Agenda

Advisory Committee on Rules of Civil Procedure

September 25, 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 26.4: review of comments	4:05	Tab 2	Nancy Sylvester
Licensed Paralegal Practitioners and the Civil Rules: New Rule 86	4:20	Tab 3	Nancy Sylvester
Draft Rule 65C: Version approved by clerks of court and AG's Office.	4:35	Tab 4	Nancy Sylvester
Amendments to Rule 7A based on comments Approval of Rules 7 and 100	4:40	Tab 5	Lauren DiFrancesco (subcommittee chair), Jim Hunnicutt, Judge Holmberg, Susan Vogel.
Rule 68 Subcommittee report on progress	5:10		Judge Clay Stucki (subcommittee chair), Leslie Slaugh, Rod Andreason, Susan Vogel
Service of subpoenas: discussion of proposal based on last meeting	5:15	Tab 6	Nancy Sylvester
Advisory committee notes	5:25	Tab 7	Group D: Judge Andrew Stone, Judge James Blanch, Bryan Pattison, Judge Laura Scott
Forming a technology subcommittee	5:45		Trevor Lee, Susan Vogel
Other business	5:55		Jonathan Hafen

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

2019-2020 Meeting Schedule:

October 16, 2019

November 20, 2019

January 22, 2020

February 26, 2020

March 25, 2020

April 22, 2020

May 27, 2020

June 24, 2020

September 23, 2020

October 28, 2020

November 18, 2020

Tab 1

UTAH SUPREME COURT ADVISORY COMMITTEE
ON RULES OF CIVIL PROCEDURE

Meeting Minutes – August 28, 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**		
Brooke McKnight	**X**		
Ash McMurray, Recording Secretary	**X**		
Nancy Sylvester, Staff	**X**		

(1) WELCOME AND APPROVAL OF MINUTES

Jonathan Hafen welcomed the committee and introduced Brook McKnight, a new committee member, and Ash McMurray the new recording secretary. Mr. Hafen asked for approval of the minutes. The minutes were approved unanimously.

(2) RULE 4 AND ELECTRONIC ACCEPTANCE OF SERVICE

Lane Gleaves (Mr. Gleaves) and Tyler Gleaves of Utah Court Services presented on their system of electronic service of process, which has evolved in response to feedback from judges and law firms. The presentation compared electronic service to certified mail and highlighted security features, including requiring individuals receiving service to provide their phone numbers and the last four digits of their social security numbers. Lauren DiFrancesco asked whether the system verifies phone numbers, and Mr. Gleaves explained that the system does not verify phone numbers but that requiring recipients to provide a phone number is a higher level of verification than used for in-person service. Susan Vogel raised concerns regarding the use of IP addresses, and Mr. Gleaves clarified that service is delivered, not to IP addresses, but to email addresses, and that the system saves IP addresses of devices used to download documents in case recipients contest service. Judge Laura Scott raised concerns regarding whether the system merely provided service or also required acceptance of service. Judge Andrew Stone raised concerns regarding the proof of service details needed in affidavits of electronic service to guarantee the identities of individuals served, given that electronic service does not involve witnesses, physical addresses, or signatures. The subcommittee was asked to discuss and prepare a proposal to address acceptance and proof of service issues.

(3) SERVICE OF SUBPOENAS: DISCUSSION OF NEED FOR SERVICE OF SUPPORTING DOCUMENTS

Michael Drechsel introduced a legislator's request that documents accompanying civil subpoenas be made electronic via a weblink to court resources. He explained the practical problem officers face when they need to print lengthy civil subpoenas from their vehicles. Mr. Slaugh noted that the proposal to provide documents via weblink could extend to other documents, such as writs of execution and writs of garnishment. Susan Vogel raised concerns that elderly individuals unfamiliar or uncomfortable with digital technology and online resources would require assistance. Judge Stone noted that those who do not read English already face a similar problem. Larissa Lee suggested that the documents could be condensed and include a telephone number for those who need assistance. James Hunnicutt mentioned that the documents can be and often are reduced to a single ten-page document, and Ms. DiFrancesco noted that federal courts have condensed the documents to a single page that includes a telephone number and other information for additional resources. Nancy Sylvester was asked to create a proposed amendment to Rule 45 using the federal form as a model.

(4) LICENSED PARALEGAL PRACTITIONERS AND THE CIVIL RULES

Ms. Sylvester introduced the committee to the issue of clarifying the applicability of the Utah Rules of Civil Procedure to licensed paralegal practitioners (LPPs). The committee discussed adding "licensed paralegal practitioner" throughout the rule where attorneys are included. Mr. Slaugh suggested that "LPP" could be defined to apply attorney rules to LPPs except where doing so would go beyond the scope of permitted practice. Mr. Slaugh also suggested that the term "attorney" throughout the rules could be replaced by "legal professional," which would be defined to include both attorneys and LPPs. Judge Stone raised concerns that such changes could create access to justice problems by making LPP fees equivalent to attorney fees. Judge Amber Mettler, Mr. Hafen, and Ms. Lee also raised concerns that such changes could inappropriately expand the role of LPPs. Rod Anderson suggested an alternative solution of creating a new Rule 86 aggregating all LPP rules and a fee schedule in one place. Mr. Hafen and Ms. Sylvester were asked to create a proposal for a Rule 86.

(5) REVIEW OF COMMENTS TO RULES 7A, 7, 100

Ms. DiFrancesco introduced the comments to the draft language of Rule 7A that recently circulated for public input. The committee discussed potential concerns regarding ex parte communications. Mr. Hunnicutt was asked to explore the possibility of having different tracks for different case types. The subcommittee will come back next month with a proposal to address the concerns raised in the comments. Approval of Rules 7 and 100, which received no comments, was deferred until next month.

(6) OTHER BUSINESS

The committee discussed the Supreme Court's approval of a new Utah Rules of Probate Procedure area.

(7) ADJOURNMENT.

The remaining issues were deferred until next month. The fall meeting schedule was discussed. The meeting adjourned at 5:50 pm. The next meeting will be held September 25, 2019 at 4:00 pm.

Tab 2

URCP Rule 26.4, CJA Rule 6-506

URCP026.04. Provisions governing disclosure and discovery in contested proceedings under Title 75 of the Utah Code. New. Carves out the circumstances under which an objection to a probate petition may be made, as well as the initial disclosures and timelines for discovery.

CJA06-506. Procedure for contested matters filed in the probate court. New. Codifies a long-standing probate mediation practice in the Third District, makes probate mediation statewide, institutes a pre-mediation conference, and addresses the role of interested persons.

https://www.utcourts.gov/utc/rules-comment/2019/06/24/rules-of-civil-procedure-and-code-of-judicial-administration-comment-period-closes-august-8-2019/.

Comments

Anonymous

(1)(B): "Upon the filing of a written objection with the court in accordance with Rule 26.4(c)(2) of the Utah Rules of Civil Procedure, all probate disputes will be automatically referred by the court to the Alternative Dispute Resolution (ADR) Program under Rule 4-510.05 of the Utah Code of Judicial Administration, unless the court waives mediation" should be changed to allow private mediators to also mediate contested probate disputes or allow the ADR program to contract private mediators to mediate contested probate disputes.

Nancy's response:

This comment addresses CJA 6-506. In the Third District, where this program first piloted many years ago, mediation has always been done through the ADR program. The court has an interest in using mediators vetted through the ADR program from a consumer protection standpoint.

Jeffrey Bahls

Both of these proposed rules are poorly constructed and are not designed for the fair and orderly administration of an estate.

The URCP 026.4 rule has been designed to favor the apparent personal representative or the first person/entity to file petition for appointment as the personal representative. The time frames for objection, notice and response are ridiculously short. For an ill disposed petitioner could easily take control of an estate where the family is in turmoil due to a sudden death or there is a huge distance/ time problem. Under the proposed URCP 026.04 there is almost no time for a family member with an

interest in the estate to learn what is going on, find and hire skilled counsel, gather information, and file an objection. In this day and age with scattered families not only over the US but world wide this proposed rule fails to take in these practical considerations. Where there is a disabled person involved, a frequent occurrence, it is even more difficult for him or her to operate within the confines of the proposed rule.

Nancy's response:

This comment addresses URCP 26.4. Regarding the time frame issues he raises, paragraph (c)(3)(D) allows departure from the timing of disclosures for any reason, which could include the distance issue. (c)(4)(D) allows the same. It probably makes sense to add the same type of provision to paragraph (c)(2), as follows: "The court may modify the timing for filing a written objection for any reason justifying departure from these rules."

The CJA 06-506 is equally deficient. The issues in an estate are typically (1) valuation of assets; (2) management of the estate; (3) distribution of those assets; (4) expenses of administration; (5) tax issues; (6) fees of personal representative; and (7) conflicts of interest. Mediation is a good way of resolving many of the more mundane property distribution issues in a particular estate and maybe some management and expense issues. Most of the remaining categories are not easily address by mediation. These are most frequently complicated issues of fact (like valuation, expenses, and management) and of law (like taxes, conflicts, fees of the personal representative, and distribution). As presently drawn the mandatory nature of the rule is an obstacle to the very flexibility that is needed to mold the role of the court to particular situations. The time frames for response and action is also not well served for the same reasons previously discussed. I would suggest that rule require the court to hold a mandatory conference on these issues once raised after a filing and a response to determine if mediation is a reasonable way to resolve the issues or whether discovery and hearing or the filing of briefs on pure matters of law be appropriate. This is particularly important where minors and disabled persons are involved. The rule as drawn only favors personal representatives who want to cram down a result, novel a good result.

Nancy's response:

This comment addresses CJA 6-506. I would suggest that the rule already does what the commenter would like to see done in providing that the court can waive mediation. But perhaps the rule could be bolstered in (1)(C), for example, by adding a provision that says something to the effect of "determining whether the case contains complicated issues of fact and law that are better resolved in the ordinary court of litigation rather than through mediation."

Jeff Skoubye

CJA06-506 line 83 and 84 has a strikeout that makes no sense and needs to be corrected. I believe the stricken language should not be stricken.

Nancy's response:

This comment addresses CJA 6-506. I agree that the stricken language should remain in. This was an oversight.

Earl Tanner

I agree that the strike-outs in proposed CJA06-506 lines 83 and 84 seem inappropriate.

I would add that the "informal trial under Rule 4-1001" at line 107 puzzles me since I can't find such a rule in CJA.

Nancy's response:

This comment addresses CJA 6-506. I agree that the stricken language at lines 83 and 84 should remain in. This was an oversight. The informal trial rule language at line 207 should be stricken, though. That rule is still in the pipeline.

Proposed Rule 26.4 at lines 62-63 requires pretrial disclosures no later than 14 days before the hearing. Rule 26(a)(5)(B) sets that date at 28 days before the hearing and requires a counter designation at 14 days that includes objections to depositions and exhibits. Lines 62-63 should be stricken and the usual rules retained.

Nancy's response:

This comment addresses URCP 26.4. The commenter makes a good point. If paragraph (d) is kept in, it should be titled, "Pretrial disclosures under Rule 26(a)(5)." But I think he's right that this paragraph may be redundant to (c)(5) unless we want to make the point that "trial" in Rule 26(a)(5) also refers to evidentiary hearings.

ADR Committee of the Judicial Council

Proposed addition to Rule 6-506 (1)(C):

Insert additional provision as new (iii) "selecting the mediator or determining the process and time frame for selecting the mediator. The mediator shall be selected as provided in Code of Judicial Administration Rule 4-510.05(4),"

Nancy's response:

This comment addresses CJA 6-506 and what will occur at the premediation conference. This could be wordsmithed since these subparagraphs are offset by commas, but the ADR Committee has suggested a good addition.

Andrew Riggle

The Disability Law Center (DLC) is the state's protection and advocacy agency for Utahns with disabilities. We are also a member of the Working Interdisciplinary Network of Guardianship Stakeholders.

The DLC is concerned by lines 13-14, which require an objection to a petition be made at a hearing and filed in writing within 7 days. A respondent may fear objecting publicly, especially if a parent or other individual whose relationship is important to him or her is the petitioner. Relatedly, for physical, sensory, cognitive, or other reasons, a respondent may find it difficult to submit an objection in writing. Therefore, we recommend language be added clarifying that a court should offer assistance to a respondent in filing an objection using his or her preferred method or means of communication.

The DLC appreciates the reference in lines 32-34 to the statute's preference for limited guardianship or conservatorship. However, we think it will be reinforced by not only identifying what alternatives, if any, have been explored, but whether and how come each was found to be inappropriate or inadequate. This could be accomplished by including language similar to "If any of these alternatives exist, why are they not sufficient to support or protect the respondent?," as found in the Bench Book under "Questions a Judge Should Consider in Determining Capacity, Appropriate Guardian, and Limited Guardianship."

Thank you for your time and consideration of our feedback. If you have questions or would like more information, please do not hesitate to contact us.

Nancy's response:

This comment addresses URCP 26.4. Regarding lines 13-14, as I mentioned above, a provision in (c)(2) could be added, as follows: "The court may modify the timing for filing a written objection for any reason justifying departure from these rules." And also add to that, "If a respondent is unable to object in writing due to disability or related circumstance, the court may accept an objection filed using the person's preferred means of communication." I am a bit concerned about putting in the rule that the court will assist the respondent in objecting to the petition because the court's role is to act on information it receives, and I would be concerned about a perception that the court favors the respondent in providing too much assistance. I think this would be a good opportunity for the court to appoint a court visitor to investigate the respondent's circumstances and preferences and/or appoint counsel. Regarding lines 32-34, I think this paragraph already assumes what the commenter proposes. The rule asks petitioners to tell the court how the guardianship or conservatorship may be limited.

Andrew Riggle

The Disability Law Center (DLC) is the state's protection and advocacy agency for Utahns with disabilities. We are also a member of the Working Interdisciplinary Network of Guardianship Stakeholders.

Given that lines 12-14 of CJA 06-506 require all matters under Title 75 in which an objection is filed to be referred to mediation, the DLC agrees with Mr. Bahls comment, "that [the] rule require the court to hold a mandatory conference on these issues once raised after a filing and a response to determine if mediation is a reasonable way to resolve the issues or whether discovery and hearing or the filing of briefs on pure matters of law be appropriate. This is particularly important where minors and disabled persons are involved."

Regardless of whether it occurs as a result of mediation or a hearing, guardianship and, to a lesser extent, conservatorship can lead to the elimination of some or all of a respondent's civil rights. Therefore, the DLC strongly recommends that lines 29-30 and 49-51 include the requirement of counsel from UCA 75-5-303(2)(b), and follow the process in 75-5-303(5)(d) if a respondent is not represented by counsel.

If mediation is mandated, line 82's requirement that the parties share the cost of mediation could be problematic or prohibitive for many respondents with disabilities who may wish to object, but often have little in the way of income or assets.

Thank you for your time and consideration of our feedback. If you have questions or would like more information, please do not hesitate to contact us.

Nancy's response:

This comment addresses CJA 6-506. Regarding lines 12-14, as I mentioned above, perhaps the rule could be bolstered in (1)(C), for example, by adding a provision that says something to the effect of "determining whether the case contains complicated issues of fact and law that are better resolved in the ordinary court of litigation rather than through mediation." Regarding the requirement of counsel, I would instead add a provision to paragraph (1)(C) that says something to the effect of, "ensuring that the respondent has been provided counsel or that the process provided in Utah Code section 75-5-303(5)(d) has been followed." Regarding line 82, this concern may be addressed in line 87, which involves a waiver of mediation fees.

Rule 26.4. Provisions governing disclosure and discovery in contested proceedings under Title 75 of the Utah Code.

(a) **Scope.** This rule applies to all contested actions arising under Title 75 of the Utah Code.

(b) **Definition.** A probate dispute is a contested action arising under Title 75 of the Utah Code.

(c) **Designation of parties, objections, initial disclosures, and discovery.**

(c)(1) **Designation of Parties**. For purposes of Rule 26, the plaintiff in probate proceedings is presumed to be the petitioner in the matter, and the defendant is presumed to be any party filing an objection. Once a probate dispute arises, and based on the facts and circumstances of the case, the court may designate an interested person as plaintiff, defendant, or non-party for purposes of discovery. Only an interested person who has appeared will be treated as a party for purposes of discovery.

(c)(2) **Objection to the petition**.

(c)(2)(A) Any oral objection must be made at a scheduled hearing on the petition and then reduced to writing within 7 days, unless the written objection has been previously filed with the court. If a respondent is unable to object in writing due to disability or related circumstance, the court may accept an objection filed using the person's preferred means of communication.

(c)(2)(B) A written objection must set forth the grounds for the objection and any supporting authority, must be filed with the court, and must be mailed to the parties named in the petition and any interested persons as provided in Utah Code § 75-1-201(24), unless the written objection has been previously filed with the court.

(c)(2)(C) If the petitioner and objecting party agree to an extension of time to file the written objection, notice of the agreed upon date must be filed with the court.

(c)(2)(D) The court may modify the timing for filing a written objection for any reason justifying departure from these rules.

(c)(2)(D) In the event no written or other objection under paragraph (c)(2)(A) is timely filed, the court will act on the original petition upon the petitioner's filing of a request to submit pursuant to Rule 7 of the Utah Rules of Civil Procedure.

(c)(3) **Initial disclosures in guardianship and conservatorship matters.**

(c)(3)(A) In addition to the disclosures required by Rule 26(a), and unless included in the petition, the following documents must be served by the party in possession or control of the documents within 14 days after a written objection has been filed:

(c)(3)(A)(i) any document purporting to nominate a guardian or conservator, including a will, trust, power of attorney, or advance healthcare directive, copies of which must be served upon all interested persons; and

(c)(3)(A)(ii) a list of less restrictive alternatives to guardianship or conservatorship that the petitioner has explored and ways in which a guardianship or conservatorship of the respondent may be limited.

This paragraph supersedes Rule 26(a)(2).

(c)(3)(B) The initial disclosure documents must be served on the parties named in the probate petition and the objection and anyone who has requested notice under Title 75 of the Utah Code:

(c)(3)(C) If there is a dispute regarding the validity of an original document, the proponent of the original document must make it available for inspection by the contesting party within 14 days of the date of referral to mediation unless the parties agree to a different date.

(c)(3)(D) The court may modify the content and timing of the disclosures required in this rule or in Rule 26(a) for any reason justifying departure from these rules.

(c)(4) **Initial disclosures in all other probate matters.**

(c)(4)(A) In addition to the disclosures required by Rule 26(a), and unless included in the petition, the following documents must be served by the party in possession or control of the documents within 14 days after a written objection has been filed: any other document purporting to nominate a representative after death, including wills, trusts, and any amendments to those documents, copies of which must be served upon all interested persons. This paragraph supersedes Rule 26(a)(2).

(c)(4)(B) The initial disclosure documents must be served on the parties named in the probate petition and the objection and anyone who has requested notice under Title 75 of the Utah Code.

(c)(4)(C) If there is a dispute regarding the validity of an original document, the proponent of the original document must make it available for inspection by the contesting party within 14 days of the date of referral to mediation unless the parties agree to a different date.

(c)(4)(D) The court may modify the content and timing of the disclosures required in this rule or in Rule 26(a) for any reason justifying departure from these rules.

(c)(5) **Discovery once a probate dispute arises**. Except as provided in this rule or as otherwise ordered by the court, once a probate dispute arises, discovery will proceed pursuant to the Rules of Civil Procedure, including the other provisions of Rule 26.

(d) **Pretrial disclosures under Rule 26(a)(5)~~, objections~~.** The term "trial" in Rule 26(a)(5)(B) also refers to evidentiary hearings for purposes of this rule. ~~No later than 14 days prior to an evidentiary hearing or trial, the parties must serve the disclosures required by Rule 26(a)(5)(A).~~

Rule 6-506. Procedure for contested matters filed in the probate court.

Intent:

To establish procedures for contested matters filed in the probate court.

Applicability:

This rule applies to matters filed under Title 75, Utah Uniform Probate Code when an objection is made orally or in writing upon the record (a "probate dispute").

Statement of the Rule:

(1) **General Provisions.** When there is a probate dispute:

(1)(A) Rule 4-510.05 of the Utah Code of Judicial Administration and Rule 101 of the Utah Rules of Court-Annexed Alternative Dispute Resolution apply.

(1)(B) Upon the filing of a written objection with the court in accordance with Rule 26.4(c)(2) of the Utah Rules of Civil Procedure, all probate disputes will be automatically referred by the court to the Alternative Dispute Resolution (ADR) Program under Rule 4-510.05 of the Utah Code of Judicial Administration, unless the court waives mediation.

(1)(C) After an objection has been filed, and unless the court has waived mediation, the court will schedule the matter for a pre-mediation conference for purposes of the following:

(1)(C)(i) determining whether the case contains complicated issues of fact and law that are better resolved in the ordinary court of litigation rather than through mediation;

(1)(C)(ii) ensuring that the respondent has been provided counsel or that the process provided in Utah Code section 75-5-303(5)(d) has been followed;

~~(1)(C)(i)~~(1)(C)(iii) determining all interested persons who should receive notice of mediation;~~,~~

(1)(C)(iv) determining whether any interested person should be excused from mediation~~,~~;

~~(1)(C)(ii)~~(1)(C)(v) selecting the mediator or determining the process and time frame for selecting the mediator, ~~. The mediator shall be selected~~ as provided in Code of Judicial Administration Rule 4-510.05(4)~~,~~;

~~(1)(C)(iii)~~(1)(C)(vi) determining the issues for mediation~~,~~;

~~(1)(C)(iv)~~(1)(C)(vii) setting deadlines~~,~~;

~~(1)(C)(v)~~(1)(C)(viii) modifying initial disclosures if necessary and addressing discovery~~,~~;

~~(1)(C)(vi)~~(1)(C)(ix) determining how mediation costs will be paid; and

~~(1)(C)(vii)~~(1)(C)(x) entering a mediation order.

(1)(D) The court will send notification of the pre-mediation conference to petitioner, respondent, and all interested persons identified in the petition at the hearing and any objection as of the date of the notification. The notification will include a statement that

Comment [NS1]: This is an amendment by the ADR Committee.

(1)(D)(i) the interested persons have a right to be present and participate in the mediation, the interested persons have a right to consult with or be represented by their own counsel, and the interests of the interested persons cannot be negotiated unless the interested persons specifically waive that right in writing; and

(1)(D)(ii) unless excused by the court, an interested person who fails to participate after receiving notification of the mediation may be deemed to have waived their right to object to the resolution of the issues being mediated.

(2) **Procedure**

(2)(A) **Objections.** A party who files a timely written objection pursuant to Rule of Civil Procedure 26.4 is required to participate in the court-ordered mediation unless the court upon motion excuses the party's participation.

(2)(B) **Involvement of Interested Persons.**

(2)(B)(i) Any notice required under this rule must be served in accordance with Rule 5 of the Utah Rules of Civil Procedure.

(2)(B)(ii) Once mediation is scheduled, the petitioner must serve notice of the following to all interested persons:

(2)(B)(ii)(a) The time, date, and location of the scheduled mediation;

(2)(B)(ii)(b) The issues to be mediated as provided in the pre-mediation scheduling conference order;

(2)(B)(ii)(c) A statement that the interested persons have a right to be present and participate in the mediation, that the interested persons have a right to consult with or be represented by their own counsel, and that the interests of the interested persons cannot be negotiated unless the interested persons specifically waive that right in writing; and

(2)(B)(ii)(d) a statement that, unless excused by the court, an interested person who fails to participate after being served notice of the mediation may be deemed to have waived their right to object to the resolution of the issues being mediated.

(2)(B)(iii) Additional issues may be resolved at mediation as agreed upon by the mediating parties and the mediator.

(2)(B)(iv) Once the mediation has taken place, the petitioner must notify all interested persons in writing of the mediation's outcome, including any proposed settlement of additional issues.

(2)(B)(iv)(a) An excused person has the right to object to the settlement of any additional issue under (2)(B)(iii) within 7 days of receiving written notice of the settlement.

(2)(B)(iv)(b) Any objection to the settlement of additional issues must be reduced to a writing, set forth the grounds for the objection and any supporting authority, and be filed with the court and mailed to the parties named in the petition and any interested persons as provided in Utah Code § 75-1-201(24).

(2)(B)(iv)(c) Upon the filing of an objection to the settlement of additional issues, the case will proceed pursuant to paragraphs (2)(C) through (2)(I).

(2)(C) **Deadline for mediation completion.**

(2)(C)(i) Mediation must be completed within 60 days from the date of referral.

(2)(C)(ii) If the parties agree to a different date, the parties must file notice of the new date with the court.

(2)(D) **Mediation Fees.**

(2)(D)(i) If the estate or trust has liquid assets, and the personal representative, trustee, guardian, or conservator, as applicable, is a mediating party, the estate or trust must pay the mediator's fees.

(2)(D)(ii) Otherwise, the disputing parties will share the cost of the mediation but may later request reimbursement from the estate or trust if the estate or trust has liquid assets.

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(2)(D)(iii) A party may petition the court for a waiver of all or part of the mediation fees if the party cannot afford mediator fees or for other good cause.

(2)(D)(iv) If the court grants a waiver of mediation fees, the party must contact the ADR Director who will appoint a pro bono mediator.

(2)(E) **Initial disclosures.** Within 14 days after a written objection has been filed, the parties must comply with the initial disclosure requirements of Rule 26.4 of the Rules of Civil Procedure.

(2)(F) **Discovery once a probate dispute arises.** Except as provided in Rule 26.4 of the Rules of Civil Procedure or as otherwise ordered by the court, once a probate dispute arises, discovery will proceed pursuant to the Rules of Civil Procedure, including the other provisions of Rule 26.

(2)(G) **Completion of mediation.** Upon completion of mediation, the parties will notify the Court of the mediation's resolution pursuant to Rule 101 of the Utah Rules of Court-Annexed Alternative Dispute Resolution.

(2)(H) **Written settlement agreement.** If mediation results in a written settlement agreement, upon a motion from any party, the court may enter orders consistent with its terms. The filing of an objection under paragraph (2)(B)(iv)(a) does not preclude the court from entering orders consistent with the resolved issues.

(2)(I) **Remaining issues.** If issues remain to be resolved after the conclusion of mediation, the parties must request a pretrial conference with the assigned judge to establish the deadlines for any supplemental initial disclosures, fact discovery, expert disclosures, expert discovery, and readiness for trial~~, and to inform the parties of the availability of an informal trial under Rule 4-1001~~.

Tab 3

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: September 20, 2019
Re: LPP's and new Civil Rule 86

At our last meeting, the committee considered how to address Licensed Paralegal Practitioners in the rules. The discussion addressed changing language throughout the rules to say "legal professional" instead of attorney or counsel, or adding "or licensed paralegal practitioner" when a rule says attorney or counsel. The committee ultimately requested a single LPP rule that carves out which rules apply to LPP's and a addressing, for example, Rule 73's fee schedule. New Rule 86 is attached for your review.

Rule 86. Licensed Paralegal Practitioners.

(a) **Application of the Rules of Civil Procedure 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.

(b) **Terms "attorney" and "counsel."** Throughout these rules, where the terms "attorney" and "counsel" are used, they refer to legal professionals. Legal professionals are 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 this rule.

(c) **Papers served under Rule 5**. If a party is represented by a licensed paralegal practitioner, a paper served under Rule 5 must be served upon both the party and the licensed paralegal practitioner.

(d) **Discovery under Rule 26.** Licensed paralegal practitioners are not permitted to conduct discovery except for initial disclosures under Rule 26(a)(1)-(3).

(e) **Licensed paralegal fees.** Where these rules refer to attorney fees, they also mean licensed paralegal practitioner fees. Under Rule 73, the licensed paralegal practitioner may recover for the amounts provided in the rule without a supporting affidavit, except for the amount in paragraph (f)(2), fees upon entry of judgment after contested proceeding.

(f) **Limited appearance.** Under Rule 75, a 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.

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: September 20, 2019
Re: Rule 65C

The Attorney General's post-conviction office requested that Rule 65C be modified to make clear that the underlying criminal case records must be served on that office when a post-conviction petition is also served. In the past, judges have assumed that the AG's office had access to the underlying criminal case via Xchange. But the AG's office has access to only the public documents, so they proposed the attached amendments. The clerks of court have reviewed the amendments and approved them. The clerks of court will be working on a technology solution to the workload issues that attach to having to mail the entire criminal case out, but are satisfied for now that a CD or thumb drive will suffice with respect to the electronic documents.

Rule 65C. Post-conviction relief.

(a) Scope. This rule governs proceedings in all petitions for post-conviction relief filed under the Post-Conviction Remedies Act, Utah Code Title 78B, Chapter 9. The Act sets forth the manner and extent to which a person may challenge the legality of a criminal conviction and sentence after the conviction and sentence have been affirmed in a direct appeal under Article I, Section 12 of the Utah Constitution, or the time to file such an appeal has expired.

(b) Procedural defenses and merits review. Except as provided in paragraph (h), if the court comments on the merits of a post-conviction claim, it shall first clearly and expressly determine whether that claim is independently precluded under Section 78B-9-106.

(c) Commencement and venue. The proceeding shall be commenced by filing a petition with the clerk of the district court in the county in which the judgment of conviction was entered. The petition should be filed on forms provided by the court. The court may order a change of venue on its own motion if the petition is filed in the wrong county. The court may order a change of venue on motion of a party for the convenience of the parties or witnesses.

(d) Contents of the petition. The petition shall set forth all claims that the petitioner has in relation to the legality of the conviction or sentence. The petition shall state:

(d)(1) whether the petitioner is incarcerated and, if so, the place of incarceration;

(d)(2) the name of the court in which the petitioner was convicted and sentenced and the dates of proceedings in which the conviction was entered, together with the court's case number for those proceedings, if known by the petitioner;

(d)(3) in plain and concise terms, all of the facts that form the basis of the petitioner's claim to relief;

(d)(4) whether the judgment of conviction, the sentence, or the commitment for violation of probation has been reviewed on appeal, and, if so, the number and title of the appellate proceeding, the issues raised on appeal, and the results of the appeal;

(d)(5) whether the legality of the conviction or sentence has been adjudicated in any prior post-conviction or other civil proceeding, and, if so, the case number and title of those proceedings, the issues raised in the petition, and the results of the prior proceeding; and

(d)(6) if the petitioner claims entitlement to relief due to newly discovered evidence, the reasons why the evidence could not have been discovered in time for the claim to be addressed in the trial, the appeal, or any previous post-conviction petition.

(e) Attachments to the petition. If available to the petitioner, the petitioner shall attach to the petition:

(e)(1) affidavits, copies of records and other evidence in support of the allegations;

(e)(2) a copy of or a citation to any opinion issued by an appellate court regarding the direct appeal of the petitioner's case;

(e)(3) a copy of the pleadings filed by the petitioner in any prior post-conviction or other civil proceeding that adjudicated the legality of the conviction or sentence; and

(e)(4) a copy of all relevant orders and memoranda of the court.

(f) Memorandum of authorities. The petitioner shall not set forth argument or citations or discuss authorities in the petition, but these may be set out in a separate memorandum, two copies of which shall be filed with the petition.

(g) Assignment. On the filing of the petition, the clerk shall promptly assign and deliver it to the judge who sentenced the petitioner. If the judge who sentenced the petitioner is not available, the clerk shall assign the case in the normal course.

(h)(1) Summary dismissal of claims. The assigned judge shall review the petition, and, if it is apparent to the court that any claim has been adjudicated in a prior proceeding, or if any claim in the petition appears frivolous on its face, the court shall forthwith issue an order dismissing the claim, stating either that the claim has been adjudicated or that the claim is frivolous on its face. The order shall be sent by mail to the petitioner. Proceedings on the claim shall terminate with the entry of the order of dismissal. The order of dismissal need not recite findings of fact or conclusions of law.

(h)(2) A claim is frivolous on its face when, based solely on the allegations contained in the pleadings and attachments, it appears that:

(h)(2)(A) the facts alleged do not support a claim for relief as a matter of law;

(h)(2)(B) the claim has no arguable basis in fact; or

(h)(2)(C) the claim challenges the sentence only and the sentence has expired prior to the filing of the petition.

(h)(3) If a claim is not frivolous on its face but is deficient due to a pleading error or failure to comply with the requirements of this rule, the court shall return a copy of the petition with leave to amend within 21 days. The court may grant one additional 21-day period to amend for good cause shown.

(h)(4) The court shall not review for summary dismissal the initial post-conviction petition in a case where the petitioner is sentenced to death.

(i) Service of petitions. If, on review of the petition, the court concludes that all or part of the petition should not be summarily dismissed, the court shall designate the portions of the petition that are not dismissed and direct the clerk to serve a copy of the petition, attachments, ~~and~~ memorandum, and the record of the underlying criminal case being challenged, including all non-public documents, by mail upon the respondent. In lieu of mailing paper copies to the respondent, the clerk may mail to the respondent a compact disk or other external electronic storage device containing electronic copies of the records enumerated above

(i)(1) If the petition is a challenge to a felony conviction or sentence, the respondent is the state of Utah represented by the Attorney General. Service on the Attorney General shall be by mail at the following address:

Utah Attorney General's Office
Criminal Appeals
Post-Conviction Section
160 East 300 South, 6th Floor
P.O. Box 140854
Salt Lake City, UT 84114-0854

(i)(2) In all other cases, the respondent is the governmental entity that prosecuted the petitioner.

(j) Appointment of pro bono counsel. If any portion of the petition is not summarily dismissed, the court may, upon the request of an indigent petitioner, appoint counsel on a pro bono basis to represent the petitioner in the post-conviction court or on post-conviction appeal. In determining whether to appoint counsel the court shall consider whether the petition or the appeal contains factual allegations that will

require an evidentiary hearing and whether the petition involves complicated issues of law or fact that require the assistance of counsel for proper adjudication.

(k) Answer or other response. Within 30 days after service of a copy of the petition upon the respondent, or within such other period of time as the court may allow, the respondent shall answer or otherwise respond to the portions of the petition that have not been dismissed and shall serve the answer or other response upon the petitioner in accordance with Rule 5(b). Within 30 days (plus time allowed for service by mail) after service of any motion to dismiss or for summary judgment, the petitioner may respond by memorandum to the motion. No further pleadings or amendments will be permitted unless ordered by the court.

(l) Hearings. After pleadings are closed, the court shall promptly set the proceeding for a hearing or otherwise dispose of the case. The court may also order a prehearing conference, but the conference shall not be set so as to delay unreasonably the hearing on the merits of the petition. At the prehearing conference, the court may:

(l)(1) consider the formation and simplification of issues;

(l)(2) require the parties to identify witnesses and documents; and

(l)(3) require the parties to establish the admissibility of evidence expected to be presented at the evidentiary hearing.

(m) Presence of the petitioner at hearings. The petitioner shall be present at the prehearing conference if the petitioner is not represented by counsel. The prehearing conference may be conducted by means of telephone or video conferencing. The petitioner shall be present before the court at hearings on dispositive issues but need not otherwise be present in court during the proceeding. The court may conduct any hearing at the correctional facility where the petitioner is confined.

(n) Discovery; records.

(n)(1) Discovery under Rules 26 through 37 shall be allowed by the court upon motion of a party and a determination that there is good cause to believe that discovery is necessary to provide a party with evidence that is likely to be admissible at an evidentiary hearing.

(n)(2) The court may order either the petitioner or the respondent to obtain any relevant transcript or court records.

(n)(3) All records in the criminal case under review, including the records in an appeal of that conviction, are deemed part of the trial court record in the petition for post-conviction relief. A record from the criminal case retains the security classification that it had in the criminal case.

(o) Orders; stay.

(o)(1) If the court vacates the original conviction or sentence, it shall enter findings of fact and conclusions of law and an appropriate order. If the petitioner is serving a sentence for a felony conviction, the order shall be stayed for 7 days. Within the stay period, the respondent shall give written notice to the court and the petitioner that the respondent will pursue a new trial, pursue a new sentence, appeal the order, or take no action. Thereafter the stay of the order is governed by these rules and by the Rules of Appellate Procedure.

(o)(2) If the respondent fails to provide notice or gives notice that no action will be taken, the stay shall expire and the court shall deliver forthwith to the custodian of the petitioner the order to release the petitioner.

(o)(3) If the respondent gives notice that the petitioner will be retried or resentenced, the trial court may enter any supplementary orders as to arraignment, trial, sentencing, custody, bail, discharge, or other matters that may be necessary and proper.

(p) Costs. The court may assign the costs of the proceeding, as allowed under Rule 54(d), to any party as it deems appropriate. If the petitioner is indigent, the court may direct the costs to be paid by the governmental entity that prosecuted the petitioner. If the petitioner is in the custody of the Department of Corrections, Utah Code Title 78A, Chapter 2, Part 3 governs the manner and procedure by which the trial court shall determine the amount, if any, to charge for fees and costs.

(q) Appeal. Any final judgment or order entered upon the petition may be appealed to and reviewed by the Court of Appeals or the Supreme Court of Utah in accord with the statutes governing appeals to those courts.

Advisory Committee Notes

Tab 5

Utah State Courts

Nancy Sylvester

Rule 7A subcommittee proposal

DiFrancesco, Lauren E.H. Fri, Sep 20, 2019 at 9:53 AM
To: Nancy Sylvester, Jim Hunnicutt, Judge Kent Holmberg , Leslie Slaugh, Susan Vogel
Cc: "DiFrancesco, Lauren E.H."

Nancy –

The Rule 7A subcommittee met last night and here are our final drafts for the committee for new proposed Rules 7A and 7B. With these two new rules, I think Rule 7(q) should now be deleted. And we recognize the adoption Rule 7B may require some changes to Rule 101, which Judge Holmberg has agreed to discuss with the appropriate committee. We believe our changes address the comments, and to the extent it's not clear from the text that they do, we are happy to discuss it. Please let me know if there's anything else you need from our subcommittee before next week's meeting.

Best,
Lauren

Lauren E.H. DiFrancesco (née Hosler) | Attorney
STOEL RIVES LLP |

2 attachments

URCP 007A FINAL.docx
18K

URCP 007B FINAL.docx
18K

Rule 7A. Motion to enforce order and for sanctions.

(a) Motion. To enforce a court order or to obtain a sanctions order for violation of an order, a party must file an ex-parte motion to enforce order and for sanctions (if requested), pursuant to this rule and Rule 7. The motion must be filed in the same case in which that order was entered. The timeframes set forth in this rule, rather than those set forth in Rule 7, govern motions to enforce orders and for sanctions.

(b) Affidavit. The motion must state the title and date of entry of the order that the moving party seeks to enforce. The motion must be verified, or must be accompanied by at least one supporting affidavit that is based on personal knowledge and shows that the affiant is competent to testify on the matters set forth. The verified motion or affidavit must set forth facts that would be admissible in evidence and that would support a finding that the party has violated the order.

(c) Proposed order. The motion must be accompanied by a request to submit for decision and a proposed order to attend hearing, which must:

(c)(1) state the title and date of entry of the order that the motion seeks to enforce;

(c)(2) state the relief sought in the motion;

(c)(3) state whether the motion is requesting that the other party be held in contempt and, if so, state that the penalties for contempt may include, but are not limited to, a fine of up to $1000 and confinement in jail for up to 30 days;

(c)(4) order the other party to appear personally or through counsel at a specific place (the court's address) and date and time (left blank for the court clerk to fill in) to explain whether the nonmoving party has violated the order; and

(c)(5) state that no written response to the motion is required but is permitted if filed within 14 days of service of the order, unless the court sets a different time, and that any written response must follow the requirements of Rule 7.

(d)

(d) Service of the order. If the court issues an order to attend a hearing, the moving party must have the order, motion, and all supporting affidavits served on the nonmoving party at least 28 days before the hearing. Service must be in a manner provided in Rule 4 if the nonmoving party is not represented by counsel in the case. If the nonmoving party is represented by counsel in the case, service must be made on the nonmoving party's counsel of record in a manner provided in Rule 5. For purposes of this rule, a party is represented by counsel if, within the last 120 days, counsel for that party has served or filed any documents in the case. The court may shorten the 28 day period if:

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

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

(e) Opposition. A written opposition is not required, but if filed, must be filed within 14 days of service of the order, unless the court sets a different time, and must follow the requirements of Rule 7.

(f) Reply. If the nonmoving party files a written opposition, the moving party may file a reply within 7 days of the filing of the opposition to the motion, unless the court sets a different time. Any reply must follow the requirements of Rule 7.

(g) Hearing. At the hearing the court may receive evidence, hear argument, and rule upon the motion, or may request additional briefing or hearings. The moving party bears the burden of proof on all claims made in the motion. At the court's discretion, the court may convene a telephone conference before the hearing to preliminarily address any issues related to the motion, including whether the court would like to order a briefing schedule other than as set forth in this rule.

(h) Limitations. This rule does not apply to an order that is issued by the court on its own initiative. This rule does not apply in criminal cases or motions filed under Rule 37. Nothing in this rule is intended to limit or alter the inherent power of the court to initiate order to show cause proceedings to assess whether cases should be dismissed for failure to prosecute or to otherwise manage the court's docket, or to limit the authority of the court to hold a party in contempt for failure to appear pursuant to a court order.

(i) Orders to show cause. The process set forth in this rule replaces and supersedes the prior order to show cause procedure. An order to attend hearing serves as an order to show cause as that term is used in Utah law.

Rule 7B. Motion to enforce order and for sanctions in domestic law matters.

(a) Motion. To enforce a court order or to obtain a sanctions order for violation of an order, a party must file an ex-parte motion to enforce order and for sanctions (if requested), pursuant to this rule and Rule 7. The motion must be filed in the same case in which that order was entered. The timeframes set forth in this rule, rather than those set forth in Rule 7, govern motions to enforce orders and for sanctions. If the motion is to be heard by a commissioner, the motion must also follow the procedures of Rule 101. For purpose of this rule, an order includes a decree.

(b) Affidavit. The motion must state the title and date of entry of the order that the moving party seeks to enforce. The motion must be verified, or must be accompanied by at least one supporting affidavit that is based on personal knowledge and shows that the affiant is competent to testify on the matters set forth. The verified motion or affidavit must set forth facts that would be admissible in evidence and that would support a finding that the party has violated the order.

(c) Proposed order. The motion must be accompanied by a request to submit for decision and a proposed order to attend hearing, which must:

(c)(1) state the title and date of entry of the order that the motion seeks to enforce;

(c)(2) state the relief sought in the motion;

(c)(3) state whether the motion is requesting that the other party be held in contempt and, if so, state that the penalties for contempt may include, but are not limited to, a fine of up to $1000 and confinement in jail for up to 30 days;

(c)(4) order the other party to appear personally or through counsel at a specific place (the court's address) and date and time (left blank for the court clerk to fill in) to explain whether the nonmoving party has violated the order; and

(c)(5) state that no written response to the motion 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.

(d) Service of the order. If the court issues an order to attend a hearing, the moving party must have the order, motion, and all supporting affidavits served on the nonmoving party at least 28 days before the hearing. Service must be in a manner provided in Rule 4 if the nonmoving party is not represented by counsel in the case. If the nonmoving party is represented by counsel in the case, service must be made on the nonmoving party's counsel of record in a manner provided in Rule 5. For purposes of this rule, a party is represented by counsel if, within the last 120 days, counsel for that party has served or filed any documents in the case. The court may shorten the 28 day period if:

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

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

(e) Opposition. A written opposition is not required, but if filed, must be filed at least 14 days before the hearing, unless the court sets a different time, and must follow the requirements of Rule 7, and Rule 101 if the hearing will be before a commissioner.

(f) Reply. If the nonmoving party files a written opposition, the moving party may file a reply at least 7 days before the hearing, unless the court sets a different time. Any reply must follow the requirements of Rule 7, and Rule 101 if the hearing will be before a commissioner.

(g) Hearing. At the hearing the court may receive evidence, hear argument, and rule upon the motion, or may request additional briefing or hearings. The moving party bears the burden of proof on all claims made in the motion. At the court's discretion, the court may convene a telephone conference before the hearing to preliminarily address any issues related to the motion, including whether the court would like to order a briefing schedule other than as set forth in this rule.

(h) Counter Motions. A responding party may request affirmative relief only by filing a counter motion, to be heard at the same hearing. A counter motion need not be limited to the subject matter of the original motion. All of the provisions of this rule apply to counter motions except that a counter motion must be filed and served with the opposition. Any opposition to the counter motion must be filed and served no later than the reply to the motion. Any reply to the opposition to the counter motion must be filed and served at least 3 business days before the hearing in a manner that will cause the reply to be actually received by the party responding to the counter motion (i.e. hand-delivery, fax or other electronic delivery as allowed by rule or agreed by the parties). The party who filed the counter motion bears the burden of proof on all claims made in the counter motion. A separate proposed order is required only for counter motions to enforce a court order or to obtain a sanctions order for violation of an order, in which case the proposed order for the counter motion must:

(h)(1) state the title and date of entry of the order that the counter motion seeks to enforce;

(h)(2) state the relief sought in the counter motion;

(h)(3) state whether the counter motion is requesting that the other party be held in contempt and, if so, state that the penalties for contempt may include, but are not limited to, a fine of up to $1000 and confinement in jail for up to 30 days;

(h)(4) order the other party to appear personally or through counsel at the scheduled hearing to explain whether that party has violated the order; and

(h)(5) state that no written response to the countermotion is required, but that a written response is permitted if filed at least 7 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.

(i) Limitations. This rule does not apply to an order that is issued by the court on its own initiative. This rule applies only to domestic relations actions, including divorce; temporary separation; separate maintenance; parentage; custody; child support; adoptions; cohabitant abuse protective orders; child protective orders; civil stalking injunctions; grandparent visitation; and modification actions. Nothing in this

rule is intended to limit or alter the inherent power of the court to initiate order to show cause proceedings to assess whether cases should be dismissed for failure to prosecute or to otherwise manage the court's docket, or to limit the authority of the court to hold a party in contempt for failure to appear pursuant to a court order.

(j) Orders to show cause. The process set forth in this rule replaces and supersedes the prior order to show cause procedure. An order to attend hearing serves as an order to show cause as that term is used in Utah law.

URCP Rules 7A, 7, 100

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

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: Utah Supreme Court
From: Nancy Sylvester
Date: September 20, 2019
Re: Rule 45 Subpoenas

At our last meeting, Mike Drechsel presented a legislator's request that the accompanying documents to subpoenas be electronic (contain a link to court resources). The committee discussed including in the subpoena form an option to call someone for purposes of receiving the supporting papers in person or getting more information. The committee also discussed the federal courts' form as a potential model. Attached is a proposed amendment based on our discussions.

Frankly, I don't see the need for a rule amendment, but rather a recommendation to the Forms Committee on how the committee thinks the form should look moving forward. But the committee should discuss the pros and cons of a rule amendment versus simply modifying the court form.

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

Rule 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 that includes a list of court resources and contact information 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

UNITED STATES DISTRICT COURT

for the

_____ *Plaintiff*	)	
v.	)	Civil Action No.
_____ *Defendant*	)	

SUBPOENA TO TESTIFY AT A DEPOSITION IN A CIVIL ACTION

To:

_____

(Name of person to whom this subpoena is directed)

❒ *Testimony:* **YOU ARE COMMANDED** to appear at the time, date, and place set forth below to testify at a deposition to be taken in this civil action. If you are an organization, you must designate one or more officers, directors, or managing agents, or designate other persons who consent to testify on your behalf about the following matters, or those set forth in an attachment:

Place:	Date and Time:

The deposition will be recorded by this method: _____

❒ *Production:* You, or your representatives, must also bring with you to the deposition the following documents, electronically stored information, or objects, and must permit inspection, copying, testing, or sampling of the material:

The following provisions of Fed. R. Civ. P. 45 are attached – Rule 45(c), relating to the place of compliance; Rule 45(d), relating to your protection as a person subject to a subpoena; and Rule 45(e) and (g), relating to your duty to respond to this subpoena and the potential consequences of not doing so.

Date: _____

CLERK OF COURT

OR

_____ _____

Signature of Clerk or Deputy Clerk *Attorney's signature*

The name, address, e-mail address, and telephone number of the attorney representing *(name of party)* _____ _____, who issues or requests this subpoena, are:

Notice to the person who issues or requests this subpoena

If this subpoena commands the production of documents, electronically stored information, or tangible things before trial, a notice and a copy of the subpoena must be served on each party in this case before it is served on the person to whom it is directed. Fed. R. Civ. P. 45(a)(4).

Civil Action No.

PROOF OF SERVICE

(This section should not be filed with the court unless required by Fed. R. Civ. P. 45.)

I received this subpoena for *(name of individual and title, if any)* _____ on *(date)* _____ .

❒ I served the subpoena by delivering a copy to the named individual as follows: _____

_____

_____ on *(date)* _____ ; or

❒ I returned the subpoena unexecuted because: _____

_____ .

Unless the subpoena was issued on behalf of the United States, or one of its officers or agents, I have also tendered to the witness the fees for one day's attendance, and the mileage allowed by law, in the amount of $ _____ .

My fees are $ _____ for travel and $ _____ for services, for a total of $ 0.00 .

I declare under penalty of perjury that this information is true.

Date: _____

_____
Server's signature

_____
Printed name and title

_____
Server's address

Additional information regarding attempted service, etc.:

Print Save As... Add Attachment Reset

Federal Rule of Civil Procedure 45 (c), (d), (e), and (g) (Effective 12/1/13)

(c) Place of Compliance.

(1) ***For a Trial, Hearing, or Deposition.*** A subpoena may command a person to attend a trial, hearing, or deposition only as follows:

(A) within 100 miles of where the person resides, is employed, or regularly transacts business in person; or

(B) within the state where the person resides, is employed, or regularly transacts business in person, if the person

(i) is a party or a party's officer; or

(ii) is commanded to attend a trial and would not incur substantial expense.

(2) ***For Other Discovery.*** A subpoena may command:

(A) production of documents, electronically stored information, or tangible things at a place within 100 miles of where the person resides, is employed, or regularly transacts business in person; and

(B) inspection of premises at the premises to be inspected.

(d) Protecting a Person Subject to a Subpoena; Enforcement.

(1) ***Avoiding Undue Burden or Expense; Sanctions.*** A party or attorney responsible for issuing and serving a subpoena must take reasonable steps to avoid imposing undue burden or expense on a person subject to the subpoena. The court for the district where compliance is required must enforce this duty and impose an appropriate sanction—which may include lost earnings and reasonable attorney's fees—on a party or attorney who fails to comply.

(2) ***Command to Produce Materials or Permit Inspection.***

(A) *Appearance Not Required.* A person commanded to produce documents, electronically stored information, or tangible things, or to permit the inspection of premises, need not appear in person at the place of production or inspection unless also commanded to appear for a deposition, hearing, or trial.

(B) *Objections.* A person commanded to produce documents or tangible things or to permit inspection may serve on the party or attorney designated in the subpoena a written objection to inspecting, copying, testing, or sampling any or all of the materials or to inspecting the premises—or to producing electronically stored information in the form or forms requested. The objection must be served before the earlier of the time specified for compliance or 14 days after the subpoena is served. If an objection is made, the following rules apply:

(i) At any time, on notice to the commanded person, the serving party may move the court for the district where compliance is required for an order compelling production or inspection.

(ii) These acts may be required only as directed in the order, and the order must protect a person who is neither a party nor a party's officer from significant expense resulting from compliance.

(3) ***Quashing or Modifying a Subpoena.***

(A) *When Required.* On timely motion, the court for the district where compliance is required must quash or modify a subpoena that:

(i) fails to allow a reasonable time to comply;

(ii) requires a person to comply beyond the geographical limits specified in Rule 45(c);

(iii) requires disclosure of privileged or other protected matter, if no exception or waiver applies; or

(iv) subjects a person to undue burden.

(B) *When Permitted.* To protect a person subject to or affected by a subpoena, the court for the district where compliance is required may, on motion, quash or modify the subpoena if it requires:

(i) disclosing a trade secret or other confidential research, development, or commercial information; or

(ii) disclosing an unretained expert's opinion or information that does not describe specific occurrences in dispute and results from the expert's study that was not requested by a party.

(C) *Specifying Conditions as an Alternative.* In the circumstances described in Rule 45(d)(3)(B), the court may, instead of quashing or modifying a subpoena, order appearance or production under specified conditions if the serving party:

(i) shows a substantial need for the testimony or material that cannot be otherwise met without undue hardship; and

(ii) ensures that the subpoenaed person will be reasonably compensated.

(e) Duties in Responding to a Subpoena.

(1) ***Producing Documents or Electronically Stored Information.*** These procedures apply to producing documents or electronically stored information:

(A) *Documents.* A person responding to a subpoena to produce documents must produce them as they are kept in the ordinary course of business or must organize and label them to correspond to the categories in the demand.

(B) *Form for Producing Electronically Stored Information Not Specified.* If a subpoena does not specify a form for producing electronically stored information, the person responding must produce it in a form or forms in which it is ordinarily maintained or in a reasonably usable form or forms.

(C) *Electronically Stored Information Produced in Only One Form.* The person responding need not produce the same electronically stored information in more than one form.

(D) *Inaccessible Electronically Stored Information.* The person responding need not provide discovery of electronically stored information from sources that the person identifies as not reasonably accessible because of undue burden or cost. On motion to compel discovery or for a protective order, the person responding must show that the information is not reasonably accessible because of undue burden or cost. If that showing is made, the court may nonetheless order discovery from such sources if the requesting party shows good cause, considering the limitations of Rule 26(b)(2)(C). The court may specify conditions for the discovery.

(2) ***Claiming Privilege or Protection.***

(A) *Information Withheld.* A person withholding subpoenaed information under a claim that it is privileged or subject to protection as trial-preparation material must:

(i) expressly make the claim; and

(ii) describe the nature of the withheld documents, communications, or tangible things in a manner that, without revealing information itself privileged or protected, will enable the parties to assess the claim.

(B) *Information Produced.* If 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 that received the information of the claim and the basis for it. After being notified, a party must promptly return, sequester, or destroy the specified information and any copies it has; must not use or disclose the information until the claim is resolved; must take reasonable steps to retrieve the information if the party disclosed it before being notified; and may promptly present the information under seal to the court for the district where compliance is required for a determination of the claim. The person who produced the information must preserve the information until the claim is resolved.

(g) Contempt.

The court for the district where compliance is required—and also, after a motion is transferred, the issuing court—may hold in contempt a person who, having been served, fails without adequate excuse to obey the subpoena or an order related to it.

For access to subpoena materials, see Fed. R. Civ. P. 45(a) Committee Note (2013).

Tab 7

Utah State Courts

Nancy Sylvester <nancyjs@utcourts.gov>

Fwd: Section D working group on Civil Rules

Ahstone Wed, Aug 28, 2019 at 5:43 PM
To: Nancyjs <nancyjs@utcourts.gov>, "Jonathan O. Hafen" <jhafen@parrbrown.com>

Begin forwarded message:

From: Judge Andrew Stone
Date: Aug 26, 2019 at 9:27 AM
To: Bryan Pattison, Judge James Blanch, Judge Laura Scott
Subject: Section D working group on Civil Rules

I know Nancy says we probably don't need to be ready on Wednesday, but I thought I'd get the ball rolling with our group by passing along my thoughts on the comments to Rules 41, 43, 45, 47, 50 and 52.

In short, I think we can eliminate all of the comments to these rules (the only rules in our section with comments).
Rule 41 explains the history of the rule (it follows the federal rule change) and explains why one section is moved to Rule 52. None of this seems necessary.
Rule 43 encourages telephone hearings. It is unnecessary given the Rule's text.
Rule 45 explains a change from the approved forms contained in the Rules to a form issued by the Board of District Court Judges. It's outdated (Forms are now approved by the Forms Committee) and unnecessary. Folks can find the form on their own. Perhaps retain a reference to "forms for subpoenas may be found at . . . "
47- Is very long and primarily concerns challenges for cause in jury selection. I have to admit I've referred to this frequently, but it really doesn't add anything to the Rule's text. It perhaps gives good context, commentary, and examples for applying the Rule, but isn't that precisely what we are trying to eliminate? The other sections are similar--they purport to add emphasis and encourage practices permitted under the rule beyond the text of the Rule itself.
50 just quotes the federal rules committee. Doesn't add anything to the text of the Rule itself.
52 explains that the provisions for a ruling in a bench trial after a side has finished its case are now in 52 instead of 41. This seems unnecessary and not particularly helpful.

I look forward to hearing all of your thoughts.
-Andy

--
Andrew Stone
Third District Judge