

# Agenda

## Advisory Committee on Rules of Civil Procedure

May 25, 2005  
4:00 to 6:00 p.m.

Administrative Office of the Courts  
Scott M. Matheson Courthouse  
450 South State Street  
Council Room, Suite N31

Certificate to Glenn Hanni	Chief Justice Durham Fran Wikstrom
Approval of minutes.	Fran Wikstrom
Rule 64C. Attachments.	Tim Shea
Rule 74. Withdrawal of attorney.	Todd Shaughnessy
Rule 45. Subpoena.	David Nuffer Tim Shea
E-filing rules.	Tim Shea

### Meeting Schedule

July 27, 2005  
September 28, 2005  
October 26, 2005  
November 16, 2005

Committee Web Page: <http://www.utcourts.gov/committees/civproc/>

# MINUTES

## UTAH SUPREME COURT ADVISORY COMMITTEE ON THE RULES OF CIVIL PROCEDURE

Wednesday, April 27, 2005  
Administrative Office of the Courts

Francis M. Wikstrom, Presiding

PRESENT: Francis M. Wikstrom, Francis J. Carney, Cullen Battle, Glenn C. Hanni, Thomas R. Karrenberg, Terrie T. McIntosh, Leslie W. Slauch, Honorable Anthony W. Schofield, Virginia S. Smith, Debora Threedy, Todd M. Shaughnessy, R. Scott Waterfall

EXCUSED: Paula Carr, Honorable Lyle R. Anderson, James T. Blanch, Lance Long, Honorable Anthony B. Quinn, Honorable David Nuffer, David W. Scofield, Janet H. Smith, Matty Branch

STAFF: Tim Shea, Trystan Smith

### I. APPROVAL OF MINUTES.

Chairman Wikstrom called the meeting to order at 4:05 p.m. The minutes of the March 23, 2005 meeting were reviewed. Mr. Carney moved that they be approved as submitted. The motion was seconded, and approved unanimously.

### II. RULE 64C. ATTACHMENTS.

Zachary Shaw from the Attorney General's office made a presentation to the committee suggesting Rule 64C be amended to include "in an action upon a judgment." Mr. Shaw indicated the Attorney General's office had numerous concerns about its ability to obtain pre-judgment writs of attachments to collect prior judgments in state collection actions, child support enforcement actions, criminal enforcement restitution actions, etc., because of the deletion of the "judgment" language from Rule 64C. Mr. Shaw noted the previous version of the rule included the "judgment" language which his office utilized to attach property where they alleged a fraudulent transfer from the judgment creditor to a third party.

Mr. Shea noted the committee deleted the word "judgment" from Rule 64C because the proper remedy would be to execute on a judgment under Rule 68, because by definition, you do not need a pre-judgment writ of attachment.

Mr. Wikstrom questioned whether a judgment creditor could obtain a pre-judgment writ against a transferee in the case of fraudulent transfer because this would not be an action on the

judgment. Mr. Shea indicated if there were a fraudulent transfer then a party should seek to enforce the judgment against the transferee under Rule 68.

Mr. Shaw told the committee that under Rule 68 a judgment creditor needs to show a fraudulent transfer by clear and convincing evidence — a higher standard than under Rule 64C. Mr. Shaw referred to the decision of *Jensen v. Aimes*, 519 P.2d 236 (Utah 1974) where he indicated the clear and convincing evidence standard had been set forth. Mr. Shaw further indicated the *Jensen v. Aimes* decision addressed Utah's Fraudulent Transfer Act.

Mr. Wikstrom indicated it did not appear the previous version of Rule 64C allowed a party to obtain a pre-judgment writ against a third party based upon a judgment against the transferor. He noted the proper remedy would be Rule 68. Several committee members expressed concern that the Attorney General's interpretation of the original rule was incorrect. Mr. Shaughnessy expressed concern the proposed amendment would be a mechanism to get around *Jensen's* clear and convincing evidence standard.

Mr. Wikstrom asked the committee to give thought to the bigger question that if there were a fraud should Rule 64C allow a party to attach assets. Mr. Wikstrom indicated the rule does not currently allow for pre-judgment writs in fraud actions, but allows attachments in contract actions and actions against nonresidents. The committee generally questioned why the rule did not have fraud language.

Mr. Hanni mentioned the problem is a fraudulent transfer. He suggested a party first needs to convince the trial court of a fraudulent transfer. Mr. Battle suggested the committee add the "fraudulent transfer" language. Ms. Threedy expressed concern the term "fraudulent transfer" did not indicate an amount certain making it difficult for a trial court to determine an amount to attach.

Virginia Smith suggested Mr. Shea draft an amendment to Rule 64C addressing "fraud" and "fraudulent transfers." Mr. Wikstrom asked the committee to examine whether it should modify Rule 64C to include fraud.

Mr. Wikstrom suggested the committee continue its discussion of Rule 64C at the next meeting. Mr. Wikstrom asked Mr. Shaw to examine Rule 64D to determine whether the Attorney General's office could use the garnishment rules to serve its purposes.

### **III. RULE 68. OFFER OF JUDGMENT**

The committee addressed a proposed amendment to Rule 68(a) allowing offers of judgment to be bilateral. The committee also addressed an amendment to Rule 68(e) expanding the definition of "costs" to include "reasonably incurred fees and expenses for expert witnesses who are not regular employees of a party for preparation for trial and during trial; and the reasonably incurred expenses for reporting and recording fees and travel expenses for depositions reasonably taken, whether used at trial or not."

Colin King spoke on behalf of the Utah Trial Lawyers Association (“UTLA”). Victoria Kidman spoke on behalf of the Utah Defense Lawyers Association. Mr. King began his presentation referring to two anecdotes presented by Eric Nielsen, and Steve Sullivan regarding their experiences representing plaintiffs in personal injury actions. Mr. King stated UTLA had no objection to making subsection (a) bilateral. However, he expressed concern that subsection (e) would have a chilling effect on clients with modest means.

Mr. King told the committee plaintiffs’ personal injury lawyers do not allow cost-shifting to determine why they settle cases. He was fearful plaintiffs would improperly settle cases out of fear of having to reimburse the opposing party for costs.

Ms. Kidman stated the personal injury defense bar also dislikes subsection (e). She believed subsection (e) would prohibit the smaller valued cases from being tried. She further expressed concern that an insurance company presented with a first party claim from its insured would only have ten (10) days to respond or face the possibility of incurring substantial costs.

The committee was generally of the opinion that Rule 68 in its present form was ineffective. Mr. Karrenberg suggested a minimum dollar amount before subsection (e) came into play, for example \$100,000. Mr. Carney expressed concern that plaintiffs’ lawyers could make an exorbitant offer at the beginning of a case, and then run up costs.

Mr. Battle asked Ms. Kidman and Mr. King if they would have the same concerns if the provisions of subsection (e) were under Rule 54. Mr. Hanni indicated that traditionally the American legal system required the losing party to only pay his/her/its attorney’s fees and costs, so why change it now.

Mr. Battle moved to adopt the amendment to subsection (a), strike the additions of subsections (e) 2 & 3, remove subsection (e)1, and revise subsection (e) to state “costs under Rule 54.” Mr. Battle’s motion did not receive a second.

Mr. Wikstrom entertained a motion to strike subsection (e) in its entirety, and adopt the amendment to subsection (a). Mr. Karrenberg seconded the motion, and it was approved unanimously.

#### **IV. RULE 74. WITHDRAWAL OF COUNSEL.**

Mr. Shaughnessy brought Rule 74 back to the committee for further discussion. The proposed amendment would allow withdrawal of an attorney, unless an objection is filed within five (5) days. Presumably an objection could be filed by an opposing party, an opposing attorney, or the withdrawing attorney’s client. If an objection was filed, the object party would need to show good cause to oppose the withdrawal.

Judge Schofield asked whether there were any concerns that five (5) days was too short of a time period. Mr. Shaughnessy responded that he did not want to leave the withdrawing

attorney in limbo for a longer period. Mr. Carney asked whether the committee wanted to adopt a committee note with the proposed revision. Mr. Shea indicated he would prefer the committee, as a practice, adopt language that would not require a committee note.

Mr. Battle expressed concern that allowing a client to object may hamper an attorney with an unethical client from withdrawing. Several committee members expressed concern about abridging a lawyers' freedom to withdraw when a client isn't paying. Scott Waterfall indicated the rule did not need amending because it worked fine, as is.

Mr. Slauch suggested the committee amend subsection (b) to state, "If a motion *or a deposition* is pending . . ." Mr. Wikstrom asked for a sense from committee members on the proposed amendment. The committee expressed no clear consensus.

Mr. Shaughnessy moved to adopt the amendment. Mr. Carney seconded the motion, but no vote was called for.

Due to time constraints, Mr. Wikstrom asked the committee to revisit Rule 74 at the next meeting.

#### **V. RULE 62. STAY OF PROCEEDINGS TO ENFORCE A JUDGMENT.**

Mr. Carney proposed an amendment to Rule 62 that would prevent a party from executing on a judgment until the expiration of ten (10) days. The purpose would be to prevent a party from enforcing a judgment until the time for post-trial motions expired.

After a brief discussion, Mr. Carney moved to adopt the amendment. Mr. Battle seconded the motion, and it was approved unanimously. Subsequently, Judge Schofield moved to redact the phrase "and on such conditions for the security of the adverse party as are proper." Ms. McIntosh seconded the motion, and it was approved unanimously.

#### **VI. PHYSICIAN REPORTS.**

Mr. Carney asked the committee to postpone the discussion on physician reports until he could propose alternative language.

#### **VII. RULE 45. SUBPOENA.**

The committee briefly revisited Rule 45. Mr. Shea asked the committee to consider whether a party should give ten (10) days notice of intent to serve a subpoena. Notice would require an opposing party to object before the subpoenaed party voluntarily complied.

Due to time constraints, Mr. Wikstrom suggested the committee revisit Rule 45 at the next meeting.

**VIII. E-FILING RULES.**

Not discussed due to time constraints.

**IX. ADJOURNMENT.**

The meeting adjourned at 6:01 p.m. The next meeting of the Committee will be held at 4:00 p.m. on Wednesday, May 25, 2005, at the Administrative Office of the Courts.

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1 Rule 64C. Writ of attachment.

2 (a) Availability. A writ of attachment is available to seize property in the possession  
3 or under the control of the defendant.

4 (b) Grounds. In addition to the grounds required in Rule 64A, the grounds for a writ  
5 of attachment require all of the following:

6 (b)(1) that the defendant is indebted to the plaintiff;

7 (b)(2) that the action is upon a contract [or a judgment](#) or is against a defendant who  
8 is not a resident of this state or is against a foreign corporation not qualified to do  
9 business in this state; and

10 (b)(3) that payment of the claim has not been secured by a lien upon property in this  
11 state.

12

1 Rule 74. Withdrawal of counsel.

2 (a) ~~If a motion is not pending and a certificate of readiness for trial has not been~~  
3 ~~filed, an~~ An attorney may withdraw from the case by filing with the court and serving on  
4 all parties a notice of withdrawal, unless a motion is pending, a certificate of readiness  
5 for trial has been filed, or an objection to the notice is filed. The notice of withdrawal  
6 shall include the address of the attorney's client and a statement that no motion is  
7 pending and no certificate of readiness for trial has been filed. Within five days after the  
8 notice of withdrawal is filed, a party may file an objection to the notice, showing good  
9 cause to oppose it. If an objection is timely filed, the notice will be treated as a motion to  
10 withdraw, under subsection (b).

11 (b) If a motion is pending or a certificate of readiness for trial has been filed, an  
12 attorney may not withdraw except upon motion and order of the court. The motion to  
13 withdraw shall describe the nature of any pending motion and the date and purpose of  
14 any scheduled hearing.

15 ~~(b)-(c)~~ If an attorney withdraws, dies, is suspended from the practice of law, is  
16 disbarred, or is removed from the case by the court, the opposing party shall serve a  
17 Notice to Appear or Appoint Counsel on the unrepresented party, informing the party of  
18 the responsibility to appear personally or appoint counsel. A copy of the Notice to  
19 Appear or Appoint Counsel must be filed with the court. No further proceedings shall be  
20 held in the case until 20 days after filing the Notice to Appear or Appoint Counsel unless  
21 the unrepresented party waives the time requirement or unless otherwise ordered by  
22 the court.

23 ~~(e)-(d)~~ Substitution of counsel. An attorney may replace the counsel of record by  
24 filing and serving a notice of substitution of counsel signed by former counsel, new  
25 counsel and the client. Court approval is not required if new counsel certifies in the  
26 notice of substitution that counsel will comply with the existing hearing schedule and  
27 deadlines.

28

1 Rule 45. Subpoena.

2 (a) Form; issuance.

3 (a)(1) Every subpoena shall:

4 (a)(1)(A) issue from the court in which the action is pending;

5 (a)(1)(B) state the title of the action, the name of the court from which it is issued, the  
6 name and address of the party or attorney serving the subpoena, and its civil action  
7 number;

8 (a)(1)(C) command each person to whom it is directed, at a specified time and place,  
9 (a)(1)(C)(i) to appear to give testimony at trial, or at hearing, or at deposition, or

10 (a)(1)(C)(ii) to produce ~~or to permit for~~ inspection and copying ~~of~~ documents or  
11 tangible things in the possession, custody or control of that person, or

12 (a)(1)(C)(iii) to copy and mail to the party issuing the subpoena documents or  
13 tangible things in the possession, custody or control of that person, or

14 (a)(1)(C)(iv) to permit inspection of premises, ~~at a time and place therein specified;~~  
15 and

16 (a)(1)(D) set forth the text of Notice to Persons Served with a Subpoena, in  
17 substantially similar form to the subpoena form appended to these rules.

18 (a)(2) A command to copy and mail documents or tangible things or to produce ~~or to~~  
19 ~~permit for~~ inspection and copying ~~of~~ documents or tangible things, or to permit  
20 inspection of premises, may be joined with a command to appear at trial, or at hearing,  
21 or at deposition, or may be issued separately.

22 (a)(3) The clerk shall issue a subpoena, signed but otherwise in blank, to a party  
23 requesting it, who shall complete it before service. An attorney admitted to practice in  
24 the court in which the action is pending may also issue and sign a subpoena as an  
25 officer of the court.

26 (b) Service; scope.

27 (b)(1) ~~Generally.~~

28 ~~(b)(1)(A)~~ A subpoena may be served by any person who is not a party and is not  
29 less than 18 years of age. Service of a subpoena upon a person named therein shall be  
30 made as provided in Rule 4(d) for the service of process and, if the person's  
31 appearance is commanded, by tendering to that person the fees for one day's

32 attendance and the mileage allowed by law. When the subpoena is issued on behalf of  
33 the United States, or this state, or any officer or agency of either, fees and mileage need  
34 not be tendered. Prior notice of any commanded production or inspection of documents  
35 or tangible things or inspection of premises before trial shall be served on each party in  
36 the manner prescribed by Rule 5(b) at least ten days before the subpoena is issued.

37 ~~(b)(1)(B) Proof of service when necessary shall be made by filing with the clerk of~~  
38 ~~the court from which the subpoena is issued a statement of the date and manner of~~  
39 ~~service and of the names of the persons served, certified by the person who made the~~  
40 ~~service.~~<sup>1</sup>

41 ~~(b)(1)(C) (b)(2)~~ Service of a subpoena outside of this state, ~~for the taking of a~~  
42 ~~deposition or production or inspection of documents or tangible things or inspection of~~  
43 ~~premises outside this state,~~ shall be made in accordance with the requirements of the  
44 jurisdiction in which such service is made.

45 ~~(b)(2) Subpoena for appearance at trial or hearing.~~ A subpoena commanding a  
46 witness to appear at a trial or at a hearing pending in this state may be served at any  
47 place within the state.

48 (b)(3) Subpoena for taking deposition.

49 ~~(b)(3)(A)~~ A person who resides in this state may be required to appear at deposition  
50 only in the county where the person resides, or is employed, or transacts business in  
51 person, or at such other place as the court may order. A person who does not reside in  
52 this state may be required to appear at deposition only in the county in this state where  
53 the person is served with a subpoena, or at such other place as the court may order.

54 ~~(b)(3)(B) A subpoena commanding the appearance of a witness at a deposition may~~  
55 ~~also command the person to whom it is directed to produce or to permit inspection and~~  
56 ~~copying of documents or tangible things relating to any of the matters within the scope~~  
57 ~~of the examination permitted by Rule 26(b), but in that event the subpoena will be~~  
58 ~~subject to the provisions of Rule 30(b) and paragraph (c) of this rule.~~<sup>2</sup>

59 (b)(4) Subpoena for production or inspection of documents or tangible things or  
60 inspection of premises. ~~A subpoena to command a person who is not a party to produce~~

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<sup>1</sup> Covered by Rule 4(e) and Rule 5(d).

<sup>2</sup> Covered by Rule 45(a)(2).

61 ~~or to permit inspection and copying of documents or tangible things or to permit~~  
62 ~~inspection of premises may be served at any time after commencement of the action.~~  
63 ~~The scope and procedure shall comply with Rule 34, except that the person must be~~  
64 ~~allowed at least 14 days to comply as stated in subparagraph (c)(2)(A) of this rule.~~<sup>3</sup>The  
65 party serving the subpoena shall pay the reasonable cost of producing or copying the  
66 documents or tangible things. Upon the request of any other party and the payment of  
67 reasonable costs, the party serving the subpoena shall provide to the requesting party  
68 copies of all documents obtained in response to the subpoena.

69 (c) Protection of persons subject to subpoenas.

70 (c)(1) A party or an attorney responsible for the issuance and service of a subpoena  
71 shall take reasonable steps to avoid imposing undue burden or expense on a person  
72 subject to that subpoena. The court from which the subpoena was issued shall enforce  
73 this duty and impose upon the party or attorney in breach of this duty an appropriate  
74 sanction, which may include, but is not limited to, lost earnings and a reasonable  
75 attorney's fee.

76 ~~(c)(2)(A)-(c)(2)~~ A subpoena served upon a person who is not a party to copy and  
77 mail documents or tangible things or to produce ~~or to permit for~~ inspection and copying  
78 ~~of~~ documents or tangible things or to permit inspection of premises, ~~whether or not~~  
79 ~~joined with a command to appear at trial, or at hearing, or at deposition,~~ must allow the  
80 person at least 14 days after service to comply, unless a shorter time has been ordered  
81 by the court for good cause shown.<sup>4</sup>

82 ~~(c)(2)(B)-(c)(3)~~ A person commanded to copy and mail documents or tangible things  
83 or to produce ~~or to permit for~~ inspection and copying ~~of~~ documents or tangible things or  
84 to permit inspection of premises need not appear in person at the place of production or  
85 inspection unless also commanded to appear at trial, at hearing, or at deposition. A  
86 person commanded to copy and mail documents or tangible things or to produce for  
87 inspection and copying documents or tangible things shall serve on the party issuing the  
88 subpoena an affidavit stating in substance:

89 (c)(3)(A) that the affiant is a witness qualified to make the affidavit;

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<sup>3</sup> Covered by Rule 34 and Rule 45(c)(2).

<sup>4</sup> This provision should be part of Rule 34 and deleted here.

90 (c)(3)(B) that the documents or tangible things produced or copied are a full and  
91 complete response to the subpoena;

92 (c)(3)(C) that the documents or tangible things are the originals or that the copy is a  
93 true copy of the originals;

94 (c)(3)(D) the identity of the documents or tangible things;

95 (c)(3)(E) a description of the method of preparing the documents or tangible things;

96 (c)(3)(F) that the documents or tangible things were prepared by the personnel of  
97 the business in the ordinary course of business at or near the time of the act, condition,  
98 or event; and

99 (c)(3)(G) an accounting of the actual cost of copying the documents or tangible  
100 things.

101 ~~(e)(2)(G)-(c)(4)~~ A person commanded to copy and mail documents or tangible things  
102 or to produce or to permit for inspection and copying ~~of~~ documents or tangible things or  
103 inspection of premises may, before the time specified for compliance with the  
104 subpoena, serve upon the party or attorney designated in the subpoena written  
105 objection to inspection or copying of any or all of the documents or tangible things or  
106 inspection of the premises. If objection is made, the party serving the subpoena shall  
107 not be entitled to inspect and copy the materials or inspect the premises except  
108 pursuant to an order of the court. If objection has been made, the party serving the  
109 subpoena may, upon notice to the person commanded to produce, move at any time for  
110 an order to compel the production. Such an order to compel production shall protect any  
111 person who is not a party or an officer of a party from significant expense resulting from  
112 the inspection and copying commanded.

113 ~~(e)(3)(A)-(c)(5)~~ On timely motion, the court from which a subpoena was issued shall  
114 quash or modify the subpoena if it:

115 ~~(e)(3)(A)(i)-(c)(5)(A)~~ fails to allow reasonable time for compliance;

116 ~~(e)(3)(A)(ii)-(c)(5)(B)~~ requires a resident of this state who is not a party to appear at  
117 deposition in a county in which the resident does not reside, or is not employed, or does  
118 not transact business in person; or requires a non-resident of this state to appear at  
119 deposition in a county other than the county in which the person was served;

120 ~~(e)(3)(A)(iii)~~ (c)(5)(C) requires disclosure of privileged or other protected matter and  
121 no exception or waiver applies;

122 ~~(e)(3)(A)(iv)~~ (c)(4)(D) subjects a person to undue burden.

123 ~~(e)(3)(B)~~ (c)(6) If a subpoena:

124 ~~(e)(3)(B)(i)~~ (c)(5)(A) requires disclosure of a trade secret or other confidential  
125 research, development, or commercial information;

126 ~~(e)(3)(B)(ii)~~ (c)(6)(B) requires disclosure of an unretained expert's opinion or  
127 information not describing specific events or occurrences in dispute and resulting from  
128 the expert's study made not at the request of any party;

129 ~~(e)(3)(B)(iii)~~ (c)(6)(C) requires a resident of this state who is not a party to appear at  
130 deposition in a county in which the resident does not reside, or is not employed, or does  
131 not transact business in person; or

132 ~~(e)(3)(B)(iv)~~ (c)(6)(D) requires a non-resident of this state who is not a party to  
133 appear at deposition in a county other than the county in which the person was served;  
134 the court may, to protect a person subject to or affected by the subpoena, quash or  
135 modify the subpoena or, if the party serving the subpoena shows a substantial need for  
136 the testimony or material that cannot otherwise be met without undue hardship and  
137 assures that the person to whom the subpoena is addressed will be reasonably  
138 compensated, the court may order appearance or production only upon specified  
139 conditions.

140 (d) Duties in responding to subpoena.

141 (d)(1) A person responding to a subpoena to copy and mail documents or tangible  
142 things or to produce for inspection and copying documents or tangible things shall copy  
143 or produce them as they are kept in the usual course of business or shall organize and  
144 label them to correspond with the categories in the demand.

145 (d)(2) When information subject to a subpoena is withheld on a claim that it is  
146 privileged or subject to protection as trial preparation materials, the claim shall be made  
147 expressly and shall be supported by a description of the nature of the documents,  
148 communications, or things not produced that is sufficient to enable the demanding party  
149 to contest the claim.

150 (e) Contempt. Failure by any person without adequate excuse to obey a subpoena  
151 served upon that person may be deemed a contempt of the court ~~from which the~~  
152 ~~subpoena issued~~. An adequate cause for failure to obey exists when a subpoena  
153 purports to require a nonparty to appear or produce at a place not within the limits  
154 provided by ~~subparagraph (c)(3)(A)(ii)~~ this rule.

155 (f) Procedure where witness conceals ~~himself~~ or fails to attend. If a witness evades  
156 service of a subpoena, or fails to attend after service of a subpoena, the court may  
157 issue a warrant to the sheriff of the county to arrest the witness and bring the witness  
158 before the court.

159 (g) Procedure when witness is confined in jail. If the witness is a prisoner ~~confined in~~  
160 ~~a jail or prison within the state, a party may move without notice for~~ an order for  
161 ~~examination to examine the witness~~ in the jail; or prison ~~upon deposition~~ or, ~~in the~~  
162 ~~discretion of the court, for temporary removal and production to produce the witness~~  
163 before the court or officer for the purpose of being orally examined, ~~may be made upon~~  
164 ~~motion, with or without notice, by a justice of the Supreme Court, or by the district court~~  
165 ~~of the county in which the action is pending~~.

166 (h) Subpoena unnecessary; ~~when~~. A person present in court, or before a judicial  
167 officer, may be required to testify in the same manner as if the person were in  
168 attendance upon a subpoena.

169

Fed. R. Civ. P. 45 (b)(1) requires that “[p]rior notice of any commanded production of documents and things or inspection of premises before trial shall be served on each party in the manner prescribed by Rule 5(b).” Utah R. Civ. P. 45(b)(1)(A) states, "Prior notice of any commanded production of documents and things or inspection of premises before trial shall be served on each party in the manner prescribed by Rule 5(b)."

Unfortunately, neither Rule 45 clearly states whether the notice is to be given prior to issuance, sending for service or service of the subpoena, or prior to the production the subpoena commands. The material enclosed includes a letter to the Utah District local rules committee; a section from Moore's Federal Practice and a rule already enacted in the District of Nebraska. Among other things, that rule provides "No subpoenas for production or inspection may be issued for service on a nonparty without giving the adverse party at least ten (10) days notice before the subpoena will be issued." There are other good procedural requirements in the Nebraska local rule.

I would recommend the committee consider adopting at least the single sentence:

"No subpoenas for production or inspection may be issued for service on a nonparty without giving the adverse party at least ten (10) days notice before the subpoena will be issued."

I am not sure the other procedural requirements of the Nebraska local rule are needed in a state rule, but the procedure outlined is a good framework.

David Nuffer

DAVID NUFFER  
UNITED STATES MAGISTRATE JUDGE

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April 8, 2005

Oscar W. McConkie  
Kirton & McConkie  
1800 Eagle Gate Tower  
60 East South Temple  
P.O. Box 45120  
Salt Lake City, Utah 84145-0120

Re: Utah District Court Local Rules Committee - Notice of Subpoena

Dear Chairman McConkie:

Fed. R. Civ. P. 45 (b)(1) requires that “[p]rior notice of any commanded production of documents and things or inspection of premises before trial shall be served on each party in the manner prescribed by Rule 5(b).” Unfortunately, the Rule does not clearly state whether the notice is to be given prior to issuance, sending for service or service of the subpoena, or prior to the production the subpoena commands.

The 1991 Rule comment states, "The purpose of such [prior] notice is to afford other parties an opportunity to object." The opportunity to object is

- meaningless if notice arrives after the compliance (many times a compliant recipient will produce documents before the scheduled deadline);
- meaningful if notice is given around the time of service; and
- most meaningful if given well before service to allow a party to file a motion for protective order.

As Rule 45 existed prior to 1991, subpoenas were issued by the clerk only after a notice of deposition was filed. That notice advised everyone in the case of the pending event. Two major changes were made to the Rule in 1991: (1) Attorneys could sign subpoenas and (2) subpoenas could issue for production of documents, without deposition. These combined changes have created an opportunity for attorneys to send subpoenas (and even receive documents) before the other party has an effective opportunity to object.

Recent case law in our circuit holds that failure to serve a party with a subpoena before *service* on a third party on is improper<sup>1</sup> and sanctionable.<sup>2</sup> “ ‘[P]rior notice’ under Rule 45(b)(1) requires notice be given prior to service rather than prior to production.”<sup>3</sup> But notice prior to service does not cure prejudice entirely.

Over the last few months, I have quashed subpoenas where

- a party subpoenaed competitors of the adverse party;
- a party issued blanket subpoenas to all the employers, past and present, of the adverse party even when there were no employment issues in the case; and
- a party subpoenaed health records of the injured plaintiff’s spouse.

In each of these cases subpoenas were served before the other party received notice of the subpoenas and in some cases documents were produced by complaint third parties before an objection could be filed. Some of the lag in notice was due to counsel’s strategic action.

Counsel generally are confused about the proper time to give notice of subpoenas because of the ambiguity of Fed. R. Civ. P. 45. A local rule would provide some clarity and could provide a suggested procedure. I suggest the Rules Committee consider adoption of a rule requiring notice prior to issuance of the subpoena. Nebraska’s rule to this effect is enclosed. I think that service that early – before issuance – would avoid many disputes.

Sincerely,

David Nuffer  
United States Magistrate Judge

cc: Markus Zimmer, Reporter  
Encl: Nebraska Local Civil Rule 45.1  
Moore's Federal Practice 3d Section 45.03[4][b][iii]

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<sup>1</sup> *Butler v. Biocore Med. Techs., Inc.*, 348 F.3d 1163 (10<sup>th</sup> Circ. 2003).

<sup>2</sup> *Allender v. Raytheon Aircraft Co.*, 220 F.R.D. 661 (D. Kan. 2004).

<sup>3</sup> *Butler*, 348 F.3d at 1173. See the lower court’s analysis of “the cases, the history, and the language of Rule 45(b)(1)” which it interpreted “to require notice prior to service of a subpoena duces tecum.” *Biocore Medical Technologies, Inc. v. Khosrowshahi*, 181 F.R.D. 660, 667 (D.Kan. 1998).

## DUCivR 45-1 PRIOR NOTICE OF SUBPOENA FOR NON PARTY

A copy of any subpoena that is (i) directed to a nonparty, and (ii) commands production of documents and things or inspection of premises before trial shall be served on each party as prescribed by Rule 5(b). Such service shall be made at least five (5) days prior<sup>1</sup> to service of the subpoena on the nonparty. Service on other parties under Rule 5(b)(2)(B), (C) or (D)<sup>2</sup> shall be made at least eight (8) days prior to service of the subpoena on the nonparty.<sup>3</sup>

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<sup>1</sup> The word “prior” reflects the use of “prior” in Fed. R. Civ. P. 45 (b)(1) which requires that “[p]rior notice of any commanded production of documents and things or inspection of premises before trial shall be served on each party in the manner prescribed by Rule 5(b).”

<sup>2</sup> Fed. R. Civ. P. 5 (b) reads:

**(b) Making Service.**

(1) Service under Rules 5(a) and 77(d) on a party represented by an attorney is made on the attorney unless the court orders service on the party.

(2) Service under Rule 5(a) is made by:

(A) Delivering a copy to the person served by:

(i) handing it to the person;

(ii) leaving it at the person’s office with a clerk or other person in charge, or if no one is in charge leaving it in a conspicuous place in the office; or

(iii) if the person has no office or the office is closed, leaving it at the person’s dwelling house or usual place of abode with someone of suitable age and discretion residing there.

(B) Mailing a copy to the last known address of the person served. Service by mail is complete on mailing.

(C) If the person served has no known address, leaving a copy with the clerk of the court.

(D) Delivering a copy by any other means, including electronic means, consented to in writing by the person served. Service by electronic means is complete on transmission; service by other consented means is complete when the person making service delivers the copy to the agency designated to make delivery. If authorized by local rule, a party may make service under this subparagraph (D) through the court’s transmission facilities.

<sup>3</sup> This phrase is meant to add the three days provided under Fed. R. Civ. P. 6(e) which extends time *after* service.

Whenever a party has the right or is required to do some act or take some proceedings within a prescribed period after the service of a notice or other paper upon the party and the notice or paper is served upon the party under Rule 5(b)(2)(B), (C), or (D), 3 days shall be added to the prescribed period.

**[iii]-- Prior Notice of Demand for Production or Inspection Must Be Served on Each Party**

Rule 45(b)(1) also provides that prior notice of any demand for production of documents or inspection of premises before trial must be served on each party pursuant to Rule 5(b), which covers service and filing of pleadings and other papers in general. (*see* Ch. 5, *Service and Filing of Pleadings and Other Papers*). Several courts have held that the requirement that "prior notice" of any commanded production be served on each party requires counsel to provide the notice to other parties before service of the subpoena. It had been argued that "prior notice" simply means notice before the date set for compliance with the subpoenas. However, the courts have noted that the purpose of the notice requirement is to provide opposing parties an opportunity to object to the subpoena, if desired, which requires notice and sufficient time to object before the date of compliance. <sup>36.1</sup>

Footnote 36.1. "Prior notice" defined.

**2d Circuit** *Murphy v. Board of Educ. of Rochester Sch. Dist.*, 196 F.R.D. 220, 222-223 (W.D.N.Y. 2000) (citing Moore's, court ruled that notice must be given before issuance of subpoena, not before its return date).

**6th Circuit** *See Firefighters' Inst. for Racial Equality v. City of St. Louis*, 220 F.3d 898, 903 (8th Cir. 2000), *cert. denied*, 532 U.S. 921 (2001) (district court properly quashed subpoenas because issuing party failed to serve other parties with prior notice of demand for production).

**10th Circuit** *Butler v. Biocore Med. Techs., Inc.*, 348 F.3d 1163, 1173 (10th Cir. 2003) (citing Moore's, Rule 45(b)(1) requires that notice be given to all parties before service of subpoena, rather than before production, to give opposing counsel opportunity to object to subpoena before production dates).

A similar requirement appears in Rule 30(b)(1), which mandates--when a subpoena duces tecum is to be served on a deponent--that the designation of materials to be produced must be attached to, or included in, the deposition notice. (*see* Ch. 30, *Depositions Upon Oral Examination*).

The notice requirement is meant to give other parties "an opportunity to object to the production or inspection, or to serve a demand for additional documents or things." The 1991 Advisory Committee Note reflects that this notice is unnecessary when production is sought with a deposition pursuant to Rule 30 or Rule 31 because of the notice requirements inherent in those rules, but when production or inspection has been sought without a deposition, the other parties need notice to be able to monitor the discovery process and to "pursue access to any information that may or should be produced" (*see* § 45App.08[2]). Regardless of the source of the obligation, notice to all parties is mandatory whenever materials are subpoenaed.

request for trial at Omaha, Lincoln, or North Platte. If the request is for a place different from that requested by the plaintiff, third-party plaintiff, or removing party, it must be accompanied by a supporting affidavit.

- (1) **Form of Request.** The request for place of trial may be a separate pleading or may be endorsed upon the complaint or other initial pleading, and shall be served upon each party.
  - (2) **Conflicting Requests.** The judge may resolve conflicting requests without oral argument. Except for cases governed by the special rules for the Nebraska docket and for the death penalty, see NEGenR 1.4(a)(5) and (6), the judge shall consider the convenience of the litigants, witnesses, and counsel when deciding the place of trial.
  - (3) **Amended Request.** A party may amend an initial or opposing request for place of trial at any time during the pendency of the action if material circumstances bearing on the proper place of trial change.
- (c) **Calendaring Cases.** The clerk shall calendar the case according to the initial request. If the parties make no initial request, the clerk will calendar the case in the city where the clerk's office receiving the case for filing is located.

**41.1 Dismissal of Actions.** If a case which has been at issue for one (1) year or more and in which for a period of one (1) year no advancement has been made in the pleadings or in its preparation for trial, the court may order the case to trial forthwith or dismiss it unless good cause is shown for some other disposition. The court may at any time dismiss an action for lack of prosecution when it appears it is not being prosecuted with reasonable diligence.

#### **45.1 Subpoenas to Nonparties.**

- (a) **Notice to Adverse Party.** No subpoenas for production or inspection may be issued for service on a nonparty without giving the adverse party at least ten (10) days notice before the subpoena will be issued. The notice shall state the name and address of the nonparty who will be subpoenaed, the documents or items to be produced or inspected, the time and place for production or inspection, and the date on which the subpoena will be issued.
- (b) **Objections.** After receipt of the notice, the adverse party shall have five (5) days to serve written objections to the subpoena on the party who gave notice that a subpoena would be issued. The adverse party must specifically identify the grounds for the objections. No subpoena shall be issued for documents or premises whose inspection or production is contested under this rule until the court has resolved the objection. Nothing in this rule affects

the availability of objections set forth in Federal Rule of Civil Procedure 45(c) and (d).

- (c) **Hearing.** The party who gave notice that a subpoena would be issued may move for a hearing on unresolved objections. Upon hearing after notice to all parties, the court may order that the subpoena be issued or not issued, or that discovery proceed in a different manner or subject to a protective order. The court may also, in its discretion, award expenses.
- (d) **Effect of Failure to Object.** A failure to object to issuance of a subpoena to a nonparty shall not preclude an adverse party from moving for a protective order under Federal Rule of Civil Procedure 26(c).

#### 47.1 Jury Pool Questionnaires.

- (a) **Standard Jury Questionnaire.** The clerk shall submit questionnaires to potential members of the jury pool. These completed questionnaires by prospective jurors cannot be obtained by counsel or the parties and are not available for review unless ordered by the court. A list of potential jurors will be available to parties and their counsel prior to trial and is to be used exclusively for the purposes of jury selection. Information included on the list shall not be released to members of the public.
- (b) **Additional Questionnaire for a Specific Case.** The judge who will preside over a trial may determine sua sponte or upon the motion of a party that the circumstances of a particular case justify submitting additional questions to prospective members of a jury pool. In the interest of securing a fair and impartial trial, the judge may solicit assistance from the parties in drafting additional questions and may require that additional written questions be submitted to potential members of the jury pool.

#### 47.2 Jury Selection.

- (a) **Voir Dire.** Voir dire examination may be conducted by the court, by counsel, or by both, as the court shall determine. Within the sound discretion of the court, counsel's examination may be limited by time and subject matter.
- (b) **Peremptory Challenges.** Unless otherwise ordered, all parties shall exercise peremptory challenges alternately, beginning with the plaintiff. Each party will be informed, after the exercise of each peremptory challenge, of the identity of each prospective juror peremptorily challenged by each other party.
- (c) **Waiver of Peremptory Challenges.** To pass or refuse to exercise a peremptory challenge constitutes a waiver of the right to exercise the

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

2 (a) Service: When required.

3 (a)(1) Except as otherwise provided in these rules or as otherwise directed by the  
4 court, every judgment, every order required by its terms to be served, every pleading  
5 subsequent to the original complaint, every paper relating to discovery, every written  
6 motion other than one heard ex parte, and every written notice, appearance, demand,  
7 offer of judgment, and similar paper shall be served upon each of the parties.

8 (a)(2) No service need be made on parties in default except that:

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

10 (a)(2)(B) a party in default for any reason other than for failure to appear shall be  
11 served with all pleadings and papers;

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

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

17 (a)(2)(E) pleadings asserting new or additional claims for relief against a party in  
18 default for any reason shall be served in the manner provided for service of summons in  
19 Rule 4.

20 (a)(3) In an action begun by seizure of property, ~~whether through arrest, attachment,~~  
21 ~~garnishment or similar process,~~ in which no person ~~need be or~~ is named as defendant,  
22 any service required to be made prior to ~~the filing of~~ an answer, claim or appearance  
23 shall be made upon the person having custody or possession of the property at the time  
24 of its seizure.

25 (b) Service: How made ~~and by whom~~.

26 (b)(1) ~~Whenever under these rules service is required or permitted to be made upon~~  
27 ~~if~~ a party is represented by an attorney, ~~the~~ service shall be ~~made~~ upon the attorney  
28 unless service upon the party is ordered by the court. ~~Service upon the attorney or upon~~  
29 ~~a party shall be made by delivering a copy or by mailing a copy to the last known~~  
30 ~~address or, if no address is known, by leaving it with the clerk of the court.~~

31 ~~(b)(1)(A) Delivery of a copy within this rule means: Handing~~ The judge may require  
32 in a specific case service under this rule by email. A party shall use the method most  
33 likely to give actual notice of a hearing scheduled 5 days or less from the date of  
34 service. Otherwise, a party shall serve a paper under this rule by:

35 (b)(1)(A)(i) handing it to the attorney or to the party person; or

36 (b)(1)(A)(ii) leaving it at the person's office with a clerk or person in charge, thereof;  
37 or, if there is no one in charge, leaving it in a receptacle intended for receiving deliveries  
38 or in a conspicuous place therein; or, if the office is closed or the person to be served  
39 has no office,

40 (b)(1)(A)(iii) leaving it at the person's dwelling house or usual place of abode with  
41 some person of suitable age and discretion then residing therein; or, if consented to in  
42 writing by the person to be served, delivering a copy by electronic or other means;

43 (b)(1)(A)(iv) mailing it to the person's last known address;

44 (b)(1)(A)(v) faxing it to the person's last known fax number if that person has agreed  
45 to accept service by fax;

46 (b)(1)(A)(vi) sending it by email to the person's last known email address if that  
47 person has agreed to accept service by email or if that person has an electronic filing  
48 account; or

49 (b)(1)(A)(vii) upon any person with an electronic filing account, who is a party or  
50 attorney in the case, by submitting the paper for electronic filing.

51 (b)(1)(B) Service by mail is complete upon mailing. ~~If the paper served is notice of a~~  
52 ~~hearing and if the hearing is scheduled 5 days or less from the date of service, service~~  
53 ~~shall be by delivery or other method of actual notice. Service by electronic means is~~  
54 ~~complete on transmission if transmission is completed during normal business hours at~~  
55 ~~the place receiving the service; otherwise, service is complete on the next business day~~  
56 Service by mail is complete upon mailing. Service by fax or email is not effective if the  
57 party making service learns that the attempted service did not reach the person to be  
58 served.

59 (b)(2) Unless otherwise directed by the court:

60 (b)(2)(A) an order signed by the court and required by its terms to be served or a  
61 judgment signed by the court shall be served by the party preparing it;

62 (b)(2)(B) every other pleading or paper required by this rule to be served shall be  
63 served by the party preparing it; and

64 (b)(2)(C) an order or judgment prepared by the court shall be served by the court.

65 (c) Service: Numerous defendants. In any action in which there is an unusually large  
66 number of defendants, the court, upon motion or of its own initiative, may order that  
67 service of the pleadings of the defendants and replies thereto need not be made as  
68 between the defendants and that any cross-claim, counterclaim, or matter constituting  
69 an avoidance or affirmative defense contained therein shall be deemed to be denied or  
70 avoided by all other parties and that the filing of any such pleading and service thereof  
71 upon the plaintiff constitutes ~~due~~ notice of it to the parties. A copy of every such order  
72 shall be served upon the parties in such manner and form as the court directs.

73 (d) Filing. All papers after the complaint required to be served upon a party shall be  
74 filed with the court either before or within a reasonable time after service. The papers  
75 shall be accompanied by a certificate of service showing the date and manner of service  
76 completed by the person effecting service. Rule 26(i) governs the filing of papers related  
77 to discovery.

78 (e) Filing with the court defined. ~~The filing of pleadings and other papers with the~~  
79 ~~court as required by these rules shall be made by filing them with the clerk of the court,~~  
80 A person may file with the court using any means of delivery permitted by the court,  
81 including personal, courier, mail, fax or electronic. The judge may require parties to file  
82 electronically. Filing is complete upon acceptance by the clerk of court, except that the  
83 judge may accept the papers, ~~note thereon the filing date~~ and ~~forthwith~~ transmit them to  
84 the office of the clerk. The clerk or judge shall note on the paper the date of acceptance.

85

1 Rule 10. Form of pleadings and other papers.

2 (a) Caption; names of parties; other necessary information. All pleadings and other  
3 papers filed with the court shall contain a caption setting forth the name of the court, the  
4 title of the action, the file number, the name of the pleading or other paper, and the  
5 name, if known, of the judge (and commissioner if applicable) to whom the case is  
6 assigned. ~~In the complaint, the title of the action shall include the names of all the~~  
7 ~~parties, but other pleadings and papers need only state the name of the first party on~~  
8 ~~each side with an indication that there are other parties. A party whose name is not~~  
9 ~~known shall be designated by any name and the words "whose true name is unknown."~~  
10 ~~In an action in rem, unknown parties shall be designated as "all unknown persons who~~  
11 ~~claim any interest in the subject matter of the action."~~ Every pleading and other paper  
12 ~~filed with the court shall also state in the top left hand corner of the first page~~ the name,  
13 address, email address, telephone number and bar number of ~~any~~the attorney  
14 representing the party filing the paper, ~~which information shall appear in the top left~~  
15 ~~hand corner of the first page and signing the paper under subsection (e).~~ Every pleading  
16 shall state in the lower left hand corner of the last page the name ~~and address~~ of the  
17 party for whom it is filed; ~~this information shall appear in the lower left hand corner of the~~  
18 ~~last page of the pleading.~~ In the complaint, the title of the action shall include the names  
19 of all the parties, but other papers need only state the name of the first party on each  
20 side with an indication that there are other parties. A party whose name is not known  
21 shall be designated by any name and the words "whose true name is unknown." In an  
22 action in rem, unknown parties shall be designated as "all unknown persons who claim  
23 any interest in the subject matter of the action." The plaintiff shall file ~~together~~ with the  
24 complaint a completed cover sheet substantially similar in form and content to the cover  
25 sheet approved by the Judicial Council.

26 (b) Paragraphs; separate statements. All averments of claim or defense shall be  
27 made in numbered paragraphs, ~~the contents of each of which.~~ Each averment shall be  
28 limited as far as practicable to a ~~statement of a~~ single set of circumstances; and a  
29 paragraph may be referred to by number in all succeeding pleadings. Each claim  
30 founded upon a separate transaction or occurrence and each defense other than

31 denials shall be stated in a separate count or defense whenever a separation facilitates  
32 the clear presentation of the matters set forth.

33 (c) Adoption by reference; exhibits. Statements in a pleading paper may be adopted  
34 by reference in a different part of the same pleading or ~~in another pleading, or in any~~  
35 motion paper. An exhibit to a pleading paper is a part thereof for all purposes.

36 (d) ~~Paper quality, size, style and printing. All pleadings and other papers filed with~~  
37 ~~the court, except printed documents or other exhibits, shall be typewritten, printed or~~  
38 ~~photocopied in black type on good, white, unglazed paper of letter size (8 1/2" x 11"),~~  
39 ~~with a top margin of not less than 2 inches above any typed material, a left hand margin~~  
40 ~~of not less than 1 inch, a right hand margin of not less than one half inch, and a bottom~~  
41 ~~margin of not less than one half inch. All typing or printing shall be clearly legible, shall~~  
42 ~~be double spaced, except for matters customarily single spaced or indented, and shall~~  
43 ~~not be smaller than 12-point size. Typing or printing shall appear on one side of the~~  
44 ~~page only.~~ Paper format. All pleadings and other papers filed with the court, other than  
45 exhibits, shall be created and reproduced with a page format of 8 ½ inches wide x 11  
46 inches long, on white background, with a top margin of not less than 2 inches, all other  
47 margins of not less than 1 inch, with text or images only on one side. All text or images  
48 shall be clearly legible, shall be double spaced, except for matters customarily single  
49 spaced or indented, and shall not be smaller than 12-point size.

50 (e) Signature line. ~~Names~~ The name of the person signing shall be typed or printed  
51 under all that person's signature lines, and ~~all signatures shall be made in permanent~~  
52 ~~black or blue ink.~~ If a paper is digitally signed, the paper may contain the typed or  
53 printed name of the signer with or without a graphic signature.

54 (f) Enforcement by clerk; waiver for pro se parties. The clerk of the court shall  
55 ~~examine all pleadings and other papers filed with the court. If they are~~ accept for filing  
56 papers not prepared in conformity with this rule, ~~the clerk shall accept the filing~~ but may  
57 require counsel to substitute properly prepared papers for nonconforming papers. The  
58 clerk or the court may ~~waive the requirements of this rule for~~ permit parties appearing  
59 pro se to file nonconforming papers. For good cause shown, the court may ~~relieve any~~  
60 ~~party of any requirement of this rule~~ permit any party to file nonconforming papers.

61 (g) Replacing lost ~~pleadings or~~ papers. If an original ~~pleading or~~ paper filed ~~in any~~  
62 ~~action or proceeding with the court~~ is lost or incomplete, the court may, upon motion,  
63 with or without notice, authorize a copy thereof to be filed and used in lieu of the  
64 original.

65 (h) Electronic papers.

66 (h)(1) Any reference in these rules to a writing, recording or image includes the  
67 electronic version thereof.

68 (h)(2) A paper digitally signed and electronically filed is the original.

69 (h)(3) An electronic copy of a paper, recording or image may be filed as though it  
70 were the original. Proof of the original, if necessary, is governed by the Utah Rules of  
71 Evidence.

72 (h)(4) An electronic copy of a paper shall conform to the format of the original.

73 (h)(5) An electronically filed paper may contain links only to other papers filed  
74 simultaneously or already on file with the court.

75

1 Rule 11. Signing of pleadings, motions, and other papers; representations to court;  
2 sanctions.

3 (a) Signature.

4 (a)(1) Every pleading, written motion, and other paper shall be signed by at least one  
5 attorney of record~~in the attorney's individual name~~, or, if the party is not represented ~~by~~  
6 ~~an attorney~~, shall be signed by the party. ~~Each paper shall state the signer's address~~  
7 ~~and telephone number, if any.~~

8 (a)(2) A person may sign a paper using any form of signature recognized by law as  
9 binding.

10 (a)(3) Except when otherwise specifically provided Unless required by rule or  
11 statute, pleadings need not ~~be~~ have a notarized, verified or ~~accompanied by affidavit~~  
12 acknowledged signature. A digital signature is not the equivalent of a notarized, verified  
13 or an acknowledged signature, but if a rule or statute requires a notarized, verified or an  
14 acknowledged signature, a digital signature satisfies that requirement.

15 (a)(4) An unsigned paper shall be stricken unless omission of the signature is  
16 corrected promptly after being called to the attention of the attorney or party.

17 (b) Representations to court. By presenting a ~~pleading, written motion, or other~~  
18 paper to the court (whether by signing, filing, submitting, or ~~later~~ advocating), an  
19 attorney or unrepresented party is certifying that to the best of the person's knowledge,  
20 information, and belief, formed after an inquiry reasonable under the circumstances,

21 (b)(1) it is not being presented for any improper purpose, such as to harass or to  
22 cause unnecessary delay or needless increase in the cost of litigation;

23 (b)(2) the claims, defenses, and other legal contentions ~~therein~~ are warranted by  
24 existing law or by a nonfrivolous argument for the extension, modification, or reversal of  
25 existing law or the establishment of new law;

26 (b)(3) the ~~allegations and other~~ factual contentions have evidentiary support or, if  
27 specifically so identified, are likely to have evidentiary support after a reasonable  
28 opportunity for further investigation or discovery; and

29 (b)(4) the denials of factual contentions are warranted on the evidence or, if  
30 specifically so identified, are reasonably based on a lack of information or belief.

31 (c) Sanctions. If, after notice and a reasonable opportunity to respond, the court  
32 determines that subdivision (b) has been violated, the court may, subject to the  
33 conditions stated below, impose an appropriate sanction upon the attorneys, law firms,  
34 or parties that have violated subdivision (b) or are responsible for the violation.

35 (c)(1) How initiated.

36 (c)(1)(A) By motion. A motion for sanctions under this rule shall be made separately  
37 from other motions or requests and shall describe the specific conduct alleged to violate  
38 subdivision (b). It shall be served as provided in Rule 5, but shall not be filed with or  
39 presented to the court unless, within 21 days after service of the motion (or such other  
40 period as the court may prescribe), the challenged paper, claim, defense, contention,  
41 allegation, or denial is not withdrawn or appropriately corrected. ~~If warranted, the court  
42 may award to the party prevailing on the motion the reasonable expenses and attorney  
43 fees incurred in presenting or opposing the motion. In appropriate circumstances, a law  
44 firm may be held jointly responsible for violations committed by its partners, members,  
45 and employees.~~

46 (c)(1)(B) On court's initiative. On its own initiative, the court may enter an order  
47 describing the specific conduct that appears to violate subdivision (b) and directing an  
48 attorney, law firm, or party to show cause why it has not violated subdivision (b) ~~with  
49 respect thereto.~~

50 (c)(2) Nature of sanction; limitations. ~~If warranted, the court may award to the party  
51 prevailing on the motion the costs and reasonable attorney fees incurred in presenting  
52 or opposing the motion.~~ A sanction imposed for violation of this rule shall be limited to  
53 what is sufficient to deter repetition ~~of such conduct or comparable conduct by others  
54 similarly situated.~~ Subject to the limitations in subparagraphs (A) and (B), the sanction  
55 may ~~consist of, or~~ include, directives of a nonmonetary nature, an order to pay a penalty  
56 into court, or, if imposed on motion and warranted for effective deterrence, an order  
57 directing payment to the movant of some or all of the costs and reasonable attorney  
58 fees ~~and other expenses~~ incurred as a direct result of the violation. In appropriate  
59 circumstances, a law firm may be held jointly responsible for violations committed by its  
60 partners, members, and employees.

61 (c)(2)(A) Monetary sanctions may not be awarded against a represented party for a  
62 violation of subdivision (b)(2).

63 (c)(2)(B) Monetary sanctions may not be awarded on the court's initiative unless the  
64 court issues its order to show cause before a voluntary dismissal or settlement of the  
65 claims ~~made by or against the party which is, or whose attorneys are, to be sanctioned.~~

66 (c)(3) Order. When imposing sanctions, the court shall describe the conduct  
67 determined to constitute a violation of this rule and explain the basis for the sanction  
68 ~~imposed.~~

69 (d) Inapplicability to discovery. ~~Subdivisions (a) through (c) of this~~ This rule does not  
70 apply to disclosures and discovery requests, responses, objections, and motions that  
71 are subject to ~~the provisions of~~ Rules 26 through 37.

72