Agenda

Supreme Court Advisory Committee
Utah Rules of Civil Procedure
Sept. 27, 2023
4:00 to 6:00 p.m.
Via Webex

Welcome and approval of minutes	Tab 1	Lauren DiFrancesco
Rule 3(a)(2) – prefiling service of complaint	Tab 2	Trevor Lee
Rule 104 – divorce decree upon affidavit	Tab 3	Susan Vogel
Rule 101 – language change from OSC to "motion to enforce order and for sanctions"	Tab 4	Jim Hunnicutt
MSJ Deadline feedback from Utah Supreme Court	Tab 5	Lauren DiFrancesco
Rule 7A and 37 – motions to enforce discovery orders	Tab 6	Clint Hansen
Rule 65C – appointment of counsel in postconviction relief proceedings	Tab 7	Ian Quiel
Review subcommittees	Tab 8	Lauren DiFrancesco
December meeting		Lauren DiFrancesco
Consent agenda - *None*		
Pipeline items: - Removal of gendered pronouns - Rule 60 Subcommittee - Omnibus Subcommittee - Remote Hearings Subcommittee - Rule 62 Subcommittee - Standard POs Subcommittee - Rule 47 Attorney Voir Dire - Third Party Financing - Rule 26		Lauren DiFrancesco

Next Meeting: October 25 (Hybrid)

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

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

Tab 1

Tab 2

Rule 3(b)

Rule 3(b) Summary

- Federal Rules: Case is commenced by filing a complaint
- Utah Rule 3: Case is commenced by: (a) filing a complaint or (b) serving a summons and copy of the complaint, and then filing within 10 days
- Rule 3(b) is used primarily in debt collection cases because:
    - Debt collectors want to try to settle relatively low-dollar disputes without paying a filing fee
    - Debtors are difficult to serve, especially after they have been contacted once, so collectors want to serve them once, give them an opportunity to settle, and then file and pay the filing fee if debtors won't pay/settle
- Problems
    - Debtors are confused when they receive a complaint; don't know whether they need to answer
    - Debtors constantly call the court to see if a case has been filed
    - Even if a case was filed within the 10-day window, it often doesn't show up in the system until day 13
    - Court ends up fielding a bunch of phone calls
    - Also, if an answer is filed early, there is no complaint to associate it with, so the clerks end up with a basket of orphan answers they have to keep track of

2 Potential Solutions

- **Option 1** - Get rid of Rule 3(b) + delay filing fee until default + extend time to serve
    - Positives:
        - This solves the court's problems of fielding phone calls and tracking orphan answers
        - This solves the debtors' problems of confusion about if and when a case has been filed and an answer is due
    - Negatives
        - Debt collection bar wants to keep using Rule 3(b)
            - This concern is mitigated because (1) delaying the filing fee until default solves the issue of wanting to negotiate these relatively low-dollar-amount cases before paying the filing fee, and (2) extending the time to serve gives debt collectors time to locate debtor, serve, and negotiate settlement after a case has been filed
        - This may result in many more cases overall being filed, as cases that were served and settled under Rule 3(b) without an actual filing would now be filed
        - Debt collector representatives have stated that filing a lawsuit, even if quickly settled, stays on a debtor's permanent record; not clear if this is accurate
        - This may require a technical solution to delay filing fee for debt collection cases
        - This results in different rules for debt collection cases regarding filing fees and answer time

- **Option 2** - Keep Rule 3(b) + change summons language
  - Changes to summons language:
    - Instruct debtor to call court after 15 days
    - Give debtor form answer to fill out if a case has been filed
    - Provide email address for filing
    - Extend debtor's time to respond to 60 days
  - Also, there would be a case management system enhancement for clerical staff that would change the "wire basket" storage to a digital basket that would be easier to access and track answers that are filed before a case is filed. This tech change would take some time to implement, and until then, clerical staff would be left with the manual process in place now.
  - Positives:
    - Debt collection bar prefers this solution (keeping Rule 3(b))
    - Changes to summons language should mitigate some confusion on part of debtor
    - Changes to summons language should help court avoid excessive phone calls before deadline to file complaint
  - Negatives:
    - Still requires clerks to answer phone calls from every debtor to tell them whether case has been filed
    - Process for debtors is still more confusing than answering under Rule 3(a)
  - Additional notes:
    - There has also been discussion of requiring debt collectors to try to serve the debtor again after the case has actually been filed
      - One complication is that this would likely require personal service (increasing cost), because at least in rural Utah, many people cannot receive mail at the address at which they were served
    - There was also discussion about requiring the debt collector to attach evidence of the debt to the complaint (sort of unrelated to the Rule 3 issue, but potentially a good addition)

Rule 3. Commencement of action.

(a) How commenced. A civil action is commenced (1) by filing a complaint with the court, or (2) by service of a summons together with a copy of the complaint in accordance with Rule 4. If the action is commenced by the service of a summons and a copy of the complaint, then the complaint, the summons and proof of service, must be filed within ten days of such service. If, in a case commenced under paragraph (a)(2) of this rule, the complaint, summons and proof of service are not filed within ten days of service, the action commenced shall be deemed dismissed and the court shall have no further jurisdiction thereof. If a check or other form of payment tendered as a filing fee is dishonored, the party shall pay the fee by cash or cashier's check within 10 days after notification by the court. Dishonor of a check or other form of payment does not affect the validity of the filing, but may be grounds for such sanctions as the court deems appropriate, which may include dismissal of the action and the award of costs and attorney fees.
(b) Time of jurisdiction. The court shall have jurisdiction from the time of filing of the complaint or service of the summons and a copy of the complaint.

Advisory Committee Notes

Rule 3 constitutes a significant change from the prior rule. The rule retains service of the ten-day summons as one of two means to commence an action, but the rule requires that the summons together with a copy of the complaint be served on the defendant pursuant to Rule 4. In so doing, the rule eliminates the requirement that a copy of the complaint be deposited with the clerk for the defendant whose address is unknown. The changes in Rule 3 must be read and should be interpreted in conjunction with coordinate changes in Rule 4 and with a change in Rule 12(a) that begins the running of the defendant's 20-day response time from the service of the summons and complaint.

Paragraph (a). This paragraph eliminates the requirement that a copy of the complaint be deposited with the clerk for the defendant whose address is unknown. Paragraph (b) of the former rule, which permitted the plaintiff to deposit copies of the complaint with the clerk for defendants not otherwise served with a copy at the time of the service of the summons, has also been eliminated. The rule requires, in effect, that both the summons and the complaint be served pursuant to Rule 4. Under a coordinate change in Rule 12(a), the defendant's time for answering or otherwise responding to the complaint does not begin to run until service of the summons and complaint pursuant to Rule 4.

Paragraph (b). This paragraph is substantially identical to paragraph (c) of the former rule.

CURRENT 10-DAY SUMMONS

Name

Address

City, State, Zip

Phone

Email

I am [ ] Plaintiff/Petitioner [ ] Defendant/Respondent
[ ] Plaintiff/Petitioner's Attorney [ ] Defendant/Respondent's Attorney (Utah Bar #:_____)
[ ] Plaintiff/Petitioner's Licensed Paralegal Practitioner
[ ] Defendant/Respondent's Licensed Paralegal Practitioner (Utah Bar #:_____)

In the District Court of Utah

_____ Judicial District _____ County

Court Address _____

_____ Plaintiff/Petitioner v. _____ Defendant/Respondent	**Ten Day Summons** (Utah Rule of Civil Procedure 3 and 4) _____ Case Number _____ Judge _____ Commissioner (domestic cases)

The State of Utah to

_____ (party's name):

A lawsuit has been filed against you. You must respond in writing by the deadline for the court to consider your side. The written response is called an Answer.	Se ha presentado una demanda en su contra. Si desea que el juez considere su lado, deberá presentar una respuesta por escrito dentro del periodo de tiempo establecido. La respuesta por escrito es

	conocida como la Respuesta.
Call the court to see if a Complaint or Petition has been filed The plaintiff must file the Complaint with the court within 10 days after service of this Summons on you. If the complaint is not filed within that time, the case is considered to be dismissed and you do not need to file an answer. Call the court at _____ (phone number) at least 14 days after service of this Summons to ask if the Complaint has been filed. This is an action to: _____ (describe nature of action).	**Llame al tribunal para ver si se ha presentado una demanda o petición** El demandante debe presentar la demanda en el tribunal dentro de 10 días después de haberle entregado formalmente este citatorio a usted. Si la demanda no es presentada dentro de ese plazo, el caso se considera desestimado usted no necesita presentar una respuesta. Llame al tribunal al _____ (número de teléfono) al menos 14 días después de la entrega formal de este citatorio a usted para preguntar si se ha presentado la demanda. Esta es una acción para: _____ (describir el tipo de acción).
Deadline! Your Answer must be filed with the court and served on the other party **within 21 days** of the date you were served with this Summons. If you do not file and serve your Answer by the deadline, the other party can ask the court for a default judgment. A default judgment means the other party can get what they asked for, and you do not get the chance to tell your side of the story.	**¡Fecha límite para contestar!** Su Respuesta debe ser presentada en el tribunal y también con la debida entrega formal a la otra parte **dentro de 21 días** a partir de la fecha en que usted recibió la entrega formal del Citatorio. Si usted no presenta una respuesta ni hace la entrega formal dentro del plazo establecido, la otra parte podrá pedirle al juez que asiente un fallo por incumplimiento. Un fallo por incumplimiento significa que la otra parte recibe lo que pidió, y usted no tendrá la oportunidad de decir su versión de los hechos.
Read the complaint/petition The Complaint or Petition has been filed with the court and explains what the other party is asking for in their lawsuit. Read it carefully.	**Lea la demanda o petición** La demanda o petición fue presentada en el tribunal y ésta explica lo que la otra parte pide. Léala cuidadosamente.

Answer the complaint/petition
You must file your Answer in writing with the court **within 21 days** of the date you were served with this Summons. You can find an Answer form on the court's website:
utcourts.gov/ans

Scan QR code to visit page

Cómo responder a la demanda o petición
Usted debe presentar su Respuesta por escrito en el tribunal **dentro de 21 días** a partir de la fecha en que usted recibió la entrega formal del Citatorio. Puede encontrar el formulario para la presentación de la Respuesta en la página del tribunal:
utcourts.gov/ans-span

Para accesar esta página escanee el código QR

Serve the Answer on the other party
You must email, mail or hand deliver a copy of your Answer to the other party (or their attorney or licensed paralegal practitioner, if they have one) at the address shown at the top left corner of the first page of this Summons.

Entrega formal de la respuesta a la otra parte
Usted deberá enviar por correo electrónico, correo o entregar personalmente una copia de su Respuesta a la otra parte (o a su abogado o asistente legal, si tiene) a la dirección localizada en la esquina izquierda superior de la primera hoja del citatorio.

Finding help
The court's Finding Legal Help web page (utcourts.gov/help) provides information about the ways you can get legal help, including the Self-Help Center, reduced-fee attorneys, limited legal help and free legal clinics.

Scan QR code to visit page

Cómo encontrar ayuda legal
Para información sobre maneras de obtener ayuda legal, vea nuestra página de Internet Cómo Encontrar Ayuda Legal.
(utcourts.gov/help-span)
Algunas maneras de obtener ayuda legal son por medio de una visita a un taller jurídico gratuito, o mediante el Centro de Ayuda. También hay ayuda legal a precios de descuento y consejo legal breve.

Para accesar esta página escanee el código QR

قم بالمسح الضوئي لرمز لزيارة الصفحة

An Arabic version of this document is available on the court's website:
نسخة عربية من هذه الوثيقة على موقع المحكمة على تـ وجد الإنترنت:

utcourts.gov/arabic-ten

A Simplified Chinese version of this document is available on the court's website:
本文件的简体中文版可在法院网站上找到：
utcourts.gov/chinese-ten

请扫描QR码访问网页

A Vietnamese version of this document is available on the court's website:
Một bản tiếng Việt của tài liệu này có sẵn trên trang web của tòa:
utcourts.gov/viet-ten

Xin vui lòng quét mã QR (Trả lời nhanh)để viếng trang

Plaintiff/Petitioner or Defendant/Respondent

I declare under criminal penalty under the law of Utah that everything stated in this document is true.

Signed at _____ (city, and state or country).

_____ Signature ► _____

Date

Printed Name _____

Attorney or Licensed Paralegal Practitioner of record (if applicable)

_____ Signature ► _____

Date

Printed Name _____

PROPOSED UPDATED
SERVE FIRST SUMMONS

Name

Address

City, State, Zip

Phone

Email

I am [ ] Plaintiff/Petitioner
[ ] Plaintiff/Petitioner's Attorney (Utah Bar #:_____)
[ ] Plaintiff/Petitioner's Licensed Paralegal Practitioner

In the District Court of Utah

_____ Judicial District _____ County

Court Address _____

_____
Plaintiff/Petitioner

v.

_____
Defendant/Respondent

Case Initiation Summons
(Utah Rule of Civil Procedure 3 and 4)

(a case number and judge will be assigned if the Plaintiff files the attached complaint with the court within the 10-day deadline referenced below)

_____
Case Number

_____
Judge

The State of Utah to

_____ (party's name):

A lawsuit may be filed against you within the next 10 days. The Plaintiff in this case has 10 days to chose whether to file the attached complaint with the Court. Call the Court 15 days after being served with this document at XXX-XXX-XXXX to determine if the complaint was filed. Do not call before day 15.

If the complaint was not filed, you do not need to respond to the complaint.

If the complaint was filed, you will receive a case number, and you need to respond by filing an answer. Attached to this document is a form answer that you can use to respond. Please include your case number on the form answer.

You must file your answer within 60 days of the complaint and summons being served on you. You can file your answer by emailing it to XXX@XXXX.gov or bringing a printed copy to the court. If you fail to file an answer within 60 days of being served with this complaint and summons, judgment by default may be entered against you for the relief demanded in the complaint.

You may choose to file a motion under Rule 12 of the Utah Rules of Civil Procedure instead of filing an answer. If you choose to file such a motion, you will need to follow the same requirements set forth in the preceding paragraphs to file and serve the motion.

The court's Finding Legal Help web page (utcourts.gov/help) provides information about the ways you can get legal help, including the Self-Help Center, reduced-fee attorneys, limited legal help, and free legal clinics.

Plaintiff/Petitioner or Defendant/Respondent

I declare under criminal penalty under the law of Utah that everything stated in this document is true.

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_____ Signature ► _____

Date

Printed Name _____

Attorney or Licensed Paralegal Practitioner of record (if applicable)

_____ Signature ► _____

Date

Printed Name _____

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Tab 3

Tab 4

Rule 101
Nelson v. Nelson footnote
Motions to Enforce Order and Sanctions

The footnote found in *Nelson v. Nelson*, 2023 UT App 38, instructed the Committee as follows:

> The "motion to enforce order" procedure outlined in rule 7B of the Utah Rules of Civil Procedure has now "replace[d] and supersede[d] the prior order to show cause procedure" in the context of "domestic relations actions, including divorce." Utah R. Civ. P. 7B(a), (i), (j). A similar "motion to enforce order" procedure outlined in rule 7A now applies in the context of other civil proceedings. See id. R. 7A. In recommending rule 7B, the Utah Supreme Court's Advisory Committee on the Rules of Civil Procedure left untouched rule 101(k), which addresses motion practice before district court commissioners and still recites requirements for "[a]n application to the court for an order to show cause." Id. R. 101(k). The committee may wish to revise rule 101(k) to conform rule 101(k)'s provisions to those of rule 7B.

There is a recommendation to simply update **URCP 101(k)** by changing all references from "application for order to show cause" to "motion to enforce order and for sanctions" in order to be consistent with the newer URCP 7A and 7B.

Rule 101. Motion practice before court commissioners.

Effective: 5/1/2021

(a) Written motion required. An application to a court commissioner for an order must be by motion which, unless made during a hearing, must be made in accordance with this rule.

(1) A motion must be in writing and state succinctly and with particularity the relief sought and the grounds for the relief sought. Any evidence necessary to support the moving party's position must be presented by way of one or more affidavits or declarations or other admissible evidence. The motion may also include a supporting memorandum.

(2)All motions must provide the bilingual Notice to Responding Party approved by the Judicial Council.

(3) Each motion to a court commissioner must include the following caution language at the top right corner of the first page, in bold type: **This motion will be decided by the court commissioner at an upcoming hearing. If you do not appear at the hearing, the Court might make a decision against you without your input. In addition, you may file a written response at least 14 days before the hearing.**

(4) Failure to provide the bilingual Notice to Responding Party or to include the caution language may provide the non-moving party with a basis under Rule 60(b) for excusable neglect to set aside any resulting order or judgment.

(b) Time to file and serve. The moving party must file the motion and any supporting papers with the clerk of the court and obtain a hearing date and time. The moving party must serve the responding party with the motion and supporting papers, together with notice of the hearing at least 28 days before the hearing. If service is more than 90 days after the date of entry of the most recent appealable order, service may not be made through counsel.

(c) Response. Any other party may file a response, consisting of any responsive memorandum, affidavit(s) or declaration(s). The response must be filed and served on the moving party at least 14 days before the hearing.

(d) Reply. The moving party may file a reply, consisting of any reply memorandum, affidavit(s) or declaration(s). The reply must be filed and served on the responding party at least 7 days

before the hearing. The contents of the reply must be limited to rebuttal of new matters raised in the response to the motion.

(e) Counter motion. Responding to a motion is not sufficient to grant relief to the responding party. A responding party may request affirmative relief by way of a counter motion. 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 response. Any response to the counter motion must be filed and served no later than the reply to the motion. Any reply to the response to the counter motion must be filed and served at least 3 business days before the hearing. The reply must be served 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) at least 3 business days before the hearing. A separate notice of hearing on counter motions is not required.

(f) Necessary documentation. Motions and responses regarding temporary orders concerning alimony, child support, division of debts, possession or disposition of assets, or litigation expenses, must be accompanied by verified financial declarations with documentary income verification attached as exhibits, unless financial declarations and documentation are already in the court's file and remain current. Attachments for motions and responses regarding child support and child custody must also include a child support worksheet.

(g) No other papers. No moving or responding papers other than those specified in this rule are permitted.

(h) Exhibits; objection to failure to attach.

(1) Except as provided in paragraph (h)(3) of this rule, any documents such as tax returns, bank statements, receipts, photographs, correspondence, calendars, medical records, forms, or photographs must be supplied to the court as exhibits to one or more affidavits (as appropriate) establishing the necessary foundational requirements. Copies of court papers such as decrees, orders, minute entries, motions, or affidavits, already in the court's case file, may not be filed as exhibits. Court papers from cases other than that before the court, such as protective orders, prior divorce decrees, criminal orders, information or dockets, and juvenile court orders (to the extent the law does not prohibit their filing), may be submitted as exhibits.

(2) If papers or exhibits referred to in a motion or necessary to support the moving party's position are not served with the motion, the responding party may file and serve an objection to the defect with the response. If papers or exhibits referred to in the response or necessary to support the responding party's position are not served with the response, the moving party may file and serve an objection to the defect with the reply. The defect must be cured within 2 business days after notice of the defect or at least 3 business days before the hearing, whichever is earlier.

(3) Voluminous exhibits which cannot conveniently be examined in court may not be filed as exhibits, but the contents of such documents may be presented in the form of a summary, chart or calculation under Rule 1006 of the Utah Rules of Evidence. Unless they have been previously supplied through discovery or otherwise and are readily identifiable, copies of any such voluminous documents must be supplied to the other parties at the time of the filing of the summary, chart or calculation. The originals or duplicates of the documents must be available at the hearing for examination by the parties and the commissioner. Collections of documents, such as bank statements, checks, receipts, medical records, photographs, e-mails, calendars and journal entries that collectively exceed ten pages in length must be presented in summary form. Individual documents with specific legal significance, such as tax returns, appraisals, financial statements and reports prepared by an accountant, wills, trust documents, contracts, or settlement agreements must be submitted in their entirety.

(i) Length. Initial and responding memoranda may not exceed 10 pages of argument without leave of the court. Reply memoranda may not exceed 5 pages of argument without leave of the court. The total number of pages submitted to the court by each party may not exceed 25 pages, including affidavits, attachments and summaries, but excluding financial declarations and income verification. The court commissioner may permit the party to file an over-length memorandum upon ex parte application and showing of good cause.

(j) Late filings; sanctions. If a party files or serves papers beyond the time required in this rule, the court commissioner may hold or continue the hearing, reject the papers, impose costs and attorney fees caused by the failure and by the continuance, and impose other sanctions as appropriate.

(k) Limit on motion to enforce order and for sanctions ~~order to show cause~~. An application to the court for a motion to enforce order and for sanctions ~~an order to show cause~~ may be made only for enforcement of an existing order or for sanctions for violating an existing order. An application for a motion to enforce order and for sanctions ~~an order to show cause~~ must be supported by affidavit or other evidence sufficient to show ~~cause to believe~~ a party has violated a court order.

(l) Hearings.

(1) The court commissioner may not hold a hearing on a motion for temporary orders before the deadline for an appearance by the respondent under Rule 12.

(2) Unless the court commissioner specifically requires otherwise, when the statement of a person is set forth in an affidavit, declaration or other document accepted by the commissioner, that person need not be present at the hearing. The statements of any person not set forth in an affidavit, declaration or other acceptable document may not be presented by proffer unless the person is present at the hearing and the commissioner finds that fairness requires its admission.

(m) Motions to judge. The following motions must be to the judge to whom the case is assigned: motion for alternative service; motion to waive 30-day waiting period; motion to waive divorce education class; motion for leave to withdraw after a case has been certified as ready for trial; and motions in limine. A court may provide that other motions be considered by the judge.

(n) Objection to court commissioner's recommendation. A recommendation of a court commissioner is the order of the court until modified by the court. A party may object to the recommendation by filing an objection under Rule 108.

Tab 5

Rule 56
Motion for Summary Judgment Issue
Feedback from Supreme Court Justices

Proposed amendments to Rule 56 were presented to the Supreme Court Justices and the rule is currently out for public comment. In relation to this amendment, the Justices asked the Committee discuss motions to certify for trial and URCP Rule 16. Specifically, to consider modifying the language of subparagraph (b) to include deadlines for motions for summary judgment, certificates of readiness for trial, or any language that would establish a timeline to move the case forward.

Rule 56 with amendments that are out for public comment until October 7 is included in the materials, as well as the current Rule 16.

Rule 56. Summary judgment.

(a) Motion for summary judgment or partial summary judgment. A party may move for summary judgment, identifying each claim or defense—or the part of each claim or defense—on which summary judgment is sought. The court shall grant summary judgment if the moving party shows that there is no genuine dispute as to any material fact and the moving party is entitled to judgment as a matter of law. The court should state on the record the reasons for granting or denying the motion. The motion and memoranda must follow Rule 7 as supplemented below.

~~(a)~~(1) Instead of a statement of the facts under Rule 7, a motion for summary judgment must contain a statement of material facts claimed not to be genuinely disputed. Each fact must be separately stated in numbered paragraphs and supported by citing to materials in the record under paragraph (c)(1) of this rule.

~~(a)~~(2) Instead of a statement of the facts under Rule 7, a memorandum opposing the motion must include a verbatim restatement of each of the moving party's facts that is disputed with an explanation of the grounds for the dispute supported by citing to materials in the record under paragraph (c)(1) of this rule. The memorandum may contain a separate statement of additional materials facts in dispute, which must be separately stated in numbered paragraphs and similarly supported.

~~(a)~~(3) The motion and the memorandum opposing the motion may contain a concise statement of facts, whether disputed or undisputed, for the limited purpose of providing background and context for the case, dispute and motion.

~~(a)~~(4) Each material fact set forth in the motion or in the memorandum opposing the motion under paragraphs (a)(1) and (a)(2) that is not disputed is deemed admitted for the purposes of the motion.

(b) Time to file a motion. A party seeking to recover upon a claim, counterclaim or cross-claim or to obtain a declaratory judgment may move for summary judgment at any time after service of a motion for summary judgment by the adverse party or after

21 days from the commencement of the action. A party against whom a claim, counterclaim, or cross-claim is asserted or a declaratory judgment is sought may move for summary judgment at any time. ~~Unless the court orders otherwise, a party may file a motion for summary judgment at any time no later than 28 days after the close of all discovery.~~ The court may set a deadline under Rule 16 to file motions for summary judgment.

(c) Procedures.

~~(c)~~**(1) Supporting factual positions.** A party asserting that a fact cannot be genuinely disputed or is genuinely disputed must support the assertion by:

~~(c)(1)~~(A) citing to particular parts of materials in the record, including depositions, documents, electronically stored information, affidavits or declarations, stipulations (including those made for purposes of the motion only), admissions, interrogatory answers, or other materials; or

~~(c)(1)~~(B) showing that the materials cited do not establish the absence or presence of a genuine dispute.

~~(c)~~**(2) Objection that a fact is not supported by admissible evidence.** A party may object that the material cited to support or dispute a fact cannot be presented in a form that would be admissible in evidence.

~~(c)~~**(3) Materials not cited.** The court need consider only the cited materials, but it may consider other materials in the record.

~~(c)~~**(4) Affidavits or declarations.** An affidavit or declaration used to support or oppose a motion must be made on personal knowledge, must set out facts that would be admissible in evidence, and must show that the affiant or declarant is competent to testify on the matters stated.

(d) When facts are unavailable to the nonmoving party. If a nonmoving party shows by affidavit or declaration that, for specified reasons, it cannot present facts essential to justify its opposition, the court may:

~~(d)~~(1) defer considering the motion or deny it without prejudice;

~~(d)~~(2) allow time to obtain affidavits or declarations or to take discovery; or

~~(d)~~(3) issue any other appropriate order.

(e) Failing to properly support or address a fact. If a party fails to properly support an assertion of fact or fails to properly address another party's assertion of fact as required by paragraph (c), the court may:

~~(e)~~(1) give an opportunity to properly support or address the fact;

~~(e)~~(2) consider the fact undisputed for purposes of the motion;

~~(e)~~(3) grant summary judgment if the motion and supporting materials—including the facts considered undisputed—show that the moving party is entitled to it; or

~~(e)~~(4) issue any other appropriate order.

(f) Judgment independent of the motion. After giving notice and a reasonable time to respond, the court may:

~~(f)~~(1) grant summary judgment for a nonmoving party;

~~(f)~~(2) grant the motion on grounds not raised by a party; or

~~(f)~~(3) consider summary judgment on its own after identifying for the parties material facts that may not be genuinely in dispute.

(g) Failing to grant all the requested relief. If the court does not grant all the relief requested by the motion, it may enter an order stating any material fact—including an item of damages or other relief—that is not genuinely in dispute and treating the fact as established in the case.

(h) Affidavit or declaration submitted in bad faith. If satisfied that an affidavit or declaration under this rule is submitted in bad faith or solely for delay, the court—after notice and a reasonable time to respond—may order the submitting party to pay the other party the reasonable expenses, including attorney's fees, it incurred as a result.

The court may also hold an offending party or attorney in contempt or order other appropriate sanctions.

Advisory Committee Notes

The objective of the 2015 amendments is to adopt the class of Federal Rule of Civil Procedure 56 without changing the substantive Utah law. The 2015 amendments also move to this rule the special briefing requirements of motions for summary judgment formerly found in Rule 7. Nothing in these changes should be interpreted as changing the line of Utah cases regarding the burden of proof in motions for summary judgment.

Effective: ~~*November 2015*~~ *May/Nov. 1, 20__*

Rule 16. Pretrial conferences.

(a) Pretrial conferences. The court, in its discretion or upon motion, may direct the attorneys and, when appropriate, the parties to appear for such purposes as:

(a)(1) expediting the disposition of the action;

(a)(2) establishing early and continuing control so that the case will not be protracted for lack of management;

(a)(3) discouraging wasteful pretrial activities;

(a)(4) improving the quality of the trial through more thorough preparation;

(a)(5) facilitating mediation or other ADR processes for the settlement of the case;

(a)(6) considering all matters as may aid in the disposition of the case;

(a)(7) establishing the time to join other parties and to amend the pleadings;

(a)(8) establishing the time to file motions;

(a)(9) establishing the time to complete discovery;

(a)(10) extending fact discovery;

(a)(11) setting the date for pretrial and final pretrial conferences and trial;

(a)(12) provisions providing for the preservation, disclosure or discovery of electronically stored information;

(a)(13) considering any agreements the parties reach for asserting claims of privilege or of protection as trial-preparation material after production; and

(a)(14) considering any other appropriate matters.

(b) Trial settings. Unless an order sets the trial date, any party may and the plaintiff shall, at the close of all discovery, certify to the court that discovery is complete, that any required mediation or other ADR processes have been completed or excused and that the case is ready for trial. The court shall schedule the trial as soon as mutually convenient to the court and parties. The court shall notify parties of the trial date and of any final pretrial conference.

(c) Final pretrial conferences. The court, in its discretion or upon motion, may direct the attorneys and, when appropriate, the parties to appear for such purposes as settlement and trial management. The conference shall be held as close to the time of trial as reasonable under the circumstances.

(d) Sanctions. If a party or a party's attorney fails to obey an order, if a party or a party's attorney fails to attend a conference, if a party or a party's attorney is substantially unprepared to participate in a conference, or if a party or a party's attorney fails to participate in good faith, the court, upon motion or its own initiative, may take any action authorized by Rule 37(b).

Advisory Committee Notes

For the purposes of this rule, “ADR” is as defined in CJA Rule 4-510.01.

Tab 6

Rule 7A and 37
Request to address Motions to Enforce Discovery Orders

Lauren and Rod,

Good afternoon. I am writing to provide some thoughts on a rule issue that we have encountered twice now and that I think would be worth some discussion with the Rules Committee. The issue arose in the context of enforcing a court order. We have had two cases now where we had a party refusing to participate in discovery, so we file a SODI under Rule 37 and obtained an order requiring the party to respond to discovery within 10 days, but they failed to comply. There should be a finding of contempt and sanctions arising from this violation of a court order. But there appears to be some confusion about exactly how to do that.

In the old days, we would have filed a motion for an "order to show cause." But then the "show cause" process was superseded by the adoption of Rule 7A. Rule 7A appears on its face to be the mechanism for enforcing all court orders, and has this whole process requiring you to submit a "Motion to Enforce" on an *ex parte* basis, with a proposed "Order to Attend Hearing," and a request to submit. It has a specific 28-day timeline and tells you exactly what needs to be included in that motion and order. It allows the court to enter the "Order to Attend Hearing" without awaiting a response, but still gives the offending party time to respond *after* the order has been entered.

In our two cases with orders compelling discovery responses, we followed the Rule 7A process to submit a Motion to Enforce, but the judges refused to sign the Order to Attend Hearing on grounds that it was premature and not properly submitted on an *ex parte* basis. Both judges required us to resubmit our Motion to Enforce on a *non ex parte* basis, to serve the motion on the offending party, and to wait out 14 days for a response, before the motion would be taken up. Both pointed us to the language in 7A(h) that says "This rule does not apply in criminal cases or motions filed under Rule 37."

At the time, we did not understand why the judges would refuse to follow 7A, because this was not a "<u>motion</u> filed under Rule 37" – we had already filed our motion under rule 37 and obtained and order and now we are trying to enforce that order.

With some hindsight, I think I understand now that Rule 37 has its own enforcement mechanism found in 37(b), but this is not very apparent from the rules and there is no committee note or other direction to point you there. It is also not intuitive to have these two competing schemes for enforcement of court orders where all civil orders are enforced under Rule 7A with the *ex parte* filing of a Motion to Enforce, <u>*except*</u> orders that relate to discovery, which are addressed on a *non-ex-parte* basis under a different set of rules. This is quite odd.

I think a couple of changes could be made to make this more clear:

1. The separate enforcement scheme for discovery motions under Rule 37(b) could be deleted. It is superfluous and confusing. There ought to be one process for enforcing a court order. Rule 7A covers all of it. There is no practical purpose served by carving out discovery orders from that rule.

2. Alternatively, if you hold on to the two separate processes, then:
    a. That second sentence in 7A(h) should be moved up to the first line of Rule 7A, i.e. “Except for orders in criminal cases (which are enforced under XXX) or orders on discovery matters (which are governed by Rule 37(b)), motions to enforce a court order or to obtain sanctions ….
    b. Or, the wording in Rule 7A(h) should at least be clarified to say “This rule does not apply to orders in criminal cases (which are enforced under XXX) or orders on discovery matters (which are governed by Rule 37(b)).”
    c. And the subheading of Rule 37(b) should be changed to: “Motion to Enforce Discovery Orders and for Sanctions”

I don’t think I am the only person who has been confused by these issues. I hope these thoughts are helpful. Let me know if you would like to discuss further. Thanks.

Clint R. Hansen

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

(a) Motion. To enforce a court order or to obtain a sanctions order for violation of an order, including in supplemental proceedings under Rule 64, a party must file an ex parte motion to enforce order and for sanctions (if requested), pursuant to this rule and Rule 7. The motion must be filed in the same case in which that order was entered. The timeframes set forth in this rule, rather than those set forth in Rule 7, govern motions to enforce orders and for sanctions.

(b) Affidavit. The motion must state the title and date of entry of the order that the moving party seeks to enforce. The motion must be verified, or must be accompanied by at least one supporting affidavit or declaration that is based on personal knowledge and shows that the affiant or declarant is competent to testify on the matters set forth. The verified motion, affidavit, or declaration 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 within 14 days of service of the order, unless the court sets a different time, and that any written response must follow the requirements of Rule 7.

(d) 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 within 14 days of service of the order, unless the court sets a different time, and must follow the requirements of Rule 7.

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

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

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

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

Effective May 1, 2023

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) 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 7

UTAH INDIGENT APPELLATE DEFENSE DIVISION
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DEBRA M. NELSON, CHIEF APPELLATE OFFICER

August 25, 2023

Supreme Court Advisory Committee
Utah Rules of Civil Procedure

ATTN: Lauren DiFrancesco, *Chair*
Lauren.DiFrancesco@gtlaw.com

CC: Stacy Haacke, *Staff*
stacyh@utcourts.gov

RE: Proposed Amendments to Utah R. Civ. P. 65C(j) – Appointment of Counsel in Postconviction Relief Proceedings

To the Committee,

My name is Ian L. Quiel, and I am a public defender and the head of the Postconviction Division, of the Utah Indigent Appellate Defense Division ("***IADD***").[1] With this letter, we wish to bring to the Committee's attention recent legislative amendments to Utah's Post-Conviction Remedies Act ("***PCRA***") regarding the appointment of counsel and to propose corresponding amendments to Rule 65C of the Utah Rules of Civil Procedure. The current version of Rule 65C conflicts with the PCRA, given recent legislative amendments. There are two conflicts in subsection (j) of Rule 65C that the amendments proposed herein address. These proposed amendments are set out in a redlined version of Rule 65C(j), attached to this letter

A copy of proposed amendments to Rule 65C is attached as Addendum A. Copies of statutes relevant to this issue are attached as Addendum B.

Background

[1] Formed in 2020 by the legislature, IADD is a state agency that provides various public defense services throughout Utah. *See* Utah Code Ann. § 78B-22-902. IADD provides legal services to indigent individuals in all criminal appeals from third, fourth, fifth, and sixth class counties, in appeals from parental termination actions, and in actions or appeals for postconviction relief under the PCRA. *Id.* § 78B-22-903(1).

Adopted in 1996, the PCRA outlines the grounds and procedures for challenging a defendant's criminal conviction, post direct appeal.[2] A person convicted of a crime may bring a petition for relief under the PCRA's various grounds, which include discovery of new evidence, constitutional defects in the conviction, and ineffective assistance of counsel, to name few.[3] A PCRA petition is often a defendant's last chance in state court to resolve issues or reverse improper convictions. PCRA proceedings are civil in nature, and petitioners have no constitutional right to counsel.

During the General Session of the 2022 Utah Legislature, lawmakers amended Utah's PCRA statute to give indigent petitioners meaningful access to effective postconviction counsel.[4] The amendments targeted the appointment of counsel in PCRA proceedings, at both the district court and appellate level.[5] With this change, Utah courts may now appoint attorneys from IADD's Postconviction Division to represent indigent PCRA petitioners.[6]

Prior to 2022, appointment of counsel in PCRA proceedings was extremely limited. Courts could only "appoint counsel on a *pro bono basis* to represent the petitioner" in postconviction claims.[7] The process for identifying and selecting a willing and able pro bono attorney was ill-defined and often incredibly difficult. Given the specialized nature of PCRA proceedings, coupled with the pro bono aspect of the appointment, few members of the bar were available to accept cases. This forced many petitioners to wait months or sometimes years for pro bono counsel or to proceed pro se. The lack of effective and available counsel further discouraged or frustrated otherwise viable claims.

For these reasons, the PCRA was amended during the 2022 General Session. The legislature overwhelmingly passed Senate Bill 210, altering the PCRA to allow for the appointment of "counsel on a pro bono basis *or from the Indigent Appellate Defense Division.*"[8] The Postconviction Division of IADD was since formed to fulfill this important statutory duty.

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[2] *Id.* § 78B-9-101 *et. seq.*
[3] *Id.* § 78B-9-104(1).
[4] S.B. 210, 2022 Gen. Session (Utah 2022); Utah Code Ann. § 78B-9-109 (2022). The legislature also amended IADD's enabling statute to reflect the Division's new statutory obligation to represent indigent petitioners in PCRA proceedings. *Id.* § 78B-22-903(1)(a)(ii).
[5] *See* S.B. 210, 2022 Gen. Session (Utah 2022).
[6] Utah Code Ann. §§ 78B-9-109(1)(a), -22-903(1)(a).
[7] *Id.* § 78B-9-109(1)(a) (2021) (emphasis added).
[8] S.B. 210, 2022 Gen. Session (Utah 2022) (emphasis added); *see also* Utah Code Ann. § 78B-9-109(1)(a) (2022).

The Postconviction Division is now tasked with representing indigent petitioners at any stage of PCRA litigation. Utah law mandates that IADD shall provide defense services "for an action or an appeal for postconviction relief under [the PCRA] if the court appoints the division to represent the indigent individual . . . ."[9] IADD's mission is to fulfill this mandate by providing zealous, ethical, and professional representation to indigent individuals seeking postconviction relief.

Proposed Amendments

The PCRA is a legislative creation, rooted in the judiciary's extraordinary writ authority—specifically the writ of habeas corpus.[10] While the legislature may regulate this constitutional writ power through statutes such as the PCRA, the legislature may not diminish the substance of that writ power.[11] In other words, the judiciary's writ authority supersedes legislative action.

The Utah Supreme Court functionally adopted the PCRA, through the Utah Rules of Civil Procedure, as a reasonable legislative limit on the court's writ power.[12] Rule 65C "governs proceedings in all petitions for post-conviction relief filed under the [PCRA]."[13] It is the judicially-created rule of procedure that corresponds with the legislatively-enacted PCRA statute. Rule 65C adopted by reference the PCRA's grounds for relief and outlines its specific procedures.[14]

The proposed amendments seek to ensure that there is no meaningful inconsistency between Rule 65C and § 78B-8-109.

A. Appointment of IADD under § 78B-9-109(1)(a).

First, the current version of Rule 65C(j) states that if "the petition is not summarily dismissed, the court may, upon the request of an indigent petitioner, appoint counsel on a

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[9] *Id.* § 78B-22-903(1)(a).
[10] *Patterson v. State*, 2021 UT 52, ¶ 76, 504 P.3d 92 ("[T]he Utah Constitution provides the judicial branch the power to issue writs that challenge the detention of an individual— such writs have traditionally been called writs of habeas corpus.").
[11] *Id.* ¶ 169.
[12] The judiciary has constitutional authority to promulgate rules of evidence and procedure. Utah Const. art. VIII, § 4.
[13] Utah R. Civ. P. 65C(a).
[14] *See Patterson*, 2021UT 52, ¶ 183 n. 42 (agreeing that "the PCRA set forth an acceptable manner of regulating the procedure by which [the Court] would hear writ petitions").

pro bono basis to represent the petitioner"[15] This mirrors the old language of Section 78B-9-109, which prior to 2022, allowed only for pro bono counsel in PCRA cases. The current version of Section 78B-9-109, as discussed above, contemplates the appointment of counsel from IADD.

The new appointment language from Section 78B-9-109(1)(a) needs to be added to Rule 65C(j). This additional language mirrors the PCRA appointment provisions and will inform judges and practitioners about IADD's ability to take these cases.

B. Factors relevant to determining whether to appoint counsel under Section 78B-9-109(2).

Second, Rule 65C(j) currently omits numerous factors that a court should consider when determining whether to appoint counsel. Presently, Rule 65C(j) requires the court to consider only two factors: whether "[1] the petition or the appeal contains factual allegations that will require an evidentiary hearing and [2] whether the petition involves complicated issues of law or fact that require the assistance of counsel for proper adjudication."[16]

Section 78B-9-109(2), on the other hand, identifies five relevant factors for the court to consider when making this determination:

(a) whether the petitioner is incarcerated;
(b) the likelihood that an evidentiary hearing will be necessary;
(c) the likelihood that an investigation will be necessary;
(d) the complexity of the factual and legal issues; and
(e) any other factor relevant to the particular case.[17]

Rule 65C(j) needs to be amended to replace the current two factors with the five statutory factors from the PCRA. The current version is misleading and results in judges misapplying the standard for appointment of counsel.

Conclusion

The proposed amendments resolve inconsistencies between the Rules of Civil Procedure and the PCRA. This change is needed to avoid confusion and the misapplication of law. It will also encourage the appointment of counsel on these important matters.

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[15] Utah R. Civ. P. 65C(j).
[16] *Id.*
[17] Utah Code Ann. § 78B-9-109(2).

The proposed amendments will help IADD further aid clients and improve access to justice for all Utahns. We appreciate the Committee's time and consideration of this important issue. Please feel free to contact IADD with any questions, comments, or concerns, or visit our website: https://idc.utah.gov/contact. We welcome an invitation to present this proposal to the Committee or to provide anything else that may aid the Committee in this process.

Respectfully,

Ian L. Quiel
Postconviction Division Head

UTAH INDIGENT DEFENSE COMMISSION
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Addendum A

Proposed Amendments to Rule 65C

Rule 65C. Post-conviction relief.

. . .

(j) Appointment of ~~pro bono~~ counsel. If any portion of the petition is not summarily dismissed, the court may, upon the request of an indigent petitioner, appoint counsel on a pro bono basis or from the Indigent Appellate Defense Division, created in Section 78B-22-902, to represent the petitioner in the post-conviction court or on post-conviction appeal. In determining whether to appoint counsel the court shall consider ~~whether the petition or the appeal contains factual allegations that will require an evidentiary hearing and whether the petition involves complicated issues of law or fact that require the assistance of counsel for proper adjudication~~ (a) whether the petitioner is incarcerated; (b) the likelihood that an evidentiary hearing will be necessary; (c) the likelihood that an investigation will be necessary; (d) the complexity of the factual and legal issues; and (e) any other factor relevant to the particular case.

Addendum B

Effective 5/4/2022

78B-9-109 Appointment of pro bono counsel or counsel from Indigent Appellate Defense Division.

(1)

(a) If any portion of the petition is not summarily dismissed, the court may, upon the request of an indigent petitioner, appoint counsel on a pro bono basis or from the Indigent Appellate Defense Division, created in Section 78B-22-902, to represent the petitioner in the postconviction court or on postconviction appeal.

(b) Counsel who represented the petitioner at trial or on the direct appeal may not be appointed to represent the petitioner under this section.

(2) In determining whether to appoint counsel, the court may consider:

(a) whether the petitioner is incarcerated;

(b) the likelihood that an evidentiary hearing will be necessary;

(c) the likelihood that an investigation will be necessary;

(d) the complexity of the factual and legal issues; and

(e) any other factor relevant to the particular case.

(3) An allegation that counsel appointed under this section was ineffective cannot be the basis for relief in any subsequent postconviction petition.

Amended by Chapter 295, 2022 General Session

Effective 5/4/2023

78B-22-903 Powers and duties of the division.

(1) The division shall:

(a) provide appellate defense services:

(i) for an appeal under Section 77-18a-1, in counties of the third, fourth, fifth, and sixth class;

(ii) for an action or an appeal for postconviction relief under Chapter 9, Postconviction Remedies Act, if the court appoints the division to represent the indigent individual; and

(iii) for an appeal of right from an action for the termination or restoration of parental rights under Chapter 6, Part 1, Utah Adoption Act, Title 80, Chapter 3, Abuse, Neglect, and Dependency Proceedings, or Title 80, Chapter 4, Termination and Restoration of Parental Rights; and

(b) provide appellate defense services in accordance with the core principles adopted by the commission under Section 78B-22-404 and any other state and federal standards for appellate defense services.

(2) Upon consultation with the executive director and the commission, the division shall:

(a) adopt a budget for the division;

(b) adopt and publish on the commission's website:

(i) appellate performance standards;

(ii) case weighting standards; and

(iii) any other relevant measures or information to assist with appellate defense services; and

(c) if requested by the commission, provide a report to the commission on:

(i) the provision of appellate defense services by the division;

(ii) the caseloads of appellate attorneys; and

(iii) any other information relevant to appellate defense services in the state.

(3) If the division provides appellate defense services to an indigent individual in an indigent defense system, the division shall provide notice to the district court and the indigent defense system that the division intends to be appointed as counsel for the indigent individual.

(4) The office shall assist with providing training and continual legal education on appellate defense to indigent defense service providers in counties of the third, fourth, fifth, and sixth class.

Amended by Chapter 229, 2023 General Session

Rule 65C. Post-conviction relief.

Effective: 5/1/2021

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

(b) Procedural defenses and merits review. Except as provided in paragraph (h), if the court comments on the merits of a post-conviction claim, it shall first clearly and expressly determine whether that claim is independently precluded under Section78B-9-106.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

(h)Summary dismissal of claims.

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

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

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

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

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

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

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

(i) Service of petitions. If, on review of the petition, the court concludes that all or part of the petition should not be summarily dismissed, the court shall designate the portions of the petition that are not dismissed and direct the clerk to serve upon the respondent a copy of the petition, attachments, memorandum, and an electronic court record of the underlying criminal case being challenged, including all non-public documents. If an electronic appellate record of the underlying case has not already been created, the clerk will create the record.

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

Utah Attorney General's Office

Criminal Appeals

Post-Conviction Section

160 East 300 South, 6th Floor

P.O. Box 140854

Salt Lake City, UT 84114-0854

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

(j) Appointment of ~~pro bono~~ counsel. If any portion of the petition is not summarily dismissed, the court may, upon the request of an indigent petitioner, appoint counsel on a pro bono basis or from the Indigent Appellate Defense Division, created in Section 78B-22-902, to represent the petitioner in the post-conviction court or on post-conviction appeal. In determining whether to appoint counsel the court shall consider: ~~whether the petition or the appeal contains factual allegations that will require an evidentiary hearing and whether the petition involves complicated issues of law or fact that require the assistance of counsel for proper adjudication.~~

(1) whether the petitioner is incarcerated;

(2) the likelihood that an evidentiary hearing will be necessary;

(3) the likelihood that an investigation will be necessary;

(4) the complexity of the factual and legal issues; and

(5) any other factor relevant to the particular case.

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

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

(1) consider the formation and simplification of issues;

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

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

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

(n) Discovery; records.

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

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

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

(o) Orders; stay.

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

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

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

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

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

Tab 8

URCP Subcommittees

Subcommittee/Subject	Members	Subcommittee Chair
Probate	Judge Scott, Allison Barger, Brant Christiansen, David Parkinson, Judge Kelly, Kathie Brown Roberts, Keri Sargent, Russ Mitchell, Shonna Thomas, Sarah Box	Judge Scott
Records Classification	Judge Stone, Justin Toth, Jim Hunnicutt, Susan Vogel, Crystal Powell	Judge Stone
Plain language/Terminology	Susan Vogel, Ash McMurray, Trevor Lee, Loni Page, Heather Lester, Giovanna Speiss, Crystal Powell; Jensie Anderson	Susan Vogel
Rule 5	Susan Vogel, Loni Page, Tonya Wright, Keri Sargent	Loni Page
Rule 5 - Default	TBD	
Omnibus (Rule 30(b)(6), 45, 37, and 7)	Justin Toth, Tonya Wright, Rod Andreason	Justin Toth
Rule 3(a)(2)	Trevor Lee, Susan Vogel, Judge Stucki, Keri Sargeant, Tonya Wright; Heather Lester; Giovanna Speiss; Jensie Anderson	Trevor Lee
Eviction Expungements	Judge Stucki, Tonya Wright, Lauren DiFrancesco; Heather Lester	Lauren DiFrancesco
Rule 60	Judge Holmberg, Judge Cornish, Susan Vogel, Justin Toth	Judge Cornish
Rule 101	Jim Hunnicutt, Susan Vogel, Commissioner Conklin	Jim Hunnicutt
MSJ Deadline	Rod Anderson, Jensie Anderson, Michael Stahler	Rod Andreason
Remote Hearings	Jonas Anderson, Michael Stahler, Heather Lester, Bryan Pattison, Tim Pack	Tim Pack
Affidavit/Declaration	Ash McMurray, Giovanna Speiss, Bryan Pattison	Ash McMurray
Rule 53A - Special Masters	Brent Salazar-Hall; Nicole Salazar-Hall; Jim Hunnicut	Jim Hunnicutt
Rule 62 (COA opinion)	Jim Hunnicutt, Commissioner Conklin, Susan Vogel, Judge Holmberg	Jim Hunnicutt
Standard POs	Judge Holmberg, Judge Stucki, Judge Oliver, Bryan Pattison	Judges Oliver and Holmberg