Agenda

Advisory Committee on Rules of Civil Procedure

February 26, 2020

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.	Tab 1	Jonathan Hafen, Chair
Legislative standing agenda item This month: • Rule 83 • Probate revisions • Expedited procedures rule		Lauren DiFrancesco Nancy Sylvester
Rule 64: • Additional revisions following Board of District Court Judges meeting	Tab 2	Judge Andrew Stone Nancy Sylvester
Rules 4, 7, 36, 55: • More notice to unrepresented litigants + forms (separate attachment) • Service on infants	Tab 3	Judge Barry Lawrence Nathanael Player
Rule 65C: • Back from comment	Tab 4	Nancy Sylvester
Rule 5(a)(2)(D): • Mistake in citing reference	Tab 5	Nancy Sylvester
Other business This month: • Volunteer to attend working group meeting on innovation in law practice • Rule drafting guidelines	Tab 6	Jonathan Hafen, Chair Nancy Sylvester

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

2020 Meeting Schedule: 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 – January 22, 2020

Committee members & staff	Present	Excused	Appeared by Phone
Jonathan Hafen, Chair	X		
Rod N. Andreason		X	
Judge James T. Blanch	X		
Lauren DiFrancesco			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 asked for approval of the minutes as amended. Jim Hunnicutt moved to adopt the minutes. The minutes were approved unanimously.

(2) RULE 68 SUBCOMMITTEE REPORT

Representative Brady Brammer, Judge Clay Stucki, and Doug Cannon led the continued discussion of a proposed amendment to Rule 68 to create new settlement and fee-shifting rules. Representative Brammer emphasized that the purpose of the proposed change is to alleviate overburdened district courts by incentivizing early settlements and thereby reducing caseloads. Representative Brammer also reiterated that the proposed rule change would require accompanying legislation to address contract-right implications, but explained that he plans to wait until the 2021 general legislative session to run a bill because he would prefer to allow the current rule-making process to move forward and to obtain more stakeholder feedback of his plan.

Susan Vogel expressed support for rules and legislation that aid self-represented parties, and suggested the possibility of incorporating an easy-to-use calculator to help pro se litigants determine reasonable offers of judgment, similar to the calculator used in child-support cases. Representative Brammer and Judge Stone noted the challenge of calculating reasonable fees without more data.

Paul Stancil raised concerns regarding the imposition of sanctions for rejecting an offer of judgment in cases where the primary dispute centers on liability rather than the quantum of damages. Representative Brammer reemphasized that the policy underlying the rule change is to encourage litigants to understand their cases early and that typical offers of judgment will be well-substantiated because parties will be required to demonstrate to the judge that an offer is reasonable or, alternatively, that an offer cannot yet be evaluated without further discovery.

Judge Holmberg raised additional concerns regarding whether the proposed rule change may create additional barriers for pro se litigants to the extent the rule would limit judicial discretion to give pro se parties the benefit of the doubt in matters of offers of judgment.

Judge Stucki recommend that the Rule 68 subcommittee meet again to work on the rule before the whole committee votes to send it to the Supreme Court. Representative Brammer requested committee members to recommend other ways that the legislature can help district courts manage caseloads, such as appropriating funds for additional law clerks.

(3) RULE 64 BOARD OF DISTRICT COURT JUDGES REQUEST

Judge Stone and Judge Lawrence presented on a proposed Rule 64 amendment from the Board of District Court Judges to require Rule 4 service of notice of a hearing and a motion under Rule 7 before a warrant is processed for a party who fails to appear in supplemental proceedings. The amendment was proposed in response to a recent news article criticizing current warrant practice in Utah, particularly with regard to collections cases.

During the discussion, Judge Stucki noted that the Board of Justice Court Judges has discussed this issue and found that a warrant is issued only if it becomes clear that a debtor has refused to appear after being personally served with an order to appear and show cause. Judge Lawrence raised concerns that current warrant practice may disproportionately implicate individuals' liberty interests when compared to the actual debt owed. Judge Scott, Judge Stucki, Judge Stone, and Judge Lawrence shared their experiences related to warrant practice. Lauren DiFrancesco raised concerns that changing current warrant practice may make collecting child-support and alimony more difficult. After further discussion, Mr. Hafen summarized the committee's consensus that adequate notice should be given to debtors of the consequences under the rules for failure to appear.

In response to the discussion, Judge Amber Mettler and Leslie Slaugh recommended revisions to the proposed amendments. Judge Holmberg moved to adopt the proposed amendments as revised by the committee. Judge Stone seconded the motion. The motion passed unanimously.

Rule 64. Writs in general.

(a) Definitions. As used in Rules 64, 64A, 64B, 64C, 64D, 64E, 69A, 69B and 69C:

(a)(1) "Claim" means a claim, counterclaim, cross claim, third party claim or any other claim.

(a)(2) "Defendant" means the party against whom a claim is filed or against whom judgment has been entered.

(a)(3) "Deliver" means actual delivery or to make the property available for pick up and give to the person entitled to delivery written notice of availability.

(a)(4) "Disposable earnings" means that part of earnings for a pay period remaining after the deduction of all amounts required by law to be withheld.

(a)(5) "Earnings" means compensation, however denominated, paid or payable to an individual for personal services, including periodic payments pursuant to a pension or retirement program. Earnings accrue on the last day of the period in which they were earned.

(a)(6) "Notice of exemptions" means a form that advises the defendant or a third person that certain property is or may be exempt from seizure under state or federal law. The notice shall list examples of exempt property and indicate that other exemptions may be available. The notice shall instruct the defendant of the deadline for filing a reply and request for hearing.

(a)(7) "Officer" means any person designated by the court to whom the writ is issued, including a sheriff, constable, deputy thereof or any person appointed by the officer to hold the property.

(a)(8) "Plaintiff" means the party filing a claim or in whose favor judgment has been entered.

(a)(9) "Property" means the defendant's property of any type not exempt from seizure. Property includes but is not limited to real and personal property, tangible and intangible property, the right to property whether due or to become due, and an obligation of a third person to perform for the defendant.

(a)(10) "Serve" with respect to parties means any method of service authorized by Rule 5, unless otherwise specified in this rule, and with respect to non-parties means any manner of service authorized by Rule 4.

(b) Security.

(b)(1) Amount. When security is required of a party, the party shall provide security in the sum and form the court deems adequate. For security by the plaintiff the amount should be sufficient to reimburse other parties for damages, costs and attorney fees incurred as a result of a writ wrongfully obtained. For security by the defendant, the amount should be equivalent to the amount of the claim or judgment or the value of the defendant's interest in the property. In fixing the amount, the court may consider any relevant factor. The court may relieve a party from the necessity of providing security if it appears that none of the parties will incur damages, costs or attorney fees as a result of a writ wrongfully obtained or if there exists some other substantial reason for dispensing with security. The amount of security does not establish or limit the amount of damages, costs or attorney fees recoverable if the writ is wrongfully obtained.

(b)(2) Jurisdiction over surety. A surety submits to the jurisdiction of the court and irrevocably appoints the clerk of the court as agent upon whom papers affecting the surety's liability may be served. The surety shall file with the clerk of the court the address to which the clerk may mail papers. The surety's liability may be enforced on motion without the necessity of an independent action. If the opposing party recovers judgment or if the writ is wrongfully obtained, the surety will pay the judgment, damages, costs and attorney fees not to exceed the sum specified in the contract. The surety is responsible for return of property ordered returned.

(b)(3) Objection. The court may issue additional writs upon the original security subject to the objection of the opposing party. The opposing party may object to the sufficiency of the security or the sufficiency of the sureties within five days after service of the writ. The burden to show the sufficiency of the security and the sufficiency of the sureties is on the proponent of the security.

(b)(4) Security of governmental entity. No security is required of the United States, the State of Utah, or an officer, agency, or subdivision of either, nor when prohibited by law.

(c) Procedures in aid of writs.

(c)(1) Referee. The court may appoint a referee to monitor hearings under this subsection.

(c)(2) Hearing; witnesses; discovery. The court may conduct hearings as necessary to identify property and to apply the property toward the satisfaction of the judgment or order. Witnesses may be subpoenaed to appear, testify, and produce records. The notice of the hearing must be served under Rule 4. The court may permit discovery.

(c)(3) Restraint. The court may forbid any person from transferring, disposing or interfering with the property.

(c)(4) Enforcement. A failure to appear or cooperate in proceedings under this subsection may only be enforced by proceeding by motion under [Rule 7(q)] [new Rule 7A], and may not be heard by a referee. All sanctions and remedies for contempt may be considered on such a motion, and a bench warrant may issue for failure to appear at such motion hearing.

(d) Issuance of writ; service

(d)(1) Clerk to issue writs. The clerk of the court shall issue writs. A court in which a transcript or abstract of a judgment or order has been filed has the same authority to issue a writ as the court that entered the judgment or order. If the writ directs the seizure of real property, the clerk of the court shall issue the writ to the sheriff of the county in which the real property is located. If the writ directs the seizure of personal property, the clerk of the court may issue the writ to an officer of any county.

(d)(2) Content. The writ may direct the officer to seize the property, to keep the property safe, to deliver the property to the plaintiff, to sell the property, or to take other specified actions. If the writ is to enforce a judgment or order for the payment of money, the writ shall specify the amount ordered to be paid and the amount due.

(d)(2)(A) If the writ is issued ex parte before judgment, the clerk shall attach to the writ plaintiff's affidavit, detailed description of the property, notice of hearing, order authorizing the writ, notice of exemptions and reply form.

(d)(2)(B) If the writ is issued before judgment but after a hearing, the clerk shall attach to the writ plaintiff's affidavit and detailed description of the property.

(d)(2)(C) If the writ is issued after judgment, the clerk shall attach to the writ plaintiff's application, detailed description of the property, the judgment, notice of exemptions and reply form.

(d)(3) Service.

(d)(3)(A) Upon whom; effective date. The officer shall serve the writ and accompanying papers on the defendant, and, as applicable, the garnishee and any person named by the plaintiff as claiming an interest in the property. The officer may simultaneously serve notice of the date, time and place of sale. A writ is effective upon service.

(d)(3)(B) Limits on writs of garnishment.

(d)(3)(B)(i) A writ of garnishment served while a previous writ of garnishment is in effect is effective upon expiration of the previous writ; otherwise, a writ of garnishment is effective upon service.

(d)(3)(B)(ii) Only one writ of garnishment of earnings may be in effect at one time. One additional writ of garnishment of earnings for a subsequent pay period may be served on the garnishee while an earlier writ of continuing garnishment is in effect.

(d)(3)(C) Return; inventory. Within 14 days after service, the officer shall return the writ to the court with proof of service. If property has been seized, the officer shall include an inventory of the property and whether the property is held by the officer or the officer's designee. If a person refuses to give the officer an affidavit describing the property, the officer shall indicate the fact of refusal on the return, and the court may require that person to pay the costs of any proceeding taken for the purpose of obtaining such information.

(d)(3)(D) Service of writ by publication. The court may order service of a writ by publication upon a person entitled to notice in circumstances in which service by publication of a summons and complaint would be appropriate under Rule 4.

(d)(3)(D)(i) If service of a writ is by publication, substantially the following shall be published under the caption of the case:

To _____, [Defendant/Garnishee/Claimant]:

A writ of _____ has been issued in the above-captioned case commanding the officer of _____ County as follows:

[Quoting body of writ]

Your rights may be adversely affected by these proceedings. Property in which you have an interest may be seized to pay a judgment or order. You have the right to claim property exempt from seizure under statutes of the United States or this state, including Utah Code, Title 78B, Chapter 5, Part 5.

(d)(3)(D)(ii) The notice shall be published in a newspaper of general circulation in each county in which the property is located at least 14 days prior to the due date for the reply or at least 14 days prior to the date of any sale, or as the court orders. The date of publication is the date of service.

(e) Claim to property by third person.

(e)(1) Claimant's rights. Any person claiming an interest in the property has the same rights and obligations as the defendant with respect to the writ and with respect to providing and objecting to security. Any claimant named by the plaintiff and served with the writ and accompanying papers shall exercise those rights and obligations within the same time allowed the defendant. Any claimant not named by the plaintiff and not served with the writ and accompanying papers may exercise those rights and obligations at any time before the property is sold or delivered to the plaintiff.

(e)(2) Join claimant as defendant. The court may order any named claimant joined as a defendant in interpleader. The plaintiff shall serve the order on the claimant. The claimant is thereafter a defendant to the action and shall answer within 14 days, setting forth any claim or defense. The court may enter judgment for or against the claimant to the limit of the claimant's interest in the property.

(e)(3) Plaintiff's security. If the plaintiff requests that an officer seize or sell property claimed by a person other than the defendant, the officer may request that the court require the plaintiff to file security.

(f) Discharge of writ; release of property.

(f)(1) By defendant. At any time before notice of sale of the property or before the property is delivered to the plaintiff, the defendant may file security and a motion to discharge the writ. The plaintiff may object to the sufficiency of the security or the sufficiency of the sureties within 7 days after service of the motion. At any time before notice of sale of the property or before the property is delivered to the plaintiff, the defendant may file a motion to discharge the writ on the ground that the writ was wrongfully obtained. The court shall give the plaintiff reasonable opportunity to correct a defect. The defendant shall serve the order to discharge the writ upon the officer, plaintiff, garnishee and any third person claiming an interest in the property.

(f)(2) By plaintiff. The plaintiff may discharge the writ by filing a release and serving it upon the officer, defendant, garnishee and any third person claiming an interest in the property.

(f)(3) Disposition of property. If the writ is discharged, the court shall order any remaining property and proceeds of sales delivered to the defendant.

(f)(4) Copy filed with county recorder. If an order discharges a writ upon property seized by filing with the county recorder, the officer or a party shall file a certified copy of the order with the county recorder.

(f)(5) Service on officer; disposition of property. If the order discharging the writ is served on the officer:

(f)(5)(A) before the writ is served, the officer shall return the writ to the court;

(f)(5)(B) while the property is in the officer's custody, the officer shall return the property to the defendant; or

(f)(5)(C) after the property is sold, the officer shall deliver any remaining proceeds of the sale to the defendant.

(4) RULES 4, 7, 36 & 55 NOTICE REQUIREMENTS REQUESTS

Judge Lawrence, Nathanael Player, and Jonathan Felt presented on amendments to Rules 4, 7, 36, and 55 to require more notice to parties when a response is required. The presenters explained to the committee that, for example, pro se parties often have no notice that they must respond to a counterclaim, thereby obstructing their access to justice. As a solution, the presenters proposed amending the rules to require notice prior to an entry of default judgment.

The committee discussed what form and substance the notice should have. Mr. Slaugh recommended that the requirement for notice be extended to every document requiring a response and not be limited to only cases involving pro se litigants. Mr. Slaugh also suggested that the notice should appear as a response due date in the top corner of relevant documents. Mr. Hunnicut agreed that lawyers would also benefit from the required notices. In contrast, Mr. Felt and Mr. Player recommended that a separate notice be given using a standard form approved by the Forms Committee. Judge Lawrence suggested that notice on the front of a document would provide more effective notice than additional documents. Mr. Player noted that a separate notice could provide additional information, including instructions to help pro se litigants. Judge Stone and Mr. Slaugh raised concerns that providing detailed explanations could be burdensome and might risk inappropriately providing legal advice.

Mr. Stancil raised concerns that some research shows that disclosures can sometimes be ineffective or create greater confusion. In particular, Mr. Stancil observed that while trained attorneys may benefit from a small notice in the corner of a filing, pro se litigants may not. Accordingly, Mr. Stancil recommended that the committee study what form of notice would be most effective. Mr. Player informed the committee that the OCAP Forms Committee has non-lawyer members to help ensure that pro se litigants also receive fair notice.

Justin Toth raised concerns that requiring a response due date could create opportunities for abuse or incentivize lawyers to provide incorrect due dates, which could be especially harmful to pro se litigants. The committee debated how response due dates would be calculated and penalties for failure to provide the correct date. Judge Scott explained that a document with a missing or incorrect due date would likely be treated akin to a missing certificate of service: the court would reject the filing and require a correct resubmission.

After further discussion, Judge Blanch proposed a general rule that if a party is subject to a deadline as a result of a filing, the filing party must provide notice of the deadline. The notice would

include the number of days that the responding party has to respond rather than an exact date, thereby avoiding or minimizing concerns that filing parties might purposefully or accidentally provide incorrect deadlines. Judge Blanch noted that this form of notice is standard practice in many contexts, including criminal cases and other practical situations such as taxes and banking where substantive rights are at stake.

The committee will continue to discuss this item in February.

(6) ADJOURNMENT

The remaining items were deferred until the next meeting. The meeting adjourned at 6:00 p.m. The next meeting will be held February 25, 2020.

Tab 2

Administrative Office of the Courts

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

Mary T. Noonan
State Court Administrator
Catherine J. Dupont
Deputy Court Administrator

MEMORANDUM

To: Civil Rules Committee
From: Nancy Sylvester
Date: February 21, 2020
Re: Rule 64. Writs in general.

Jonathan and I met with the Supreme Court last Wednesday on the Rule 64 amendments made at our January meeting. The original proposal came from the Board of District Court Judges. The Supreme Court approved gathering comment on the following policies:

- Requiring personal service of the notice of supplemental proceedings hearing. This is the hearing where the debt collector gathers information from the debtor about their assets so that they can collect on the judgment.
- Requiring a motion to enforce the judgment. If the debtor does not show up to the supplemental proceedings hearing, the debt collector would have to file a motion to enforce the judgment under new Rule 7A.
- Permitting the issuance of a bench warrant only after the debtor doesn't show up twice. If the debtor still doesn't show up to the hearing scheduled on the motion to enforce the judgment, then the court may issue a bench warrant. Only a judge may issue a bench warrant, not a clerk.
- In essence, the court would have to be satisfied that the debtor is truly avoiding the court process in order to issue a bench warrant for the debtor's arrest on contempt of court.

In reviewing the rule again today, though, the Board of District Court Judges observed that further amendments are needed. So the rule is back for some discussion, which will continue at a subsequent meeting. Here are some of the things the Board discussed:

- "Referee" is an antiquated term. We mean clerk of court. So that is an update that's needed.
- Post-judgment discovery. The Board would also like to more clearly spell out the kind of post-judgment discovery that can be conducted. I'll be working on getting feedback from the debt collection bar on that. The

Board conjectured that if post-judgment discovery were more robust, some of the issues highlighted in the news articles could be avoided since fewer debtors would need to be brought into court post-judgment.

- Plain language. The rule language is very old and outdated. It needs to be more plainly drafted. Have other states done this yet? Or the feds?

The Board will be generally reviewing the supplemental proceedings process over the next month to make sure the rule is in as good a place as possible. So we are probably still at least a month or two out from this rule circulating for comment.

Rule 64. Writs in general.

Comment [NS1]: This rule needs to be plain language drafted.

(a) Definitions. As used in Rules 64, 64A, 64B, 64C, 64D, 64E, 69A, 69B and 69C:

(a)(1) "Claim" means a claim, counterclaim, cross claim, third party claim or any other claim.

(a)(2) "Defendant" means the party against whom a claim is filed or against whom judgment has been entered.

(a)(3) "Deliver" means actual delivery or to make the property available for pick up and give to the person entitled to delivery written notice of availability.

(a)(4) "Disposable earnings" means that part of earnings for a pay period remaining after the deduction of all amounts required by law to be withheld.

(a)(5) "Earnings" means compensation, however denominated, paid or payable to an individual for personal services, including periodic payments pursuant to a pension or retirement program. Earnings accrue on the last day of the period in which they were earned.

(a)(6) "Notice of exemptions" means a form that advises the defendant or a third person that certain property is or may be exempt from seizure under state or federal law. The notice shall list examples of exempt property and indicate that other exemptions may be available. The notice shall instruct the defendant of the deadline for filing a reply and request for hearing.

(a)(7) "Officer" means any person designated by the court to whom the writ is issued, including a sheriff, constable, deputy thereof or any person appointed by the officer to hold the property.

(a)(8) "Plaintiff" means the party filing a claim or in whose favor judgment has been entered.

(a)(9) "Property" means the defendant's property of any type not exempt from seizure. Property includes but is not limited to real and personal property, tangible and intangible property, the right to property whether due or to become due, and an obligation of a third person to perform for the defendant.

(a)(10) "Serve" with respect to parties means any method of service authorized by Rule 5, unless otherwise specified in this rule, and with respect to non-parties means any manner of service authorized by Rule 4.

(b) Security.

(b)(1) Amount. When security is required of a party, the party shall provide security in the sum and form the court deems adequate. For security by the plaintiff the amount should be sufficient to reimburse other parties for damages, costs and attorney fees incurred as a result of a writ wrongfully obtained. For security by the defendant, the amount should be equivalent to the amount of the claim or judgment or the value of the defendant's interest in the property. In fixing the amount, the court may consider any relevant factor. The court may relieve a party from the necessity of providing security if it appears that none of the parties will incur damages, costs or attorney fees as a result of a writ wrongfully obtained or if there exists some other substantial reason for dispensing with security. The amount of security does not establish or limit the amount of damages, costs or attorney fees recoverable if the writ is wrongfully obtained.

(b)(2) Jurisdiction over surety. A surety submits to the jurisdiction of the court and irrevocably appoints the clerk of the court as agent upon whom papers affecting the surety's liability may be served. The surety shall file with the clerk of the court the address to which the clerk may mail papers. The surety's liability may be enforced on motion without the necessity of an independent action. If the opposing party recovers judgment or if the writ is wrongfully obtained, the surety will pay the judgment, damages, costs and attorney fees not to exceed the sum specified in the contract. The surety is responsible for return of property ordered returned.

(b)(3) Objection. The court may issue additional writs upon the original security subject to the objection of the opposing party. The opposing party may object to the sufficiency of the security or the sufficiency of the sureties within five days after service of the writ. The burden to show the sufficiency of the security and the sufficiency of the sureties is on the proponent of the security.

(b)(4) Security of governmental entity. No security is required of the United States, the State of Utah, or an officer, agency, or subdivision of either, nor when prohibited by law.

(c) Procedures in aid of writs.

(c)(1) ~~Referee~~Court clerk. In accordance with Rule 4-403 of the Utah Code of Judicial Administration, ~~T~~the court may ~~appoint~~ permit a court clerk ~~a referee~~ to monitor hearings under this ~~subsection~~paragraph.

(c)(2) Hearing; witnesses; discovery. The court may conduct hearings as necessary to identify property and to apply the property toward the satisfaction of the judgment or order. Witnesses may be subpoenaed to appear, testify, and produce records. The notice of hearing must be served under Rule 4. The court may permit discovery.

(c)(3) Restraint. The court may forbid any person from transferring, disposing or interfering with the property.

(c)(4) Enforcement. A failure to appear or cooperate in proceedings under this paragraph may only be enforced by proceeding by motion under Rule 7A and may not be heard by a court clerk. All sanctions and remedies for contempt may be considered on such motion, and a bench warrant may issue for failure to appear at the motion hearing.

(d) Issuance of writ; service

(d)(1) Clerk to issue writs. The clerk of the court shall issue writs. A court in which a transcript or abstract of a judgment or order has been filed has the same authority to issue a writ as the court that entered the judgment or order. If the writ directs the seizure of real property, the clerk of the court shall issue the writ to the sheriff of the county in which the real property is located. If the writ directs the seizure of personal property, the clerk of the court may issue the writ to an officer of any county.

(d)(2) Content. The writ may direct the officer to seize the property, to keep the property safe, to deliver the property to the plaintiff, to sell the property, or to take other specified actions. If the writ is to enforce a judgment or order for the payment of money, the writ shall specify the amount ordered to be paid and the amount due.

Comment [NS2]: The Board would like a post-judgment discovery rule. What kind of discovery? We know it's about assets. Is there a form that can be drafted and sent to the debtor that the debtor can fill out rather than coming to court to answer questions?

(d)(2)(A) If the writ is issued ex parte before judgment, the clerk shall attach to the writ plaintiff's affidavit, detailed description of the property, notice of hearing, order authorizing the writ, notice of exemptions and reply form.

(d)(2)(B) If the writ is issued before judgment but after a hearing, the clerk shall attach to the writ plaintiff's affidavit and detailed description of the property.

(d)(2)(C) If the writ is issued after judgment, the clerk shall attach to the writ plaintiff's application, detailed description of the property, the judgment, notice of exemptions and reply form.

(d)(3) Service.

(d)(3)(A) Upon whom; effective date. The officer shall serve the writ and accompanying papers on the defendant, and, as applicable, the garnishee and any person named by the plaintiff as claiming an interest in the property. The officer may simultaneously serve notice of the date, time and place of sale. A writ is effective upon service.

(d)(3)(B) Limits on writs of garnishment.

(d)(3)(B)(i) A writ of garnishment served while a previous writ of garnishment is in effect is effective upon expiration of the previous writ; otherwise, a writ of garnishment is effective upon service.

(d)(3)(B)(ii) Only one writ of garnishment of earnings may be in effect at one time. One additional writ of garnishment of earnings for a subsequent pay period may be served on the garnishee while an earlier writ of continuing garnishment is in effect.

(d)(3)(C) Return; inventory. Within 14 days after service, the officer shall return the writ to the court with proof of service. If property has been seized, the officer shall include an inventory of the property and whether the property is held by the officer or the officer's designee. If a person refuses to give the officer an affidavit describing the property, the officer shall indicate the fact of refusal on the return, and the court may require that person to pay the costs of any proceeding taken for the purpose of obtaining such information.

(d)(3)(D) Service of writ by publication. The court may order service of a writ by publication upon a person entitled to notice in circumstances in which service by publication of a summons and complaint would be appropriate under Rule 4.

(d)(3)(D)(i) If service of a writ is by publication, substantially the following shall be published under the caption of the case:

To _____, [Defendant/Garnishee/Claimant]:

A writ of _____ has been issued in the above-captioned case commanding the officer of _____ County as follows:

[Quoting body of writ]

Your rights may be adversely affected by these proceedings. Property in which you have an interest may be seized to pay a judgment or order. You have the right to claim property

exempt from seizure under statutes of the United States or this state, including Utah Code, Title 78B, Chapter 5, Part 5.

(d)(3)(D)(ii) The notice shall be published in a newspaper of general circulation in each county in which the property is located at least 14 days prior to the due date for the reply or at least 14 days prior to the date of any sale, or as the court orders. The date of publication is the date of service.

(e) Claim to property by third person.

(e)(1) Claimant's rights. Any person claiming an interest in the property has the same rights and obligations as the defendant with respect to the writ and with respect to providing and objecting to security. Any claimant named by the plaintiff and served with the writ and accompanying papers shall exercise those rights and obligations within the same time allowed the defendant. Any claimant not named by the plaintiff and not served with the writ and accompanying papers may exercise those rights and obligations at any time before the property is sold or delivered to the plaintiff.

(e)(2) Join claimant as defendant. The court may order any named claimant joined as a defendant in interpleader. The plaintiff shall serve the order on the claimant. The claimant is thereafter a defendant to the action and shall answer within 14 days, setting forth any claim or defense. The court may enter judgment for or against the claimant to the limit of the claimant's interest in the property.

(e)(3) Plaintiff's security. If the plaintiff requests that an officer seize or sell property claimed by a person other than the defendant, the officer may request that the court require the plaintiff to file security.

(f) Discharge of writ; release of property.

(f)(1) By defendant. At any time before notice of sale of the property or before the property is delivered to the plaintiff, the defendant may file security and a motion to discharge the writ. The plaintiff may object to the sufficiency of the security or the sufficiency of the sureties within 7 days after service of the motion. At any time before notice of sale of the property or before the property is delivered to the plaintiff, the defendant may file a motion to discharge the writ on the ground that the writ was wrongfully obtained. The court shall give the plaintiff reasonable opportunity to correct a defect. The defendant shall serve the order to discharge the writ upon the officer, plaintiff, garnishee and any third person claiming an interest in the property.

(f)(2) By plaintiff. The plaintiff may discharge the writ by filing a release and serving it upon the officer, defendant, garnishee and any third person claiming an interest in the property.

(f)(3) Disposition of property. If the writ is discharged, the court shall order any remaining property and proceeds of sales delivered to the defendant.

(f)(4) Copy filed with county recorder. If an order discharges a writ upon property seized by filing with the county recorder, the officer or a party shall file a certified copy of the order with the county recorder.

(f)(5) Service on officer; disposition of property. If the order discharging the writ is served on the officer:

(f)(5)(A) before the writ is served, the officer shall return the writ to the court;

(f)(5)(B) while the property is in the officer's custody, the officer shall return the property to the defendant; or

(f)(5)(C) after the property is sold, the officer shall deliver any remaining proceeds of the sale to the defendant.

Tab 3

Administrative Office of the Courts

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

Mary T. Noonan
State Court Administrator
Catherine J. Dupont
Deputy Court Administrator

MEMORANDUM

To: Civil Rules Committee
From: Nancy Sylvester
Date: February 21, 2020
Re: Rules 4, 7, 36, and 55

As a reminder, last month Judge Lawrence, Nathanael Player, and Jonathan Felt presented on Rules 4, 7, 36, and 55. Although the proposals came from two different groups, the committee took them up together since the crux of the proposed amendments addressed requiring more notice to parties when a response is required.

The committee debated the suggestion of putting a due date at the top of any paper requiring a response. The debate revolved around calculations and penalties for failure to add a due date. The committee also debated whether these amendments were treading into legal advice.

We left the discussion on the proposal of having a general rule that if the other party is subject to a deadline as a result of the filing, you must provide a deadline. This happens in many other contexts, including criminal cases as well as other practical situations when we have substantive rights at stake (i.e. banking, taxes, etc.). The deadline does not have to be calculated (i.e. it can simply say you have 14 days to respond).

Rule 4. Process.

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

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

(c) Contents of summons.

(c)(1) The summons must be in a form that is substantially similar to the applicable form summons approved by the Utah Judicial Council. The summons must also:

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

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

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

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

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

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

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

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

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

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

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

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

(d)(1)(A) Upon any individual other than one covered by paragraphs (d)(1)(B), (d)(1)(C) or (d)(1)(D), by delivering a copy of the summons and complaint to the individual personally, or by

leaving them at the individual's dwelling house or usual place of abode with a person of suitable age and discretion who resides there, or by delivering them to an agent authorized by appointment or by law to receive process;

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

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

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

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

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

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

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

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

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

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

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

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

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

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

(d)(3) Acceptance of service.

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

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

(d)(3)(B)(i) Content of proof of electronic acceptance. If acceptance is obtained electronically, the proof of acceptance must demonstrate on its face that the electronic signature is attributable to the party accepting service and was voluntarily executed by the party. The proof of acceptance must demonstrate that the party received readable copies of the summons and complaint prior to signing the acceptance of service.

(d)(3)(B)(ii) Duty to avoid deception. A request to accept service must not be deceptive, including stating or implying that the request to accept service originates with a public servant, peace officer, court, or official government agency. A violation of this paragraph may nullify the acceptance of service and could subject the person to criminal penalties under applicable Utah law.

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

(d)(3)(D) Effect of acceptance, proof of acceptance. A person who accepts service of the summons and complaint retains all defenses and objections, except for adequacy of service. Service

is effective on the date of the acceptance. Filing the acceptance of service with the court constitutes proof of service under Rule 4(e).

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

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

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

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

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

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

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

(d)(5) Other service.

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

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

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

(e) Proof of service.

(e)(1)The person effecting service must file proof of service stating the date, place, and manner of service, including a copy of the summons. If service is made by a person other than by an attorney, sheriff, constable, United States Marshal, or by the sheriff’s, constable’s or marshal's deputy, the

proof of service must be by affidavit or unsworn declaration as described in Title 78B, Chapter 18a, Uniform Unsworn Declarations Act.

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

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

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

Advisory Committee Notes

Rule 7. Pleadings allowed; motions, memoranda, hearings, orders.

(a) Pleadings. Only these pleadings are allowed:

(a)(1) a complaint;

(a)(2) an answer to a complaint;

(a)(3) an answer to a counterclaim designated as a counterclaim;

(a)(4) an answer to a crossclaim;

(a)(5) a third-party complaint;

(a)(6) an answer to a third-party complaint; and

(a)(7) a reply to an answer if ordered by the court.

(b) Motions. A request for an order must be made by motion. The motion must be in writing unless made during a hearing or trial, must state the relief requested, and must state the grounds for the relief requested. Except for the following, a motion must be made in accordance with this rule.

(b)(1) A motion, other than a motion described in paragraphs (b)(2), (b)(3) or (b)(4), made in proceedings before a court commissioner must follow Rule 101.

(b)(2) A request under Rule 26 for extraordinary discovery must follow Rule 37(a).

(b)(3) A request under Rule 37 for a protective order or for an order compelling disclosure or discovery—but not a motion for sanctions—must follow Rule 37(a).

(b)(4) A request under Rule 45 to quash a subpoena must follow Rule 37(a).

(b)(5) A motion for summary judgment must follow the procedures of this rule as supplemented by the requirements of Rule 56.

(c) Name and content of motion.

(c)(1) The rules governing captions and other matters of form in pleadings apply to motions and other papers.

(c)(2) **Caution language.** For all dispositive motions governed by Rule 12 or Rule 56, the motion must include the following language on the first page of the document, to the right of the movant's name, in bold type:

This is important. You must respond to this document within 14 days of when it was served on you. If you do not, you could lose your case.

(c)(3) **Bilingual notice.** Motions must include a bilingual notice that is substantially similar to the one contained in the form motion approved by the Judicial Council.

(c)(4) **Title of motion.** The moving party must title the motion substantially as: "Motion [short phrase describing the relief requested]."

(c)(5) **Contents of motion.** The motion must include the supporting memorandum. The motion must include under appropriate headings and in the following order:

(c)(~~1~~5)(A) a concise statement of the relief requested and the grounds for the relief requested; and

(c)(~~1~~5)(B) one or more sections that include a concise statement of the relevant facts claimed by the moving party and argument citing authority for the relief requested.

(c)(~~2~~5) If the moving party cites documents, interrogatory answers, deposition testimony, or other discovery materials, relevant portions of those materials must be attached to or submitted with the motion.

(c)(~~3~~6) **Length of motion.** If the motion is for relief authorized by Rule 12(b) or 12(c), Rule 56 or Rule 65A, the motion may not exceed 25 pages, not counting the attachments, unless a longer motion is permitted by the court. Other motions may not exceed 15 pages, not counting the attachments, unless a longer motion is permitted by the court.

(d) Name and content of memorandum opposing the motion.

(d)(1) A nonmoving party may file a memorandum opposing the motion within 14 days after the motion is filed. The nonmoving party must title the memorandum substantially as: "Memorandum opposing motion [short phrase describing the relief requested]." The memorandum must include under appropriate headings and in the following order:

(d)(1)(A) a concise statement of the party's preferred disposition of the motion and the grounds supporting that disposition;

(d)(1)(B) one or more sections that include a concise statement of the relevant facts claimed by the nonmoving party and argument citing authority for that disposition; and

(d)(1)(C) objections to evidence in the motion, citing authority for the objection.

(d)(2) If the non-moving party cites documents, interrogatory answers, deposition testimony, or other discovery materials, relevant portions of those materials must be attached to or submitted with the memorandum.

(d)(3) If the motion is for relief authorized by Rule 12(b) or 12(c), Rule 56 or Rule 65A, the memorandum opposing the motion may not exceed 25 pages, not counting the attachments, unless a longer memorandum is permitted by the court. Other opposing memoranda may not exceed 15 pages, not counting the attachments, unless a longer memorandum is permitted by the court.

(e) Name and content of reply memorandum.

(e)(1) Within 7 days after the memorandum opposing the motion is filed, the moving party may file a reply memorandum, which must be limited to rebuttal of new matters raised in the memorandum opposing the motion. The moving party must title the memorandum substantially as "Reply memorandum supporting motion [short phrase describing the relief requested]." The memorandum must include under appropriate headings and in the following order:

(e)(1)(A) a concise statement of the new matter raised in the memorandum opposing the motion;

(e)(1)(B) one or more sections that include a concise statement of the relevant facts claimed by the moving party not previously set forth that respond to the opposing party's statement of facts and argument citing authority rebutting the new matter;

(e)(1)(C) objections to evidence in the memorandum opposing the motion, citing authority for the objection; and

(e)(1)(D) response to objections made in the memorandum opposing the motion, citing authority for the response.

(e)(2) If the moving party cites documents, interrogatory answers, deposition testimony, or other discovery materials, relevant portions of those materials must be attached to or submitted with the memorandum.

(e)(3) If the motion is for relief authorized by Rule 12(b) or 12(c), Rule 56 or Rule 65A, the reply memorandum may not exceed 15 pages, not counting the attachments, unless a longer memorandum is permitted by the court. Other reply memoranda may not exceed 10 pages, not counting the attachments, unless a longer memorandum is permitted by the court.

(f) Objection to evidence in the reply memorandum; response. If the reply memorandum includes an objection to evidence, the nonmoving party may file a response to the objection no later than 7 days after the reply memorandum is filed. If the reply memorandum includes evidence not previously set forth, the nonmoving party may file an objection to the evidence no later than 7 days after the reply memorandum is filed, and the moving party may file a response to the objection no later than 7 days after the objection is filed. The objection or response may not be more than 3 pages.

(g) Request to submit for decision. When briefing is complete or the time for briefing has expired, either party may file a "Request to Submit for Decision," but, if no party files a request, the motion will not be submitted for decision. The request to submit for decision must state whether a hearing has been requested and the dates on which the following documents were filed:

(g)(1) the motion;

(g)(2) the memorandum opposing the motion, if any;

(g)(3) the reply memorandum, if any; and

(g)(4) the response to objections in the reply memorandum, if any.

(h) Hearings. The court may hold a hearing on any motion. A party may request a hearing in the motion, in a memorandum or in the request to submit for decision. A request for hearing must be separately identified in the caption of the document containing the request. The court must grant a request for a hearing on a motion under Rule 56 or a motion that would dispose of the action or any claim or defense in the action unless the court finds that the motion or opposition to the motion is frivolous or the issue has been authoritatively decided.

(i) Notice of supplemental authority. A party may file notice of citation to significant authority that comes to the party's attention after the party's motion or memorandum has been filed or after oral argument but before decision. The notice may not exceed 2 pages. The notice must state the citation to the authority, the page of the motion or memorandum or the point orally argued to which the authority applies, and the reason the authority is relevant. Any other party may promptly file a response, but the court may act on the motion without waiting for a response. The response may not exceed 2 pages.

(j) Orders.

(j)(1) Decision complete when signed; entered when recorded. However designated, the court's decision on a motion is complete when signed by the judge. The decision is entered when recorded in the docket.

(j)(2) Preparing and serving a proposed order. Within 14 days of being directed by the court to prepare a proposed order confirming the court's decision, a party must serve the proposed order on

the other parties for review and approval as to form. If the party directed to prepare a proposed order fails to timely serve the order, any other party may prepare a proposed order confirming the court's decision and serve the proposed order on the other parties for review and approval as to form.

(j)(3) Effect of approval as to form. A party's approval as to form of a proposed order certifies that the proposed order accurately reflects the court's decision. Approval as to form does not waive objections to the substance of the order.

(j)(4) Objecting to a proposed order. A party may object to the form of the proposed order by filing an objection within 7 days after the order is served.

(j)(5) Filing proposed order. The party preparing a proposed order must file it:

(j)(5)(A) after all other parties have approved the form of the order (The party preparing the proposed order must indicate the means by which approval was received: in person; by telephone; by signature; by email; etc.);

(j)(5)(B) after the time to object to the form of the order has expired (The party preparing the proposed order must also file a certificate of service of the proposed order.); or

(j)(5)(C) within 7 days after a party has objected to the form of the order (The party preparing the proposed order may also file a response to the objection.).

(j)(6) Proposed order before decision prohibited; exceptions. A party may not file a proposed order concurrently with a motion or a memorandum or a request to submit for decision, but a proposed order must be filed with:

(j)(6)(A) a stipulated motion;

(j)(6)(B) a motion that can be acted on without waiting for a response;

(j)(6)(C) an ex parte motion;

(j)(6)(D) a statement of discovery issues under Rule 37(a); and

(j)(6)(E) the request to submit for decision a motion in which a memorandum opposing the motion has not been filed.

(j)(7) Orders entered without a response; ex parte orders. An order entered on a motion under paragraph (l) or (m) can be vacated or modified by the judge who made it with or without notice.

(j)(8) Order to pay money. An order to pay money can be enforced in the same manner as if it were a judgment.

(k) Stipulated motions. A party seeking relief that has been agreed to by the other parties may file a stipulated motion which must:

(k)(1) be titled substantially as: "Stipulated motion [short phrase describing the relief requested]";

(k)(2) include a concise statement of the relief requested and the grounds for the relief requested;

(k)(3) include a signed stipulation in or attached to the motion and;

(k)(4) be accompanied by a request to submit for decision and a proposed order that has been approved by the other parties.

(l) Motions that may be acted on without waiting for a response.

(l)(1) The court may act on the following motions without waiting for a response:

(l)(1)(A) motion to permit an over-length motion or memorandum;

(l)(1)(B) motion for an extension of time if filed before the expiration of time;

(l)(1)(C) motion to appear pro hac vice; and

(l)(1)(D) other similar motions.

(l)(2) A motion that can be acted on without waiting for a response must:

(l)(2)(A) be titled as a regular motion;

(l)(2)(B) include a concise statement of the relief requested and the grounds for the relief requested;

(l)(2)(C) cite the statute or rule authorizing the motion to be acted on without waiting for a response; and

(l)(2)(D) be accompanied by a request to submit for decision and a proposed order.

(m) Ex parte motions. If a statute or rule permits a motion to be filed without serving the motion on the other parties, the party seeking relief may file an ex parte motion which must:

(m)(1) be titled substantially as: "Ex parte motion [short phrase describing the relief requested]";

(m)(2) include a concise statement of the relief requested and the grounds for the relief requested;

(m)(3) cite the statute or rule authorizing the ex parte motion;

(m)(4) be accompanied by a request to submit for decision and a proposed order.

(n) Motion in opposing memorandum or reply memorandum prohibited. A party may not make a motion in a memorandum opposing a motion or in a reply memorandum. A party who objects to evidence in another party's motion or memorandum may not move to strike that evidence. Instead, the party must include in the subsequent memorandum an objection to the evidence.

(o) Overlength motion or memorandum. The court may permit a party to file an overlength motion or memorandum upon a showing of good cause. An overlength motion or memorandum must include a table of contents and a table of authorities with page references.

(p) Limited statement of facts and authority. No statement of facts and legal authorities beyond the concise statement of the relief requested and the grounds for the relief requested required in paragraph (c) is required for the following motions:

(p)(1) motion to allow an over-length motion or memorandum;

(p)(2) motion to extend the time to perform an act, if the motion is filed before the time to perform the act has expired;

(p)(3) motion to continue a hearing;

(p)(4) motion to appoint a guardian ad litem;

(p)(5) motion to substitute parties;

(p)(6) motion to refer the action to or withdraw it from alternative dispute resolution under Rule 4-510.05;

(p)(7) motion for a conference under Rule 16; and

(p)(8) motion to approve a stipulation of the parties.

~~**(q) Limit on order to show cause.** An application to the court for an order to show cause shall be made only for enforcement of an existing order or for sanctions for violating an existing order. An application for an order to show cause must be supported by an affidavit sufficient to show cause to believe a party has violated a court order. 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.~~

Advisory Committee Notes

Rule 36. Request for admission.

(a) Request for admission. A party may serve upon any other party a written request to admit the truth of any discoverable matter set forth in the request, including the genuineness of any document. The matter must relate to statements or opinions of fact or of the application of law to fact. Each matter shall be separately stated and numbered. A copy of the document shall be served with the request unless it has already been furnished or made available for inspection and copying. The request shall notify the responding party that the matters will be deemed admitted unless the party responds within 28 days after service of the request.

(a)(1) **Plaintiff request for admissions.** For all requests for admissions filed by a plaintiff, the document must include the following language on the first page of the document, to the right of the requesting party's name, in all bold type:

This is important. You must respond to these requests within 28 days. If you do not, you could lose your case.

(A)(2) **Defendant request for admissions.** For all requests for admissions filed by a defendant, the document must include the following language on the first page of the document, to the right of the requesting party's name, in bold type:

This is important. You must respond to these requests within 28 days. If you do not, your case could be dismissed.

(b) Answer or objection.

(b)(1) The matter is admitted unless, within 28 days after service of the request, the responding party serves upon the requesting party a written response.

(b)(2) The answering party shall restate each request before responding to it. Unless the answering party objects to a matter, the party must admit or deny the matter or state in detail the reasons why the party cannot truthfully admit or deny. A party may identify the part of a matter which is true and deny the rest. A denial shall fairly meet the substance of the request. Lack of information is not a reason for failure to admit or deny unless, after reasonable inquiry, the information known or reasonably available is insufficient to enable an admission or denial. A party who considers the subject of a request for admission to be a genuine issue for trial may not object on that ground alone but may, subject to Rule 37(c), deny the matter or state the reasons for the failure to admit or deny.

(b)(3) If the party objects to a matter, the party shall state the reasons for the objection. Any reason not stated is waived unless excused by the court for good cause. The party shall admit or deny any part of a matter that is not objectionable. It is not grounds for objection that the truth of a matter is a genuine issue for trial.

(c) Effect of admission. Any matter admitted under this rule is conclusively established unless the court on motion permits withdrawal or amendment of the admission. The court may permit withdrawal or amendment if the presentation of the merits of the action will be promoted and withdrawal or amendment

will not prejudice the requesting party. Any admission under this rule is for the purpose of the pending action only. It is not an admission for any other purpose, nor may it be used in any other action.

Rule 55. Default.

(a) Entry. When a party against whom a judgment for affirmative relief is sought has failed to plead or otherwise defend as provided by these rules and that fact is made to appear the clerk shall enter the default of that party.

(b) Judgment. Judgment by default may be entered as follows:

(b)(1) By the clerk. When the plaintiff's claim against a defendant is for a sum certain, upon request of the plaintiff the clerk shall enter judgment for the amount claimed and costs against the defendant if:

(b)(1)(A) the default of the defendant is for failure to appear;

(b)(1)(B) the defendant is not an infant or incompetent person;

(b)(1)(C) the defendant has been personally served pursuant to Rule 4(d)(1); and

(b)(1)(D) the plaintiff, through a verified complaint, an affidavit, or an unsworn declaration as described in Title 78B, Chapter 18a, Uniform Unsworn Declarations Act, submitted in support of the default judgment, sets forth facts necessary to establish the amount of the claim, after deducting all credits to which the defendant is entitled, and verifies the amount is warranted by information in the plaintiff's possession.

(b)(2) By the court. In all other cases the party entitled to a judgment by default shall apply to the court therefor. If, in order to enable the court to enter judgment or to carry it into effect, it is necessary to take an account or to determine the amount of damages or to establish the truth of any averment by evidence or to make an investigation of any other matter, the court may conduct such hearings or order such references as it deems necessary and proper.

(c) Setting aside default. For good cause shown the court may set aside an entry of default and, if a judgment by default has been entered, may likewise set it aside in accordance with Rule 60(b).

(d) Plaintiffs, counterclaimants, cross-claimants. The provisions of this rule apply whether the party entitled to the judgment by default is a plaintiff, a third-party plaintiff, or a party who has pleaded a cross-claim or counterclaim. In all cases a judgment by default is subject to the limitations of Rule 54(c).

(e) Judgment against the state or officer or agency thereof. No judgment by default shall be entered against the state of Utah or against an officer or agency thereof unless the claimant establishes his claim or right to relief by evidence satisfactory to the court.

(f) **Notice requirement**. Prior to seeking default, a party must provide no fewer than 14 days notice to the other party, whether in a summons or standalone notice, that failure to answer the claim, cross-claim, or counter-claim may result in [default] [judgment being entered against that party].

Alternative:

(f) **Caution language**. A party seeking default must provide 14 days notice and include the following language conspicuously on the first page of the document in bold type:

This is important. You must respond to the [claim/cross-claim/counterclaim] within 14 days of receiving this notice. If you do not, you could lose your case.

Tab 4

URCP Rule 65C

URCP065C. Post-conviction relief. AMEND. Addresses service of post-conviction petitions and the underlying court record.

https://www.utcourts.gov/utc/rules-comment/2019/10/22/rules-of-civil-procedure-comment-period-closes-december-6-2019/

Comments

Doug Thompson

I think serving the respondent with a copy of the record in (i) makes sense, though it seems that if the respondent gets a copy, a copy should also be sent to the petitioner for use in any reply or amended petition. The petitioner has filed a petition and survived summary disposition likely without unfettered access to the record, Isn't it fair that if the government gets to respond using the record, the petitioner (who most times is a pro se inmate in a correctional facility) should be able to see what the government is referring to?

I'd suggest adding the following language:

(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 court record of the underlying criminal case being challenged, including all non-public documents, by mail upon the petitioner and respondent. In lieu of mailing paper copies, the clerk may mail to the respondent a storage medium containing electronic copies of the records enumerated above. The petitioner may request that the record be provided in paper form.

Nancy's comment:

Doug's suggestion to add the petitioner likely makes sense but the last sentence is probably not a good idea. The clerks of court are trying to get away from mailing out paper copies now that almost all records are electronic. Paper copies create an unnecessary amount of work for court staff.

Earl Tanner

I agree with Doug Thompson but have a comment on his proposed amendment. If the default rule is sending paper to both petitioner and respondent, shouldn't the last sentence authorize a request by the petitioner for the records in electronic form?

Nancy's comment:

The default is now electronic form under the new language, so this suggestion does not need to be adopted.

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 court record of the underlying criminal case being challenged, including all non-public documents, by mail upon the petitioner and respondent. In lieu of mailing paper copies, the clerk may mail to the respondent a storage medium 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 <nancyjs@utcourts.gov>

Mistake in citing reference in URCP 5(a)(2)(D)?

Jessica Van Buren <jessicavb@utcourts.gov> Mon, Nov 25, 2019 at 3:20 PM
To: Nancy Sylvester <nancyjs@utcourts.gov>

Nancy,

I think there may be a mistake in the citing reference in URCP 5(a)(2)(D).

It cites to URCP 58A(d), (Judge's signature), but I think it's supposed to cite to URCP 58A(g), (Notice of judgment).

-jvb

Jessica Van Buren, State Law Librarian
Utah State Law Library
450 S. State Street / PO Box 140220
Salt Lake City, UT 84114-0220
801-238-7991 / jessicavb@utcourts.gov
www.utcourts.gov/lawlibrary

Rule 5. Service and filing of pleadings and other papers.

(a) When service is required.

(a)(1) Papers that must be served. Except as otherwise provided in these rules or as otherwise directed by the court, the following papers must be served on every party:

(a)(1)(A) a judgment;

(a)(1)(B) an order that states it must be served;

(a)(1)(C) a pleading after the original complaint;

(a)(1)(D) a paper relating to disclosure or discovery;

(a)(1)(E) a paper filed with the court other than a motion that may be heard ex parte; and

(a)(1)(F) a written notice, appearance, demand, offer of judgment, or similar paper.

(a)(2) Serving parties in default. No service is required on a party who is in default except that:

(a)(2)(A) a party in default must be served as ordered by the court;

(a)(2)(B) a party in default for any reason other than for failure to appear must be served as provided in paragraph (a)(1);

(a)(2)(C) a party in default for any reason must be served with notice of any hearing to determine the amount of damages to be entered against the defaulting party;

(a)(2)(D) a party in default for any reason must be served with notice of entry of judgment under Rule 58A(~~d~~g); and

(a)(2)(E) a party in default for any reason must be served under Rule 4 with pleadings asserting new or additional claims for relief against the party.

(a)(3) Service in actions begun by seizing property. If an action is begun by seizing property and no person is or need be named as defendant, any service required before the filing of an answer, claim or appearance must be made upon the person who had custody or possession of the property when it was seized.

(b) How service is made.

(b)(1) Whom to serve. If a party is represented by an attorney, a paper served under this rule must be served upon the attorney unless the court orders service upon the party. Service must be made upon the attorney and the party if:

(b)(1)(A) an attorney has filed a Notice of Limited Appearance under Rule 75 and the papers being served relate to a matter within the scope of the Notice; or

(b)(1)(B) a final judgment has been entered in the action and more than 90 days has elapsed from the date a paper was last served on the attorney.

(b)(2) When to serve. If a hearing is scheduled 7 days or less from the date of service, a party must serve a paper related to the hearing by the method most likely to be promptly received. Otherwise, a paper that is filed with the court must be served before or on the same day that it is filed.

(b)(3) Methods of service. A paper is served under this rule by:

(b)(3)(A) except in the juvenile court, submitting it for electronic filing, or the court submitting it to the electronic filing service provider, if the person being served has an electronic filing account;

(b)(3)(B) emailing it to

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

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

(b)(3)(C) mailing it to the person's last known address;

(b)(3)(D) handing it to the person;

(b)(3)(E) leaving it at the person's office with a person in charge or, if no one is in charge, leaving it in a receptacle intended for receiving deliveries or in a conspicuous place;

(b)(3)(F) leaving it at the person's dwelling house or usual place of abode with a person of suitable age and discretion who resides there; or

(b)(3)(G) any other method agreed to in writing by the parties.

(b)(4) When service is effective. Service by mail or electronic means is complete upon sending.

(b)(5) Who serves. Unless otherwise directed by the court:

(b)(5)(A) every paper required to be served must be served by the party preparing it; and

(b)(5)(B) every paper prepared by the court will be served by the court.

(c) Serving numerous defendants. If an action involves an unusually large number of defendants, the court, upon motion or its own initiative, may order that:

(c)(1) a defendant's pleadings and replies to them do not need to be served on the other defendants;

(c)(2) any cross-claim, counterclaim avoidance or affirmative defense in a defendant's pleadings and replies to them are deemed denied or avoided by all other parties;

(c)(3) filing a defendant's pleadings and serving them on the plaintiff constitutes notice of them to all other parties; and

(c)(4) a copy of the order must be served upon the parties.

(d) Certificate of service. A paper required by this rule to be served, including electronically filed papers, must include a signed certificate of service showing the name of the document served, the date and manner of service and on whom it was served. Except in the juvenile court, this paragraph does not apply to papers required to be served under paragraph (b)(5)(B**)** when service to all parties is made under paragraph (b)(3)(A).

(e) Filing. Except as provided in Rule 7(j) and Rule 26(f), all papers after the complaint that are required to be served must be filed with the court. Parties with an electronic filing account must file a paper electronically. A party without an electronic filing account may file a paper by delivering it to the clerk of the court or to a judge of the court. Filing is complete upon the earliest of acceptance by the electronic filing system, the clerk of court or the judge.

(f) Filing an affidavit or declaration. If a person files an affidavit or declaration, the filer may:

(f)(1) electronically file the original affidavit with a notary acknowledgment as provided by Utah Code Section 46-1-16(7);

(f)(2) electronically file a scanned image of the affidavit or declaration;

(f)(3) electronically file the affidavit or declaration with a conformed signature; or

(f)(4) if the filer does not have an electronic filing account, present the original affidavit or declaration to the clerk of the court, and the clerk will electronically file a scanned image and return the original to the filer.

The filer must keep an original affidavit or declaration of anyone other than the filer safe and available for inspection upon request until the action is concluded, including any appeal or until the time in which to appeal has expired.

Advisory Committee Notes

Tab 6

Administrative Office of the Courts

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

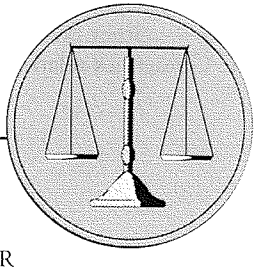
Mary T. Noonan
State Court Administrator
Catherine J. Dupont
Deputy Court Administrator

MEMORANDUM

To: Civil Rules Committee
From: Nancy Sylvester
Date: February 21, 2020
Re: Innovation in Law Work Group: Request for volunteer

Earlier this month, Greg Hoole contacted Jonathan as the chair of the Bar's Innovation in Law Practice committee. His committee has been discussing the difficulties of taking low-value cases to trial while still providing a benefit that exceeds attorney fees and fees, etc., to one's client. He said his committee has some ideas that would involve a modification to the existing rules of civil procedure. He asked for a member of this committee to join the work group.

GUIDELINES FOR DRAFTING AND EDITING COURT RULES



BY BRYAN A. GARNER

Originally published: 1996.
Fifth printing: 2007.

Board conjectured that if post-judgment discovery were more robust, some of the issues highlighted in the news articles could be avoided since fewer debtors would need to be brought into court post-judgment.

- Plain language. The rule language is very old and outdated. It needs to be more plainly drafted. Have other states done this yet? Or the feds?

The Board will be generally reviewing the supplemental proceedings process over the next month to make sure the rule is in as good a place as possible. So we are probably still at least a month or two out from this rule circulating for comment.

In January 1996, the Standing Committee on Federal Rules of Practice and Procedure authorized the Secretary of the Rules Committee to publish for comment a revised draft of the Federal Rules of Appellate Procedure. To help explain the drafting and editing choices reflected in the Appellate Rules, the Standing Committee also authorized the Secretary to publish *Guidelines for Drafting and Editing Court Rules.*

As consultant to the Rules Committees, Bryan A. Garner skillfully constructed these Guidelines to help all those working on the Appellate Rules, as well as those engaged in other drafting and editing projects.

Publication of the Guidelines promotes openness of the rulemaking process to public scrutiny and participation. It is my hope that people who comment on the proposed Appellate Rules — either favorably or unfavorably — will also take time to comment on any of the Guidelines relating to their views.

–ALICEMARIE H. STOTLER, CHAIR
Committee on Rules of Practice and Procedure
Judicial Conference of the United States

Preface by Robert E. Keeton

1.

Federal Rules of Practice and Procedure ought to be user-friendly. This is the prime characteristic of good rules of procedure. They should be easy to read and understand — as clear in content and meaning as it is possible to make them, and as crisp and readable as clarity permits.

Of almost equal importance is another characteristic. Rules of procedure should be that and no more. They should be substantively neutral. In other words, we should draft procedural rules that neither favor nor disfavor any particular legal interest. To that end, we should do our best to foster institutional arrangements for resolving disputes about substantive issues in the appropriate forums for substantive lawmaking, and to keep substantive issues out of procedural rulemaking. Rules of practice and procedure are used in resolving individual cases and, at their best, are as fair, impartial, and substantively neutral as we can make them.

2.

Even superbly drafted rules are at risk of becoming less consistent, clear, and readable as they are amended. And the need for amendments is inevitable. The only effective remedy for the risks incident to amendment is twofold — eternal vigilance and a commitment to excellence in style as well as content. Fortunately, good style and good content reinforce each other.

3.

The first of the Federal Rules were the Rules of Civil Procedure, drafted in the 1930s. By the year 1990, we had five sets of Federal Rules — Appellate, Bankruptcy, Civil, Criminal, and Evidence — and five Rules Committees of the Judicial Conference of the United States, one each for Appellate, Bankruptcy, Civil, and Criminal (not for Evidence), and a coordinating committee commonly called the Judicial Conference Standing Committee on Rules. Each committee had its own set of consultants and drafters and its own set of stylistic preferences. The predictable result was five sets of

rules that sometimes said almost the same thing, but in different ways and without being clear about whether they meant the same thing. In addition, substantial differences existed both within and among the different sets of rules, without any explanation of why lawyers and judges should have to adjust to so many different ways of behaving in different court proceedings.

Lawyers and judges necessarily have spent — or wasted — precious time thinking, conversing, and writing about ambiguities in the rules. Occasionally a lawyer falls into a procedural trap and a client suffers an injustice that trial and appellate courts, giving due respect to the rules as construed, are unwilling or unable to redress.

4.

When I came to chair the Standing Committee in the fall of 1990, I was tempted by the thought that some of the enormous resources of time and talent being committed to making and interpreting rules might better be redirected. Some resources might be directed toward a long-term aim of combining all the separate sets of rules into one set, integrated in both style and content: the Federal Rules of Practice and Procedure.

Substantive integration would have the benefits of (1) reducing length by stating only once a rule of general application; (2) reducing complexity, even where repetition is warranted, by using precisely the same phrasing when expressing the same idea; and (3) improving clarity by explaining why different phrasing is used to address analogous problems in the different settings — for example, in bankruptcy, civil, and criminal rules. But substantive integration may prove to be an elusive ideal.

Stylistic integration, however, is a different matter: even with different sets of rules, there is much that rulemakers can do to sharpen style. Having a consistent drafting style in all the rules carries major benefits. Foremost among these, of course, is that clear expression promotes clear thought. Variation, elegant or not, impairs clarity: it is seldom commendable where clarity of meaning is paramount.

5.

Good writing of any kind is labor-intensive. Good legal writing is even harder work because content is paramount. One simply cannot arrive at good content without mastery of the subject matter.

Good drafting of a contract, statute, or procedural rule is at least as labor-intensive as good drafting of a judicial opinion, a lawyer's opinion letter, or an article because contracts, statutes, and rules serve as prescriptions for ongoing conduct and relationships. In this context, there must be a heightened sensitivity to such matters as striking an appropriate balance between rigor and flexibility, choosing between hard-edged rules and guidelines for discretion, and determining who among foreseeable actors is to be allowed discretion.

Undertaking to draft all federal rules so that they excel in style as well as content is, to say the least, daunting. The predictable reaction to the proposal to do so runs along these lines: "The federal rulemaking process, even though vested finally in Congress and the Supreme Court, depends in the first instance on volunteer committee members and overloaded staff — including reporters and Administrative Office support staff. Trying to make all federal rules consistent in style asks too much of both the volunteers and the staff." I fully agree that members and staff of the Judicial Conference Rules Committees are overloaded and underappreciated.

6.

Now that I am no longer a member of any of the Rules Committees, I feel free to add that, with two exceptions, I believe no other entities in our legal culture rival the Rules Committees for the impartial drafting of proposals for legislation or rules. The two exceptions are the American Law Institute and the National Conference of Commissioners on Uniform State Laws — both of which are committed to excellence in drafting.

With a view to the importance of style, in 1991 the Standing Committee on Rules of Practice and Procedure created a Style Subcommittee. Its charge was to review the drafting style of all amendments to federal rules. Because of the importance of this new undertaking, we needed a leader with a demonstrated sense of good writing style. Fortunately, Charles Alan Wright, a dedicated stylist whose writings rank with the best in legal literature, was then serving on the Standing Committee. He accepted the appointment to chair the Style Subcommittee. To serve as the original members of the Subcommittee, I invited Judge George C. Pratt, of the Second Circuit; Judge Alicemarie H. Stotler, of the United States District Court in Santa Ana, California, who now chairs the Standing Committee; and Joseph F. Spaniol, Jr., the former Clerk of the United States Supreme Court. I participated in the Subcommittee's work, ex officio, during 1991–93.

Not long after the Subcommittee began its work, we realized just how time-consuming — and arduous — the detailed work on the rules would be. We saw the need for a style consultant, and with the support of L. Ralph Mecham, Director of the Administrative Office of the United States Courts, we were able to engage Bryan A. Garner, whose books on legal writing the members of the Style Subcommittee were frequently consulting.

Initially, the Style Subcommittee worked on amendments only, but the value of the work was so readily apparent that the Style Subcommittee was asked to produce fully restyled drafts of two sets of rules: the Federal Rules of Civil Procedure and the Federal Rules of Appellate Procedure. The Style Subcommittee finished preliminary versions of the Civil Rules in 1992, and of the Appellate Rules in 1994.

In the course of those two major projects, however, the membership of the Style Subcommittee had changed. When Professor Wright asked to be relieved of this responsibility upon assuming the presidency of the American Law Institute in 1993,

Judge George C. Pratt became the new chair. And when, that same year, Judge Stotler began chairing the Standing Committee, she likewise resigned from the Style Subcommittee. To fill the two open positions, Judge Stotler appointed Judge James A. Parker, of the United States District Court in New Mexico, and Professor Geoffrey G. Hazard, Jr., of the University of Pennsylvania.

In the fall of 1995, Judge Pratt's term on the Standing Committee expired, and Judge Parker became chair of the Style Subcommittee. Meanwhile, Judge Stotler appointed Judge William R. Wilson, Jr., as a member.

Every member of the Style Subcommittee has served with extraordinary skill and energy.

An important part of the subcommittee's work is to call attention to ambiguities of substantive meaning. But the subcommittee does not make substantive recommendations because the Standing Committee and the five Rules Committees (a Committee on Evidence having been added) are responsible for substantive recommendations.

Despite some initial reservations among committee members about the scope of this undertaking regarding style, the several committees have cooperated generously. This team effort has already developed restyled drafts of Civil Rules and Appellate Rules. These drafts dramatically illustrate how readable and easily comprehensible court rules can be — if, that is, the drafters devote themselves to the clearest possible style.

7.

Out of this team effort has evolved, in addition to early model drafts, another product — the *Guidelines for Drafting and Editing Court Rules.* I am delighted and encouraged that this publication will now be available to everyone who has an interest in improving the quality of legal writing.

Improving and maintaining the style of Federal Rules of Practice and Procedure is a long-term project. The early drafts have already demonstrated, in my view, that benefits far outweigh costs. Also, I believe we can maintain a continuing enterprise whose primary resources are the time and energy of talented professional volunteers — members of the Rules Committees of the Judicial Conference of the United States. This is the group who, with painstaking care, will examine every proposal suggested to them by the Style Subcommittee and will then recommend to the Judicial Conference and the enacting authorities proposed Rules that excel in style and readability as well as fair and impartial content.

–Robert E. Keeton
U.S. District Judge
Boston, Massachusetts

Introduction by George C. Pratt

When Judge Robert E. Keeton, then Chair of the Judicial Conference's Standing Committee on the Rules of Practice and Procedure, asked me to join Professor Charles A. Wright, Judge Alicemarie H. Stotler, and Joseph F. Spaniol, Jr., on a new Style Subcommittee, I expected the work to be a relatively mundane experience of scouting for inconsistencies, typographical errors, and occasional grammatical slipups in the existing rules of practice. Working with Professor Wright, however, was an opportunity I couldn't pass up. His treatise on federal courts had been my bible for many years on both the district and circuit courts, and I envied his clarity of expression and his simple, direct style. I knew I could learn a lot, and perhaps our work might be useful to the entire rules process.

Developing the Guidelines

The Style Subcommittee began its work by reviewing a series of amendments that were being proposed by the four advisory committees. Very soon, however, we recognized a need for guiding principles and a more systematic process. With the aid of our consultant, Bryan A. Garner, we initially agreed on and outlined some basic goals, and then more specific guides for achieving those goals. Our goals, which should apply to all legal writing, were clarity, brevity, and readability.

For clarity, we sought to express each rule in terms and in a form that could most accurately express the idea behind the rule. This meant avoiding ambiguities and developing consistent modes of expression. Readability, we found, could be enhanced by using an outline format, applying it consistently, keeping sentences relatively short, and adhering to a series of conventions on how to treat exceptions, conditions, and qualifying phrases. Brevity is always a hallmark of good legal writing. While we consciously worked for it by eliminating all unnecessary words and searching for shorter, more accurate expressions, in many instances we found that our quest for clarity and readability had automatically given us brevity through shorter, more tightly written rules.

We reached a turning point when the subcommittee agreed to undertake a complete reworking of two set of rules — civil and appellate. We began with the civil rules. Our procedure was to have Bryan Garner first do a restyled version of an entire set of rules. Then the subcommittee would separately review his work, looking first for any inadvertent substantive changes but also making further suggestions on style. Next, we would put our collective thoughts into a final version, which the subcommittee, with an occasional additional edit, would approve for eventual submission to the Civil Advisory Committee.

Having successfully followed that process, we have now completed a restyled version of the appellate rules and substantial work on the civil rules. For various reasons, the appellate rules have moved more swiftly through the Advisory Committee, and in January 1996 the Standing Committee voted unanimously to publish those rules for comment by the bench and bar. As of early 1996, the appellate rules represent a bellwether for the desirability of revising sets of federal rules for clarity and consistency. Ultimately, a restyled set of rules is subject to approval by the Judicial Conference and the Supreme Court, and to review by Congress.

When the Style Subcommittee first went to work, we realized after a few conferences that the matters we were discussing, debating, and agreeing upon represented valuable conventions for our work, and that they needed to be preserved and collected in a coherent, organized manual. We asked Bryan Garner to undertake that task, using his notes from the hundreds of edits and decisions that the subcommittee had already made. Bryan has now formalized his work into this manual, *Guidelines for Drafting and Editing Court Rules.*

Using the Guidelines

The subcommittee has found the Guidelines to be invaluable. They provide a handy reference to the conventions we have previously addressed and agreed on. When Professor Wright and Judge Stotler left us for higher callings, their replacements, Judge James A. Parker and Professor Geoffrey G. Hazard, Jr., quickly picked up the nature and direction of our work by referring to the Guidelines, which permit us to operate from a common base of understanding.

Bryan Garner has always worked closely with the reporters of the respective advisory committees. Using the Guidelines, the reporters now draft their proposed amendments and new rules following what has rapidly become the accepted style for federal rules.

The potential value of these Guidelines is not restricted to federal rulemaking. They could fruitfully be applied to the practice codes and even the substantive statutes of the various states. Even local ordinances would benefit from their use. When clarity and readability of statutes and rules increase, the need for litigation over meaning decreases and voluntary compliance increases.

Outside the rulemaking area, many types of legal drafting — contracts, opinion letters, and even judicial opinions — might be improved if legal writers followed these Guidelines. And it goes without saying that these Guidelines could provide a core for teaching legal writing and legal drafting — areas in which law-school graduates are notoriously deficient.

Lessons Learned from the Style Process

Working on the Style Subcommittee has underscored a number of lessons for many of us. Three in particular stand out in my mind. First, legal drafting is not easy; it is a demanding, exacting discipline that requires careful and constant attention. Second, if the result of any drafting effort is to be successful, style must be an integral part of the process. Third, paying attention to writing style requires us to clarify our own thinking. Clear style demands clear thinking, which is a prerequisite to any effective legal writing.

The Style Subcommittee is grateful to Bryan Garner for his inspiration and guidance through our labors on restyling the rules. His *Guidelines for Drafting and Editing Court Rules* will not only help us as we continue working through demanding, exacting revisions of all the rules; they also will provide continuing benefit to future members of the rules committees and ultimately, through the clarity and readability that these Guidelines can produce, to the legal profession as a whole.

–GEORGE C. PRATT
Retired Judge of the U.S. Court
of Appeals for the Second Circuit and Former
Chair of the Style Subcommittee

Author's Note

The reader might consider these Guidelines a stylesheet for rule-drafters. In a sense, they are just that.

But calling them a "stylesheet" might minimize some of the innovative ideas that the Style Subcommittee, in its work on federal rules, has elaborated. For example, the principles on placing conditions and exceptions (2.4(A), 2.4(B)) are entirely fresh. To my knowledge, they have no precedent in the literature on legal drafting. The same might be said of the principles on using the double-dash construction (2.4(C)(2)); on placing adverbs in relation to verb phrases (2.4(C)(3)); and on enumerating only at the end of the sentence, not in midsentence (3.3(B)). Several principles of good drafting, then, make their debut in these pages.

Many other principles are fairly standard, and their value here lies primarily in illustrating how to carry out those principles in the context of rule-drafting.

The Guidelines contain only a "blackletter" statement of principles, followed by illustrations. I have omitted any detailed explanation of their rationale, which must await publication of *The Elements of Legal Drafting,* forthcoming from Oxford University Press. In any event, there is much to be said for a cleanly stated set of principles uncluttered by pro-and-con arguments and extended rationales.

–BRYAN A. GARNER
Dallas, Texas

Table of Contents

Basic Principles

1.1 Be clear.

A. Identify instances of vagueness and ambiguity and sharpen the wording.

B. If you need substantive directions, consider alternative wordings and set them out as possibilities for the decision-maker.

1.2 Make the draft readable.

A. Prefer short sentences. The average sentence length in good drafting is no more than 30 words.

B. Use the simplest possible words to express the idea clearly. Avoid legal jargon.

C. Use a word or phrase consistently to express a single idea. Do not vary your terminology for the sake of "elegant variation."

1.3 Be as brief as clarity and readability permit.

1.4 Organize the rule to serve clarity, readability, and brevity.

A. Organize the draft logically, with headings and subheadings, so that the reader has bearings.

B. Use structure to enhance readability and reinforce meaning.

2 General Conventions

2.1 Number. Draft in the singular number unless the sense is undeniably plural.

Before	After
When *issues* not raised by the pleadings *are* tried by express or implied consent of the parties, *they* shall be treated in all respects as if *they* had been raised in the pleadings. Fed. R. Civ. P. 15(b).	When *an issue* not raised by the pleadings *is* tried by the parties' express or implied consent, *it* must be treated in all respects as if raised in the pleadings.
Papers filed by an inmate confined in an institution are timely filed if . . . . Fed. R. Civ. P. 25 (a).	A *paper* filed by an inmate confined in an institution is timely filed if . . . . *(Rule as published for comment in Oct. 1993.)*

2.2 Tense. Generally, draft in the present tense, not in the past or future.

Before	After
No additional fees *will be required* for filing an amended notice. Fed. R. App. P. 4(a)(4).	No additional fee *is necessary* for filing an amended notice.
The pendency of such a suggestion whether or not included in a petition for rehearing *shall not affect* the finality of the judgment of the court of appeals or stay the issuance of the mandate. Fed. R. App. P. 35(c).	A pending suggestion for a rehearing en banc *does not affect* the finality of the appellate judgment or stay the issuance of the mandate.

2.3 Voice. Prefer the active over the passive voice.

A. When feasible, rephrase a passive-voice verb by putting it in active voice.

Before	After
. . . costs *must be taxed* by the clerk against the losing party . . . . Fed. R. Civ. P. 76(c) (intermediate draft).	. . . the clerk *must tax* costs against the losing party . . . .
A stay in a criminal case *shall be had* in accordance with the provisions of Rule 38 of the Federal Rules of Criminal Procedure. Fed. R. App. P. 8(c).	Rule 38 of the Federal Rules of Criminal Procedure *governs* a stay in a criminal case. *(Rule as published for comment in April 1996.)*

B. When feasible, rephrase a passive-voice verb by using an adjective.

Before	After
. . . the parties may . . . file a joint statement that shows how the issues *presented by the appeal* arose . . . . Fed. R. Civ. P. 75(b)(1) (intermediate draft).	. . . the parties may . . . file a joint statement that shows how the *appellate* issues arose . . . .

C. Use passive voice primarily in two circumstances: (1) when naming the actor would unduly narrow the meaning or impede the flow of the sentence; and (2) when changing to active voice would undesirably shift the emphasis from one subject to another.

Examples

When the constitutionality of a statute affecting the public interest *is questioned* in any action, the court must. . . .
Fed. R. Civ. P. 24(c)(2) (revised for style).

A party who *has been permitted* to proceed in a district-court action in forma pauperis, or who *was considered* financially unable to obtain an adequate defense in a criminal case, may proceed on appeal in forma pauperis without further authorization . . . .
Fed. R. App. P. 24(a)(2) (revised for style).

2.4 Syntax. Use a syntactic arrangement that enhances clarity, logic, and readability.

A. *Conditions.* Place conditions where they can be read most easily, preferably using the word *if.* Use *when* (not *where)* if the sentence needs an *if* to introduce another unrelated clause or if the condition is something that may occur with regularity.

Before	After
In the interest of expediting decision, or for other good cause shown, a court of appeals may, except as otherwise provided in Rule 26(b), suspend the requirements or provisions of any of these rules in a particular case *on application of a party or on its own motion.*	*On its own motion or a party's motion,* a court of appeals may — to expedite its decision or for other good cause — suspend the provisions of any of these rules in a particular case, except as otherwise provided in Rule 26(b).

Fed. R. App. P. 2.

1. If a condition is just a few words, and seeing it first would help the reader avoid a miscue, then put it at the beginning of the sentence.

2. If a condition is long and the main clause is short, put the main clause first and move directly into the condition.

Before	After
When without the parties' consent, either a prisoner petition challenging the conditions of confinement or a pretrial matter dispositive of a party's claim or defense is referred to a magistrate judge, the magistrate judge must promptly conduct the required proceedings.	A magistrate judge must promptly conduct required proceedings *when assigned, without the parties' consent, to hear either a prisoner petition challenging the conditions of confinement or a pretrial matter dispositive of a party's claim or defense.*

Fed. R. Civ. P. 72(b) (intermediate draft)

3. If a condition and the main clause are both long, foreshadow the condition and put it at the end of the sentence. If there are several conditions, a phrase such as *in the following circumstances* will serve to foreshadow the conditions at the end.

Before

(b) *Interlocutory Sales.* If property that has been attached or arrested is perishable, or liable to deterioration, decay, or injury by being detained in custody pending the action, or if the expense of keeping the property is excessive or disproportionate, or if there is unreasonable delay in securing the release of property, the court, on application of any party or of the marshal, or other person or organization having the warrant, may order the property or any portion thereof to be sold; and the proceeds, or so much thereof as shall be adequate to satisfy any judgment, may be ordered brought into court to abide the event of the action; or the court may, upon motion of the defendant or claimant, order delivery of the property to the defendant or claimant, upon the giving of security in accordance with these rules.

Supp. R. Adm. & Mar. Claims E(9)(b).

After

(2) *Interlocutory Sales.*

(A) *In any of the following circumstances,* the court may, on application of a party or some other warrant-holder, order the property or any part of it sold:

(1) if the attached or arrested property is perishable, or liable to deterioration, decay, or injury by being detained in custody pend-ing the action;

(2) if the expense of keeping the property is excessive or disproportionate; or

(3) if there is an unreasonable delay in securing the release of property.

(B) The proceeds, or as much of them as will satisfy the judgment, may be ordered brought into court to await the disposition. Alternatively, the court may, upon a party's motion, order the property delivered to the party, who must give security under these rules.

Before

Subject to the provisions of Rule 54(b): (1) upon a general verdict of a jury, or upon a decision by the court that a party shall recover only a sum certain or costs or that all relief shall be denied, the clerk, unless the court otherwise orders, shall forthwith prepare, sign, and enter the judgment without awaiting any direction by the court; (2) upon a decision by the court granting other relief, or upon special verdict or a general verdict accompanied by answers to interrogatories, the court shall promptly approve the form of the judgment, and the clerk shall thereupon enter it.

Fed. R. Civ. P. 58.

After

(a) Subject to Rule 54(b), *the following rules* govern entry of judgment:

(1) When the jury returns a general verdict or the court decides that a party may recover only a sum certain or costs, or that all relief should be denied, the clerk shall, unless the court orders otherwise, promptly prepare, sign, and enter the judgment without awaiting the court's direction.

(2) When the court grants other relief or the jury returns a special verdict or a general verdict accompanied by answers to interrogatories, the court shall promptly approve the form of the judgment, which the clerk shall enter.

4. If a condition states a definitional test to be met — not a standard of applicability — put it at the end of the sentence.

Example

A paper required or permitted to be filed in a court of appeals must be filed with the clerk. Filing may be accomplished by mail addressed to the clerk, but filing is not timely unless the clerk receives the paper within the time fixed for filing, except that a brief is timely filed *if it is mailed to the clerk by first-class mail, postage prepaid, and bears a postmark showing that the document was mailed on or before the last day for filing.*

Fed. R. App. P. 25(a) (as revised and published for comment in October 1993).

5. Unearth hidden conditions to make them explicit, using the word *if.*

Before	After
A party must make advance arrangements with the clerk for the transportation and receipt of *exhibits of unusual bulk or weight.* Fed. R. App. P. 6(b)(2)(iii).	*If the exhibits are unusually bulky or heavy,* the party must arrange with the clerk in advance for their transportation and receipt.
The defenses specifically enumerated (1)-(7) in subdivision (b) of this rule, whether made in a pleading or by motion, and the motion for judgment mentioned in subdivision (c) of this rule shall be heard and determined before trial *on application of any party,* unless the court orders that the hearing and determination thereof be deferred until the trial. Fed. R. Civ. P. 12(d).	*If a party so requests,* the defenses listed in Rule 12(b)(1)-(7) — whether made in a pleading or by motion — and any motion for judgment on the pleadings under Rule 12(c)(1) must be heard and determined before trial unless the court orders that the hearing and determination be deferred until trial.

B. *Exceptions.* Place exceptions where they can be read most easily.

1. If an exception needs to be generally alluded to before the sentence can be read without a miscue, allude to it or state it briefly at the beginning of the sentence.

Before	After
(a) It is not necessary to aver the capacity of a party to sue or be sued or the authority of a party to sue or be sued in a representative capacity or the legal existence of an organized association of persons that is made a party, *except to the extent required to show the jurisdiction of the court. . . .* Fed. R. Civ. P. 9(a).	(a) Capacity. (1) *Except when necessary to show that the court has jurisdiction,* a pleading need not aver: (A) a party's capacity to sue or be sued; (B) a party's authority to sue or be sued in a representative capacity; or (C) the legal existence of a named party. (2) . . . .

2. If an exception cannot be stated briefly, put it at the end.

Example

(a) **Compulsory Counterclaim.** A pleading must state as a counterclaim any claim that, at the time of its service, the pleader has against an opposing party, if the claim arises from the transaction or occurrence that is the subject matter of the opposing party's claim and does not require, for adjudication, the presence of a third party over whom the court cannot acquire jurisdiction. *But the pleader need not state the claim:*

(1) if, when the action began, the claim was the subject of another pending action; or

(2) if the opposing party sued upon its claim by attachment or other process by which the court did not acquire personal jurisdiction over the pleader on that claim, and the pleader does not assert any counterclaim under this rule.

Fed. R. Civ. P. 13(a) (revised for style).

C. *Interruptive Phrases*

1. Avoid an interruptive phrase between the subject and the verb by moving it to the beginning or end of the sentence.

Before	After
The court, *on motion of the Government made within one year after the imposition of the sentence,* may reduce a sentence to reflect a defendant's subsequent, substantial assistance in the investigation or prosecution of another person who has committed an offense . . . . Fed. R. Crim. P. 35(b).	*If the Government so moves within a year after sentence is imposed,* the court may reduce a sentence to reflect a defendant's later substantial help in investigating or prosecuting another person who has committed an offense . . . .
The court *at every stage of the proceeding* must disregard any error or defect in the proceeding which does not affect the substantial rights of the parties. Fed. R. Civ. P. 61.	*At every stage of the proceeding,* the court must disregard all errors or defects that do not affect a substantial right of any party.

2. For an interruptive phrase that must appear in midsentence — because of what it modifies — use a double-dash construction instead of commas.

Before	After
These rules govern the procedure in the United States district courts in all suits of a civil nature whether cognizable as cases at law or in equity or in admiralty, with the exceptions stated in Rule 81.	These rules govern procedure in the United States district courts in all civil actions — whether arising at law, in equity, or in admiralty — except as stated in Rule 81.

Fed. R. Civ. P. 1.

3. Put an adverbial interruptive phrase in the midst of the verb phrase, not before it; if a modal verb such as *must* or *may* appears in the verb phrase, put the adverbial phrase immediately after that modal verb.

Before	After
If a party becomes incompetent, the court upon motion served as provided in subdivision (a) of this rule *may allow* the action to be continued by or against the party's representative.	If a party becomes incompetent, the district court *may*, on motion served according to (a)(3), *allow* the action to be continued by or against the party's representative.

Fed. R. Civ. P. 25(b).

D. *Modifiers*

1. To avoid ambiguity, place a modifier next to the word or phrase it modifies.

Before	After
The notice shall be published in such newspaper or newspapers as the court may direct *once a week for four successive weeks* prior to the date fixed for the filing of claims.	Before the date fixed for the filing of claims, the notice must be published *once a week for four successive weeks* in a court-designated newspaper or newspapers.

Supp. R. Adm. & Mar. Claims F(4).

2. If moving a misplaced modifier will not cure the ambiguity, rephrase the sentence.

Before	After
In an action begun by seizure of property, *in which no person need be or is named as a defendant,* any service . . . . Fed. R. Civ. P. 5(a).	If an action is begun by seizing property *and* no person is named as a defendant, service . . . .

E. *Prepositional Phrases*

1. Minimize *of*-phrases. They tend to encumber sentences.

Before	After
The content *of* the notice *of* appeal, the manner *of* its service, and the effect *of* the filing *of* the notice and *of* its service shall be as prescribed in Rule 3. Fed. R. App. P. 13(c) — (six *ofs*).	Rule 3 prescribes what a notice *of* appeal must contain, how it should be served, the effect *of* its filing, and the effect *of* its service. (Three *ofs*.)
If a notice *of* appeal is mistakenly filed in the court *of* appeals, the clerk *of* the court *of* appeals shall note thereon the date on which it was received and transmit it to the clerk *of* the district court and it shall be deemed filed in the district court on the date so noted. Fed. R. App. P. 4(a)(1) — (five *ofs*).	If a notice *of* appeal is mistakenly filed in the court *of* appeals, the circuit clerk must note on the notice the date when it was received and send it to the district clerk. It is then considered filed in the district court on the date so noted. (Two *ofs*.)

2. When feasible, change prepositional phrases to adjectives.

Before	After
. . . violation of a statute *of the United States* . . . . Supp. R. Adm. & Mar. Claims E(9)(a).	. . . violation of a *federal* statute . . . .
Unless provided otherwise by statute or order *of the court,* . . . . Fed. R. Civ. P. 54(d)(2)(B).	Unless a statute or *court order* provides otherwise, ...

Before	After
The petition shall be filed with the clerk of the court of appeals within the time provided by Rule 4(a) for filing a notice of appeal, with proof of service on all parties to *the action in the district court.*	The petition must be filed with the circuit clerk within the time provided by Rule 4(a) for filing a notice of appeal, with proof of service on all parties to *the district-court action.*
Fed. R. App. P. 5.1(a).	

3. When feasible, change prepositional phrases to possessives.

Before	After
Failure of an appellant to take any step other than the timely filing of a notice of appeal does not affect the *validity of the appeal*	*An appellant's failure* to take any step other than the timely filing of a notice of appeal does not affect the *appeal's validity* . . . .
Fed. R. App. P. 3(a).	

F. *Antecedents*

1. Ensure that an antecedent precedes a referent, not vice versa; use a noun twice rather than having a referent precede its antecedent.

2. Ensure that an antecedent agrees in number with its referent.

Before	After
[T]he court may, on motion, order any person having possession or control of such *property or its proceeds* to show cause why *it* should not be delivered into the custody of the marshal or other person or organization having a warrant for the arrest of the property, or paid into court to abide the judgment	[T]he court may, on motion, order any person possessing or controlling the property or its proceeds to show cause: (A) if the property has not been sold, why a marshal or other person or organization having an arrest warrant should not take the property into custody; or (B) if the property has been sold or consists of U.S. currency, why the proceeds should not be paid into court pending judgment.
Supp. R. Adm. & Mar. Claims C(5).	

G. *Sentence Length.* Strive for an average sentence length of fewer than 25 words — 30 words at most.

1. Break long compound sentences into two or more sentences.

Before	After
Sentence shall be imposed without unnecessary delay, but the court may, when there is a factor important to the sentencing determination that is not then capable of being resolved, postpone the imposition of sentence for a reasonable time until the factor is capable of being resolved. Fed. R. Crim. P. 23(a)(1), before 1994 amendments.	Sentence *must* be imposed without unnecessary delay. But if some factor important to sentencing cannot be resolved promptly, the court may postpone sentencing for a reasonable time until that factor becomes resolvable.
A class action shall not be dismissed or compromised without the approval of the court, and notice of the proposed dismissal or compromise shall be given to all members of the class in such manner as the court directs. Fed. R. Civ. P. 23(e).	A class action must not be dismissed or compromised without court approval. Notice of a proposed dismissal or compromise must be given to all class members as the court directs.

2. For purposes of computing sentence length, count a tabulated or set-off subpart as a separate sentence.

H. *Punctuation*

1. End each subpart (except the last) with a semicolon. After the next-to-last subpart, put a conjunction — either *and* or *or*.

Before	After
Service of a summons or filing a waiver of service is effective to establish jurisdiction over the person of a defendant	Serving a summons or filing a waiver of service establishes personal jurisdiction over a defendant:
(A) who could be subjected to the jurisdiction in the state in which the district is located, or	(A) who is subject to the jurisdiction of a court of general jurisdiction in the state where the district court is located;
(B) who is a party joined under Rule 14 or Rule 19 and is served at a place within a judicial district of the United States and not more than 100 miles from the place from which the summons issues, or	(B) who is a party under Rule 14 or Rule 19 and is served at a place within a judicial district of the United States and not more than 100 miles from the place where the summons issues;
(C) who is subject to the federal interpleader jurisdiction under 28 U.S.C. § 1335, or	(C) who is subject to the federal interpleader jurisdiction under 28 U.S.C. § 1335; or
(D) when authorized by a statute of the United States.	(D) when authorized by a federal statute.
Fed. R. Civ. P. 4(k)(1).	

2. Place a comma after an introductory phrase or subordinate clause.

Before	After
When a transfer is ordered the clerk shall transmit	When a transfer is ordered, the clerk must send . . . .
Fed. R. Crim. P. 21(c).	

3. In an enumerated series, use the serial comma before the conjunction.

Before	After
. . . books, documents or tangible things . . . . possession, custody or control . . . . Fed. R. Civ. P. 45(a)(1).	. . . books, documents, or tangible things . . . . possession, custody, or control . . . .

4. Prefer long dashes to parentheses.

Before	After
All persons (and any vessel, cargo or other property subject to admiralty process in rem) may be joined in one action as defendants if . . . . Fed. R. Civ. P. 20(a).	Persons — as well as a vessel, cargo, or other property subject to admiralty process in rem — may be joined in the same action as defendants if . . . .

5. Eliminate hyphens separating a prefix from a root word: *nonparty* and *pretrial,* not *non-party* and *pre-trial.*

6. Hyphenate phrasal adjectives.

Before	After
civil process clerk	civil-process clerk
district court order	district-court order
trial preparation material	trial-preparation material

I. End sentences emphatically — with a word or phrase that most naturally receives stress.

Before	After
Each party adverse to the National Labor Relations Board in an enforcement or a review proceeding shall proceed first on briefing and at oral argument unless the court orders otherwise. Fed. R. App. P. 15.1.	Unless the court orders otherwise, a party adverse to the National Labor Relations Board in an enforcement or a review proceeding must, in briefing and at oral argument, proceed first.

Structure 3

3.1 Organization of Rules

A. Organize rules logically and clearly so that referring to them is relatively easy. Do this by adhering as much as possible to these organizational principles:

- Put the broadly applicable before the narrowly applicable.
- Put the general before the specific.
- Put more important items before less important.
- Put rules before exceptions.
- Put contemplated events in chronological order.

B. Group similar items together, preferably introducing them with parallel headings and subheadings.

Before

(9) Disposition of Property; Sales.

(a) *Actions for Forfeitures.* In any action in rem to enforce a forfeiture for violation of a statute of the United States the property shall be disposed of as provided by statute.

(b) *Interlocutory Sales.* If property that has been attached or arrested is perishable, or liable to deterioration, decay, or injury by being detained in custody pending the action, or if the expense of keeping the property is excessive or disproportionate, or if there is unreasonable delay in securing the release of property, the court, on application of any party or of the marshal, or other person or organization having the warrant, may order the property or any portion thereof to be sold; and the proceeds, or so much thereof as shall be adequate to satisfy any judgment, may be ordered brought into court to abide the event of the action; or the court may, upon motion of the defendant or claimant, order delivery of the property to the defendant or claimant, upon the giving of security in accordance with these rules.

(c) *Sales, Proceeds.* All sales of property shall be made by the marshal or a deputy marshal, or by other person or organization having the warrant, or by any other person assigned by the court where the marshal or other person or organization having the warrant is a party in interest; and the proceeds of sale shall be forthwith paid into the registry of the court to be disposed of according to law.

Supp. R. Adm. & Mar. Claims E(9) (in full).

After

(9) Disposition of Property; Sales.

[Reorganize section as follows:]

(a) Action for Forfeiture.

(b) Sale.

(1) *Generally.*

(2) *Interlocutory Sale.*

(c) Proceeds.

(d) Alternative Interlocutory Remedies.

3.2 Structural Divisions

A. The parts of a rule are as follows:

Fed. R. Crim. P. 6(e)(3)(A)(ii)

Rule 6

(e) [subdivision]

(3) [paragraph]

(A) [subparagraph]

(ii) [item]

B. At any level, use a subpart only if there is at least one corresponding subpart.

C. Preface a subdivision with a brief descriptive heading. Headings are optional with paragraphs, subparagraphs, and items. Add headings when they will help orient readers.

Before

Rule 23.1. Derivative Actions by Shareholders

In a derivative action brought by one or more shareholders or members to enforce a right of a corporation or of an unincorporated association, the corporation or association having failed to enforce a right which may properly be asserted by it, the complaint shall be verified and shall allege (1) that the plaintiff was a shareholder or member at the time of the transaction of which the plaintiff complains or that the plaintiff's share or membership thereafter devolved on the plaintiff by operation of law, and (2) that the action is not a collusive one to confer jurisdiction on a court of the United States which it would not otherwise have. The complaint shall also allege with particularity the efforts, if any, made by the plaintiff to obtain the action the plaintiff desires from the directors or comparable authority and, if necessary, from the shareholders or members, and the reasons for the plaintiff's failure to obtain the action or for not making the effort. The derivative action may not be maintained if it appears that the plaintiff does not fairly and adequately represent the interests of the shareholders or members similarly situated in enforcing the right of the corporation or association. The action shall not be dismissed or compromised without the approval of the court, and notice of the proposed dismissal or compromise shall be given to shareholders or members in such manner as the court desires.

Fed. R. Civ. P. 23.1 (in full).

After

Rule 23.1. Derivative Actions by Shareholders

(a) **Prerequisites.** One or more shareholders of a corporation or members of an unincorporated association may, on behalf of the corporation or association, bring a derivative action to assert and enforce a right that the corporation or association has failed to enforce. A derivative action may be maintained only if the plaintiff fairly and adequately represents the interests of similarly situated shareholders or members.

(b) **Pleading Requirements.** The complaint must be verified and must alege:

(1) that the plaintiff was a share holder or member at the time of the transaction complained of, or that the plaitiff's share or membership devolvedd on it after that time by operation of law.

(2) that the action is not a collusive one to confer jurisdiction that the court would otherwise lack; and

(3) the particular efforts, if any, made by the plaintiff to obtain the desired action from the directors or similar authority and, if necessary, from the shareholders or members, and the reasons for not obtaining the action or not making the effort.

(c) **Dismissal and Compromise.** A derivative action must not be dismissed or compromised without court approval. Notice of a proposed dismissal or compromise must be given to shareholders or members as the court directs.

D. If redrafting results in new subparts, ensure that the numbering of oft-cited rules — such as Rule 12(b)(6) of the Civil Rules — does not change.

E. As part of the official format, use so-called "hanging indents," which reveal structure cleanly.

Before	After
(c) Relation Back of Amendments. An amendment of a pleading relates back to the date of the original pleading when: (1) relation back is permitted by the law that provides the statute of limitations applicable to the action, or (2) the claim or defense asserted in the amended pleading arose out of the conduct, transaction, or occurrence set forth . . . . Fed. R. Civ. P. 15(c).	**(c) Relation Back of Amendments.** (1) An amendment of a pleading relates back to the date of the original pleading when: (A) the applicable statute of limitations permits relation back; or (B) the amendment asserts a claim or defense that arose from the conduct, transaction, or occurrence set forth . . . .

3.3 Enumerations

A. Set off enumerated items into subparts when feasible. Create new paragraphs, subparagraphs, and items in the order in which they naturally occur.

Before	After
Parties may obtain discovery by one or more of the following methods: depositions upon oral examination or written question; written interrogatories; production of documents or things or permission to enter upon land or other property under Rule 34 or 45(a)(1)(C), for inspection and other purposes; physical and mental examinations; and requests for admissions. Fed. R. Civ. P. 26(a)(5).	Parties may obtain discovery by one or more of the following methods: (A) depositions upon oral examination or written question; (B) interrogatories; (C) production of documents or things or permission to enter upon land or other property, under Rule 34 or 45(a)(1)(C), for inspection and other purposes; (D) physical or mental examinations; and (E) requests for admissions.

Before

The front covers of the briefs and of appendices, if separately printed, shall contain: (1) the name of the court and the number of the case; (2) the title of the case (see Rule 12(a)); (3) the nature of the proceeding in the court (e.g., Appeal; Petition for Review) and the name of the court, agency, or board below; (4) the title of the document (e.g., Brief for Appellant, Appendix); and (5) the names and addresses of counsel representing the party on whose behalf the document is filed.

Fed. R. App. P. 32(a).

After

The front cover of a brief must contain:

(A) the number of the case centered at the top;

(B) the name of the court;

(C) the title of the case (see Rule 12(a));

(D) the nature of the proceeding (e.g., Appeal; Petition for Review) and the name of the court, agency, or board below;

(E) the title of the document, identifying the party or parties for whom the document is filed; and

(F) the name, office address, and telephone number of counsel representing the party for whom the document is filed.

(Rule as published for comment in April 1996.)

B. Enumerate at the end — not at the beginning — of a sentence.

Before

(a) The original papers and exhibits filed in the district court, the transcript of proceedings, if any, and a certified copy of the docket entries prepared by the clerk of the district court shall constitute the record on appeal in all cases.

Fed. R. App. P. 10.

After

(a) The following items constitute the record on appeal:

(1) the original papers and exhibits filed in the district court;

(2) the transcript of proceedings, if any; and

(3) a certified copy of the docket entries prepared by the district clerk.

C. When introducing an enumeration, consider using a phrase such as *the following* to foreshadow what will follow.

Before

Except as otherwise provided in these rules, every order required by its terms to be served, every pleading subsequent to the original complaint unless the court otherwise orders because of numerous defendants, every paper relating to discovery required to be served upon a party unless the court otherwise orders, every written motion other than one which may be heard ex parte, and every written notice, appearance, demand, offer of judgment, designation of record on appeal, and similar paper shall be served upon each of the parties.

Fed. R. Civ. P. 5(a).

After

Except as these rules provide otherwise, *the following papers* must be served on every party:

(A) an order required by its terms to be served;

(B) a pleading filed after the original complaint, unless the court orders otherwise because of numerous defendants;

(C) a discovery paper required to be served upon a party, unless the court orders otherwise;

(D) a written motion, other than one that may be heard ex parte; and

(E) a written notice, appearance, demand, offer of judgment, designation of record on appeal, or similar paper.

D. When stating more than one requirement — and the requirements can be stated in parallel form — put them in parallel enumerations.

Before

A party shall state in short and plain terms the party's defenses to each claim asserted and shall admit or deny the averments upon which the adverse party relies.

Fed. R. Civ. P. 8(b).

After

In pleading, a party must:

(A) state in short and plain terms the party's defenses to each claim asserted; and

(B) admit or deny the averments on which the adverse party relies.

E. Avoid unnumbered "dangling" sections — that is, flush-left text that, following an enumeration, has no numbered designation.

Before

(1) Every subpoena shall

(A) state the name of the court from which it is issued; and

(B) state the title of the action, the name of the court in which it is pending, and its civil action number; and

(C) command each person to whom it is directed to attend and give testimony or to produce and permit inspection and copying of designated books, documents or tangible things in the possession, custody or control of that person, or to permit inspection of premises, at a time and place therein specified; and

(D) set forth the text of subdivisions (c) and (d) of this rule.

A command to produce evidence or to permit inspection may be joined with a command to appear at trial or hearing or at deposition, or may be issued separately.

Fed. R. Civ. P. 45(a)(1).

After

(1) (A) A subpoena must:

(i) state the court in whose name it is issued;

(ii) state the title of the action, the name of the court in which it is pending, and its civil-action number;

(iii) command the person to whom it is directed to attend and testify; or to produce and permit inspection and copying of designated books, documents, or tangible things in that person's possession, custody, or control; or to permit inspection of premises at a specified time and place; and

(iv) set forth the text of Rule 45(c) and (d).

(B) A command to produce evidence or to permit inspection may be included in a subpoena commanding appearance at a trial, hearing, or deposition, or may be issued by a separate subpoena.

F. Use bullets to ease the reading of a list when no citation to any individual item is likely. "Dangling" text is unobjectionable after a list of bulleted items.

Before

In pleading to a preceding pleading, a party shall set forth affirmatively accord and satisfaction, arbitration and award, assumption of risk, contributory negligence, discharge in bankruptcy, duress, estoppel, failure of consideration, fraud, illegality, injury by fellow servant, laches, license, payment, release, res judicata, statute of frauds, statute of limitations, waiver, and any other matter constituting an avoidance or affirmative defense. When a party has mistakenly designated a defense as a counterclaim or a counterclaim as a defense, the court on terms, if justice so requires, shall treat the pleading as if there had been a proper designation.

Fed R. Civ. P. 8(c)

After

In responding to a pleading, a party must affirmatively state any avoidance or affirmative defense, including:

- accord and satisfaction;
- arbitration and award;
- assumption of risk;
- contributory negligence;
- discharge in bankruptcy;
- duress;
- estoppel;
- failure of consideration;
- fraud;
- illegality;
- injury by fellow servant;
- laches;
- license;
- payment;
- release;
- res judicata;
- statute of frauds;
- statute of limitations; and
- waiver.

If a party has mistakenly designated a defense as a counterclaim, or a counterclaim as a defense, the court must — if justice requires — treat the pleading as if the party had used the correct description.

Words and Phrases 4

4.1 Verbose Phrasing

A. Omit every superfluous word.

Before	After
Subdivisions (a) through (c) of this rule do not apply to disclosures and discovery requests, responses, objections, and motions that are subject to *the provisions of* Rules 26 through 37. Fed. R. Civ. P. 11(d).	This rule does not apply to disclosures and discovery requests, responses, objections, and motions that are subject to Rules 26 through 37.
Each court of appeals *by action* of a majority of *the circuit* judges in regular active service may . . . . Fed. R. App. P. 47.	Each court of appeals acting by a majority of its judges in regular active service may . . . . *(Rule as published for comment in Oct. 1993.)*
. . . a judgment for a sum of money . . . . Fed. R. Civ. P. 67.	. . . a money judgment . . . .
. . . a judgment for the payment of money . . . . Fed. R. Civ. P. 69.	. . . a money judgment . . . .
The forms *contained* in the Appendix *of Forms are sufficient* under these rules and *are intended to* indicate the simplicity and brevity *of statement* which the rules contemplate. Fed. R. Civ. P. 84(a).	The forms in the Appendix suffice under these rules and illustrate the simplicity and brevity that these rules contemplate. *(Rule as published for comment in Oct. 1993.)*
When the owner complies with *the requirements of* Rule F(1), ... Supp. R. Adm. & Mar. Claims F(2) *(intermediate draft).*	When the owner complies with Rule F(1), ...

B. Uncover so-called "buried verbs" — i.e., abstract nouns usually ending in the suffixes *-tion, -sion, -ment, -ence, -ance, -ity* — and make them into verbs. Doing so has several advantages:

- it saves words by helping eliminate prepositional phrases;
- it increases readability by forcing the writer to be explicit about implied actors; and
- it makes sentences more vivid by substituting action verbs in place of stagnant *be*-verbs.

Before	After
Application for a writ of mandamus or of prohibition directed to a judge or judges shall be made by filing a petition therefor with the clerk of the court of appeals with proof of service on all parties to the action in the trial court. Fed. R. App. P. 21(a).	*A party applying* for a writ of mandamus or of prohibition must file a petition with the circuit clerk, with proof of service on all parties to the district-court action.
Upon *receipt of* the record, the clerk . . . . Fed. R. App. P. 6(b)(2)(iv).	Upon *receiving* the record, the clerk . . . .
If without substantial justification a certification *is made in violation of* this rule . . . . Fed. R. Civ. P. 26(g)(2).	If a certification *violates* this rule without substantial justification . . . .
The complaint shall contain a short and plain *statement* of . . . . Fed. R. Civ. P. 71A(c)(2).	The complaint must briefly and plainly *state* . . . .

C. Collapse clauses into phrases when possible. For example, instead of *case to be tried without a jury,* use *nonjury trial* or *nonjury case.*

4.2 Words of Authority*

A. Use words of authority in accordance with the following glossary:

must	=	is required to
must not	=	is required not to
may	=	has discretion to is permitted to has a right to
is entitled to	=	has a right to
will	=	(expresses a future contingency)
should	=	(denotes a directory provision)

B. Replace *shall* with *must*, *may*, or some other, more appropriate term. [For an alternative, see (C).]

Before	After
The clerk *shall*, on the date judgment is entered, mail to all parties a copy of the opinion, if any, or of the judgment if no opinion was written, and notice of the date of entry of the judgment. Fed. R. App. P. 36.	On the date judgment is entered, the clerk *must* mail to all parties a copy of the opinion — or the judgment, if no opinion was written — and a notice of the date when the judgment was entered.
No response *shall* be filed unless the court *shall* so order. Fed. R. App. P. 35(b).	No response *may* be filed unless the court orders it.

C. In the alternative to (B), use *shall* exclusively to mean "has a duty to." Avoid it when it does not impose a duty on the subject of the clause. [Note: Either the convention in (B) or this convention (C) should appear consistently in one set of revisions: the two should not be mixed.]

*For the rationale underlying these conventions, see BRYAN A. GARNER, A DICTIONARY OF MODERN LEGAL USAGE 939-42 (2d ed. 1995).

D. Avoid roundabout wordings to create a duty.

Before	After
A party who has made a disclosure under Rule 26(a) or responded to a request for discovery *is under a duty to* supplement or correct . . . . Fed. R. Civ. P. 26(e) (intermediate draft).	A party who has made a disclosure under Rule 26(a) or responded to a request for discovery *must* supplement or correct . . . .

E. Change *may not* to *must not* or *cannot.*

Before	After
(A) Monetary sanctions *may not* be awarded against a represented party for a violation of subdivision (b)(2). (B) Monetary sanctions *may not* be awarded on the court's initiative unless the court issues its order to show cause before a voluntary dismissal or settlement of the claims made by or against the party which is, or whose attorneys are, to be sanctioned. Fed. R. App. P. 11(c)(2).	The court *must not* impose monetary sanctions: (A) against a represented party for violating Rule 11(b)(2); or (B) on its own initiative, unless it issued the show-cause order before voluntary dismissal or settlement of the claims made by or against the party that is, or whose attorneys are, to be sanctioned.
In a habeas corpus proceeding in which the detention complained of arises out of process issued by a state court, an appeal by the applicant for the writ *may not* proceed unless a district or a circuit judge issues a certificate of probable cause. Fed. R. App. P. 22(b).	If the detention complained of in a habeas corpus proceeding arises from process issued by a state court, the applicant *cannot* take an appeal unless a district or circuit judge issues a certificate of probable cause. *(Rule as published for comment in April 1996.)*

4.3 Relative Pronouns

A. Use *that,* not *which,* as a restrictive relative pronoun.

Before	After
Any such motion *which* is filed before expiration of the prescribed time may be ex parte unless the court otherwise requires. Fed. R. App. P. 4(a)(5).	Any such motion *that* is filed before the prescribed time expires may be ex parte unless the court requires otherwise.

Before	After
A pleading *which* sets forth a claim for relief . . . shall contain . . . . Fed. R. Civ. P. 8(a).	A pleading *that* includes a claim for relief . . . must contain . . . .
The forms contained in the Appendix of Forms are sufficient under the rules and are intended to indicate the simplicity and brevity of statement *which* the rules contemplate. Fed. R. Civ. P. 84.	The forms in the Appendix suffice under these rules and illustrate the simplicity and brevity *that* these rules contemplate.

B. Use *which* as a nonrestrictive relative pronoun. The word should almost always follow a comma.

Example

A judge or other person designated by the court may preside over the conference, *which* may be conducted in person or by telephone.
Fed. R. App. P. 33 (revised for style).

C. To avoid the problem of the so-called "remote relative," place the relative pronoun *that* or *which* directly after the word it modifies.

Before	After
[A] party shall, without awaiting a discovery request, provide to other parties . . . a copy of . . . all documents, data compilations, and tangible things in the possession, custody, or control of the *party that* are relevant . . . . Fed. R. Civ. P. 26(a)(1)(B).	[A] party must, without awaiting a discovery request, provide to other parties . . . a copy of . . . all documents, data compilations, and tangible *things that* are in the possession, custody, or control of the party and are relevant . . . .

4.4 Conjunctions

A. Use *but* instead of *and* to introduce a contrasting idea.

Before	After
The remedy herein provided is in addition to *and* in no way supersedes or limits the remedy provided by Title 28, U.S.C., §§ 1335, 1397, and 2361. Actions under those provisions shall be conducted in accordance with these rules. Fed. R. Civ. P. 22(2).	This remedy . . . supplements — *but* does not supersede or limit — the remedy provided by 28 U.S.C. §§ 1335, 1397, and 2361, and these rules govern actions under those statutes.

B. For a contrast, use *But* to begin a sentence instead of *However.*

Before	After
A petition for rehearing may be filed within 14 days after entry of judgment unless the time is shortened or enlarged by order or by local rule. *However,* in all civil cases in which the United States or an agency or officer thereof is a party, the time within which any party may seek rehearing shall be 45 days after entry of judgment unless the time is shortened or enlarged by order. Fed. R. App. P. 40(a).	Unless the time is shortened or extended by order or local rule, a petition for rehearing may be filed within 14 days after entry of judgment. *But* in a civil case, if the United States or its officer or agency is a party, the time within which any party may seek rehearing is 45 days after entry of judgment, unless an order shortens or extends the time. *(Rule as published for comment in April 1996.)*

4.5 Ambiguity and Undesirable Vagueness. Sharpen the wording when doing so more clearly achieves the same result.

Before	After
Demurrers, pleas, and exceptions for insufficiency of a pleading *shall not be used.* Fed. R. Civ. P. 7(c).	Demurrers, pleas, and exceptions for insufficiency of a pleading *are abolished.*
The discovery plan must *indicate* the parties' views . . . . Fed. R. Civ. P. 26(f) (intermediate draft).	The discovery plan must *state* the parties' views . . . .
The plaintiff *shall* also give security for costs and, *if the plaintiff elects* to give security, for interest at the rate of 6 percent per annum from the date of the security. Supp. R. Adm. & Mar. Claims F(1). (This wording first makes the security compulsory [*shall*], but then suggests that the plaintiff may choose not to give it [*if the plaintiff elects*]. The rule can bear only one of these meanings.)	An owner *must* give security for costs and, when doing so, must include 6 percent annual interest from the date of the security. [Or:] An owner who elects to give security for costs must include 6 percent annual interest from the date of the security.

4.6 Specific Words and Forms to Avoid

- ***as to***: prefer *about, for, of, on, with, to, by,* or *in.* E.g., "If any difference arises *as to* [read *about*] whether the record truly discloses what occurred in the district court, ..." Fed. R. App. P. 10(e)./ "The parties are encouraged to agree *as to* [read *on*] the contents of the appendix." Fed. R. App. P. 30(b).

- ***every***: prefer *a* or *an.*

- ***except as***: use *unless* when referring to some future action by the court or by the parties. E.g., "*Except as* [read *Unless*] otherwise stipulated or directed by the court, ..." Fed. R. Civ. P. 26(a)(2)(B).

  Except as is appropriate when referring to something that an existing rule does. E.g., "*Except as* otherwise provided in Rule 26(b), ..."

- ***except that***: use *but* or some other, more pointed term. E.g., "[T]he parties may by written stipulation . . . modify other procedures . . . , *except that* [read *but*] stipulations extending the time provided in Rules 33, 34, and 36 for responses to discovery may . . . be made only with the approval of the court." Fed. R. Civ. P. 29.

- ***except when***: use *unless.* E.g., "*Except when* [read *Unless*] a federal statute or these rules provide otherwise, ..."

- ***except with*** [+ ***noun***]: use *unless* [+ *verb*]. E.g., "*Except with the written consent of the defendant,* [read *Unless the defendant consents in writing,*] the report *shall* [read *must*] not be submitted to the court . . . ." Fed. R. Crim. App. 32(b)(1).

- ***following***: if it means "after," write *after.*

- ***hereof, herein, thereof, therein,* and the like**: use everyday words instead — usually a demonstrative pronoun such as *that, this, these,* or *those.*

- ***if any***: try placing *any* before the noun. E.g., "[T]he complaint must further show . . . *what voyages or trips, if any,* [read *any voyages or trips*] *she* [read *the ship*] has made since the voyage or trip on which the claims sought to be limited arose." Supp. R. Adm. & Mar. Claims F(2).

- ***in the event that***: use *if.*

- ***limitation***: unless referring to a statute of limitations, use *limit.*

- ***not later than***: use *no later than* or *within.* The phrasing "*within* 10 days after entry of judgment" is usually better than "*no later than* 10 days after entry of judgment," but the latter may be needed if you want to allow the act to be done before the entry of judgment as well as in the following 10 days.

- ***partially***: use *partly.*

- ***portion***: use *part.*

- ***prior to***: use *before.* E.g., "The court shall inform counsel of its proposed action upon the requests *prior to* [read *before*] their arguments to the jury." Fed. R. Crim. P. 30.

- ***provided that, provided however that***: reword to eliminate all provisos, usually with *if* (for conditions), or *except* or *but* (for exceptions).

- ***pursuant to***: use *under Rule 3*, not *pursuant to Rule 3*; *as authorized by* or *in accordance with* 26 U.S.C. § 1333, not *pursuant to* 26 U.S.C. § 1333. E.g., "Depositions may be taken in a foreign country . . . *pursuant to* [read *under*] any applicable treaty or convention . . . ." Fed. R. Civ. P. 28(b).

- ***said,* adj.**: use *the, this,* or *that.*

- ***subsequent to***: use *after.* E.g., "Immediately upon the entry of an order made on a written motion *subsequent to* [read *after*] arraignment[,] the clerk . . . ." Fed. R. Crim. P. 49(c).

- ***such*, adj.**: use *the, this, that,* or *those.* E.g., "Copies of the reporter's transcript and other papers . . . may be inserted in the appendix; *such* [read *those*] pages may be informally renumbered if necessary." Fed. R. App. P. 32(a).

- ***such* [*noun* + *s*] *as***: use *any* [*noun*] *that* or *a* [*noun*] *that.* E.g., "At the close of the evidence or at *such earlier time during the trial as the court reasonably directs* [read *an earlier time during the trial, as the court reasonably directs*], any party may file written requests . . . ." Fed. R. Crim. P. 30./ "[T]he court may, on *such terms and conditions as are just* [read *on just terms*], order . . . ." Fed. R. Civ. P. 26(c)(2).

- ***therefor***: avoid altogether, often merely by deleting it, sometimes by writing *for it* or *for them.*

- ***there is, there are***: delete when possible. Use only if you are referring to the existence of something.

- ***transmit***: use *send* or *forward.* E.g., "The clerk *shall transmit* [read *must send*] the notice to the chief judge . . . ." Fed. R. Crim. P. 49(e).

- ***upon***: prefer *on.* Thus, *service on a defendant,* not *service upon a defendant.* But use *upon* when introducing a condition or event — e.g.: "*Upon* being served with a request, a party must . . . ."

- ***whenever***: use *when.* E.g., "*Whenever* [read *When*] a deposition is taken at the instance of the government, or *whenever* [read *when*] a deposition is taken at the instance of a defendant who is unable to bear the expenses of the taking of the deposition, the court may direct . . . ." Fed. R. Crim. P. 15(b).

4.7 Other Stylistic Preferences

A. *Cross-References.* Omit the full reference to a rule number when not needed for clarity. For example, typically when referring to a provision on the same level within the same rule, subdivision, or paragraph, you might state:

(a) Except as provided otherwise in (b), a party must . . . .

But include an appropriate reference when needed for clarity — particularly if the other provision is on a different level or is not near the reference. Repeating the rule number — *subject to Rule 4(h)* — is shorter and better for courts' and practitioners' quotations than *subject to subdivision (h) of this rule.*

B. *Particular Words*

- *may . . . only*: this is an alternative to *must not . . . except* for a conditional prohibition. E.g., "A request *may* be served *only* after . . . ."

- *only*: place this word carefully before the word it modifies.

- *otherwise*: for emphasis, this adverb should usually end a clause — e.g., "Unless this court *directs otherwise* . . . ," not "Unless this court *otherwise directs.*" But sometimes, for the sake of parallel phrasing, this term should precede the verb — e.g.: "Unless *otherwise* directed by the court or stipulated by the parties . . . ."

- *will*: use for the future tense, not as an imperative.