Agenda
Advisory Committee on Rules of Civil Procedure

January 23, 2013
4: 00 to 6:00 p.m.

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

Recognition of Judge David Nuffer		Chief Justice Matthew Durrant
Approval of minutes	Tab 1	Fran Wikstrom
ABOTA Jury Summit; Austin, TX; October 10		Fran Wikstrom
Small Claims Rule 3	Tab 2	Tim Shea
Notice deadlines	Tab 3	Tim Shea
Appeals		Tim Shea
FAQs	Tab 4	Fran Wikstrom
Expedited procedures for resolving discovery issues	Tab 5	Tim Shea
Proof of electronic signature	Tab 6	Tim Shea

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

Meeting Schedule: Matheson Courthouse, Judicial Council Room, 4:00 to 6:00 unless otherwise stated.

February 27, 2013
March 27, 2013
April 24, 2013
May 22, 2013
September 25, 2013
October 23, 2013
November 20, 2013

Tab 1

MINUTES

UTAH SUPREME COURT ADVISORY COMMITTEE OF THE RULES OF CIVIL PROCEDURE

NOVEMBER 28, 2012

PRESENT: Francis M. Wikstrom, Chair, Trystan B. Smith, Barbara L. Townsend, Terrie M. McIntosh, Francis J. Carney, Lori Woffinden, Honorable John L. Baxter, Honorable Todd M. Shaughnessy, W. Cullen Battle, Jonathan O. Hafen, Honorable Kate Toomey

TELEPHONE: Honorable Lyle R. Anderson

STAFF: Tim Shea, Sammi Anderson, Diane Abegglen

EXCUSED: Honorable Derek P. Pullan, Steven Marsden, Honorable Robert J. Shelby, Janet H. Smith

I. MINUTES.

Mr. Wikstrom entertained comments from the committee concerning the October 24, 2012 minutes. The committee unanimously approved the minutes.

II. CONSIDERATION OF COMMENTS ON PROPOSED RULES.

Tim Shea led a discussion regarding proposed changes to Rule 5, regarding the certificate of service requirement. Mr. Shea suggested modifying existing subparagraph (d), rather than inserting the proposed new language in a new subparagraph (f). The committee discussed keeping the new, separate subparagraph (f), but deleting a potentially redundant sentence from existing subparagraph (d). The judges on the committee emphasized the need to have a certificate of service attached to the relevant pleading, and for that certificate of service to specifically identify the pleading to which it is appended. The committee approved this change.

Mr. Shea discussed the comments to the proposed amendments to Rule 10, specifically regarding requiring attorneys to use on court filings the same physical address as the address that is on file with the Utah State Bar. Mr. Shea reported that the courts would be satisfied with a provision in proposed subparagraph (g) to Rule 5, stating that the courts will send notices to the e-mail address on file with the Utah State Bar, in the case of attorneys, or, in the case of a party, to the email address provided by the party. A motion was made to delete the proposed language requiring use of the same address, email address and telephone

number from Rule 10(a)(3), and to add the above-referenced language to proposed subparagraph (g) of Rule 5. The committee approved the motion unanimously.

Mr. Shea then discussed comments to the proposed amendment requiring that the parties identify the discovery tier in the caption. The purpose for the change is so that the court clerk can record the discovery tier in the court case management system. There were no comments to the remainder of the proposed changes to Rule 10 or Rule 11.

Regarding changes to Rule 26, Mr. Shea reminded the committee of an earlier discussion regarding triggering Rule 26 disclosure deadlines to the filing of the answer, as opposed to the service of the answer. Mr. Shea noted that one problem is that the filing of the answer, at least until e-filing, may not always coincide with service. However, Mr. Wikstrom noted that the rule already requires that service happen first, followed by filing within a reasonable time. Because the change has not been sent for comment, a motion is required to change Rule 26(a)(2)(A) to require Plaintiff's disclosures within 14 days of "filing", as opposed to service, of the first answer to the complaint. The motion was made and unanimously approved.

Mr. Shea next discussed whether a similar change should be made to Rule 26(c)(5), *ie*, whether the language should be changed from when "first disclosure is due", to when "answer is filed". Mr. Wikstrom noted that this change may not be necessary given the change to 26(a)(2)(A), which clarified that disclosure deadlines are keyed off the "filing" of an answer, which is a known and quantifiable date. The committee agreed that this change is not necessary.

Mr. Wikstrom next entertained a motion to approve the rules as amended in the meeting, and to send the rules to the Supreme Court for approval. The motion was made and unanimously approved.

III. RULE 37.

Judge Shaughnessy led a discussion regarding an earlier-proposed amendment designed to limit the Court's resort to the serious, terminating-type sanctions, to circumstances that warrant such a result. Judge Shaughnessy ultimately recommended making a change to the committee note, giving practitioners and judges guidance as to what sanction would be appropriate under what circumstances, and to make certain that attorneys and parties generally understand that requests for terminating sanctions are not typically appropriate in cases of failure to disclose. A motion was made to approve and adopt the proposed committee note, as amended to state "limited those more drastic sanctions to circumstances in which a party fails to comply with a court order or persists in dilatory conduct, or acts in bad faith." The motion was approved unanimously.

IV. RULES 52, 59, 60.

Mr. Carney led a discussion regarding potential changes to the post-trial motion rules. First, should the names be updated to Judgment as a Matter of Law (JMOL) and Renewed JMOL. The phrases "directed verdict" and "judgment notwithstanding the verdict" (JNOV) are archane. Updated language would track the federal rules, which were changed to make it clear that the JMOL standard is essentially the same as the summary judgment standard. Second, the rules currently require an attorney to renew a JMOL at the close of the evidence, after the motion is originally made at close of other side's case. This can be a procedural trap for the unwary and seems to yield little benefit to the trial process. Third, should the time to file post-trial motions be changed from 10 days to 28 days? The committee debated the pros and cons of changing from 10 to 28 days. Mr. Davies noted the convenience of having the post-trial rules match the federal rules, both in terms of the standards and timing of motions. Last, should the rules be changed to refer consistently to the act of "filing", as opposed to the inconsistently used terms "move" or "made", etc. The committee agreed with the changes conceptually. Mr. Carney agreed to draft some proposed language implementing these changes for consideration at the next meeting.

V. RULE 58A.

Mr. Shea reported that the Appellate Rules Committee did not reach the 58A issue at their last meeting, though it was previously reported to this committee that it would consider a proposed change to Appellate Rule 4 at its next meeting. Mr. Wikstrom has communicated to the Appellate Rules Committee that this committee feels some urgency to address the issue as requested by the Supreme Court. Ms. Abegglen agreed to report this sentiment to the Appellate Rules Committee at their next meeting. If we are unable to effect the changes through the Appellate Rules, this committee will return to its discussion of potential revisions to Rule 58A.

VI. FAQ's.

Mr. Shea introduced for the committee's consideration some of the next proposed FAQ's. The first addresses expert discovery, specifically the timing of the election of report or deposition. The gist of this FAQ is that the 7 days is calculated by including the 3 extra days for mailing. Mr. Battle noted the concern the committee discussed at the last meeting, that parties are designating their experts early and thereby trying to force the other party into an early election. The committee earlier discussed and designed a FAQ to make clear that premature expert disclosures, *ie*, prior to completion of fact discovery, do not trigger an obligation to elect by the other side. The committee suggested either linking or merging the two FAQ's. Mr. Shea agreed to make an attempt at this and to present the results of this effort at the next meeting.

FAQ No. 2 addresses stipulations for extraordinary discovery. The committee engaged in extensive discussion regarding the response but, after reviewing the committee note to Rule 26, ultimately decided to strike the response in favor of the committee note. The proposed FAQ failed for lack of motion to approve.

VII. ADJOURNMENT.

The meeting adjourned at 5:58 pm. The next meeting will be held on January 23, 2013 at 4:00 p.m. at the Administrative Office of the Courts.

Happy Holidays and Best Wishes for the New Year!

Tab 2

Administrative Office of the Courts

Chief Justice Matthew B. Durrant
Utah Supreme Court
Chair, Utah Judicial Council

Daniel J. Becker
State Court Administrator
Raymond H. Wahl
Deputy Court Administrator

MEMORANDUM

To: Civil Procedures Committee
From: Tim Shea
Date: January 16, 2013
Re: Rules for final action

The comment period for the following rules has closed, and they are ready for your final recommendations.

Rule summary

Rule of Small Claims Procedure 3. Service of the affidavit. Amend. Permits a small claims affidavit and summons to be served by any method of personal service authorized by URCP 4. Allows alternative service in a small claims case.

Comments

If the only change is to make the personal service more clear in Small Claims, then referring to Rule 4 of URCP needs to be more specific, because "Rule 4 d)(3) Service in a foreign country, and (d)(4) Other service." is not a current practice in Small Claims. The current practice is the public is told to file a separate civil action, regarding Rule 4(d)(3) and Rule 4(d)(4).

Posted by Sharon Nez November 27, 2012 06:07 PM

Analysis

The amendments would eliminate this and similar distinctions. Service in a foreign country will probably be rare, but, if the needs arises, it would be permitted. As would service by alternative means. Service on government officials identified in URCP 4 can be ignored because the government cannot be sued in a small claims action. Utah Code Section 63G-7-501.

Encl. Draft rule

Rule 3. Service of the affidavit and summons.

(a) ~~After filing the affidavit and receiving a trial date, plaintiff must serve the affidavit and summons on defendant. To serve the affidavit, plaintiff must either:~~

~~(a)(1) have the affidavit served on defendant by a sheriff's department, constable, or person regularly engaged in the business of serving process and pay for that service; or~~

~~(a)(2) have the affidavit delivered to defendant by a method of mail or commercial courier service that requires defendant to sign a receipt and provides for return of that receipt to plaintiff.~~

~~(b)~~ Service of the small claims affidavit and summons shall be as provided in Utah Rule of Civil Procedure 4.The affidavit and summons must be served at least 30 calendar days before the trial date. ~~Service by mail or commercial courier service is complete on the date the receipt is signed by defendant. If the affidavit is not served within 120 days after filing, the action may be dismissed without prejudice upon the court's own initiative with notice to the plaintiff.~~

~~(c)~~ (b) Proof of service of the affidavit and summons must be filed ~~with the court~~ as provided in Utah Rule of Civil Procedure 4 no later than 10 business days after service. ~~If service is by mail or commercial courier service, plaintiff must file a proof of service. If service is by a sheriff, constable, or person regularly engaged in the business of serving process, proof of service must be filed by the person completing the service.~~

~~(d)~~ (c) Each party shall serve on all other parties a copy of all documents filed with the court other than the counter affidavit. Each party shall serve on all other parties all documents as ordered by the court. Service of all papers other than the affidavit and counter affidavit may be by first class mail to the other party's last known address. The party mailing the papers shall file proof of mailing with the court no later than 10 business days after service. If the papers are returned to the party serving them as undeliverable, the party shall file the returned envelope with the court.

Tab 3

ALBERTA - SALT LAKE
SALT LAKE COUNTY, STATE OF UTAH

IHC,	:	**NOTICE OF EVENT**
	:	**DUE DATES**
Plaintiff,	:	
	:	
vs.	:	
	:	**Case No. 120000131 CN**
BOB JONES,	:	**Discovery Tier: 3**
	:	**Judge: STATE JUDGE**
Defendant.	:	

To Counsel and Parties:

The district court case management system has automatically generated this notice, calculating the dates set forth below under Utah Rule of Civil Procedure 26. If you believe that any of these dates have not been calculated correctly, you must file a motion within 14 days after receiving this notice, demonstrating that one or more of the dates are incorrect. Otherwise, these dates will constitute the schedule for disclosures, fact discovery, expert discovery, ADR and readiness for trial. This schedule does not govern extraordinary discovery.

Based on the date the defendant's answer was filed, the following event due dates apply in this case. If any date is a Saturday, Sunday or legal holiday, the due date is the following business day.

Date Answer filed:	27-Sep-12	
• Plaintiff's initial disclosures due:	11-Oct-12	(Date answer filed plus 14 days)
• Defendant's initial disclosures due:	8-Nov-12	(Date answer filed plus 42 days)
		(Date defendant's disclosures due plus 210 days.
• Fact discovery completed:	6-Jun-13	Will vary depending on tier.)
• Expert discovery completed:	10-Oct-13	(Date fact discovery completed plus 126 days)
• ADR completed (unless exempt):	10-Oct-13	(Date expert discovery completed)
• Certificate of Readiness for Trial due:	10-Oct-13	(Date expert discovery completed)

The parties shall promptly notify the court of any settlements or stipulations. Self Help Resources are available at www.utcourts.gov.

CERTIFICATE OF NOTIFICATION
I certify that a copy of this Notice of Event Due Dates was sent to the following people for case 120000131 by the method and on the date specified.

MAIL: IHC
MAIL: BOB JONES

Date: September 28, 2012 /S/PEGGY JOHNSON (AOC)
Clerk/Clerk of Court

Tab 4

FAQs

(1) Expert discovery — Timing of disclosures, elections and extensions.

Question: When must a party disclose its experts? What is the consequence if the plaintiff serves its expert witness disclosures before the end of fact discovery? Must the defendant elect a deposition or report within seven days or face losing the opportunity to conduct expert discovery at the appropriate time?

Answer: Rule 26(a)(4)(C)(i) states "[t]he party who bears the burden of proof on the issue for which expert testimony is offered shall provide the information required by paragraph (a)(4)(A) [i.e., the initial expert disclosure] within seven days **after** the close of fact discovery." This specifies a window within which the parties must provide their initial expert disclosures; it is not merely a deadline for such disclosures. The rules do not permit any party to "jump-start" the expert disclosure and discovery process by serving expert disclosures prematurely. There is nothing wrong with submitting an expert declaration in support of a summary judgment motion at any time, but a formal "disclosure of expert testimony" under Rule 26(a)(4)(A) is premature and ineffective if made before the close of fact discovery.

A plaintiff's disclosure of its expert witness information before the close of fact discovery disclosures does not trigger the defendant's obligation to elect an expert deposition or report, nor do they otherwise affect the timing of expert disclosures and discovery.

Question: Under Rule 26(a)(4)(C)(i), the election of a report or deposition must be made within seven days after the opponent's designation of expert witnesses. Does this mean after service of the expert designation? Is the time for the election calculated under Rule 6?

Answer: Yes. The committee intended that the election of a report or deposition must be made within seven days after an opposing party serves its designation of experts. An amendment effective April 1 will expressly state that.

The time for electing a report or deposition is calculated using Rule 6. That is, the party who does not bear the burden of proof, must serve its election on the other party within seven days after the other party serves its designation of experts. Under Rule 6 intermediate weekends and holidays are excluded from the seven-day period, and, if the other party's designation of experts was served by mail, three extra days are added for serving the election.

NOTE: These Qs & As would replace
http://www.utcourts.gov/committees/civproc/Effect%20of%20premature%20disclosure%20of%20expert%20witnesses.pdf

> The next question may point to the need for an amendment. It is possible — although it seems not to make practical sense — to require that expanding the limits of expert discovery (days to complete; hours of deposition) be resolved before the close of fact discovery. But if we take the position drafted below that the required time frame ("before the close of standard discovery and after reaching the limits of standard discovery") for a stipulation or motion for extraordinary fact discovery does not apply, it is hard to argue that the requirements of proportionality and approval of a discovery budget do.
>
> The requirements for extraordinary discovery under Rule 26(c)(6) very clearly do not apply to expanding the limits of expert discovery. However, Rule 29, which is more general in scope, contains the same requirements.
>
> Regardless of timing, the juxtaposition of Rule 26(c)(6) and Rule 29 reveals another problem: If Rule 26(c)(6) does not apply to expert discovery, then there is nothing in Rule 26 by which to expand the limits of expert discovery, and Rule 29 is limited to stipulations, not motions. It can be argued that expert discovery cannot be expanded by motion.
>
> Perhaps an amendment is needed which requires proportionality and approval of a discovery budget for expanding expert discovery, but which calculates timing based on the expert disclosure process.

Question: If parties want to stipulate (or move) to extend the 28 days for expert discovery, does the stipulation (or motion) have to be filed "before the close of standard discovery and after reaching the limits of standard discovery," as provided in Rule 26(c)(6) and Rule 29?

Answer: No. There are limits on the discovery of expert witnesses, but stipulations and motions to extend those limits are not bound by the same time frame for extraordinary discovery. See Rule 26(c)(5), which expressly excludes expert disclosure and discovery. The required timing for stipulations and motions for extraordinary fact discovery, found in Rule 26(c)(6) and in Rule 29, does not apply. Stipulations and motions to modify the limits of expert discovery can be filed after the close of fact discovery.

(2) Expert discovery — Rebuttal experts.

Question: How does the designation of rebuttal experts work?

Answer: The disclosure of rebuttal experts and the election of reports by them or depositions of them use the same procedures and time frames as for experts generally. An amendment effective April 1 will expressly state that.

(3) Expert discovery — Payment for expert's report.

Question: Does the requesting party have to pay for the report from the opposing expert witness?

Answer: No. Under Rule 26(a)(4)(B) the party deposing an expert offered by another party pays for the cost of a deposition, and the party offering the expert pays the cost for preparing a report.

(4) Expert discovery — Data relied upon by an expert.

Question: In disclosing an expert, Rule 26(a)(4)(A) says to provide, among other things "a brief summary of the opinions to which the witness is expected to testify [and] all data and other information that will be relied upon by the witness in forming those opinions…." Does this mean the party must produce actual records? Or does it mean just a summary list, such as "my training, my education, my 30 years of experience, the plaintiff's medical records"?

Answer: The disclosure should include a concise, yet thorough, summary of the expert's opinions in the same way that a summary of the expected testimony of fact witnesses is to be disclosed in initial disclosures. The disclosure does not have to include the actual records relied upon in forming those opinions, but it should identify the records reviewed, the texts consulted and so forth, keeping in mind that such foundation topics should be more fully described in the report or deposition.

Question: Must an expert produce his or her complete file? The Committee Note to Rule 26, under "Expert disclosures and timing," says that the party offering the expert must disclose, among other things, "a complete copy of the expert's file for the case." The note separately identifies the need to disclose "all of the facts and data that the expert has relied upon in forming the expert's opinions." Yet the comparable provision in the rule itself, Rule 26(a)(4)(iii), includes only the latter.

Answer:

(5) Expert discovery — Discovery among aligned parties.

Question: Rule 26(a)(4)(C) says "If no election [requiring a report from or deposition of an opposing party's expert] is made, then no further discovery of the expert shall be permitted." What happens if multiple defendants do not file an election? Does the rule default to a deposition as provided in Rule 26(a)(4)(D)?

Answer: No. Rule 26(a)(4)(D) defaults to a deposition only if "competing" elections are served by multiple defendants; i.e. one defendant asks for a report and the other asks for a deposition. In that case, the rule says that the parties will depose the witness. However, if no defendant files an election, then no further discovery is permitted (no report, no deposition) under Rule 26(a)(4)(C).

> Note: The next Q & A raises another reason to restate some fact discovery principles as part of expert discovery.

Question: Expert depositions are limited to 4 hours under Rule 26(a)(4)(B). Does this mean per side or in total? Rule 26(c)(5) calculates discovery limits for “plaintiffs collectively, defendants collectively, and third-party defendants collectively, but this applies to standard discovery, and not expert discovery.

Answer: It is the committee’s intent that the limitation on expert deposition hours apply to each side collectively, as in depositions for fact discovery.

(6) Effect of partial motions to dismiss on deadlines for disclosures and discovery.

Question: If there is a Rule 12 motion to dismiss some claims, but answers are filed on other claims, are the deadlines stayed?

Answer: No. If an answer is filed — absent any order or stipulation otherwise — the time for disclosures and discovery begin to run. If there is no answer, but rather a Rule 12 motion to dismiss all claims for relief, the deadlines are not stayed; they do not begin to run. The Committee Note to Rule 26 states, "the time periods for making Rule 26(a)(1) disclosures, and the presumptive deadlines for completing fact discovery, are keyed to the filing of an answer. If a defendant files a motion to dismiss or other Rule 12(b) motion in lieu of an answer, these time periods normally would not begin to run until that motion is resolved."

Careful practice requires filing an answer to claims for which no motion to dismiss has been filed, although a stipulation commonly obviates the need for this.

(7) Subpoena for medical examiner’s reports.

Question: The former Rule 35(c) provided for the production of prior reports from a medical examiner. That provision has been eliminated. Can a party still get those reports through subpoenas?

Answer: Yes. As the Committee Note to Rule 35 says: “The former requirement of Rule 35(c) providing for the production of prior reports on other examinees by the examiner was a source of great confusion and controversy. … Medical examiners will be treated as other expert witnesses are treated, with the required disclosure under Rule 26 and the option of a report or a deposition.” Discovering the earlier reports is subject to requirements of proportionality and relevance under Rule 26.

(8) Special practice rules — Wrongful death claims.

Question: Rule 26.2 applies to “actions seeking damages arising out of personal physical injuries or physical sickness.” Does it apply to actions claiming wrongful death?

Answer: Yes. The Committee used 26 USC § 104(a)(2) as its model and intended that "actions seeking damages arising out of personal physical injuries or physical sickness" be broadly interpreted to include wrongful death claims.

(9) Special practice rules — Effective date.

Question: Rule 26.2 was not part of the group of rules amended on November 1, 2011. Does it apply only to cases filed on or after its effective date, December 22, 2011, to cases filed on or after the effective date of the other disclosure and discovery amendments November 1, 2011, or to all pending cases?

Answer:

All pending cases. The general rule is that amendments to the Rules of Civil Procedure apply to further proceedings in actions pending on the effective date of the amendment (See Rule 1.), and the Supreme Court did not make an exception for Rule 26.2 as it did for the rules amended on November 1, 2011.

(10) Special practice rules — Divorce modification.

(Bob Wilde) **Question:** In a divorce modification seeking to increase child support where assets and net worth are irrelevant, is it necessary to disclose the non-income items in 26.1(c)?

Answer:

(11) Supplementing disclosures

From Todd

Question: How frequently must a party supplement disclosures?

From Frank:

I have a med mal case where specials are under $5,000 however the general damages are substantial, permanent and lifelong. Cases like this have been tried to verdict across the nation as high as 1.2 million but most are in the $300,000 to $600,000 range. I have filed complaint alleging tier 3. Defendant files (after answer) with "Motion for Protective Order & Issuance of an Order that the Claim falls Under Tier 1." I have reread the committee notes of the new rules but really nothing on point regarding tier limits. Do the new rules provide that the Plaintiff can claim what damages they think they are? To hold otherwise would allow the Court to determine damages.

From John Bogart

If I serve an interrogatory on Mr. A and Mr. A's LLC is that one interrogatory or two?

As they are aligned and for practical purposes the same, it could be one. But there are two parties. Does any of that matter? Is it interrogatories directed to a side now, rather to a party? Rule 33 is still by party, but the allocation isn't.

Tab 5

Administrative Office of the Courts

Chief Justice Matthew B. Durrant
Utah Supreme Court
Chair, Utah Judicial Council

Daniel J. Becker
State Court Administrator
Raymond H. Wahl
Deputy Court Administrator

MEMORANDUM

To: Civil Procedures Committee
From: Tim Shea
Date: January 16, 2013
Re: Expedited procedures for resolving discovery issues.

Soon after November 1, 2011, the effective date of the disclosure and discovery amendments, the Third District Court adopted a local rule establishing an expedited "pre-motion" process for resolving discovery disputes. The rule applied to all cases, not just those filed on or after November 1. The Second and Fourth Districts followed suit. The Judicial Council decided that a single rule with statewide applicability would be better than multiple local rules and adopted Rule 4-502, while repealing the local rules. The Council expressly intended that Rule 4-502 would be a temporary measure, until this committee has the opportunity to review the issue and draft appropriate amendments for the Rules of Civil Procedure.

I have lifted from Rule 4-502 the provisions that appear to me to govern the civil process. (There are a few provisions of Rule 4-502 that are administrative and would remain, but the balance would be deleted.) I have proposed Rule 7 as the vehicle.

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

(a) **Pleadings.** There shall be a complaint and an answer; a reply to a counterclaim; an answer to a cross claim, if the answer contains a cross claim; a third party complaint, if a person who was not an original party is summoned under the provisions of Rule 14; and a third party answer, if a third party complaint is served. No other pleading shall be allowed, except that the court may order a reply to an answer or a third party answer.

(b)(1) **Motions.** An application to the court for an order shall be by motion which, unless made during a hearing or trial or in proceedings before a court commissioner, shall be made in accordance with this rule. A motion shall be in writing and state succinctly and with particularity the relief sought and the grounds for the relief sought.

(b)(2) **Limit on order to show cause.** An application to the court for an order to show cause shall be made only for enforcement of an existing order or for sanctions for violating an existing order. An application for an order to show cause must be supported by an affidavit sufficient to show cause to believe a party has violated a court order.

(c) **Memoranda.**

(c)(1) **Memoranda required, exceptions, filing times.** All motions, except uncontested or ex parte motions, shall be accompanied by a supporting memorandum. Within ten days after service of the motion and supporting memorandum, a party opposing the motion shall file a memorandum in opposition. Within five days after service of the memorandum in opposition, the moving party may file a reply memorandum, which shall be limited to rebuttal of matters raised in the memorandum in opposition. No other memoranda will be considered without leave of court. A party may attach a proposed order to its initial memorandum.

(c)(2) **Length.** Initial memoranda shall not exceed 10 pages of argument without leave of the court. Reply memoranda shall not exceed 5 pages of argument without leave of the court. The court may permit a party to file an over-length memorandum upon ex parte application and a showing of good cause.

(c)(3) **Content.**

(c)(3)(A) A memorandum supporting a motion for summary judgment shall contain a statement of material facts as to which the moving party contends no genuine issue exists. Each fact shall be separately stated and numbered and supported by citation to relevant materials, such as affidavits or discovery materials. Each fact set forth in the moving party's memorandum is deemed admitted for the purpose of summary judgment unless controverted by the responding party.

(c)(3)(B) A memorandum opposing a motion for summary judgment shall contain a verbatim restatement of each of the moving party's facts that is controverted, and may contain a separate statement of additional facts in dispute. For each of the moving party's facts that is controverted, the opposing party shall provide an explanation of the grounds for any dispute, supported by citation to relevant materials, such as affidavits or discovery materials. For any additional facts set forth in the opposing memorandum, each fact shall be separately stated and numbered and supported by citation to supporting materials, such as affidavits or discovery materials.

(c)(3)(C) A memorandum with more than 10 pages of argument shall contain a table of contents and a table of authorities with page references.

(c)(3)(D) A party may attach as exhibits to a memorandum relevant portions of documents cited in the memorandum, such as affidavits or discovery materials.

(d) **Request to submit for decision.** When briefing is complete, either party may file a "Request to Submit for Decision." The request to submit for decision shall state the date on which the motion was served, the date the opposing memorandum, if any, was served, the date the reply memorandum, if any, was served, and whether a hearing has been requested. If no party files a request, the motion will not be submitted for decision.

(e) **Hearings.** The court may hold a hearing on any motion. A party may request a hearing in the motion, in a memorandum or in the request to submit for decision. A request for hearing shall be separately identified in the caption of the document containing the request. The court shall grant a request for a hearing on a motion under Rule 56 or a motion that would dispose of the action or any claim or defense in the

action unless the court finds that the motion or opposition to the motion is frivolous or the issue has been authoritatively decided.

(f) **Orders.**

(f)(1) An order includes every direction of the court, including a minute order entered in writing, not included in a judgment. An order for the payment of money may be enforced in the same manner as if it were a judgment. Except as otherwise provided by these rules, any order made without notice to the adverse party may be vacated or modified by the judge who made it with or without notice. Orders shall state whether they are entered upon trial, stipulation, motion or the court's initiative.

(f)(2) Unless the court approves the proposed order submitted with an initial memorandum, or unless otherwise directed by the court, the prevailing party shall, within fifteen days after the court's decision, serve upon the other parties a proposed order in conformity with the court's decision. Objections to the proposed order shall be filed within five days after service. The party preparing the order shall file the proposed order upon being served with an objection or upon expiration of the time to object.

(f)(3) Unless otherwise directed by the court, all orders shall be prepared as separate documents and shall not incorporate any matter by reference.

(g) **Expedited preliminary procedures for discovery disputes.**

(g)(1) Before filing a motion for extraordinary discovery under Rule 26, a motion for a protective order or a motion for an order compelling disclosure or discovery under Rule 37, or an objection to a subpoena or a motion to quash a subpoena under Rule 45, a party shall file a Request to Resolve a Discovery Dispute as provided in paragraph.

(g)(2) The request shall be no more than four pages, not including the permitted attachments. The request shall include only:

(g)(2)(A) a certification that the requesting party has in good faith conferred or attempted to confer with the other affected parties in an effort to resolve the dispute without court action;

(g)(2)(B) a statement regarding proportionality under Rule 26(b)(2);

(g)(2)(C) if the request is a request for extraordinary discovery, a statement complying with Rule 26(c);

(g)(2)(D) a succinct statement of the relief sought and the grounds for the relief sought;

(g)(2)(E) an attached copy of the request for discovery, the disclosure, or the response at issue;

(g)(2)(F) an attached proposed order; and

(g)(2)(G) no other exhibits or attachments, unless required by law.

(g)(3) No more than seven days after the requesting party has served the request, any opposing party may file a response. The response shall be no more than four pages, not including the proposed order. The response shall include only

(g)(3)(A) a statement regarding proportionality under Rule 26(b)(3);

(g)(3)(B) a succinct statement regarding the relief sought and the grounds for the relief sought;

(g)(3)(C) an attached copy of the request for discovery, the disclosure, or the response at issue, to the extent needed and not included among the requesting party's papers;

(g)(3)(D) an attached proposed order; and

(g)(3)(E) no other exhibits or attachments, unless required by law.

(g)(4) Upon filing of the response or expiration of the time to do so, either party may and the requesting party shall file a Request to Submit for Decision under paragraph (d). The court will promptly decide the request. The court may decide the request on the pleadings and papers unless the court schedules a hearing. The hearing may be by telephone conference or other electronic communication.

(g)(5) The court may order motion proceedings under Rule 7, in which case the requesting party's motion shall be filed within 7 days after the order, unless the court establishes a briefing schedule.

Advisory Committee Notes

Tab 6

Administrative Office of the Courts

Chief Justice Matthew B. Durrant
Utah Supreme Court
Chair, Utah Judicial Council

Daniel J. Becker
State Court Administrator
Raymond H. Wahl
Deputy Court Administrator

MEMORANDUM

To: Civil Procedures Committee
From: Tim Shea
Date: January 16, 2013
Re: Proof of electronic signatures

The Third District Court has asked for a rule governing proof of an electronic signature. Section 46-4-203 gives only general guidance:

> An electronic record or electronic signature is attributable to a person if it was the act of the person.
>
> The act of the person may be shown in any manner, including a showing of the efficacy of any security procedure applied to determine the person to which the electronic record or electronic signature was attributable.
>
> The effect of an electronic record or electronic signature attributed to a person … is determined from the context and surrounding circumstances at the time of its creation, execution, or adoption, including the parties' agreement, if any, and otherwise as provided by law.

I believe that we do not need a rule governing proof if the validity of the signature is contested. In this circumstance, the parties will put on their best evidence about “the act of the person” to whom the signature is attributed and “the efficacy of any security procedure” and “the context and surrounding circumstances at the time of … creation [of the signature].”

But the court is beginning to see printed and scanned copies of electronic records and signatures in debt collection cases in circumstances in which there is no evidentiary hearing, and the judgment or other relief is granted after only the briefest process. The representation of the electronic signature is usually a typed “s/[Name].”The judges would like the proponent to at least claim that the document was signed by the person represented to have signed. I have drafted the following for your consideration:

> Unless an electronic record or signature is self authenticating, to show the authenticity of a physical representation of an electronic record or signature, the proponent shall file an affidavit or declaration under penalty of Utah Code Section 78B-5-705 that the record or signature is valid under the Uniform Electronic Transactions Act and was electronically signed by the person to whom the signature is attributed.

If a rule similar to this is adopted, I believe the practice will evolve in two ways: First, the electronic signature itself might be attested by a notary public and thus it will be self authenticating under URE 902. Or the proponent will add a sentence or two to the supporting affidavit or statement that says, in effect, "[Name] signed the attached document with an electronic signature valid under the Uniform Electronic Transactions Act. I declare under penalty of Utah Code Section 78B-5-705 that this is true."

Copy: Judge Royal Hansen