrial disclosures; objections. No later than 14 days before trial, the parties must serve the disclosures required by Rule 26(a)(5)(A). No later than 7 days before trial, each party must serve and file counter designations of deposition testimony, objections and grounds for the objections to the use of a deposition and to the admissibility of exhibits.

(e) Failure to comply. Failure of a party to comply with this rule does not preclude any other party from obtaining a default judgment, proceeding with the case, or seeking other relief from the court.

(f) Notice of requirements. Notice of the requirements of this rule must be served on the defendant with the summons and complaint.

Rule 53. Masters.

(a) Appointment and compensation. Any or all of the issues in an action may be referred by the court to a master upon the written consent of the parties, or the court may appoint a master in an action, in accordance with the provisions of Subdivision (b) of this rule. As used in these rules the word "master" includes a referee, an auditor, and an examiner. The compensation to be allowed to a master shall be fixed by the court, and shall be charged upon such of the parties or paid out of any fund or subject matter of the action, which is in the custody and control of the court as the court may direct. The master shall not retain his report as security for his compensation; but when the party ordered to pay the compensation allowed by the court does not pay it after notice and within the time prescribed by the court, the master is entitled to a writ of execution against the delinquent party.

(b) Reference. A reference to a master shall be the exception and not the rule. In actions to be tried by a jury, a reference shall be made only when the issues are complicated; in actions to be tried without a jury, save in matters of account, a reference shall, in the absence of the written consent of the parties, be made only upon a showing that some exceptional condition requires it.

(c) Powers. The order of reference to the master may specify or limit his powers and may direct him to report only upon particular issues or to do or perform particular acts or to receive and report evidence only and may fix the time and place for beginning and closing the hearings and for the filing of the master's report. Subject to the specifications and limitations stated in the order, the master has and shall exercise the power to regulate all proceedings in every hearing before him and to do all acts and take all measures necessary or proper for the efficient performance of his duties under the order. ~~He~~ The master may require the production before him of evidence upon all matters embraced in the reference, including the production of all books, papers, vouchers, documents, and writings applicable thereto. ~~He~~ The master may rule upon the admissibility of evidence unless otherwise directed by the order of reference and has the authority to put witnesses on oath and may ~~himself~~ examine them and may call the parties to the action and examine them upon oath. When a party so requests, the master shall make a record of the evidence offered and excluded in the same manner and subject to the same limitations as provided in the Utah Rules of Evidence for a court sitting without a jury.

(d) Proceedings.

(d)(1) Meetings. When a reference is made, the clerk shall forthwith furnish the master with a copy of the order of reference. Upon receipt thereof unless the order of reference otherwise provides, the master shall forthwith set a time and place for the first meeting of the parties or their attorneys, or the parties and their licensed paralegal practitioners, ~~-~~to be held within 21 days after the date of the order of reference and shall notify the parties or their attorneys or the parties and their licensed paralegal practitioners. It is the duty of the master to proceed with all reasonable diligence. Either party, on notice to the parties and master, may apply to the court for an order requiring the master to speed the proceedings and to make his report. If a party fails to appear at the time and place

appointed, the master may proceed ex parte or, in his discretion, adjourn the proceedings to a future day, giving notice to the absent party of the adjournment.

(d)(2) Witnesses. The parties may procure the attendance of witnesses before the master by the issuance and service of subpoenas as provided in Rule 45. If without adequate excuse a witness fails to appear or give evidence, ~~he~~ the witness may be punished as for a contempt and be subjected to the consequences, penalties, and remedies provided in Rules 37 and 45.

(d)(3) Statement of accounts. When matters of accounting are in issue before the master, ~~he~~ the master may prescribe the form in which the accounts shall be submitted and in any proper case may require or receive in evidence a statement by a certified public accountant who is called as a witness. Upon objection of a party to any of the items thus submitted or upon a showing that the form of statement is insufficient, the master may require a different form of statement to be furnished, or the accounts or specific items thereof to be proved by oral examination of the accounting parties or upon written interrogatories or in such other manner as ~~he~~ the master directs.

(e) Report.

(e)(1) Contents and filing. The master shall prepare a report upon the matters submitted to him by the order of reference and, if required to make findings of fact and conclusions of law, ~~he~~ the master shall set them forth in the report. ~~He~~ The master shall file the report with the clerk of the court and in an action to be tried without a jury, unless otherwise directed by the order of reference, shall file with it a transcript of the proceedings and of the evidence and the original exhibits. The clerk shall forthwith mail to all parties notice of the filing.

(e)(2) In non-jury actions. In an action to be tried without a jury the court shall accept the master's findings of fact unless clearly erroneous. Within 14 days after being served with notice of the filing of the report any party may serve written objections thereto upon the other parties. Application to the court for action upon the report and upon objections thereto shall be by motion and upon notice as prescribed in Rule 6(d). The court after hearing may adopt the report or may modify it or may reject it in whole or in part or may receive further evidence or may recommit it with instructions.

(e)(3) In jury actions. In an action to be tried by a jury the master shall not be directed to report the evidence. ~~His~~ The master's findings upon the issues submitted to him are admissible as evidence of the matters found and may be read to the jury, subject to the ruling of the court upon any objections in point of law which may be made to the report.

(e)(4) Stipulation as to findings. The effect of a master's report is the same whether or not the parties have consented to the reference; but, when the parties stipulate that a master's findings of fact shall be final, only questions of law arising upon the report shall thereafter be considered.

(e)(5) Draft report. Before filing ~~his~~ the report, a master may submit a draft thereof to counsel for all parties for the purpose of receiving their suggestions.

(f) Objections to appointment of master. A party may object to the appointment of any person as a master on the same grounds as a party may challenge for cause any prospective trial juror in the trial of a civil action. Such objections must be heard and disposed of by the court in the same manner as a motion.

Rule 54. Judgments; costs.

(a) Definition; form. "Judgment" as used in these rules includes a decree or order that adjudicates all claims and the rights and liabilities of all parties or any other order from which an appeal of right lies. A judgment should not contain a recital of pleadings, the report of a master, or the record of prior proceedings.

(b) Judgment upon multiple claims and/or involving multiple parties. When an action presents more than one claim for relief—whether as a claim, counterclaim, cross claim, or third party claim—and/or when multiple parties are involved, the court may enter judgment as to one or more but fewer than all of the claims or parties only if the court expressly determines that there is no just reason for delay. Otherwise, any order or other decision, however designated, that adjudicates fewer than all the claims or the rights and liabilities of fewer than all the parties does not end the action as to any of the claims or parties, and may be changed at any time before the entry of judgment adjudicating all the claims and the rights and liabilities of all the parties.

(c) Demand for judgment. A default judgment must not differ in kind from, or exceed in amount, what is demanded in the pleadings. Every other judgment should grant the relief to which each party is entitled, even if the party has not demanded that relief in its pleadings.

(d) Costs.

(d)(1) To whom awarded. Unless a statute, these rules, or a court order provides otherwise, costs should be allowed to the prevailing party. Costs against the state of Utah, its officers and agencies may be imposed only to the extent permitted by law.

(d)(2) How assessed. The party who claims costs must not later than 14 days after the entry of judgment file and serve a verified memorandum of costs. A party dissatisfied with the costs claimed may, within 7 days after service of the memorandum of costs, object to the claimed costs.

(d)(3) Memorandum filed before judgment. A memorandum of costs served and filed after the verdict, or at the time of or subsequent to the service and filing of the findings of fact and conclusions of law, but before the entry of judgment, is deemed served and filed on the date judgment is entered.

(e) Amending the judgment to add costs, ~~or~~ attorney, or licensed paralegal practitioner fees. If the court awards costs under paragraph (d) or attorney or licensed paralegal practitioner fees under Rule 73 after the judgment is entered, the prevailing party must file and serve under Rule 5 an amended judgment including the costs or attorney or licensed paralegal practitioner fees. The court will enter the amended judgment unless another party objects within 7 days after the amended judgment is filed.

Advisory Committee Notes

Rule 56. Summary judgment.

(a) Motion for summary judgment or partial summary judgment. A party may move for summary judgment, identifying each claim or defense—or the part of each claim or defense—on which summary judgment is sought. The court shall grant summary judgment if the moving party shows that there is no genuine dispute as to any material fact and the moving party is entitled to judgment as a matter of law. The court should state on the record the reasons for granting or denying the motion. The motion and memoranda must follow Rule 7 as supplemented below.

(a)(1) Instead of a statement of the facts under Rule 7, a motion for summary judgment must contain a statement of material facts claimed not to be genuinely disputed. Each fact must be separately stated in numbered paragraphs and supported by citing to materials in the record under paragraph (c)(1) of this rule.

(a)(2) Instead of a statement of the facts under Rule 7, a memorandum opposing the motion must include a verbatim restatement of each of the moving party's facts that is disputed with an explanation of the grounds for the dispute supported by citing to materials in the record under paragraph (c)(1) of this rule. The memorandum may contain a separate statement of additional materials facts in dispute, which must be separately stated in numbered paragraphs and similarly supported.

(a)(3) The motion and the memorandum opposing the motion may contain a concise statement of facts, whether disputed or undisputed, for the limited purpose of providing background and context for the case, dispute and motion.

(a)(4) Each material fact set forth in the motion or in the memorandum opposing the motion under paragraphs (a)(1) and (a)(2) that is not disputed is deemed admitted for the purposes of the motion.

(b) Time to file a motion. A party seeking to recover upon a claim, counterclaim or cross-claim or to obtain a declaratory judgment may move for summary judgment at any time after service of a motion for summary judgment by the adverse party or after 21 days from the commencement of the action. A party against whom a claim, counterclaim, or cross-claim is asserted or a declaratory judgment is sought may move for summary judgment at any time. Unless the court orders otherwise, a party may file a motion for summary judgment at any time no later than 28 days after the close of all discovery.

(c) Procedures.

(c)(1) Supporting factual positions. A party asserting that a fact cannot be genuinely disputed or is genuinely disputed must support the assertion by:

(c)(1)(A) citing to particular parts of materials in the record, including depositions, documents, electronically stored information, affidavits or declarations, stipulations (including those made for purposes of the motion only), admissions, interrogatory answers, or other materials; or

(c)(1)(B) showing that the materials cited do not establish the absence or presence of a genuine dispute.

(c)(2) Objection that a fact is not supported by admissible evidence. A party may object that the material cited to support or dispute a fact cannot be presented in a form that would be admissible in evidence.

(c)(3) Materials not cited. The court need consider only the cited materials, but it may consider other materials in the record.

(c)(4) Affidavits or declarations. An affidavit or declaration used to support or oppose a motion must be made on personal knowledge, must set out facts that would be admissible in evidence, and must show that the affiant or declarant is competent to testify on the matters stated.

(d) When facts are unavailable to the nonmoving party. If a nonmoving party shows by affidavit or declaration that, for specified reasons, it cannot present facts essential to justify its opposition, the court may:

(d)(1) defer considering the motion or deny it without prejudice;

(d)(2) allow time to obtain affidavits or declarations or to take discovery; or

(d)(3) issue any other appropriate order.

(e) Failing to properly support or address a fact. If a party fails to properly support an assertion of fact or fails to properly address another party's assertion of fact as required by paragraph (c), the court may:

(e)(1) give an opportunity to properly support or address the fact;

(e)(2) consider the fact undisputed for purposes of the motion;

(e)(3) grant summary judgment if the motion and supporting materials—including the facts considered undisputed—show that the moving party is entitled to it; or

(e)(4) issue any other appropriate order.

(f) Judgment independent of the motion. After giving notice and a reasonable time to respond, the court may:

(f)(1) grant summary judgment for a nonmoving party;

(f)(2) grant the motion on grounds not raised by a party; or

(f)(3) consider summary judgment on its own after identifying for the parties material facts that may not be genuinely in dispute.

(g) Failing to grant all the requested relief. If the court does not grant all the relief requested by the motion, it may enter an order stating any material fact—including an item of damages or other relief—that is not genuinely in dispute and treating the fact as established in the case.

(h) Affidavit or declaration submitted in bad faith. If satisfied that an affidavit or declaration under this rule is submitted in bad faith or solely for delay, the court—after notice and a reasonable time to respond—may order the submitting party to pay the other party the reasonable expenses, including attorney's or licensed paralegal practitioner's fees, it incurred as a result. The court may also hold an offending party or attorney or licensed paralegal practitioner in contempt or order other appropriate sanctions.

Advisory Committee Notes

Rule 58B. Satisfaction of judgment.

(a) Satisfaction by acknowledgment. Within 28 days after full satisfaction of the judgment, the owner or the owner's attorney or licensed paralegal practitioner must file an acknowledgment of satisfaction in the court in which the judgment was entered. If the owner is not the original judgment creditor, the owner or owner's attorney or licensed paralegal practitioner must also file proof of ownership. If the satisfaction is for part of the judgment or for fewer than all of the judgment debtors, it must state the amount paid or name the debtors who are released.

(b) Satisfaction by order of court. The court in which the judgment was first entered may, upon motion and satisfactory proof, enter an order declaring the judgment satisfied.

(c) Effect of satisfaction. Satisfaction of a judgment, whether by acknowledgement or order, discharges the judgment, and the judgment ceases to be a lien as to the debtors named and to the extent of the amount paid. A writ of execution or a writ of garnishment issued after partial satisfaction must include the partial satisfaction and must direct the officer to collect only the balance of the judgment, or to collect only from the judgment debtors remaining liable.

(d) Filing certificate of satisfaction in other counties. After satisfaction of a judgment, whether by acknowledgement or order, has been entered in the court in which the judgment was first entered, a certificate by the clerk showing the satisfaction may be filed with the clerk of the district court in any other county where the judgment has been entered.

Rule 65A. Injunctions.

(a) **Preliminary injunctions.**

(a)(1) **Notice.** No preliminary injunction shall be issued without notice to the adverse party.

(a)(2) **Consolidation of hearing.** Before or after the commencement of the hearing of an application for a preliminary injunction, the court may order the trial of the action on the merits to be advanced and consolidated with the hearing of the application. Even when this consolidation is not ordered, any evidence received upon an application for a preliminary injunction which would be admissible at the trial on the merits becomes part of the trial record and need not be repeated at the trial. This subdivision (a)(2) shall be so construed and applied as to save to the parties any rights they may have to trial by jury.

(b) **Temporary restraining orders.**

(b)(1) **Notice.** No temporary restraining order shall be granted without notice to the adverse party or that party's attorney, or to the adverse party and the adverse party's licensed paralegal practitioner, unless

(b)(1)(A) it clearly appears from specific facts shown by affidavit or by the verified complaint that immediate and irreparable injury, loss, or damage will result to the applicant before the adverse party or that party's attorney or licensed paralegal practitioner can ~~be~~ respond ~~heard~~ in opposition, and

(b)(1)(B) the applicant or the applicant's attorney or licensed paralegal practitioner certifies to the court in writing as to the efforts, if any, that have been made to give notice and the reasons supporting the claim that notice should not be required.

(b)(2) **Form of order.** Every temporary restraining order shall be endorsed with the date and hour of issuance and shall be filed forthwith in the clerk's office and entered of record. The order shall define the injury and state why it is irreparable. The order shall expire by its terms within such time after entry, not to exceed 14 days, as the court fixes, unless within the time so fixed the order, for good cause shown, is extended for a like period or unless the party against whom the order is directed consents that it may be extended for a longer period. The reasons for the extension shall be entered of record.

(b)(3) **Priority of hearing.** If a temporary restraining order is granted, the motion for a preliminary injunction shall be scheduled for hearing at the earliest possible time and takes precedence over all other civil matters except older matters of the same character. When the motion comes on for hearing, the party who obtained the temporary restraining order shall have the burden to show entitlement to a preliminary injunction; if the party does not do so, the court shall dissolve the temporary restraining order.

(b)(4) **Dissolution or modification.** On 48 hours' notice to the party who obtained the temporary restraining order without notice, or on such shorter notice to that party as the court may prescribe, the

adverse party may appear and move its dissolution or modification. In that event the court shall proceed to hear and determine the motion as expeditiously as the ends of justice require.

(c) **Security.**

(c)(1) **Requirement.** The court shall condition issuance of the order or injunction on the giving of security by the applicant, in such sum and form as the court deems proper, unless it appears that none of the parties will incur or suffer costs, attorney or licensed paralegal practitioner fees, or damage as the result of any wrongful order or injunction, or unless there exists some other substantial reason for dispensing with the requirement of security. No such security shall be required of the United States, the State of Utah, or of an officer, agency, or subdivision of either; nor shall it be required when it is prohibited by law.

(c)(2) **Amount not a limitation.** The amount of security shall not establish or limit the amount of costs, including reasonable attorney or licensed paralegal practitioner fees incurred in connection with the restraining order or preliminary injunction, or damages that may be awarded to a party who is found to have been wrongfully restrained or enjoined.

(c)(3) **Jurisdiction over surety.** A surety upon a bond or undertaking under this rule submits to the jurisdiction of the court and irrevocably appoints the clerk of the court as agent upon whom any papers affecting the surety's liability on the bond or undertaking may be served. The surety's liability may be enforced on motion without the necessity of an independent action. The motion and such notice of the motion as the court prescribes may be served on the clerk of the court who shall forthwith mail copies to the persons giving the security if their addresses are known.

(d) **Form and scope.** Every restraining order and order granting an injunction shall set forth the reasons for its issuance. It shall be specific in terms and shall describe in reasonable detail, and not by reference to the complaint or other document, the act or acts sought to be restrained. It shall be binding only upon the parties to the action, their officers, agents, servants, employees, ~~and~~ attorneys, and licensed paralegal practitioners, and upon those persons in active concert or participation with them who receive notice, in person or through counsel, licensed paralegal practitioner, or otherwise, of the order. If a restraining order is granted without notice to the party restrained, it shall state the reasons justifying the court's decision to proceed without notice.

(e) **Grounds.** A restraining order or preliminary injunction may issue only upon a showing by the applicant that:

(e)(1) The applicant will suffer irreparable harm unless the order or injunction issues;

(e)(2) The threatened injury to the applicant outweighs whatever damage the proposed order or injunction may cause the party restrained or enjoined;

(e)(3) The order or injunction, if issued, would not be adverse to the public interest; and

(e)(4) There is a substantial likelihood that the applicant will prevail on the merits of the underlying claim, or the case presents serious issues on the merits which should be the subject of further litigation.

(f) **Domestic relations cases.** Nothing in this rule shall be construed to limit the equitable powers of the courts in domestic relations cases.

Advisory Committee Notes

Rule 73. ~~Attorney~~ [Legal professional] [Attorney or licensed paralegal practitioner] fees.

[(a) **Definitions.** For purposes of this rule, legal professional means an attorney or licensed paralegal practitioner.] **[Alternative: no definition here]**

(~~a~~b) **Time in which to claim.** [Attorney or licensed paralegal practitioner] [Legal professional fees must be claimed by filing a motion for[~~attorney~~] [legal professional] 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~~c) **Content of motion.** The motion must:

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

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

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

(~~b~~c)(4) specify the amount of [~~attorney~~] [legal professional] fees claimed and any amount previously awarded; and

(~~b~~c)(5) disclose if the [~~attorney~~] [legal professional] 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 or licensed paralegal practitioner] [legal professional] will not share the fee in violation of Rule of Professional Conduct 5.4.

(~~c~~d) **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, licensed paralegal practitioner, paralegal, administrative assistant, etc.) and hourly rate of the persons who performed the work, and establishes that the claimed fee is reasonable.

(~~d~~e) **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~~f) **Fees claimed in complaint.** If a party claims attorney or licensed paralegal practitioner fees under paragraphs (~~f~~g)(1) and (3), or attorney fees under paragraph (g)(2), the complaint must state the basis for the ~~attorney~~ fees, cite the law or attach a copy of the contract authorizing the award, and state that the [attorney or licensed paralegal practitioner] [legal professional] will not share the fee in violation of Rule of Professional Conduct 5.4.

(~~f~~g) **Fees.** [~~Attorney~~] [Legal professional] ~~f~~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~~g)(1), (~~f~~g)(2) and (~~f~~g)(3), and only where the augmented fees sought exceed those already awarded.

(~~f~~g)(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~~f) of this rule, the

request for judgment may include a request for [attorney or licensed paralegal practitioner] [legal professional] fees, and the clerk or the court shall allow any amount requested up to $350.00 for such [~~attorney~~] [legal professional] fees without a supporting affidavit.

(~~f~~g)(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~~g)(3) **Post Judgment Collections.** When a party has established its entitlement to [~~attorney~~] [legal professional] fees under any paragraph of this rule, and subsequently:

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

(~~f~~g)(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 or licensed paralegal practitioner] [legal professional] fees request without a supporting affidavit if it approves the writ or motion:

Action	[Attorney or Licensed Paralegal Practitioner] [Legal Professional] 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~~g)(4) **Fees in excess of the schedule.** If a party seeks attorney or licensed paralegal practitioner fees in excess of the amounts set forth in paragraphs (~~f~~g)(1), (~~f~~g)(~~2~~3), or attorney fees in excess of the amounts set forth in paragraphs (g~~f~~)(~~3~~2), the party shall comply with paragraphs (a) through (c) of this rule.

(~~f~~g)(5) **Objections.** Nothing in this paragraph shall be deemed to eliminate any right a party may have to object to any claimed [attorney or licensed paralegal practitioner] [legal professional] fees.

Advisory Committee Notes

Rule 74. Withdrawal of [counsel] [legal professional].

[(a) **Definitions.** For purposes of this rule, legal professional means an attorney or licensed paralegal practitioner.] [For purposes of this rule, "counsel" means an attorney or licensed paralegal practitioner.]

(~~a~~b) **Notice of withdrawal.** [An attorney or licensed paralegal practitioner] [A legal professional] may withdraw from the case by filing with the court and serving on all parties a notice of withdrawal. The notice of withdrawal shall include the address of the [attorney's or licensed paralegal practitioner] [legal professional]'s client and a statement that no motion is pending and no hearing or trial has been set. If a motion is pending or a hearing or trial has been set, [an attorney or licensed paralegal practitioner] [a legal professional] may not withdraw except upon motion and order of the court. The motion to withdraw shall describe the nature of any pending motion and the date and purpose of any scheduled hearing or trial.

(~~b~~c) **Withdrawal of limited appearance.** [An attorney or licensed paralegal practitioner] [A legal professional] who has entered a limited appearance under Rule 75 shall withdraw from the case upon the conclusion of the purpose or proceeding identified in the Notice of Limited Appearance:

(~~b~~c)(1) by filing and serving a notice of withdrawal; or

(~~b~~c)(2) if permitted by the judge, by the attorney orally announcing the attorney's withdrawal on the record in a proceeding.

[An attorney or licensed paralegal practitioner] [A legal professional] who seeks to withdraw before the conclusion of the purpose or proceeding shall proceed under subdivision (a).

(~~c~~d) **Notice to Appear or Appoint Counsel.** If [an attorney or licensed paralegal practitioner] [a legal professional] withdraws other than under ~~subdivision~~ paragraph (b), dies, is suspended from the practice of law, is disbarred, or is removed from the case by the court, the opposing party shall serve a Notice to Appear or Appoint Counsel on the unrepresented party, informing the party of the responsibility to appear personally or appoint counsel. A copy of the Notice to Appear or Appoint Counsel must be filed with the court. No further proceedings shall be held in the case until 21 days after filing the Notice to Appear or Appoint Counsel unless the unrepresented party waives the time requirement or unless otherwise ordered by the court.

(~~d~~e) **Substitution of counsel.** [An attorney or licensed paralegal practitioner] [A legal professional] may replace the [attorney or licensed paralegal practitioner] ~~counsel~~ [legal professional] of record by filing and serving a notice of substitution of [attorney or licensed paralegal practitioner] ~~counsel~~ [legal professional] signed by the former [attorney or licensed paralegal practitioner] ~~counsel~~[legal professional], the new [attorney or licensed paralegal practitioner] ~~counsel~~ [legal professional], and the client. Court approval is not required if the new [attorney or licensed paralegal practitioner] ~~counsel~~ [legal professional] certifies in the notice of substitution that [they] ~~counsel~~ [the legal professional] will comply with the existing hearing schedule and deadlines.

Rule 75. Limited appearance.

(a) **Purposes.** An attorney or licensed paralegal practitioner acting pursuant to an agreement with a party for limited representation that complies with the Utah Rules of Professional Conduct and the limits of the licensed paralegal practitioner's license may enter an appearance limited to one or more of the following purposes:

(a)(1) filing a pleading or other paper;

(a)(2) acting as legal counsel for a specific motion;

(a)(3) acting as legal counsel for a specific discovery procedure;

(a)(4) acting as legal counsel for a specific hearing, including a trial, pretrial conference, or an alternative dispute resolution proceeding; or

(~~a~~b)(5) any other purpose with leave of the court.

(b) **Notice.** Before commencement of the limited appearance the attorney or licensed paralegal practitioner shall file a Notice of Limited Appearance signed by the attorney or licensed paralegal practitioner and the party or, if permitted by the judge, the attorney may orally announce the attorney's limited appearance on the record in a proceeding. The Notice shall specifically describe the purpose and scope of the appearance and state that the party remains responsible for all matters not specifically described in the Notice. The clerk shall enter on the docket the attorney's or licensed paralegal practitioner's name and a brief statement of the limited appearance. The Notice of Limited Appearance and all actions taken pursuant to it are subject to Rule 11.

(c) **Motion to clarify.** Any party may move to clarify the description of the purpose and scope of the limited appearance.

(d) **Party remains responsible.** A party on whose behalf an attorney or licensed paralegal practitioner enters a limited appearance remains responsible for all matters not specifically described in the Notice.

(e) **Entry of appearance not required for preparation of pleadings or papers only.** An attorney or licensed paralegal practitioner whose agreement with a party is limited to the preparation, but not the filing, of a pleading or other paper is not required to enter an appearance.

Rule 76. Notice of contact information change.

An attorney, ~~and~~ unrepresented party, licensed paralegal practitioner, or a party represented on a limited basis must promptly notify the court in writing of any change in that person's address, e-mail address, phone number, or fax number.

Rule 81. Applicability of rules in general.

(a) **Special statutory proceedings**. These rules shall apply to all special statutory proceedings, except insofar as such rules are by their nature clearly inapplicable. Where a statute provides for procedure by reference to any part of the former Code of Civil Procedure, such procedure shall be in accordance with these rules.

(b) **Probate and guardianship.** These rules shall not apply to proceedings in uncontested probate and guardianship matters, but shall apply to all proceedings subsequent to the joinder of issue therein, including the enforcement of any judgment or order entered.

(c) **Application to small claims.** These rules shall not apply to small claims proceedings except as expressly incorporated in the Small Claims Rules.

(d) **On appeal from or review of a ruling or order of an administrative board or agency.** These rules shall apply to the practice and procedure in appealing from or obtaining a review of any order, ruling or other action of an administrative board or agency, except insofar as the specific statutory procedure in connection with any such appeal or review is in conflict or inconsistent with these rules.

(e) **Application in criminal proceedings.** These rules of procedure shall also govern in any aspect of criminal proceedings where there is no other applicable statute or rule, provided, that any rule so applied does not conflict with any statutory or constitutional requirement.

(f) **Application to licensed paralegal practitioners.** To the extent consistent with their limited license, licensed paralegal practitioners must be treated in the same manner as attorneys for purposes of interpreting and implementing these rules. If a rule permits or requires an attorney to sign or file a document, a licensed paralegal practitioner may do so only if there is an applicable court-approved form available and the practice is consistent with the scope of their license. References to attorney fees in these rules include, as applicable, fees charged by licensed paralegal practitioners.

Tab 5

URCP Rule 73

URCP007A. Motion to enforce order and for sanctions. New. Creates a new, uniform process for enforcing court orders through a regular motion practice. Replaces the current order to show cause process. (9 comments)

URCP007. Pleadings allowed; motions, memoranda, hearings, orders. Amend. Repeals paragraph (q) and moves the provisions addressing the court's inherent power to initiate order to show cause proceedings to new Rule 7A(h). (0 comments)

URCP100. Coordination of cases pending in district court and juvenile court. Amend. To ensure better coordination of cases between courts, Rule 100 is amended to clarify that parties who have a child custody case in one court must notify that court of any other custody case in another court involving the same party or the same child. Custody cases include minor guardianship. (0 comments)

https://www.utcourts.gov/utc/rules-comment/2019/06/27/rules-of-civil-procedure-comment-period-closes-august-11-2019/.

Comments

David Corbett

I generally like the proposed amendments of Rule 7A, but I am concerned about the requirement that an order to show cause be personally served and that service on counsel can only be completed with the court's permission. In the domestic law context, many OSC orders are served for violations of temporary orders before there is a final order. In those cases, I think the rule should allow for service on counsel of record without prior permission from the Court. This provision would allow for the issues to proceed expeditiously, without unnecessary cost (i.e. process servers fees), and solves problems of a non-complying party's efforts to evade service. Allowing service on counsel of record ensures appropriate notice on the non-complying party while alleviating the other concerns. If there is no counsel of record, or if more than 90 days have passed since entry of a final order (as in Rule 5(b)(1)(B)), then the requirement of personal service is entirely appropriate.

Nancy's response: This comment takes issue with the personal service requirement and the requirement that permission be requested to serve counsel under Rule 5 found in paragraph (d). The commenter raises a good point. I'm not sure of the genesis for this paragraph, except that perhaps the involvement of LPP's is what led to this, but it does seem to overcomplicate the domestic process.

Catherine Conklin

The rule contains provision for a reply, but not a response. In a domestic case, a response may be filed 14 days before, and then the reply 7 days before.

It would be helpful if the rule addressed counter-motions. One ongoing debate is whether a counter-motion for order to show cause also requires issuance of an order to show cause. This rule could clarify whether an order to appear would be required for a counter-motion.

Nancy's response: Commissioner Conklin questions whether the rule provides for a response. It does at paragraph (c)(5). She raises a concern that the rule does not address counter-motions, which currently causes confusion. The subcommittee should probably draft some language on this point.

David Corbett

I fully concur with the proposal that the rule directly address the procedure for a counter-motion for order to show cause.

Nancy's response: This comment agrees that the rule should eliminate the confusion on counter-motions.

Eric K. Johnson

I believe proposed Rule 7A DOES provide for a response memo and a reply memo (although the language could be clearer) at proposed Rule 7A(c)(5):

"(c)(5) state that no written response is required but is permitted if filed at least 14 days before the hearing, unless the court sets a different time, and that any written response must follow the requirements of Rule 7, and Rule 101 if the hearing will be before a commissioner."

Still, it may be an improvement to word Rule 7A(c)(5) this way:

"(c)(5) state that no memorandum opposing the motion for order to show cause or other written response is required but is permitted if filed at least 14 days before the hearing, unless the court sets a different time for such, and that any opposing memorandum or other written response must follow the requirements of Rule 7, and with Rule 101 if the hearing will be before a commissioner. Within 7 days after the opposing memorandum or other written response is filed, the moving party may file a reply memorandum. The reply memorandum must conform to the provisions of Rule 7, and with Rule 101 if the hearing will be before a commissioner."

Commissioner Conklin makes a very important point in observing that proposed Rule 7A does not currently provide for a counter motion procedure, and such a procedure is needed, if in no other settings than in domestic relations cases. Domestic relations parties counter move (and have genuine cause to do so) frequently. Rule 7A does needs to provide for a counter motion procedure.

Regarding Commissioner Conklin's question as to whether a counter-motion for order to show cause also requires issuance of an order to show cause, I would conclude that, if we are going to require show-cause proceedings to be pursuant to and preceded

by a court order, a counter motion for OSC does require issuance of an order to show cause.

Which raises an even more fundamental question: why require show-cause proceedings to necessitate an "order" to show cause? Could we not streamline the process by eliminating the court order element?

Why not simply have order enforcement and compliance issues handled something like this?:

1) Start the process with a "motion to show cause" and/or "motion for enforcement of court order" and/or "motion to sanction noncompliance with court order" or the like;

2) Schedule hearing under Rule 101 and either have the moving party send notice of the hearing or have the court clerk send notice of the hearing, if the motion is before a commissioner. If the motion is not before a commissioner, then proceed to step 3;

3) Exchange opposition and reply memoranda, affidavits, etc.

4) Schedule hearing under Rule 7, if either party or the court requests/requires a hearing, and then either have the moving party send notice of the hearing or have the court clerk send notice of the hearing;

5) If the movant prevails on the motion, issue an "order on MOTION to show cause"

What vital purpose does an "order" to show cause serve? It has always appeared to me that requiring a court order "to show cause" is a needlessly complex and fancy way of noticing up a hearing on a motion seeking to enforce a court order and/or sanction noncompliance.

Nancy's response: This comment 1) offers suggestions on improving the language in (c)(5) with respect to responses; 2) agrees with Commissioner Conklin on the need for counter-motions in the rule; and 3) offers a way to simplify the order to show cause process.

Chad Rasmussen

As an attorney that does a good amount of collections, many supplemental proceedings occur. Often a judgment debtor fails to appear after being served (personally or via substitute service) with an order to appear for what is commonly called a debtor's exam. However, when they fail to appear typically an order to show cause or a bench warrant is requested by the judgment creditor. The judgment creditor then has to apply for and get the appropriate order issued, but the request and grant was already made at the original hearing where the judgment debtor failed to appear. In this context, under the proposed Rule 7A, it seems that having to file a motion, wait, and then serve the order prior to at least 28 days of the next hearing is a bit too much given that the Court already knows the party failed to appear at the original hearing/debtor's exam (such failure to appear happened in the presence of the court and constitutes non-

compliance with the order). I think that the proposed Rule 7A include language that exempts from this procedure action (such as non-appearance at a hearing by a judgment debtor) that occurs before the court's presence. Otherwise this rule change would contribute to increased costs and waste of time. Maybe language in subsection (g) of Rule 7A can state something like "This rule does not apply to an order to show cause that is issued by the court on its own initiative or that is issued for conduct or non-conduct happening in the presence of the court and that constitutes a violation of the court's order."

Nancy's response: This comment notes that the some of the provisions of the rule may be too onerous for debt collection cases and lead to increased costs and time. The commenter offers a suggestion for addressing this concern in paragraph (g).

Eric K. Johnson

Requiring personal service of an order to show cause upon a represented party strikes me as totally unnecessary.

First, given that the rules of civil procedure (rule 5) already provide that "[I]f a party is represented by an attorney, a paper [i.e., "pleadings and other papers"] served under this rule MUST be served upon the attorney unless the court orders service upon the party," why create a rule that turns rule 5 on its head?

Second, no compelling interest or purpose is served by requiring that an order to show cause be personally served on a represented party, instead of on the represented party's attorney. If the rules committee somehow sees a need for the moving party to send (as opposed to formally "serve") a notice of the order to show cause to the nonmoving party, then wouldn't it be sufficient to provide in Rule 7A something like this?:

"(d) Service of the order. If the court grants the motion and issues an order to attend hearing, the moving party must have the order, the motion, and all supporting affidavits:

(d)(1) personally served on the nonmoving party in a manner provided in Rule 4 at least 28 days before the hearing, if a party is not represented by an attorney; or

(d)(2) if a party is represented by an attorney, served on the nonmoving party's counsel of record in a manner provided in Rule 5 at least 28 days before the hearing. In addition to serving the nonmoving party's counsel, the moving party must also send, at least 28 days before the hearing, a copy of the order, the motion, and all supporting affidavits to the nonmoving party, either by mail to the nonmoving party's last known physical mailing address or by email to the nonmoving party's last known email address."

The moving party or moving party's attorney could then certify in a "certificate of mailing/emailing" appended to the the order, the motion, and all supporting affidavits

that the order, the motion, and all supporting affidavits were mailed/emailed to the nonmoving party.

Nancy's response: This comment offers suggestions on improving the service issues identified by other comments. But as noted earlier, the committee should discuss how this impacts LPP's.

J. Bogart

The proposed amendment seems designed for the context of family law proceedings. It makes little sense in the context of collections, as explained above. It also makes little sense in the context of other civil proceedings. The proposal seems to conflict with the Rules of Professional Conduct as it directs communication with a represented party. It requires unnecessary costs and delays. I can see no reason for serving a represented party personally when all other motions and papers are served on counsel. This is unnecessary. Supposing a hearing at least 28 days out, to be preceded by a telephonic conference really means the hearing on the OSC will be more like 60 days or more. As we are talking about violation of a court order, what is the value of such delay? In the normal civil context, it just erodes the importance of court orders. The process here is more onerous than summary judgment. A separate rule for domestic matters makes more sense to me. The Committee should be looking at ways to make enforcement of Rules and orders easier and quicker, not harder and slower.

The rule also has some drafting ambiguities. Who sets the time and date of the hearing? As drafted, it could be ether the court or the counsel.

Nancy's response: This comment also highlights issues with service and observes that this rule may be too general and that a rule specific to domestic cases would be better. It also suggests that there is an ambiguity as to who sets the time and date of the hearing. Practically speaking, the court should be setting this, so a clarifying amendment may be appropriate.

Rowland Graff

In the Fifth District, personal service has been required for years. It is very beneficial if the attorney did not withdraw at the time of the judgment and has not had contact with the client in years. If the contact information has changed, this rule puts the onus on the enforcing party not the former attorney to find the old client. As for the comments that it violates the rules of Professional Responsibility, Rule 4.2 states that an attorney "may communicate with another's client if authorized to do so by any law, rule, or court order".

Rule 7A(f) should be modified to function like the Fifth District Local Rule. https://www.utcourts.gov/resources/rules/ucja/view.html?title=Rule%2010-1-501%20Orders%20to%20show%20cause.&rule=ch10/10-1-501.htm There is an inital hearing, where all that is decided is if the allegations are going to be contested. If the

allegation is admitted, the court can resolve the issue immediately. If it is contested, the parties usually get a evidentiary hearing date at the hearing that works for all parties and the actually contested issues are determined. (i.e. the party admits that he hadn't paid, he is contesting his ability to pay.)

Under Rule 7A(f), the movant need to prepare for an evidentiary hearing on that first hearing. That means subpoenaing witness and preparing to place your evidence on the record. Once there, you may find out that the court does not have time that day for the evidentiary hearing and you have to come back. This causes additional expense for the movant because of the duplicate preparation for the rescheduled hearing. By not having an evidentiary hearing on the first hearing, everyone is on the same page and it promotes judicial economy.

Nancy's response: This comment supports the use of personal service and suggests that the committee modify the rule to function more like the 5th and 6th district rules. My understanding is that the rule is a modified version of those rules already. Perhaps more flexibility could be built in, but the committee should discuss that.

Willard Bishop

1. To begin with, there is no need for a state-wide uniform rule concerning orders to show cause. The Fifth and Sixth Judicial Districts have adopted their own rules, which are particularly good. The entire judicial system in Utah would be better off if those involved in the proposed changes would simply leave things alone and quit meddling.

2. If new Civil Rule 7A is adopted, it should be revised to include a first appearance requirement which is not an evidentiary hearing, to determine whether the party against whom the order to show cause is brought contest the allegations, whether an evidentiary hearing is required, and the length of the evidentiary hearing. See Local Supplemental Rules 10-1-501, and 10-1-602, the first applying in the Fifth District and the second applying in the Sixth District. This a particularly important provision.

3. Setting up a process which requires an evidentiary hearing at the first appearance is not only inefficient, but it "front loads" costs of preparation. Under the proposed Civil Rule 7A, there is no way reasonably to determine how long the hearing will take, how many witnesses will be required, and creates a great deal of uncertainty. Local Supplemental Rules 10-1-501 and 10-1-602, applicable in the Fifth and Sixth Districts, respectively, avoid this problem. Many orders to show cause are quickly resolved at the first appearance, with no requirement of an evidentiary hearing.

4. From the standpoint of practitioners, any rule relating to enforcement of orders or orders to show cause, should be allowed to be adjusted, modified, created and/or amended by the judges in the local district, with input from local practitioners, thus meeting the particular conditions in any particular district. Proposed Civil Rule 7A does not permit such adjustment.

Nancy's response: This comment takes issue with having a statewide rule. The commenter makes suggestions to include a first appearance requirement, which the committee has essentially done by adding the telephone conference. The evidentiary hearing comes after that. Because the telephone conference is not required, it gives judges the option of having a one-step or two-step process, depending on the needs of the case. The committee should discuss whether there is a need for change based on this commenter's feedback.

Tab 6