

# Agenda

## Advisory Committee on Rules of Civil Procedure

October 25, 2006  
4:00 to 6:00 p.m.

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

Approval of minutes.	Fran Wikstrom
URCP 101.	Mike Evans
E-discovery	David Nuffer
Signing expert reports	Cullen Battle Frank Carney
Rule 23.1. Derivative actions by shareholders.	Tony Schofield

### Meeting Schedule

November 29, 2006 (5th Wednesday)  
January 24, 2007  
February 28, 2007  
March 28, 2007  
April 25, 2007  
May 23, 2007  
June 27, 2007  
September 26, 2007  
October 24, 2007  
November 28, 2007

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

# MINUTES

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

Wednesday, September 27, 2006  
Administrative Office of the Courts

Francis M. Wikstrom, Presiding

PRESENT: Francis J. Carney, Terrie T. McIntosh, Leslie W. Slauch, Honorable David O. Nuffer, Janet H. Smith, Jonathan Hafen, Thomas R. Lee, Judge R. Scott Waterfall, Cullen Battle, Barbara Townsend, Steven Marsden, Francis M. Wikstrom, Honorable Anthony B. Quinn, Lori Woffinden, Todd M. Shaughnessy

EXCUSED: James T. Blanch, Honorable Anthony W. Schofield, Debora Threedy, Honorable Lyle R. Anderson, David W. Scofield, Matty Branch

STAFF: Tim Shea, Trystan B. Smith

### I. APPROVAL OF MINUTES.

Mr. Wikstrom called the meeting to order at 4:05 p.m. Judge Waterfall moved to approve the September 27, 2006 minutes as submitted. The committee unanimously approved the minutes.

### II. CODE v. DOH. FINALITY OF JUDGMENTS.

Mr. Shea indicated the Utah Supreme Court granted a petition for certiorari in the *Code v. DOH* case. Mr. Shea expressed his desire that the committee wait to address a revision to Rule 7 concerning the finality of judgments until the Supreme Court ruled.

### III. RULE 45. SUBPOENA.

Mr. Shea brought Rule 45 back to the committee. Mr. Wikstrom asked for the committee's comments on the proposed changes.

Mr. Wikstrom suggested the committee delete the phrase "or contemporaneously with" in Rule 45(b)(3). Seeing no objection, the committee agreed to delete the phrase.

Mr. Wikstrom questioned whether the committee should keep the phrase "reasonable cost of producing or copying" in Rule 45(c)(2)(b). After some discussion as to what costs a subpoenaed party may request payment for, the committee agreed to keep the phrase.

Mr. Lee suggested the phrase “Notice to Persons Served with a Subpoena” in subsection (a)(1)(D) should be placed in lower case. Mr. Wikstrom suggested the subsection should state “include” instead of “set forth.” The committee agreed with both suggestions.

Mr. Slauch indicated a party cannot issue a subpoena only an attorney can issue a subpoena. Mr. Lee moved to revise the language contained throughout Rule 45 from the “party or attorney issuing” the subpoena to “the party or attorney responsible for issuing the subpoena.” The committee unanimously approved the motion.

Mr. Carney expressed concern about the perjury language contained in the declarations under Rule 45(f)(1). Mr. Lee suggested replacing the word “perjury” to “penalty of law” in subsection (f)(1) and in the declaration. The committee agreed with the changes.

Mr. Carney also expressed concern that a party does not have to serve trial subpoenas. The committee debated whether under Rule 5 trial subpoenas are “other papers.” After discussing the committee member’s conflicting opinions, the committee agreed to discuss this concern and the remainder of Rule 45 after receiving comments from the plaintiff and defense bars.

#### **IV. SPOILIATION; SANCTIONS. RULES 16, 35 AND 37.**

Mr. Shea brought Rules 16, 35 and 37 back to the committee.

The committee debated whether it should strike “or effect of what the evidence would have been” in Rule 37(b)(2)(F). The committee further debated striking “or both of them” from subsection (b)(2)(D) suggesting the phrase was redundant. The committee agreed to revise both subsections.

Mr. Wikstrom suggested the committee reverse the order of subsections (1) and (2) under Rule 37(d). The committee agreed with the change.

The committee further discussed whether under Rule 37(d) if a party can move for sanctions, instead of a motion to compel, if a party fails to respond to written discovery or attend a deposition. After some discussion, the committee did not feel it needed to change the subsection.

The committee reviewed the revised language in subsection (g) which placed the spoliation sanction in the negative. The committee indicated its initial approval to the changes to Rule 37, including subsection (g), subject to possible additional changes to accommodate the rules for e-discovery.

Mr. Carney and Mr. Lee agreed to serve on a subcommittee to revise the language contained in Rule 35.

## **V. E-DISCOVERY.**

Judge Nuffer provided the committee with an overview of the proposed federal e-discovery rules.

Judge Nuffer suggested early on during the Rule 26 attorney's planning meeting the parties discuss and plan for the discovery of electronic documents.

Judge Nuffer further discussed the form in which the electronic documents will be produced. He indicated the form of production is the central issue with e-discovery.

Judge Nuffer further indicated that parties can enter into agreements to return privileged documents if inadvertently produced.

Finally, Judge Nuffer spoke to the sanctions safe harbor if a party fails to produce certain e-discovery.

Mr. Wikstrom asked that Judge Nuffer head a subcommittee consisting of Mr. Hafen, Mr. Battle, Ms. Townsend, Mr. Shaughnessy, and Mr. Marsden to provide the committee background and proposals for the e-discovery rules.

## **VI. RULE 23.1. DERIVATIVE ACTIONS BY SHAREHOLDERS.**

The committee agreed to discuss Rule 23.1 at the next meeting.

## **VII. RULE 17. FILINGS BY EMANCIPATED MINORS.**

Mr. Shea brought proposed changes to Rule 17(b) to the committee suggesting subsection (b) should be amended to state, "An emancipated minor shall appear personally or by counsel."

Mr. Wikstrom suggested the first sentence of subsection (b) should be amended to state an "emancipated minor must appear personally." The committee agreed to the change.

## **VIII. ADJOURNMENT.**

The meeting adjourned at 6:00 p.m. The next meeting of the committee will be held at 4:00 p.m. on Wednesday, October 25, 2006, at the Administrative Office of the Courts.

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1 Rule 101. Motion practice before court commissioners.

2 (a) Written motion required. An application to a court commissioner for an order shall  
3 be by motion which, unless made during a hearing, shall be made in accordance with  
4 this rule. A motion shall be in writing and state succinctly and with particularity the relief  
5 sought and the grounds for the relief sought.

6 (b) Time to file and serve. The moving party shall file the motion and attachments  
7 with the clerk of the court and obtain a hearing date and time. The moving party shall  
8 serve the responding party with the motion and attachments and notice of the hearing at  
9 least 14 calendar days before the hearing. A party may file and serve with the motion a  
10 memorandum supporting the motion. If service is more than 90 days after the date of  
11 entry of the most recent appealable order, service may not be made through counsel.

12 (c) Response; reply. The responding party shall file and serve the moving party with  
13 a response and attachments at least 5 business days before the hearing. A party may  
14 file and serve with the response a memorandum opposing the motion. The moving party  
15 may file and serve the responding party with a reply and attachments at least 3  
16 business days before the hearing. The reply is limited to responding to matters raised in  
17 the response.

18 (d) Attachments; objection to failure to attach.

19 (d)(1) As used in this rule "attachments" includes all records, forms, information and  
20 affidavits necessary to support the party's position. Attachments for motions and  
21 responses regarding alimony shall include income verification and a financial  
22 declaration. Attachments for motions and responses regarding child support and child  
23 custody shall include income verification, a financial declaration and a child support  
24 worksheet. A financial declaration shall be verified.

25 (d)(2) If attachments necessary to support the moving party's position are not served  
26 with the motion, the responding party may file and serve an objection to the defect with  
27 the response. If attachments necessary to support the responding party's position are  
28 not served with the response, the moving party may file and serve an objection to the  
29 defect with the reply. The defect shall be cured within 2 business days after notice of the  
30 defect or at least 2 business days before the hearing, whichever is earlier.

31 (e) Courtesy copy. Parties shall deliver to the court commissioner a courtesy copy of  
32 all papers filed with the clerk of the court within the time required for filing with the clerk.  
33 The courtesy copy shall state the name of the court commissioner and the date and  
34 time of the hearing.

35 (f) Late filings; sanctions. If a party files or serves papers beyond the time required in  
36 subsections (b) or (c), the court commissioner may hold or continue the hearing, reject  
37 the papers, impose costs and attorney fees caused by the failure and by the  
38 continuance, and impose other sanctions as appropriate.

39 (g) Counter motion. Opposing a motion is not sufficient to grant relief to the  
40 responding party. An application for an order may be raised by counter motion. This rule  
41 applies to counter motions except that a counter motion shall be filed and served with  
42 the response. The response to the counter motion shall be filed and served no later  
43 than the ~~response~~ reply. The reply to the response to the counter motion shall be filed  
44 and served at least 2 business days before the hearing. A separate notice of hearing on  
45 counter motions is not required.

46 (h) Limit on hearing. The court commissioner shall not hold a hearing on a motion  
47 before the deadline for an appearance by the respondent under Rule 12.

48 (i) Limit on order to show cause. The court shall issue an order to show cause only  
49 upon motion supported by affidavit or other evidence sufficient to show probable cause  
50 to believe a party has violated a court order. The court commissioner shall proceed in  
51 accordance with Utah Code Title 78, Chapter 32, Contempt.

52 (j) Motions to judge. The following motions shall be to the judge to whom the case is  
53 assigned: motion for alternative service; motion to waive 90-day waiting period; motion  
54 to waive divorce education class; ~~motion for entry of default judgment~~; motion for leave  
55 to withdraw after a case has been certified as ready for trial; and motions in limine. A  
56 court may provide that other motions be to the judge.

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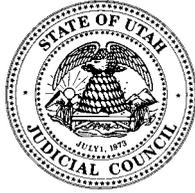
Guys:

I've actually run into someone who claims that Rule 26(a)(3) on expert reports means that the report CANNOT be signed by the attorney, but must be signed by the expert or the "party" himself: "(a)(3)(B) Unless otherwise stipulated by the parties or ordered by the court, this disclosure shall, with respect to a witness who is retained or specially employed to provide expert testimony in the case or whose duties as an employee of the party regularly involve giving expert testimony, be accompanied by a written report prepared and signed by the witness or party."

This sounds silly and I remember reading somewhere that "party" included "attorney" but I can't locate it. If a court were to interpret "party" not to mean attorney as well, then Rule 26 as a whole would require parties-- not counsel-- to do a whole host of things, including make the disclosures, disclose experts, enter into stipulations, and conduct depositions . Nothing says an 'attorney' may do this or that, only that a 'party' may.

Any thoughts? It's one of those things that seems obvious to me, but perhaps it ain't

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# Administrative Office of the Courts

Chief Justice Christine M. Durham  
Utah Supreme Court  
Chair, Utah Judicial Council

## MEMORANDUM

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Daniel J. Becker  
State Court Administrator  
Myron K. March  
Deputy Court Administrator

**To:** Civil Procedures Committee  
**From:** Tim Shea *TS*  
**Date:** October 20, 2006  
**Re:** Rule 23.1. Derivative actions

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Judge Schofield suggested that Rule 23.1 incorrectly refers to "a court of the United States," a phrase taken verbatim from the federal rule, as is the rest of the state rule, including the rule number. The remainder of the amendments are changes to remove the gender specific pronouns or to create a checklist of allegations required in the complaint.

At the Committee's request, Frank Carney circulated this draft and received the attached email.

The mission of the Utah judiciary is to provide the people an open, fair,  
efficient, and independent system for the advancement of justice under the law.

From: "Francis J. Carney" <fcarney@aklawfirm.com>  
To: "Tim Shea" <tims@email.utcourts.gov>, "Fran Wikstrom"  
<fwikstrom@pblutah.com>  
Date: 9/29/06 12:10AM  
Subject: Rule 23A

I ran the proposed rule past two people in my office who do derivative actions and they thought it was OK. One had this comment:

"The changes make sense, but it doesn't much matter what they do with Rule 23A because of the limitation on discovery by a shareholder when a corporation proposes to dismiss a derivative proceeding (Utah Code Ann. § 16-10a-740(3)(i)), and the standard for dismissing a derivative proceeding (§ 16-10a-740(4)). Everyone knows that the recommendation of the Board (or its special litigation committee) will be to dismiss the derivative action and not to sue themselves. Yet, a shareholder's discovery can't extend to any facts or substantive matters -- apparently even if such facts or matters overlap with the process (which can be reviewed in discovery), making it even more difficult to prove the lack of good faith of the Board's inquiry. It's virtually impossible to prove a whitewash, which is what often occurs."

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1 Rule ~~23.1~~ 23A. Derivative actions by shareholders.

2 (a) In The complaint in a derivative action brought by one or more shareholders or  
3 members to enforce a right of a corporation or of an unincorporated association, ~~the~~  
4 ~~corporation or association having failed to enforce a right which may properly be~~  
5 ~~asserted by it, the complaint~~ shall be verified and shall allege:

6 (a)(1) the right that the corporation or association could have enforced and did not;

7 ~~(1) (a)(2)~~ that the plaintiff was a shareholder or member at the time of the transaction  
8 ~~of which he complains complained of~~ or that ~~his~~ the plaintiff's share or membership  
9 thereafter devolved on him to the plaintiff by operation of law, ~~and;~~

10 ~~(2) (a)(3)~~ that the action is not a collusive one to confer jurisdiction on a the court of  
11 ~~the United States which that~~ it would not otherwise have;

12 (a)(4) The complaint shall also allege with particularity, the plaintiff's efforts, if any,  
13 ~~made by the plaintiff~~ to obtain the desired action ~~he desires from the directors or~~  
14 ~~comparable authority and, if necessary, from the shareholders or members;~~ and

15 (a)(5) the reasons for ~~his~~ the failure to obtain the action or for not making the effort.

16 (b) The derivative action may not be maintained if it appears that the plaintiff does  
17 not fairly and adequately represent the interests of the shareholders or members  
18 similarly situated in enforcing the right of the corporation or association.

19 (c) The action shall not be dismissed or compromised without the approval of the  
20 court, and notice of the proposed dismissal or compromise shall be given to  
21 shareholders or members in such manner as the court directs.