Agenda

Supreme Court Advisory Committee
Utah Rules of Civil Procedure
May 24, 2023
4:00 to 6:00 p.m.
In-Person at the Matheson Courthouse
And via WebEx

Welcome and approval of minutes	Tab 1	Lauren DiFrancesco
Remote Hearings discussion	Tab 2	Tim Pack
Rules 45, 37, and 7	Tab 3	Justin Toth & Omnibus Subcomm.
Rules 69A, 69B, and 69C	Tab 4	Chad Rasmussen
Rule 83 Vexatious Litigants and Due Process	Tab 5	Bryson King
Rule 7B – Change of title	Tab 6	Lauren DiFrancesco
Consent agenda - *None*		
Pipeline items: - Rule 74 (Steve Leech) - Rule 3(a)(2) (Trevor & Subcommittee) - Rule 60 (Judge Cornish & Subcommittee) - Rule 104 (Susan & Subcommittee) - Rules 101 & 62 (Jim & Subcommittee) - Eviction Expungements (Lauren & Subcommittee) - Affidavit/Declaration (Ash & Subcommittee)		Lauren DiFrancesco

Next Meeting: June 28 (Virtual)

[No Meeting Scheduled for July]

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 – April 26, 2023
via Webex

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

Committee members	Present	Excused	Guests/Staff Present
Rod N. Andreason, Vice-Chair	X		Stacy Haacke, Staff
Lauren DiFrancesco, Chair	X		Keri Sargent
Judge Kent Holmberg	X		Crystal Powell
James Hunnicutt	X		Shannon Treseder
Trevor Lee		X	
Ash McMurray		X	
Michael Stahler	X		
Timothy Pack	X		
Loni Page		X	
Bryan Pattison	X		
Judge Laura Scott		X	
Judge Clay Stucki		X	
Judge Andrew H. Stone	X		
Justin T. Toth	X		
Susan Vogel	X		
Tonya Wright	X		
Judge Rita Cornish	X		
Commissioner Catherine Conklin	X		
Giovanna Speiss	X		
Jonas Anderson	X		
Heather Lester	X		
Jensie Anderson	X		
Emeritus Seats Vacant			

(1) INTRODUCTIONS

The meeting started at 4:04 p.m. after forming a quorum. Ms. Lauren DiFrancesco welcomed the Committee and guests.

(2) APPROVAL OF MINUTES

Ms. DiFrancesco asked for approval of the March Minutes subject to amendments noted by the Minutes subcommittee. Rod Andreason moved to adopt the Minutes as amended. Judge Stucki seconded. The Minutes were unanimously approved.

(3) RULE 26 (G). STANDARD CIVIL DOCUMENTS PROTECTION ORDER

Ms. Lauren DiFrancesco met with the Forms Committee. They were not able to complete finalize the Standard Civil Protective Order in time. Two issues were raised in that meeting. First, there is no opportunity for a signed order in the standard protective order if the only thing a party has to do to have the protective order be in effect is to give notice. Second, The Forms Committee questioned the necessity for standard Findings of Fact that are a part of the order, when the judge would not have an opportunity to review the order before. They noted that the Findings of Fact is required under the Rules of Judicial Administration but queried whether the Rules of Judicial Administration needed to be amended. The draft standard order will be sent to the Standard Protective Order Subcommittee to review the concerns of the Forms Committee. Ms. DiFrancesco will follow up with the subcommittee directly.

(4) RULES RETURNING FROM PUBLIC COMMENT

Ms. DiFrancesco reported on the Rules coming back to the Committee from public comments. She noted that Rules 4 and 7, and 100A need no further discussion or amendments.

For Rule 83, one commenter expressed that it was not yet clear how petitions for interlocutory appeals are to be treated regarding vexatious litigants where the implication is that vexatious litigants need to get pre-approval from the trial court. Ms. DiFrancesco reminded the Committee that in prior discussions on vexatious litigants, this issue was raised, and the Committee felt that a change to the interlocutory process would not be necessary because interlocutory appeals go directly to the court of appeals anyway.

Ms. Sargent questioned whether the appellate courts have the ability to declare someone a vexatious litigant and in that an interlocutory appeal would face the same roadblock as a motion filed in trial court or if the appellate courts have the same obligations under Rule 83. Ms. DiFrancesco noted that in the appellate courts the party must ask for permission to appeal but it is unclear how the appellate court handles vexatious litigants are handled under the appellate rules.

Commissioner Conklin referred to the definitions section 83 (a)(2) and noted that it does not seem to include filings in the appellate courts. Ms. Di Francesco reminded the Committee of the original issue the rule change was meant address. The idea was to not truncate the right to appeal under Rule 83 based on how courts were handling notices of appeal. Judge Stone and Judge Stucki agreed with Commissioner Conklin in that what would be needed is a rule change in the appellate courts since Rule 83 does not involve the appellate courts. After further discussion, Ms. DiFrancesco questioned whether a vote was needed since there was no action taken but suggested referring the comment to the appellate rules committee. Ms. Haacke informed the Committee that only a motion to send the rules to the supreme court for final approval.

Rule 10(d). One person opposed the change in margin to preserve the ease of paper files. After discussion, the Committee decided they would not make any further amendments to the proposed Rule.

Judge Stone moved to submit the Rules to the Supreme Court for final approval. Mr. Justin Thoth seconded. The motion passed unanimously.

(5) RULE 42. CONSOLIDATION; SEPARATE TRIALS; VENUE TRANSFERS

Ms. DiFrancesco reminded the Committee that this Rule was addressed some time ago and they have now received feedback from the supreme court. The amendments to this rule started with a change from "new" to "single" in (a)(3). After further discussions there was also an addition made to (a)(2) that would allow any party "to either action to be consolidated" could file or oppose a motion to consolidate. These changes to (a)(2) and (a)(3) were presented to the Supreme Court and were acceptable. The supreme court recommended language that clarified that there no need to file a motion intervene in the first action if a party to a second action wanted to oppose the motion to consolidate.

The Committee discussed how to incorporate that language. Judge Stone questioned what happens in the situation where the first action is private; then the party in the second action would not be able gain access to the first action which some parties would want to see before crafting an opposition to the motion to consolidate. The Committee further discussed draft language and whether the Code of Judicial Administration would need amendment to facilitate the rule change. Mr. Andreason motioned to include draft language "without seeking permission to intervene" under section (a)(2). Mr. Hunnicutt seconded. The amendment was approved unanimously.

(6) RULE 65. JOINT RESOLUTION ON RULES OF CIVIL PROCEDURE ON INJUNCTIONS

Ms. DiFrancesco informed the Committee that changes to Rule 65 were approved by the legislature and went into effect immediately.

(7) RULE 26

Mr. Andreason reported on the discussions and proposal of the Motion for Summary Judgment Deadline Subcommittee. The issue was to research whether the Rules can/should set clearer deadlines for parties to file motions for summary judgment and take other actions dependent on the close of all discovery.

The Subcommittee proposed to include new subsection 26(a)(4)(C)(iv): "Unless otherwise stipulated by the parties or ordered by the court, to calculate any remaining deadlines in the case that are based on the close of discovery, expert discovery is complete on the first date that either (1) the last rebuttal expert report is served or rebuttal expert deposition is taken; or (2) any party fails to meet any of the prior expert discovery deadlines listed above."

Mr. Andreason solicited feedback from the Committee. Ms. DiFrancesco had a concern where the party that bears the burden of proof does not disclose an expert there is still the opportunity for the party not bearing the burden of proof to disclose an expert, but under the proposed (4)(2), the close of expert discovery is when the party bearing the burden of proof did not serve an expert disclosure. In that situation the deadline for summary judgment begins to run even though the parties are still engaged in expert discovery on the defense side. Mr. Bryan Pattison mentioned the notice of events due dates that fixes the expert discovery cutoff which he had always calculated as the date the summary judgment deadline starts. Ms. DiFrancesco questioned whether that would delay cases. After discussing alternate deadlines, Ms. DiFrancesco suggested a two-option scenario in the notice of event deadlines. For example, in a case where any party designates an expert then the close of all discovery is [specific date] and in a case where no party designates an expert then close of all discovery is [specific date]. Mr. Andreason questioned whether the problem is solved by designating a day in the notice of event due dates. Judge Stone noted that a notice of event due dates is an order of the courts, and any conflict is resolved by the newest order or to let the parties establish the deadlines in the notice of event due dates and otherwise address it at a pretrial conference under Rule 16 and set deadlines in order to avoid any unnecessary delays.

Mr. Andreason wondered if anything else in the case is affected by the official close of discovery. Ms. DiFrancesco wondered if anything needed to be added to Rule 26. Mr. Pattison said that he believes it's covered under Rule 16. Judge Stone suggested also add an amendment under 56(b) to allow the judge to set a deadline as follows: "The court may set a deadline under Rule 16 to file motions for summary judgment." Judge Stone moved to add that amendment. Judge Cornish Seconded. The motion unanimously passed.

(8) RULE 30 (B)(6). NOTICE OR SUBPOENA DIRECTED TO AN ORGANIZATION.

Mr. Toth summarized the key guiding principles to amend the Rule. 1) The amendment encourages more exchange of information to lessen disputes; 2) facilitates collaborative efforts to achieve proportionality goals expressed in Rules 1 and 26(b)(1); and 3) is consistent with previous discussions of the Committee where the amendments would not add deadlines to service of the notice, objections, meet and confer requirements, or provide additional limitations on the number of topics that may be set forth in the motion. Mr. Toth presented the proposed new Rule 30(b)(6) with the incorporation of the federal rule. Judge Holmberg questioned whether the understanding is correct every time Rule 30(b)(6) comes up, there needs to be a meet and confer. Mr. Toth confirmed that that is the understanding in the Rule, but it does not need to be particularly sophisticated. The Committee expressed hesitation on always requiring a meet and confer and discussed issues surrounding that. Ms. DiFrancesco expressed that there are no consequences if the parties do not meet and confer. Mr. Toth proposed adding "…if any objections are raised" into the amendment.

Ms. Di Francesco raised that Rule 30(b)(6) also applies to Rule 45 which might include non-parties and so the Rule is a little imprecise in using parties. Ms. DiFrancesco also raised that under Rule 45 if the non-party files an opposition to the deposition, the deposition does not go forward which creates a conflict between Rule 30(b)(6) involving parties and Rule 45 involving non-parties.

Mr. Toth suggested to hold off on further discussions to allow his subcommittee to reanalyze the Rule with Rule 45 in mind.

(9) RULE 45. SUBPOENA.

Ms. DiFrancesco explained that the proposed change is to 45(e)(3). The Committee expressed that looking at three different rules to understand the subpoena obligations is confusing. For example, under Rule 7 (b) a request under Rule 45 must follow Rule 37, however Rule 37 is about discovery issues and not about motions. Commissioner Conklin noted that she would like clarification under Rule 37 for the procedure if the person subject to the subpoena is the party. Ms. DiFrancesco noted that if it's a party objecting to the subpoena, they must file a statement of discovery issues and not merely file an objection. The supreme court requests that the Committee make sure the language in Rules 7, 37, and 45 are clear as to parties, non-parties, objection and motions to quash. The Committee will continue to work on this issue. Mr. Toth's Committee was renamed the Omnibus Subcommittee and will propose something tentative. Ms. DiFrancesco mentioned that she will also ask feedback from Justice Pohlman before going forward.

(10) **RULE 47. ATTORNEY VOIR DIRE- UPDATE.**

Ms. DiFrancesco noted that the proposal is a large packet and will be sent to the Committee and stakeholders. The proposal is to take the voir dire away from the judge and give it to the attorneys. Judge Holmberg reported on the survey sent to district court judges. The feeling

is that the judges are already permitting attorney conducted voir dire once it has been narrowed down to a certain point in the process. They are against the proposal for a number of reasons but overall the process has developed in wisdom over time. The Committee will continue to research the issue and pick it up back discussions in the Fall. The Board of District Court Judges currently supports the conclusion of the district court judges survey on the issue.

(11) ADJOURNMENT.

The meeting was adjourned at 6:00 p.m.

Tab 2

Remote Hearing Subcommittee Memo

The Utah Supreme Court has asked the Civil Rules Committee to consider whether there should be a rule or procedure regarding when and if to hold remote versus in person hearings. The Remote Hearing Subcommittee met and discussed this issue including:

- the current process and practice for holding remote versus in person hearings;
- what types of hearings, if any, should be normally heard in person;
- the injustice or unfairness to parties, including pro se parties, if there is not a procedure to request an in person hearing or to object to a Court's decision to deny an in person hearing;
- any proposed changes to the rules.
- the consequences that may result from implementing a procedure to request an in person hearing or object to a Court's decision deny such a request.

The Subcommittee did not reach a unanimous decision or recommendation. The Subcommittee does not have enough evidence to determine whether parties are suffering harm or injustice because of an inability to appear before Courts in person. Implementing any additional procedures will naturally cause more work for the parties, Court staff, and judges. As a result, the entire Civil Rules Committee should consider this question.

In any event, amendments to Utah R. Civ. P. 7(h) were proposed which addressed in person hearings for dispositive motions:

> 7(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. Absent good cause or stipulation of the parties, evidentiary hearings and hearings on dispositive motions must be held in person. Other motion hearings may be held remotely at the court's discretion. Any motion hearing ~~may be~~ held remotely must be conducted~~,~~ consistent with the safeguards in Rule 43(b). ~~.~~

Tab 3

Rule 7, 30, 37 and 45 Proposed Changes

Goal: Clarify the process for party, non-party and "person affected" (collectively, "Objecting Party") by a subpoena under Rule 45 to "object" and seek relief from the subpoena (as opposed to any other form of discovery under Rules 26-36).

Problem: Current Rule 37 and 45 are not clear whether Rule 37's Statement of Discovery Issues process applies to the person seeking relief from the subpoena, or whether Rule 45's "objection" process controls.

Proposed Revisions: It seems like the best process is to amend the applicable rules to make it clear that, if an Objecting Party objects to a subpoena, the Objecting Party needs to serve an objection under Rule 45(e)(3). Once the objection (not the old "motion to quash") is made, the discovery process stops and the burden shifts to the party seeking to take discovery with the subpoena to show relevance, proportionality and compliance with Rule 45(e)(3) as required by under Rule 26 and 37(a)(1)(C). That seems right because it also makes it clear that it is the burden of the party seeking discovery to demonstrate relevance and proportionality.

From a process standpoint, we get rid of the "shadow" procedure (which is sort of an artifact of the old rules) under Rule 45 of parties filing "motion to quash," unclear burden shifting and procedural guidelines, such as timing under Rule 7 or 37 and length of motions. Instead, we get a simpler process that ultimately does use Rule 37, but only when the party seeking to conduct discovery meets the requirements of Rule 37, including the meet-and-confer process.

Specific Revisions:

Rule 45

- Keep Committee' suggested deletion in Rule 45(e)(3) removing "under Rule 37"
- Add "party" under Rule 45(e)(3)

Rule 37

- Keep edits shown from Committee
- Add additional amendment to Rule 37(a)(1)(C) to cross-reference Rule 45(e)(5) and make it clear that a Rule 37 SODI is only used by the party seeking to compel compliance with the subpoena
- Delete "or the person from whom discovery is sought" from Rule 37(a)(1) to make it clear Rule 37 process applies to parties.

Rule 7

- Add additional amendment to Rule 7(b)(4) to make it clear that the party seeking an order to compel compliance must follow Rule 37

- But delete the language suggesting that a party "objecting" to a subpoena (not quash) must follow Rule 7 OR Rule 37. That's because the objection under Rule 45(e) is not seeking an "order" which would bring Rule 7(b) into play. Rather, the Rule 45(e) "objection" is self-executing. File the objection and you get your relief (i.e., no duty to comply with the subpoena). The party issuing the subpoena wants an "order" compelling compliance and therefore must follow Rules 7(b) and 37(a)

Rule 30(b)(6)

- Add additional amendment "If the organization is a non-party, the organization may object to the notice and subpoena under Rule 45(e)(3) and the deposition may not proceed until resolved by the court under Rule 37(a)."

Rule 45. Subpoena.

(a) Form; issuance.

(1) Every subpoena shall:

(A) issue from the court in which the action is pending;

(B) state the title and case number of the action, the name of the court from which it is issued, and the name and address of the party or attorney responsible for issuing the subpoena;

(C) command each person to whom it is directed

(i) to appear and give testimony at a trial, hearing or deposition, or

(ii) to appear and produce for inspection, copying, testing or sampling documents, electronically stored information or tangible things in the possession, custody or control of that person, or

(iii) to copy documents or electronically stored information in the possession, custody or control of that person and mail or deliver the copies to the party or attorney responsible for issuing the subpoena before a date certain, or

(iv) to appear and to permit inspection of premises;

(D) if an appearance is required, give notice of the date, time, and place for the appearance and, if remote transmission is requested, instructions for participation and whom to contact if there are technical difficulties; and

(E) include a notice to persons served with a subpoena in a form substantially similar to the approved subpoena form. A subpoena may specify the form or forms in which electronically stored information is to be produced.

(2) The clerk shall issue a subpoena, signed but otherwise in blank, to a party requesting it, who shall complete it before service. An attorney admitted to practice in Utah may issue and sign a subpoena as an officer of the court.

(b) **Service; fees; prior notice.**

(1) A subpoena may be served by any person who is at least 18 years of age and not a party to the case. Service of a subpoena upon the person to whom it

is directed shall be made as provided in Rule 4(d).

(2) If the subpoena commands a person's appearance, the party or attorney responsible for issuing the subpoena shall tender with the subpoena the fees for one day's attendance and the mileage allowed by law. When the subpoena is issued on behalf of the United States, or this state, or any officer or agency of either, fees and mileage need not be tendered.

(3) If the subpoena commands a person to copy and mail or deliver documents or electronically stored information, to produce documents, electronically stored information or tangible things for inspection, copying, testing or sampling or to permit inspection of premises, the party or attorney responsible for issuing the subpoena shall serve each party with the subpoena by delivery or other method of actual notice before serving the subpoena.

(c) **Appearance; resident; non-resident.**

(1) A person who resides in this state may be required to appear:

(A) at a trial or hearing in the county in which the case is pending; and

(B) at a deposition, or to produce documents, electronically stored information or tangible things, or to permit inspection of premises only in the county in which the person resides, is employed, or transacts business in person, or at such other place as the court may order.

(2) A person who does not reside in this state but who is served within this state may be required to appear:

(A) at a trial or hearing in the county in which the case is pending; and

(B) at a deposition, or to produce documents, electronically stored information or tangible things, or to permit inspection of premises only in the county in which the person is served or at such other place as the court may order.

(d) Payment of production or copying costs. The party or attorney responsible for issuing the subpoena shall pay the reasonable cost of producing or copying documents, electronically stored information, or tangible things. Upon the request of any other party and the payment of reasonable costs, the party or attorney responsible for issuing the subpoena shall provide to the requesting party copies of all documents, electronically stored information or tangible things

obtained in response to the subpoena or shall make the tangible things available for inspection.

(e) **Protection of persons subject to subpoenas; objection.**

(1) The party or attorney responsible for issuing a subpoena shall take reasonable steps to avoid imposing an undue burden or expense on the person subject to the subpoena. The court shall enforce this duty and impose upon the party or attorney in breach of this duty an appropriate sanction, which may include, but is not limited to, lost earnings and a reasonable attorney fee.

(2) A subpoena to copy and mail or deliver documents or electronically stored information, to produce documents, electronically stored information or tangible things, or to permit inspection of premises shall comply with Rule 34(a) and (b)(1), except that the person subject to the subpoena must be allowed at least 14 days after service to comply.

(3) The person subject to the subpoena, a party or a non-party affected by the subpoena may object ~~under Rule 37~~ if the subpoena:

(A) fails to allow reasonable time for compliance;

(B) requires a resident of this state to appear at other than a trial or hearing in a county in which the person does not reside, is not employed, or does not transact business in person;

(C) requires a non-resident of this state to appear at other than a trial or hearing in a county other than the county in which the person was served;

(D) requires the person to disclose privileged or other protected matter and no exception or waiver applies;

(E) requires the person to disclose a trade secret or other confidential research, development, or commercial information;

(F) subjects the person to an undue burden or cost;

(G) requires the person to produce electronically stored information in a form or forms to which the person objects;

(H) requires the person to provide electronically stored information from sources that the person identifies as not reasonably accessible

because of undue burden or cost; or

(I) requires the person to disclose an unretained expert's opinion or information not describing specific events or occurrences in dispute and resulting from the expert's study that was not made at the request of a party.

(4) T**iming and form of objections.**

(A) If the person subject to the subpoena or a non-party affected by the subpoena objects, the objection must be ~~made~~ in writing and made before the date for compliance.

(B) The objection shall be stated in a concise, non-conclusory manner.

(C) If the objection is that the information commanded by the subpoena is privileged or protected and no exception or waiver applies, or requires the person to disclose a trade secret or other confidential research, development, or commercial information, the objection shall sufficiently describe the nature of the documents, communications, or things not produced to enable the party or attorney responsible for issuing the subpoena to contest the objection.

(D) If the objection is that the electronically stored information is from sources that are not reasonably accessible because of undue burden or cost, the person from whom discovery is sought must show that the information sought is not reasonably accessible because of undue burden or cost.

(E) The objection shall be served on the party or attorney responsible for issuing the subpoena. The party or attorney responsible for issuing the subpoena shall serve a copy of the objection on the other parties.

(5) If objection is made, or if a party requests a protective order, the party or attorney responsible for issuing the subpoena is not entitled to compliance but may request an order to compel compliance under Rule 37(a). The objection or request shall be served on the other parties and on the person subject to the subpoena. An order compelling compliance shall protect the person subject to or affected by the subpoena from significant expense or harm. The court may quash or modify the subpoena. If the party or attorney responsible for issuing the subpoena shows a substantial need for the

information that cannot be met without undue hardship, the court may order compliance upon specified conditions.

(f) **Duties in responding to subpoena.**

(1) A person commanded to copy and mail or deliver documents or electronically stored information or to produce documents, electronically stored information or tangible things shall serve on the party or attorney responsible for issuing the subpoena a declaration under penalty of law stating in substance:

(A) that the declarant has knowledge of the facts contained in the declaration;

(B) that the documents, electronically stored information or tangible things copied or produced are a full and complete response to the subpoena;

(C) that the documents, electronically stored information or tangible things are the originals or that a copy is a true copy of the original; and

(D) the reasonable cost of copying or producing the documents, electronically stored information or tangible things.

(2) A person commanded to copy and mail or deliver documents or electronically stored information or to produce documents, electronically stored information or tangible things shall copy or produce them as they are kept in the usual course of business or shall organize and label them to correspond with the categories in the subpoena.

(3) If a subpoena does not specify the form or forms for producing electronically stored information, a person responding to a subpoena must produce the information in the form or forms in which the person ordinarily maintains it or in a form or forms that are reasonably usable.

(4) If the information produced in response to a subpoena is subject to a claim of privilege or of protection as trial-preparation material, the person making the claim may notify any party who received the information of the claim and the basis for it. After being notified, the party must promptly return, sequester, or destroy the specified information and any copies of it and may not use or disclose the information until the claim is resolved. A receiving party may promptly present the information to the court under seal for a determination of the claim. If the receiving party disclosed the information before being notified, it must take reasonable steps to retrieve the information. The person who

produced the information must preserve the information until the claim is resolved.

(g) **Contempt.** Failure by any person without adequate excuse to obey a subpoena served upon that person is punishable as contempt of court.

(h) **Procedure when witness evades service or fails to attend.** If a witness evades service of a subpoena or fails to attend after service of a subpoena, the court may issue a warrant to the sheriff of the county to arrest the witness and bring the witness before the court.

(i) **Procedure when witness is an inmate.** If the witness is an inmate as defined in Rule 6(e)(1), a party may move for an order to examine the witness in the institution or to produce the witness before the court or officer for the purpose of being orally examined.

(j) **Subpoena unnecessary.** A person present in court or before a judicial officer may be required to testify in the same manner as if the person were in attendance upon a subpoena.

Effective ~~May 1, 2021~~

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

Effective: 5/1/2021

(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) seeking to compel compliance with a subpoena under Rule 45(e)(5);

(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.

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 for an order to compel compliance ~~request~~ under Rule 45(e) ~~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.

(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.

(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.

(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.

(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 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.

(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.

(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;

(D) motion for Rule 16 conference;

(E) motion to strike a document filed by a vexatious litigant in violation of rule 83(d);

(F) motion to appear remotely; and

~~(E)~~(G) 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.

(q) Length of Filings.

(1) Unless one of the following filings complies with the page limits set forth below, it must comply with the corresponding word limits:

Type of Filing	**Page Limit**	**Word Limit**
Motion for Relief Authorized by Rule 12(b), 12(c), 56, or 65A	25	9,000
All Other Motions	15	5,400
Memorandum Opposing Motion Authorized by Rule 12(b), 12(c), 56, or 65A	25	9,000
Memorandum Opposing All Other Motions	15	5,400
Reply Memorandum Supporting Motion for Relief Authorized by Rule 12(b), 12(c), 56, or 65A	15	5,400
Reply Memorandum Supporting All Other Motions	10	3,600
Objection and Response under Rule 7(f)	3	1,100
Notice of Supplemental Authority and Response under Rule 7(i)	2	700
Statement of Discovery Issues and Objection under	4	1,500

Rule 37(a)(2) and 37(a)(3)		

(2) The word and page limits in this rule exclude the following: caption, table of contents, table of authorities, signature block, certificate of service, certification, exhibits, and attachments.

(3) Any filer relying on the word limits in this rule must include a certification that the document complies with the applicable word limit and must state the number of words in the document.

Effective May 1, 2023

Tab 4

To: Stacy Haacke (stachyh@utcourts.gov)

From: Chad Rasmussen (chad@alpinalegal.com; 801-747-9529)

Date: Feb. 6, 2023

RE: Suggested amendments to Rules 69A, 69B, and 69C Utah R. Civ. P.

Issue

I am an attorney licensed in Utah. I do a good amount of collections and have obtained writs of execution and sent to constables and sheriffs for service. This actually implicates issues I have personally experienced as a purchaser of real property at a sheriff's sale. It has happened twice now in dealing with the Utah County Sheriff.

On both occasions I purchased real property at a sheriff's sale that was sold pursuant to either a writ of execution issued under Rule 64E or a judgment that simply ordered the sheriff to sell the property. After the sale the sheriff issued a certificate of sale but refused to record the certificate with the county recorder unless I, the purchaser, paid the $40 filing fee that the county recorder charges. The sheriff's office claimed that they complied with the rule, which requires them to "file" a copy, by emailing a copy of the certificate to a generic email address of the county recorder and that filing is different than recording for purposes of Rule 69B.

Relevant and Related Rules

Rule 64(a)(7) states: " '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."

Rule 69A(b) states: "Unless otherwise directed by the writ, the **officer** shall seize property as follows: …Real property shall be seized by **filing** the writ and a description of the property with the county recorder and leaving the writ and description with an occupant of the property. If there is no occupant of the property, the officer shall post the writ and description in a conspicuous place on the property. If another person claims an interest in the real property, the officer shall serve the writ and description on the other person." (Bold emphasis added).

Rule 69B(i) states, in part: "Real property. Upon payment of the amount bid, the officer shall deliver to the purchaser of real property a certificate of sale for each parcel containing: …The officer **shall file** a duplicate of the certificate in the office of the county recorder." (Bold emphasis added).

Rule 69C(e) states: "Redemption price. The price to redeem is the sale price plus six percent. The price for a subsequent redemption is the redemption price plus three percent. If the purchaser or redemptioner **files** with the county recorder notice of the amounts paid for taxes, assessments, insurance, maintenance, repair or any lien other than the lien on which the redemption was

based, the price to redeem includes such amounts plus six percent for an initial redemption or three percent for a subsequent redemption. Failure to **file** notice of the amounts with the county recorder waives the right to claim such amounts." (Bold emphasis added).

Utah Code § 78B-5-504(1) states: "An individual may select and claim a homestead by complying with the following requirements: (1) **Filing** a signed and acknowledged declaration of homestead with the recorder of the county or counties in which the homestead claimant's property is located or serving a signed and acknowledged declaration of homestead upon the sheriff or other officer conducting an execution prior to the time stated in the notice of execution." (Bold emphasis added).

Suggested Amendment

I am unaware of a way to simply "file" a document with a county recorder in this state that does not constitute recording. Utah Code § 17-21-1 et seq is devoid of any language regarding "filing" anything with a county recorder. The issue identified above exists because of the somewhat vague and ambiguous language used in the rules, which allows the sheriff to try to weasel its way out of its duties under the rules. However, I think the courts and most people understand that when something is "filed" with the county recorder it is actually recorded, not merely delivered. In particular, if a homestead declaration as required by Utah Code § 78B-5-504(1) is not actually recorded, then the person will not be entitled to the exemption. Furthermore, it appears that Rules 69A, 69B, and 69C require the filing with the county recorder so that the public is put on notice, and no public notice is given unless recorded. Thus some mere "filing" of sorts (that apparently the Utah County sheriff does by emailing to a generic email address of the county recorder) is not what is contemplated or required by the rule.

Thus, I suggest amendments to the following rules as follows (strikethrough are deletions; underline are additions)(a couple of rules do not directly implicate my issue identified, but I am including them for consistency):

Utah R. Civ. P. Rule 64(f)(5)

> Copy filed with county recorder. If an order discharges a writ upon property seized by filing <u>for record</u> with the county recorder, the officer or a party shall file <u>for record</u> a certified copy of the order with the county recorder.

Utah R. Civ. P. Rule 66(g)

> Real property. Before a receiver is vested with real property, the receiver shall file <u>for record</u> a certified copy of the appointment order in the office of the county recorder of the county in which the real property is located.

Utah R. Civ. P. Rule 69A(b)

> "Real property. Real property shall be seized by filing <u>for record</u> the writ and a description of the property with the county recorder and leaving the writ and description

with an occupant of the property. If there is no occupant of the property, the officer shall post the writ and description in a conspicuous place on the property. If another person claims an interest in the real property, the officer shall serve the writ and description on the other person.

Utah R. Civ. P. Rule 69B(i)

(i) Real property. Upon payment of the amount bid, the officer shall deliver to the purchaser of real property a certificate of sale for each parcel containing:

(i)(1) a description of the real property;

(i)(2) the price paid;

(i)(3) a statement that all right, title, interest of the defendant in the property is conveyed to the purchaser; and

(i)(4) a statement whether the sale is subject to redemption.

The officer shall file for record a duplicate of the certificate in the office of the county recorder.

Utah R. Civ P. Rule 69C(e)

Redemption price. The price to redeem is the sale price plus six percent. The price for a subsequent redemption is the redemption price plus three percent. If the purchaser or redemptioner files for record with the county recorder notice of the amounts paid for taxes, assessments, insurance, maintenance, repair or any lien other than the lien on which the redemption was based, the price to redeem includes such amounts plus six percent for an initial redemption or three percent for a subsequent redemption. Failure to file for record notice of the amounts with the county recorder waives the right to claim such amounts.

Utah R. Civ P. Rule 69C(g)

(g) Certificate of redemption. The purchaser shall promptly execute and deliver to the redemptioner, or the redemptioner to a subsequent redemptioner, a certificate of redemption containing:

(g)(1) a detailed description of the real property;

(g)(2) the price paid;

(g)(3) a statement that all right, title, interest of the purchaser in the property is conveyed to the redemptioner; and

(g)(4) if known, whether the sale is subject to redemption.

The redemptioner or subsequent redemptioner shall file for record a duplicate of the certificate with the county recorder.

Utah R. Civ P. Rule 72(b)

The bond is not effective until ~~recorded~~ filed for record with the county recorder of the county in which the property is located. Proof of recording shall be filed with the court.

Tab 5

Memorandum
Vexatious Litigants and URCP Rule 83
Bryson King, Associate General Counsel

Several years ago, an attorney was named as the defendant in an attorney discipline case. After years of litigating more than two dozen unmeritorious motions filed by the defendant, and a few attempts to disqualify the judge, the court entered an order sua sponte finding that the defendant's conduct rises to the level of a vexatious litigant. The court specifically found the defendant filed unmeritorious pleadings, the pleadings were redundant and immaterial, and the pleadings amounted to tactics that were frivolous or solely for the purpose of harassment or delay. The record, on its face, supports these findings, and for sake of the argument, let's assume the court's findings were accurate and the defendant is, indeed, a vexatious litigant.

In the court's sua sponte order, the judge not only found that the defendant was a vexatious litigant, but imposed a pre-filing restriction on the defendant, requiring the defendant to seek leave of the presiding judge of the judicial district before filing any future pleadings. As you've already guessed, the judge made the vexatious litigant findings and entered the order on pre-filing restrictions with no notice and without giving the defendant an opportunity to respond.

In my personal opinion, the phrase "The court may, on its own motion…enter an order," may have been misinterpreted in this scenario. I think the judge may have assumed they could act without the normal procedural precautions because the vexatious litigant conduct had no subjective element to it and was readily apparent from the record. For example, the defendant did in fact file well over three "unmeritorious pleadings" (a factor provided in the rule), so it would be futile to dispute this fact. But, even though the court rightly found the defendant was a vexatious litigant, and the fact the court relied on in making that finding was indisputable, the court could not impose pre-filing restrictions on the defendant unless and until it found by clear and convincing evidence that there was no reasonable probability the defendant would prevail on the claim (the case). And the court did not give an opportunity for the defendant to speak to that element of Rule 83.

So, here's my dilemma: Does the due process clause/open courts clause require a court to provide procedural safeguards (notice + opportunity to respond) **before** it moves sua sponte finding a litigant vexatious and imposing pre-filing restrictions? Or, similar to our direct contempt statute (78B-6-302), may a court summarily find a litigant vexatious based on indisputable behavior or conduct, and impose restrictions on the litigant without due process considerations? *See U.S. v. Peterson*, 456 F.2d 1135 (10th Cir., 1972).

Rule 83. Vexatious litigants.

(a) Definitions.

(1) The court may find a person to be a "vexatious litigant" if the person, with or without legal representation, including an attorney acting pro se, does any of the following:

(A) In the immediately preceding seven years, the person has filed at least five claims for relief, other than small claims actions, that have been finally determined against the person, and the person does not have within that time at least two claims, other than small claims actions, that have been finally determined in that person's favor.

(B) After a claim for relief or an issue of fact or law in the claim has been finally determined, the person two or more additional times re-litigates or attempts to re-litigate the claim, the issue of fact or law, or the validity of the determination against the same party in whose favor the claim or issue was determined.

(C) In any action, the person three or more times does any one or any combination of the following:

(i) files unmeritorious pleadings or other papers,

(ii) files pleadings or other papers that contain redundant, immaterial, impertinent or scandalous matter,

(iii) conducts unnecessary discovery or discovery that is not proportional to what is at stake in the litigation, or

(iv) engages in tactics that are frivolous or solely for the purpose of harassment or delay.

(D) The person purports to represent or to use the procedures of a court other than a court of the United States, a court created by the Constitution of the United States or by Congress under the authority of the Constitution of the United States, a tribal court recognized by the United States, a court created by a state or territory of the United States, or a court created by a foreign nation recognized by the United States.

(2) "Claim" and "claim for relief" mean a petition, complaint, counterclaim, cross claim or third-party complaint.

(b) Vexatious litigant orders. The court may, on its own motion or on the motion of any party, enter an order requiring a vexatious litigant to:

(1) furnish security to assure payment of the moving party's reasonable expenses, costs and, if authorized, attorney fees incurred in a pending action;

(2) obtain legal counsel before proceeding in a pending action;

(3) obtain legal counsel before filing any future claim for relief;

(4) abide by a prefiling order requiring the vexatious litigant to obtain the court's ~~leave~~ permission~~of the court~~ before filing any paper, pleading, or motion, in a pending action~~;~~, except that the court may not require a vexatious litigant to obtain the court's permission before filing a notice of appeal;

(5) abide by a prefiling order requiring the vexatious litigant to obtain the court's ~~leave~~ permission ~~of the court~~ before filing any future claim for relief in any court; or

(6) take any other action reasonably necessary to curb the vexatious litigant's abusive conduct.

(c) Necessary findings and security.

(1) Before entering an order under subparagraph (b), the court must find by clear and convincing evidence that:

(A) the party subject to the order is a vexatious litigant; and

(B) there is no reasonable probability that the vexatious litigant will prevail on the claim.

(2) A preliminary finding that there is no reasonable probability that the vexatious litigant will prevail is not a decision on the ultimate merits of the vexatious litigant's claim.

(3) The court shall identify the amount of the security and the time within which it is to be furnished. If the security is not furnished as ordered, the court shall dismiss the vexatious litigant's claim with prejudice.

(d) Prefiling orders in a pending action.

(1) If a vexatious litigant is subject to a prefiling order in a pending action requiring ~~leave~~ the court's permission~~of the court~~ to file any paper, pleading, or motion, the vexatious litigant shall submit any proposed paper, pleading, or motion, except for a notice of appeal, to the judge assigned to the case and must:

(A) demonstrate that the paper, pleading, or motion is based on a good faith dispute of the facts;

(B) demonstrate that the paper, pleading, or motion is warranted under existing law or a good faith argument for the extension, modification, or reversal of existing law;

(C) include an oath, affirmation or declaration under criminal penalty that the proposed paper, pleading or motion is not filed for the purpose of harassment or delay and contains no redundant, immaterial, impertinent or scandalous matter;

(2) A prefiling order in a pending action shall be effective until a final determination of the action on appeal, unless otherwise ordered by the court.

(3) After a prefiling order has been effective in a pending action for one year, the person subject to the prefiling order may move to have the order vacated. The motion shall be decided by the judge to whom the pending action is assigned. In granting the motion, the judge may impose any other vexatious litigant orders permitted in paragraph (b).

(4) All papers, pleadings, and motions filed by a vexatious litigant subject to a prefiling order under this paragraph (d) shall include a judicial order authorizing the filing and any required security. If the order or security is not included, the clerk or court shall reject the paper, pleading, or motion.

(e) Prefiling orders as to future claims.

(1) A vexatious litigant subject to a prefiling order restricting the filing of future claims shall submit an application seeking an order before filing. The presiding judge of the judicial district in which the claim is to be filed shall decide the application. The presiding judge may consult with the judge who entered the vexatious litigant order in deciding the application. In granting an application, the presiding judge may impose in the pending action any of the vexatious litigant orders permitted under paragraph (b).

(2) To obtain an order under paragraph (e)(1), the vexatious litigant's application must:

(A) demonstrate that the claim is based on a good faith dispute of the facts;

(B) demonstrate that the claim is warranted under existing law or a good faith argument for the extension, modification, or reversal of existing law;

(C) include an oath, affirmation, or declaration under criminal penalty that the proposed claim is not filed for the purpose of harassment or delay and contains no redundant, immaterial, impertinent or scandalous matter;

(D) include a copy of the proposed petition, complaint, counterclaim, cross-claim, or third party complaint; and

(E) include the court name and case number of all claims that the applicant has filed against each party within the preceding seven years and the disposition of each claim.

(3) A prefiling order limiting the filing of future claims is effective indefinitely unless the court orders a shorter period.

(4) After five years a person subject to a pre-filing order limiting the filing of future claims may file a motion to vacate the order. The motion shall be filed in the same judicial district from which the order entered and be decided by the presiding judge of that district.

(5) A claim filed by a vexatious litigant subject to a prefiling order under this paragraph (e) shall include an order authorizing the filing and any required security. If the order or security is not included, the clerk of court shall reject the filing.

(f) Notice of vexatious litigant orders.

(1) The clerks of court shall notify the Administrative Office of the Courts that a pre-filing order has been entered or vacated.

(2) The Administrative Office of the Courts shall disseminate to the clerks of court a list of vexatious litigants subject to a prefiling order.

(g) Statute of limitations or time for filing tolled. Any applicable statute of limitations or time in which the person is required to take any action is tolled until 7 days after notice of the decision on the motion or application for authorization to file.

(h) Contempt sanctions. Disobedience by a vexatious litigant of a pre-filing order may be punished as contempt of court.

(i) Other authority. This rule does not affect the authority of the court under other statutes and rules or the inherent authority of the court.

(j) Applicability of vexatious litigant order to other courts. After a court has issued a vexatious litigant order, any other court may rely upon that court's findings and order its own restrictions against the litigant as provided in paragraph (b).

Effective: Nov. 1, 2023

Tab 6

Memorandum
URCP Rule 7B Title

The current title of Rule 7B contains the language "domestic law matters." Pursuant to the recent amendments to rules, the request is to change the title of Rule 7B to read "Motion to enforce order and for sanctions in domestic relations actions." This would be consistent with the language seen in Rules 26.1 and 100A, as well as the new proposed Rule 53A.

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

Effective: 5/1/2023

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

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

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

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

(2) state the relief sought in the motion;

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

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

(5) state that no written response to the motion is required, but is permitted if filed at least 14 days before the hearing, unless the court sets a different time, and that any written response must follow the requirements of Rule 7, and Rule 101 if the hearing will be before a commissioner.

(d) Service of the order. If the court issues an order to attend a hearing, the moving party must have the order, motion, and all supporting affidavits served on the nonmoving party at least 28 days before the hearing. Service must be in a manner provided in Rule 4 if the nonmoving party is not represented by counsel in the case. If

the nonmoving party is represented by counsel in the case, service must be made on the nonmoving party's counsel of record in a manner provided in Rule 5. For purposes of this rule, a party is represented by counsel if, within the last 120 days, counsel for that party has served or filed any documents in the case and has not withdrawn. The court may shorten the 28 day period if:

(1) the motion requests an earlier date; and

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

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

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

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

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

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

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

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

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

(5) state that no written response to the countermotion is required, but that a written response is permitted if filed at least 7 days before the hearing, unless the court sets a different time, and that any written response must follow the requirements of Rule 7, and Rule 101 if the hearing will be before a commissioner.

(i) Limitations. This rule does not apply to proceedings instituted by the court on its own initiative to enforce an order. This rule applies only to domestic relations actions, including divorce; temporary separation; separate maintenance; parentage; custody; child support; adoptions; cohabitant abuse protective orders; child protective orders; civil stalking injunctions; grandparent visitation; and modification actions. Nothing in this rule is intended to limit or alter the inherent power of the court to initiate order to show cause proceedings to assess whether cases should be dismissed for failure to prosecute or to otherwise manage the court's docket, or to limit the authority of the court to hold a party in contempt for failure to appear pursuant to a court order.

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