Agenda

Advisory Committee on Rules of Civil Procedure
October 27, 2021
4:00 to 6:00 p.m.
Via Webex

Welcome and approval of minutes	Tab 1	Lauren DiFrancesco
Introduction of new staff attorney (*Stacy Haacke*)		Keisa Williams
Supreme Court Conf. Update: • Rules 24 and 62 *(approved as final)* • Rules 5 and 65 *(published for comment)*		Lauren DiFrancesco
Preferred terminology	Tab 2	Susan Vogel
Remote hearing notices	Tab 3	Susan Vogel
Legal community requests • Rule 7(j)(6) • Rule 37	Tab 4	Lauren DiFrancesco
Federal Rule 41 issue	Tab 5	Judge Linda Jones Judge Amber Mettler
Consent agenda --		
Verify Pipeline items: • Rule 45 and objections (Jen Tomchak) • Trial date setting (family law-Judge Holmberg, Jim Hunnicutt)		Lauren DiFrancesco, Chair

2021 Meeting Schedule: 4th Wednesday at 4pm unless otherwise scheduled

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

Tab 1

UTAH SUPREME COURT ADVISORY COMMITTEE
ON RULES OF CIVIL PROCEDURE

Summary Minutes – September 22, 2021

DUE TO THE COVID-19 PANDEMIC AND PUBLIC HEALTH EMERGENCY
THIS MEETING WAS CONDUCTED ELECTRONICALLY VIA WEBEX

Committee members, staff, and guests	Present	Excused	Guests/Staff Present
Robert Adler	X		Keisa Williams, Staff
Rod N. Andreason	X		Crystal Powell, Recording Secretary
Judge James T. Blanch	X		Paul Barron, Guest
Lauren DiFrancesco, Chair	X		Judge Brendan McCullagh, Guest
Judge Kent Holmberg	X		Keri Sargent, Guest
James Hunnicutt	X		Christopher Williams, Guest
Trevor Lee	X		Nick Stiles, Guest
Ash McMurray		X	Nathanael Player, Guest
Judge Amber M. Mettler	X		Jim Peters, Guest
Kim Neville	X		
Timothy Pack	X		
Loni Page	X		
Bryan Pattison		X	
James Peterson	X		
Michael Petrogeorge	X		
Judge Laura Scott		X	
Leslie W. Slaugh	X		
Paul Stancil		X	
Judge Clay Stucki	X		
Judge Andrew H. Stone		X	
Justin T. Toth	X		
Susan Vogel	X		

(1) INTRODUCTION OF NEW COMMITTEE MEMBERS

New and continuing members as well as committee staff and guests introduced themselves.

(2) APPROVAL OF MINUTES

Lauren Di Francesco asked for approval of the minutes subject to minor amendments noted by the minutes subcommittee. Jim Hunnicutt moved to adopt the minutes as amended; Susan Vogel seconded. The minutes were approved unanimously.

(3) DISCUSSION OF RULE 5

Ms. Keisa Williams opened the discussion on Rule 5, summarizing public comments and questions raised by Justice Lee, as noted in the rule draft included in the materials. Following discussion, the Committee made the following amendments in response to Justice Lee's questions:

- *(line 46)* **What does "or by other notice" mean?**
  - "or by other notice" was meant to address all of the ways in which a pro se litigant might provide an email address to the court or to other parties.
  - To clarify and accomplish that purpose, the committee struck "or by other notice," removed the reference to Rules 10 and 76, and added "and other parties."

- *(lines 49-50)* **What if the person hasn't provided a mailing address? Couldn't service be made by other methods listed in (C)?**
  - Yes. The committee added a reference to the methods in (b)(3)(C).

- *lines 50-51:* **Does this mean there is an unlimited amount of time to serve someone by mail following an undeliverable notice?**
  - The committee added a time limit: "provided service by another method is made within 3 days following receipt of an undeliverable email notice, excluding Saturday, Sunday, or legal holidays.

- *lines 58-59:* **Doesn't this essentially allow parties to "opt-out" of email service by simply not providing an email address? Does that defeat the purpose?**
  - This is really a policy decision for the Court. An exception is necessary to account for those who cannot communicate by email, but most pro se litigants prefer email and provide it freely. The committee does not believe the "opt-out" provision would be abused.

Other amendments included eliminating the use of gendered pronouns (*lines 56 and 58*) and eliminating the requirement that parties "certify" their inability to serve and receive documents by

email (*line 55*). The amendment would allow litigants to simply "notify" the court and other parties of their inability to use email. The committee felt certification was unnecessary and confusing for pro se litigants.

Ms. Vogel noted that more a focused discussion of persons with disabilities or lack of access to technology is necessary to ensure those individuals are able to easily "opt-out" or certify that they are unable to serve or be served by email. Ms. Vogel noted the difficulty that self-represented parties and those who lack access to technology already have in receiving notices from the court. Ms. Vogel explored whether this should be done by adding a 'check box' on the form and should be referred to the forms committee.

After a full discussion, Mr. Hunnicutt moved to adopt the revisions and Ms. Vogel seconded. The motion passed unanimously.

(4) Rule 100A

Judge Holmberg summarized the concerns raised by court staff on Rule 100A pertaining to the additional workload that will be created for court staff. He noted that the November 1st effective date posed an unfeasible burden on court staff and would have a detrimental affect given the lack of human and financial resources. Based on extensive feedback, he recommended that that the effective date be suspended. Ms. Keri Sargant also recommended a delay in implementation of the rule to allow court staff and administration to prepare. Mr. Hunnicutt noted that while delay in the short term is required, the rule has been in the pipeline for over four years and expressed concern that postponing implementation may lead to other legislative actions. Judge Amber Mettler recommended that that the issue be addressed with the legislative council to push for increased resources so that the rule may be implemented properly.

Mr. Robert Alder questioned whether it makes sense to remove case management conferences from track one cases. Mr. Hunnicutt noted that the proposal for a case management conference does expedite the divorce process by identifying what track a case falls in; thereby estimating how long a case will take and how many resources will be needed.

Ms. Vogel noted that the case management conference can be highly effective for pro se litigants who do not understand the system. Litigants receive a quick education of the process and learn what will be required of them.

Mr. Nick Stiles suggested that the committee's decision be placed on the Supreme Court's conference agenda in October. Judge Holmberg and Ms. DiFrancesco volunteered to attend the conference to lead the discussion.

Judge Holmberg moved to delay the effective date until May 1, 2022. Judge Stucki seconded. The motion passed unanimously.

(5) Rule 108

Judge Holmberg and Mr. Hunnicutt updated the committee on the status of Rule 108. Judge Holmberg stated that all of the discussion and feedback he received, as well as recent case law on the authority of judges and commissioners, leads to the conclusion that the proposed changes are unconstitutional. Judge Holmberg recommended that the committee retire the issue. The committee expressed thanks for the work that had been done.

(6) RULES OF SMALL CLAIMS PROCEDURE: ODR (ONLINE DISPUTE RESOLUTION)

Judge McCullagh opened the discussion concerning ODR and the Small Claims Procedure Rules by giving a summary of the history of ODR from its pilot program to its current operation under a standing order of the Supreme Court. They are now working on a permanent set of rules to govern the roll out of the program. Judge McCullagh noted that it is expedient to standardize the rules and make them more understandable.

Judge McCullagh asked for a focus on substantive changes in order to present the concept of the proposals to the Court for feedback.

Judge Stucki expressed that the language in Rule 9(c) could be unclear as "immediately" needs to be defined. The rule was revised to provide that the party granted default judgment must serve the judgment within 7 days. Judge McCullagh noted that service of judgements will most likely be by traditional mail as the second party would have defaulted by their absence and most likely have not provided an email address.

Judge Stucki noted that Rule 3(d) only provides one method of dismissing the case and questioned whether to provide courts with the ability to dismiss the case after 14 days of failure to file the proof of service. Judge McCullagh clarified that the failure to serve the proof of service triggers the ability of the defendant to exercise the right to move for dismissal and the court must be notified of that by the defendant.

The committee discussed changing the language in 2(d) to read, "the court will notify the plaintiff at the email address provided."

Judge Stucki asked for clarification of whether Rule 2(b) mandates that small claims litigants must have emails and suggested including a statement about requesting an exemption pursuant to Rule 5.

With regard to Rule 13, Judge Mettler suggested including that the party may also be represented by a paralegal within the authorized scope of practice and licensure and noted as an aside that a representative from the paralegal sector should be invited to sit on the committee.

Other changes to the rules were suggested in: (1) Rule 7 to allow for permissive subpoena rather than mandatory; (2) the numbering error in Rule 6B.

Judge Stucki motioned for adoption of the rules as amended. Mr. Hunnicutt seconded. The changes were adopted unanimously. Judge McCullagh expressed his excitement about the positive impact the new rules may have on access to justice.

(7) ADJOURNMENT

The chair thanked everyone for their time and efforts and requested that any new items be emailed to her or Ms. Keisa Williams. The meeting adjourned at 6:00 p.m.

Tab 2

CURRENT TERMINOLOGY	WHEN USED	POSSIBLE NEW TERMINOLOGY
NAMES TO START A CASE		
Acceptance of Service		Acceptance of Documents
Complaint		Request? Application?
Petition		Request? Application?
Service of Process		Service of Court Documents
NAMES OF COURT DECISIONS THAT MUST BE FOLLOWED		
Confession of Judgment	Debt	Agreemeet for Judgment
Letters	Probate only	Order
Stay of Execution	Collection	Stop or Pause
Writ ot Attachment	Collections	Order to Assist in ...
Writ of Execution	Collections	Order to Take Property
Writ of Garnishment	Colllections	Order to Take Money
Writ of Replevin		Order to Return Property
NAMES OF PROCESSES DURING CASE		
Application		
Discovery		Formal Request for Information
Motion		Request
Motion for Satisfaction of Judgment		Request to Show Judgment Paid
Motion to Change Venue		Request to Change Court Location
Motion to Continue		Request to Reschedule
Motion to Expunge	Criminal	Motion to Seal Criminal Case
Motion to Recuse		Request to Change Judge
Motion to Set Aside		Request to Undo
Motion to Stay		Request to Stop (or Pause?)
Motion to Waive	filing fee, mediation, classes	Motion to excuse (someone's requirement, like court fees) or agreement to give up (their rights, like in adoption)
Request for Admission		
Waive notice	Probate	GIve up my right to have papers sent to me
NAMES RELATING TO PROCESS - LIKE SERVICE or FILING		
Delilver to the court		File with the court
Deliver to the other parties		Serve to the other parties under Rule 5
Deliver to the prosecutor		
Docket with the court		File with the court
Interpose with the court	Rule 12	File with the court
Lodge with the court		File with the court
Present to the court	Rule 11	File with the court
Register with the court		File with the court
Remand		Send back

Supplemental order	Collection	Order to attend hearing about property
DISPOSITIONS		
Dismissed - re closing case		Closed
Dismissed as in petition to modify		
Dissolved	Injunction, marriage	End
Expire	PO/Judgment/stay/lien will expire	End
Remove	Remove case	Move, transfer
Revoked	Power of atty, provisions of will	Cancel
Vacated	Vacate dismissal, stay, PO, conviction	Cancel
OTHER		
Assign	Right to collect debt	Transfer
Common Law Marriage		Marriage Without Certificate?
Conservatorship		Order to Manage Finances/Assets of Another Person
Estate (for probate)		Assets/Debts of Deceased
Extinguished	Right to foreclose	Ended
Fixed	Rule 12, diff time is fixed by order	Ordered
Foreign Judgment		Order from Another State Court in U.S.
Forfeit	Rights to adoptee, bail, gun, lease	Lose rights to
Garnishee		Person/Co. who has debtor's property
Impecuniosity	Right to counsel, fee waiver	Inability to pay
Judgment by Confession		Agreement to Enter Judgment
Laches	Right to collect	Creditor seeking debtor's property
	RIght to fee waiver, counsel	Waited too long
Minute Entry		Court Order
More definite statement	Rule 12	clearer, more detailed?
Power of attorney		Permission to act on my behalf
Prescribe	Rule 11, the court may prescribe	Order
Probate		
Quiet title		Establish who owns property
Sanction		Punishment
Statute of limitations		Deadline for filing case
Stipulation		Agreement
Third party practice		
Toll		Pause or stop
Tort		Wrongful Act

Whom		Who

Tab 3

Wish list for **notices of remote hearings** suggested by the Utah State Courts' Self-Help Center attorneys based on court patrons' reports of difficulties in connecting and having to file motions to set aside default/judgment or address warrants that result.

1. A notice of an online, telephonic or other remote hearing must include:

    a. Clear information that the hearing *will be remote and whether there is an option to attend in person*. It must provide information on how the person can connect remotely to the hearing through technology at the courthouse.

    b. Information on how to connect to the hearing such as the Webex link or the phone number to call to connect. If this information is not available when the notice is sent out, and will be provided to later, the notice must state from what email or phone number the information will be provided [so it does not go to spam, etc.] and whom to contact and how [their phone number, email or a link] if the information is not received prior to the hearing. If the notice states the party should contact the court for information, it must provide the phone number and the name of the department to call. If the person is provided the court website address to get the link, the link must be to the page on which the link is posted, likely https://www.utcourts.gov/cal/

    b. A phone number for technical support if the person is having trouble connecting or is unable to connect to attend due to technology issues. An email or phone number to call to let the judge or commissioner know that they are trying to connect and having problems [hopefully that can be noted in the minutes].

    c. A certificate of service stating when and how the notice was provided to the parties (including the email address/text/phone/street address to which it was sent, unless protected).

    d. If the parties are to present evidence remotely, the notice must explain how the party can do this or provide a link where they can find the information.

2. If a party notifies the court, pursuant to 1 (b) above, that they are trying to connect, and unable to due to technology issues, such information will be provided to the judge as soon as received and noted in the record of the hearing [hopefully this will avoid a default or warrant]. In order to issue a default judgment, or issue a warrant, based on failure to appear at a virtual hearing, the court must first find that the party's failure to appear was not due to technological barriers in connecting to the virtual hearing. If a court cannot make the finding, the court must reset the hearing one time before issuing a default judgment or warrant.

3. A party/person is unable to connect due to technology issues, the court shall reschedule the hearing.

4. The court shall provide the parties/witnesses the notices above at least __ prior to the hearing via the email they have provided the court for this purpose or their last-provided email (or is no email is provided, their last provided contact information) and shall post the link to all public hearings on the court calendar webpage at least __ days prior to the hearing date. [https://www.utcourts.gov/cal/]

Tab 4

Legal Community Rule Amendment Requests
Rules of Civil Procedure

Spencer W. Young (Strong & Hanni)

Rule 7(j)(6): "As you may know, the Utah Judicial Council's Code of Judicial Administration, specifically Rules 4-202.02, [4-202.03, and] 4-202.04, set forth the classification schema for court records. That includes documents that are "private," "protected," and "sealed," which tend to mirror the access control provisions of typical protective orders I've seen. So, when parties are filing a document that's been designated under a protective order, they'll typically file a "Motion to Classify" those records accordingly.

GreenFiling provides instructions for this process, and invites the parties to file a proposed order with the motion to classify. However, as you likely know, URCP 7(j)(6) precludes the filing of a proposed order concurrently with a motion, with a few discrete exceptions. None of those circumstances, however, mention motions to classify, creating a small ambiguity between the instruction practitioners are receiving from GreenFiling and the rules that govern civil practice.

I would respectfully urge the committee to consider proposing an amendment to URCP 7(j)(6) that simply adds "a motion to classify a record in accord with Utah Judicial Council Code of Judicial Administration Rules 4-202.02 through -202.04," as one of those exceptions, to resolve this ambiguity and create consistency between what GreenFiling is instructing and what the rules permit.

If the committee is concerned that this may open the door too broadly, it could add "if the motion is made pursuant to a protective order the court previously entered" as a condition to the exception, since most protective orders provide a means by which a party may challenge the designation of documents, separately from an opposition to the motion to classify."

Rule 37: "…amendment to URCP 37 to specify that if an SODI is brought for one party's failure to pay the costs of an expert's deposition under URCP 26, the Court "shall" order payment of attorney fees and costs incurred to bring the SODI. The reason is I've recently experienced a situation where opposing counsel elected a deposition, was sent the invoices from the expert, but never paid, even after repeat reminders. The hourly rate for the expert was $300 an hour, and the depo was three hours, so I believe the calculus from opposing counsel may have been that our client would just pay the expert's invoice because it'll cost our client just as much in attorney fees to raise the issue with the Court and fight about it.

In any event, it's another circumstance I've seen come up that the rules (particularly the unique facets of our 2011 amendments) don't really anticipate/address."

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

(a) Pleadings. Only these pleadings are allowed:

(1) a complaint;

(2) an answer to a complaint;

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

(4) an answer to a crossclaim;

(5) a third-party complaint;

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

(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.

(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.

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

(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).

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

(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.

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

(2) **Caution language.** For all dispositive motions, the motion must include the following caution language at the top right corner of the first page, in bold type: **This motion requires you to respond. Please see the Notice to Responding Party.**

(3) **Bilingual notice.** All motions must include or attach the bilingual Notice to Responding Party approved by the Judicial Council.

(4) **Failure to include caution language and notice**. Failure to include the caution language in paragraph (c)(2) or the bilingual notice in paragraph (c)(3) may be grounds to

continue the hearing on the motion, or may provide the non-moving party with a basis under Rule 60(b) for excusable neglect to set aside the order resulting from the motion. Parties may opt out of receiving the notices set forth in paragraphs (c)(2) and (c)(3) while represented by counsel.

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

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

(A) a concise statement of the relief requested and the grounds for the relief requested; and

(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.

(7) 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.

(8) **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.

(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:

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

(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

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

(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.

(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.

(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:

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

(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;

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

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

(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.

(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:

(1) the motion;

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

(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. A motion hearing may be held remotely, consistent with the safeguards in Rule 43(b).

(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.

(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.

(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.

(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.

(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.

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

(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.);

(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

(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.).

(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:

(A) a stipulated motion;

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

(C) an ex parte motion;

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

(E) the request to submit for decision a motion in which a memorandum opposing the motion has not been filed; and

(F) a motion to classify a record in accordance with Utah Code of Judicial Administration Rules 4-202.02, 4-202.03, and 4-202.04.

Commented [KW1]: Proposed Option #1

(F) a motion to classify a record in accordance with Utah Code of Judicial Administration Rules 4-202.02, 4-202.03, and 4-202.04, if the motion is made pursuant to a protective order the court previously entered.

Commented [KW2]: Proposed Option #2

(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.

(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:

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

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

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

(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.

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

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

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

(C) motion to appear pro hac vice; and

(D) other similar motions.

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

(A) be titled as a regular motion;

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

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

(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:

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

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

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

(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:

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

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

(3) motion to continue a hearing;

(4) motion to appoint a guardian ad litem;

(5) motion to substitute parties;

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

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

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

Effective May 1, 2021

Rule 37. Statement of discovery issues; Sanctions; Failure to admit, to attend deposition or to preserve evidence.

(a) Statement of discovery issues.

(1) A party or the person from whom discovery is sought may request that the judge enter an order regarding any discovery issue, including:

(A) failure to disclose under Rule 26;

(B) extraordinary discovery under Rule 26;

(C) a subpoena under Rule 45;

(D) protection from discovery; or

(E) compelling discovery from a party who fails to make full and complete discovery.

(2) Statement of discovery issues length and content. The statement of discovery issues must be no more than 4 pages, not including permitted attachments, and must include in the following order:

(A) the relief sought and the grounds for the relief sought stated succinctly and with particularity;

(B) a certification that the requesting party has in good faith conferred or attempted to confer with the other affected parties in person or by telephone in an effort to resolve the dispute without court action;

(C) a statement regarding proportionality under Rule 26(b)(2); and

(D) if the statement requests extraordinary discovery, a statement certifying that the party has reviewed and approved a discovery budget.

(3) Objection length and content. No more than 7 days after the statement is filed, any other party may file an objection to the statement of discovery issues. The

objection must be no more than 4 pages, not including permitted attachments, and must address the issues raised in the statement.

(4) Permitted attachments. The party filing the statement must attach to the statement only a copy of the disclosure, request for discovery or the response at issue.

(5) Proposed order. Each party must file a proposed order concurrently with its statement or objection.

(6) Decision. Upon filing of the objection or expiration of the time to do so, either party may and the party filing the statement must file a Request to Submit for Decision under Rule 7(g). The court will promptly:

(A) decide the issues on the pleadings and papers;

(B) conduct a hearing, preferably remotely and if remotely, then consistent with the safeguards in Rule 43(b); or

(C) order additional briefing and establish a briefing schedule.

(7) Orders. The court may enter orders regarding disclosure or discovery or to protect a party or person from discovery being conducted in bad faith or from annoyance, embarrassment, oppression, or undue burden or expense, or to achieve proportionality under Rule 26(b)(2), including one or more of the following:

(A) that the discovery not be had or that additional discovery be had;

(B) that the discovery may be had only on specified terms and conditions, including a designation of the time or place;

(C) that the discovery may be had only by a method of discovery other than that selected by the party seeking discovery;

(D) that certain matters not be inquired into, or that the scope of the discovery be limited to certain matters;

(E) that discovery be conducted with no one present except persons designated by the court;

(F) that a deposition after being sealed be opened only by order of the court;

(G) that a trade secret or other confidential information not be disclosed or be disclosed only in a designated way;

(H) that the parties simultaneously deliver specified documents or information enclosed in sealed envelopes to be opened as directed by the court;

(I) that a question about a statement or opinion of fact or the application of law to fact not be answered until after designated discovery has been completed or until a pretrial conference or other later time;

(J) that the costs, expenses and attorney fees of discovery be allocated among the parties as justice requires; or

(K) that a party pay the reasonable costs, expenses, and attorney fees incurred on account of the statement of discovery issues if the relief requested is granted or denied, or if a party provides discovery or withdraws a discovery request after a statement of discovery issues is filed and if the court finds that the party, witness, or attorney did not act in good faith or asserted a position that was not substantially justified.

(8) Request for sanctions prohibited. A statement of discovery issues or an objection may include a request for costs, expenses and attorney fees but not a request for sanctions.

(9) Statement of discovery issues does not toll discovery time. A statement of discovery issues does not suspend or toll the time to complete standard discovery.

(b) Motion for sanctions. Unless the court finds that the failure was substantially justified, the court, upon motion, may impose appropriate sanctions for the failure to follow its orders, including the following:

(1) deem the matter or any other designated facts to be established in accordance with the claim or defense of the party obtaining the order;

(2) prohibit the disobedient party from supporting or opposing designated claims or defenses or from introducing designated matters into evidence;

(3) stay further proceedings until the order is obeyed;

(4) dismiss all or part of the action, strike all or part of the pleadings, or render judgment by default on all or part of the action;

(5) order the party or the attorney to pay the reasonable costs, expenses, and attorney fees, caused by the failure;

(6) treat the failure to obey an order, other than an order to submit to a physical or mental examination, as contempt of court; and

(7) instruct the jury regarding an adverse inference.

(c) Motion for costs, expenses and attorney fees on failure to admit. If a party fails to admit the genuineness of a document or the truth of a matter as requested under Rule 36, and if the party requesting the admissions proves the genuineness of the document or the truth of the matter, the party requesting the admissions may file a motion for an order requiring the other party to pay the reasonable costs, expenses and attorney fees incurred in making that proof. The court must enter the order unless it finds that:

(1) the request was held objectionable pursuant to Rule 36(a);

(2) the admission sought was of no substantial importance;

(3) there were reasonable grounds to believe that the party failing to admit might prevail on the matter;

(4) that the request was not proportional under Rule 26(b)(2); or

(5) there were other good reasons for the failure to admit.

(d) Motion for sanctions for failure of party to attend deposition. If a party or an officer, director, or managing agent of a party or a person designated under Rule 30(b)(6) to testify on behalf of a party fails to appear before the officer taking the deposition after service of the notice, any other party may file a motion for sanctions under paragraph (b). The failure to appear may not be excused on the ground that the discovery sought is objectionable unless the party failing to appear has filed a statement of discovery issues under paragraph (a).

(e) Failure to preserve evidence. Nothing in this rule limits the inherent power of the court to take any action authorized by paragraph (b) if a party destroys, conceals, alters, tampers with or fails to preserve a document, tangible item, electronic data or other evidence in violation of a duty. Absent exceptional circumstances, a court may not impose sanctions under these rules on a party for failing to provide electronically stored information lost as a result of the routine, good-faith operation of an electronic information system.

Advisory Committee Notes

The 2011 amendments to Rule 37 make two principal changes. First, the amended Rule 37 consolidates provisions for motions for a protective order (formerly set forth in Rule 26(c)) with provisions for motions to compel. Second, the amended Rule 37 incorporates the new Rule 26 standard of "proportionality" as a principal criterion on which motions to compel or for a protective order should be evaluated.

Paragraph (a) adopts the expedited procedures for statements of discovery issues formerly found in Rule 4-502 of the Code of Judicial Administration. Statements of discovery issues replace discovery motions, and paragraph (a) governs unless the judge orders otherwise.

Tab 5

Federal Rule 41 Issue Summary

Judge Linda Jones / Judge Amber Mettler:
An issue was brought to my attention in a case where 4 out of 5 defendants settled and all parties stipulated to a dismissal as to the 4 settling defendants. The parties then turned to the rules. Rule 54(b) did not seem appropriate, and rule 41 was a possibility. The problem, however, is that rule 41 allows the plaintiff to dismiss an "action" by stip or otherwise, and an action is a term of art per rule 2.

Apparently, Utah federal judges have interpreted the federal rule on this point. Specifically, there is disagreement as to whether a Rule 41 dismissal can be used to dismiss parties in a multi-defendant case or whether it can be utilized only to dismiss an entire action.

In the case before me, the parties briefed it this way. I hope this helps.

Here are the excerpts in briefing:

> In *Van Leeuwen v. Bank of America, N.A*., 304 F.R.D. 691, 693, 695-697 (D. Utah 2015), Judge Waddoups analyzed the existence of "a circuit split ... on the question of whether a plaintiff must dismiss the entire action under Rule 41(a)(1)(A) or whether it can more surgically dismiss all claims against one of multiple defendants." Id. Judge Waddoups observed that "[t]he First, Third, Fifth, Eighth, and Ninth Circuits form the majority in holding that 'Rule 41(a)(1) allows a plaintiff to dismiss without a court order any defendant who has yet to serve an answer or a motion for summary judgment.' (quoting *Pedrina v. Chun*, 987 F.2d 608, 609 & n.1 (9th Cir. 1993). Id. But, "[t]he Second and Sixth Circuits have historically taken the opposite approach based on a literal reading of the Rule." Id.
>
> Further, Judge Waddoups noted that the Tenth Circuit has not precisely considered whether Rule 41 permits dismissal of all claims against one defendant in a multi-defendant lawsuit. Id. at 695-696. Judge Waddoups considered *Gobbo Farms & Orchards v. Poole Chemical Co., Inc.*, 81 F.3d 122, 123 (10th Cir.1996), the case that came the closest to answering the question, and concluded that the *Gobbo Farms'* holding "seem[ed] to follow the minority approach of the Second and Sixth Circuits." Id.
>
> Nevertheless, Judge Waddoups concluded that *Gobbo Farms'* holding is limited to dismissing claims—not parties—and so "*Gobbo* should not ... block [a] plaintiff's use of Rule 41(a)(1)(A)(i) to dismiss all claims against" fewer than all defendants. Id. at 696. Based upon his interpretation of the rule, Judge Waddoups held that the plaintiff's voluntary dismissal of all claims against one defendant was a proper dismissal under R. 41(a)(1)(A)(i) and was not a dismissal of the entire case in a multi-party case. Id. at 697.
>
> Judge Nuffer, however, came to exactly the opposite conclusion in *Peter E. v. United HealthCare Servs., Inc.*, No. 2:17-CV-00435, 2018 WL 6068107, at *1 (D. Utah Nov. 20, 2018). Judge Nuffer held: "Generally, the dismissal of single claims is not permitted under Rule 41 because it speaks to dismissal of an action, not just a claim within an action. *Gobbo Farms & Orchards v. Poole Chemical Co., Inc.*, 81 F.3d 122, 123 (10th Cir.1996). When a plaintiff wishes to dismiss certain claims without dismissing the entire case, 'the proper procedure is to amend the complaint under Rule 15.' *Utah Republican Party v. Cox*, 177 F.Supp.3d 1343, 1372 (D. Utah, Apr. 6, 2016)."

Rule 41. Dismissal of Actions

(a) Voluntary Dismissal.

(1) *By the Plaintiff.*

(A) *Without a Court Order.* Subject to Rules 23(e), 23.1(c), 23.2, and 66 and any applicable federal statute, the plaintiff may dismiss an action without a court order by filing:

(i) a notice of dismissal before the opposing party serves either an answer or a motion for summary judgment; or

(ii) a stipulation of dismissal signed by all parties who have appeared.

(B) *Effect.* Unless the notice or stipulation states otherwise, the dismissal is without prejudice. But if the plaintiff previously dismissed any federal- or state-court action based on or including the same claim, a notice of dismissal operates as an adjudication on the merits.

(2) *By Court Order; Effect.* Except as provided in Rule 41(a)(1), an action may be dismissed at the plaintiff's request only by court order, on terms that the court considers proper. If a defendant has pleaded a counterclaim before being served with the plaintiff's motion to dismiss, the action may be dismissed over the defendant's objection only if the counterclaim can remain pending for independent adjudication. Unless the order states otherwise, a dismissal under this paragraph (2) is without prejudice.

(b) Involuntary Dismissal; Effect. If the plaintiff fails to prosecute or to comply with these rules or a court order, a defendant may move to dismiss the action or any claim against it. Unless the dismissal order states otherwise, a dismissal under this subdivision (b) and any dismissal not under this rule—except one for lack of jurisdiction, improper venue, or failure to join a party under Rule 19—operates as an adjudication on the merits.

(c) Dismissing a Counterclaim, Crossclaim, or Third-Party Claim. This rule applies to a dismissal of any counterclaim, crossclaim, or third-party claim. A claimant's voluntary dismissal under Rule 41(a)(1)(A)(i) must be made:

(1) before a responsive pleading is served; or

(2) if there is no responsive pleading, before evidence is introduced at a hearing or trial.

(d) Costs of a Previously Dismissed Action. If a plaintiff who previously dismissed an action in any court files an action based on or including the same claim against the same defendant, the court:

(1) may order the plaintiff to pay all or part of the costs of that previous action; and

(2) may stay the proceedings until the plaintiff has complied.

Rule 41. Dismissal of actions.

(a) Voluntary dismissal; effect.

(a)(1) By the plaintiff.

(a)(1)(A) Subject to Rule 23(e) and any applicable statute, the plaintiff may dismiss an action without a court order by filing:

(a)(1)(A)(i) a notice of dismissal before the opposing party serves an answer or a motion for summary judgment; or

(a)(1)(A)(ii) a stipulation of dismissal signed by all parties who have appeared.

(a)(1)(B) Unless the notice or stipulation states otherwise, the dismissal is without prejudice. But if the plaintiff previously dismissed any federal- or state-court action based on or including the same claim, a notice of dismissal operates as an adjudication on the merits.

(a)(2) By court order. Except as provided in paragraph (a)(1), an action may be dismissed at the plaintiff's request by court order only on terms the court considers proper. If a defendant has pleaded a counterclaim before being served with the plaintiff's motion to dismiss, the action may be dismissed over the defendant's objection only if the counterclaim can remain pending for independent adjudication by the court. Unless the order states otherwise, a dismissal under this paragraph is without prejudice.

(b) Involuntary dismissal; effect. If the plaintiff fails to prosecute or to comply with these rules or any court order, a defendant may move to dismiss the action or any claim against it. Unless the dismissal order otherwise states, a dismissal under this paragraph and any dismissal not under this rule, other than a dismissal for lack of jurisdiction, improper venue, or failure to join a party under Rule 19, operates as an adjudication on the merits.

(c) Dismissal of counterclaim, crossclaim, or third-party claim. This rule applies to the dismissal of any counterclaim, crossclaim, or third-party claim. A claimant's voluntary dismissal under paragraph (a)(1) must be made before a responsive pleading is served or, if there is no responsive pleading, before evidence is introduced at a trial or hearing.

(d) Costs of previously-dismissed action. If a plaintiff who previously dismissed an action in any court files an action based on or including the same claim against the same defendant, the court may order the plaintiff to pay all or part of the costs of the previous action and may stay the proceedings until the plaintiff has complied.

(e) Bond or undertaking to be delivered to opposing party. If a party dismisses a complaint, counterclaim, crossclaim, or third-party claim, under paragraph (a)(1) after a provisional remedy has been allowed the party, the bond or undertaking filed in support of the provisional remedy must be delivered to the party against whom the provisional remedy was obtained.

Advisory Committee Notes

Effective November 1, 2016.