# Agenda

## Advisory Committee on Rules of Civil Procedure

March 22, 2017

4:00 to 6:00 p.m.

Scott M. Matheson Courthouse

450 South State Street

Judicial Council Room

Administrative Office of the Courts, Suite N31

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|---|---|---|
| Welcome and approval of minutes. | Tab 1 | Jonathan Hafen |
| Rule 5: Courts and certificates of service. | Tab 2 | Clayson Quigley, Nancy Sylvester, Paul Barron |
| Rules 7, 101: Filed vs. served and pro se litigants. | Tab 3 | Nancy Sylvester |
| Arizona reforms (discussion only). | | Lincoln Davies, Paul Stancil |
| Rule 63 and URCrP 29: Motions to disqualify. | Tab 4 | Nancy Sylvester |

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

**Meeting Schedule:**

April 26, 2017

May 24, 2017

September 27, 2017

October 25, 2017

November 15, 2017

# Tab 1

# UTAH SUPREME COURT ADVISORY COMMITTEE ON RULES OF CIVIL PROCEDURE

**Meeting Minutes – February 22, 2017**

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**PRESENT:** Chair Jonathan Hafen, Judge Andrew Stone, Judge James Blanch, Judge Kate Toomey, Judge Kent Holmberg, Lincoln Davies, Paul Stancil, Rod Andreason, Leslie Slaugh, Terri McIntosh, Trystan Smith, Heather Sneddon, James Hunnicutt

**TELEPHONE:** Judge Derek Pullan (guest)

**EXCUSED:** Judge John Baxter, Amber Mettler, Sammi Anderson, Barbara Townsend, Dawn Hautamaki

**STAFF:** Nancy Sylvester, Lauren Hosler

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## (1) WELCOME, APPROVAL OF MINUTES

Chair Jonathan Hafen welcomed the committee. Mr. Hafen proposed cancelling the June meeting. There was a consensus of approval among the committee. Rod Andreason moved to approve the minutes as drafted; Leslie Slaugh seconded. The motion was approved unanimously, with one abstention (Judge Kate Toomey, due to her absence at the prior meeting).

Mr. Hafen congratulated Kent Holmberg on his recent appointment as a Third District judge. Mr. Hafen then informed the committee of two resignations: Judge Derek Pullan, due to another assignment, and Romaine Marshall, due to his lack of availability. Mr. Hafen announced that the Utah Supreme Court appointed Judge Laura Scott and Justin Toth to fill the vacancies.

## (2) COMMENTS TO RULES 5, 45, AND 84

The committee then reviewed comments to Rule 5. The committee discussed moving the proposed amendment to Rule 6 (from its proposed location in Rule 5), and creating a new subsection (6)(d). The committee also discussed whether the rule should state "filed" or "served," or both. The committee reached a consensus on the following language to be added to Rule 6:

> **(d) Filing or service by inmate.**
>
> (d)(1) Papers filed or served by an inmate confined in an institution are timely filed or served if they are deposited in the institution's internal mail system on or before the last day for filing or service. Timely filing or service may be shown by a notarized statement or written declaration setting forth the date of deposit and stating that first-class postage has been, or is being, prepaid, and that the inmate has complied with any applicable requirements for legal mail set by the institution.

> Response time will be calculated from the date the papers are received by the court, or for papers served on parties that do not need to be filed with the court, the postmark date the papers were deposited in U.S. mail, plus any time added under paragraph (b).
>
> (d)(2) The provisions of paragraph (d)(1) do not apply to service of process, which is governed by Rule 4.

Judge Andrew Stone moved to adopt foregoing proposal and to submit it to the Utah Supreme Court for approval, pending approval of the proposed changes by the Rules of Appellate Procedure Committee. Judge James Blanch seconded the motion. The committee approved it unanimously.

Rules 45 and 84 had no public comments, but the review of the comments to Rule 5 (now Rule 6) raised concerns about Rule 45. Based on that discussion, the committee proposed the following change to Rule 45:

> **(i) Procedure when witness is ~~confined in jail.~~an inmate.** If the witness is an ~~prisoner~~ inmate confined in an institution, a party may move for an order to examine the witness in the institution ~~in the jail or prison~~ or to produce the witness before the court or officer for the purpose of being orally examined.

Judge Blanch moved to adopt the change and to submit it to the Utah Supreme Court for approval. Jim Hunnicutt seconded the motion, which the committee unanimously approved.

**(3) FRCP RULE 37(e); FAILURE TO PRESERVE ESI**

The committee picked up the discussion of proposed changes to Rule 37, which was a continuation of prior meetings' discussions. Paul Stancil began with a short summary and input from his recent conversation with Chief Judge Lee Rosenthal of the Southern District of Texas, who was involved in the amendments to the corresponding federal rule. Mr. Stancil also reported on cases from federal district courts interpreting the recent amendments to the FRCP 37(e).

Judge Stone presented his suggested Advisory Committee Note, to be added to the existing proposed note:

> Subsection (e) concerns sanctions available for the destruction of electronically stored information and is limited to such sanctions. It does not limit the Court's ability to sanction in other circumstances (see e.g., 37(b)(7)), and does not bar (1) the parties from litigating the issue of the loss or destruction of electronically stored information before the finder of fact, (2) the finder of fact making whatever inferences it deems appropriate from the totality of the evidence, or (3) the court from giving general instructions regarding permissible inferences from a failure to produce evidence formerly in a party's possession.

There was general support for proposed change with Judge Stone's suggested note addition. Mr. Stancil made a motion to send the proposed amendment to Rule 37 with Judge Stone's proposed

addition to the Advisory Committee note out for public comment; Judge Toomey seconded. Further discussion ensued before a vote was taken.

Heather Sneddon raised the issue of the distinction between "presume" and "infer" in proposed Rule 37(e)(1)(B)(2). Trystan Smith raised the issue of Utah Rule of Evidence 301 in support of using the federal rule's language. The committee discussed both issues.

Ultimately, the committee reached a consensus to send the proposed changes to Rule 37 (matching the recently amended federal rule verbatim) out for comment, with the addition of the following in the Advisory Committee note:

> It is the opinion of the Advisory Committee that subsection (e) concerns sanctions available for the destruction of electronically stored information and is limited to such sanctions. It does not limit the Court's ability to sanction in other circumstances (see e.g., Rule 37(b)(7)), and does not bar (1) the parties from litigating the issue of the loss or destruction of electronically stored information before the finder of fact, (2) the finder of fact making whatever inferences it deems appropriate from the totality of the evidence, or (3) the court from giving general instructions regarding permissible inferences from a failure to produce evidence formerly in a party's possession.
>
> Regarding missing evidence instructions, this note represents a departure from the approach articulated in the federal committee's note.

Mr. Hunnicutt moved to send the above proposal out for comment. Ms. Sneddon seconded the motion. The committee approved it unanimously.

**(4) ADJOURNMENT**

The remaining matters were deferred, and the committee adjourned at 6:00 pm. The next meeting will be held on March 22, 2017 at 4:00 pm at the Administrative Office of the Courts, Level 3.

# 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 Rules Committee
**From:** Nancy Sylvester
**Date:** March 15, 2017
**Re:** Rule 5 and Certificates of Service

Administrative Office personnel and judicial staff recently raised an issue regarding certificates of service and methods of service under Rule 5. The requirement in paragraph (d) of a certificate of service accompanying any paper that must be served, including electronically filed papers, appears to be redundant for clerks. When clerks issue electronic notifications to parties of, for example, a hearing that is scheduled, the electronic notification can—and should—include all of the information that a certificate of service would. This requires simply clicking a few boxes in the computer system. A certificate of service, on the other hand, is less automatic and thus less efficient.

A related issue deals with methods of service. If the parties to be served are represented, it should be sufficient for the clerk to simply submit the notice to the attorneys' electronic filing service providers. Attorneys already receive notifications of other attorneys' filings there, so this makes sense from an efficiency standpoint. The rule as currently drafted in paragraph (b)(3)(A) does not fully contemplate this method.

It appears that these amendments would not prejudice pro se litigants because the same methods of service would still apply for them; they just wouldn't see a separate certificate of service attached. The court notice would contain all of the required information in a single document.

I looked into how this issue affects the juvenile and appellate courts, and it appears that the juvenile court should be exempted from these provisions because of the way their CARE system is set up. The appellate courts have different rules and also a different system at play. On the criminal side, Rule 3 refers to our civil rules for service, so both of these provisions would come into play, but there does not appear to be a downside in doing so.

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

**(a) When service is required.**

**(a)(1) Papers that must be served.** Except as otherwise provided in these rules or as otherwise directed by the court, the following papers must be served on every party:

(a)(1)(A) a judgment;

(a)(1)(B) an order that states it must be served;

(a)(1)(C) a pleading after the original complaint;

(a)(1)(D) a paper relating to disclosure or discovery;

(a)(1)(E) a paper filed with the court other than a motion that may be heard ex parte; and

(a)(1)(F) a written notice, appearance, demand, offer of judgment, or similar paper.

**(a)(2) Serving parties in default.** No service is required on a party who is in default except that:

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

(a)(2)(B) a party in default for any reason other than for failure to appear must be served as provided in paragraph (a)(1);

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

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

(a)(2)(E) a party in default for any reason must be served under Rule 4 with pleadings asserting new or additional claims for relief against the party.

**(a)(3) Service in actions begun by seizing property.** If an action is begun by seizing property and no person is or need be named as defendant, any service required before the filing of an answer, claim or appearance must be made upon the person who had custody or possession of the property when it was seized.

**(b) How service is made.**

**(b)(1) Whom to serve.** If a party is represented by an attorney, a paper served under this rule must be served upon the attorney unless the court orders service upon the party. Service must be made upon the attorney and the party if

(b)(1)(A) an attorney has filed a Notice of Limited Appearance under Rule 75 and the papers being served relate to a matter within the scope of the Notice; or

(b)(1)(B) a final judgment has been entered in the action and more than 90 days has elapsed from the date a paper was last served on the attorney.

**(b)(2) When to serve.** If a hearing is scheduled 7 days or less from the date of service, a party must serve a paper related to the hearing by the method most likely to be promptly received. Otherwise, a paper that is filed with the court must be served before or on the same day that it is filed.

**(b)(3) Methods of service.** A paper is served under this rule by:

(b)(3)(A) except in the juvenile court, submitting it for electronic filing, or the court submitting it to the electronic filing service provider, if the person being served has an electronic filing account;

(b)(3)(B) emailing it to the email address provided by the person or to the email address on file with the Utah State Bar, if the person has agreed to accept service by email or has an electronic filing account;

(b)(3)(C) mailing it to the person's last known address;

(b)(3)(D) handing it to the person;

(b)(3)(E) leaving it at the person's office with a person in charge or, if no one is in charge, leaving it in a receptacle intended for receiving deliveries or in a conspicuous place;

(b)(3)(F) leaving it at the person's dwelling house or usual place of abode with a person of suitable age and discretion who resides there; or

(b)(3)(G) any other method agreed to in writing by the parties.

**(b)(4) When service is effective.** Service by mail or electronic means is complete upon sending.

**(b)(5) Who serves.** Unless otherwise directed by the court:

(b)(5)(A) every paper required to be served must be served by the party preparing it; and

(b)(5)(B) an order or judgment prepared by the court will be served by the court.

**(c) Serving numerous defendants.** If an action involves an unusually large number of defendants, the court, upon motion or its own initiative, may order that:

(c)(1) a defendant's pleadings and replies to them do not need to be served on the other defendants;

(c)(2) any cross-claim, counterclaim avoidance or affirmative defense in a defendant's pleadings and replies to them are deemed denied or avoided by all other parties;

(c)(3) filing a defendant's pleadings and serving them on the plaintiff constitutes notice of them to all other parties; and

(c)(4) a copy of the order must be served upon the parties.

**(d) Certificate of service.** A paper required by this rule to be served, including electronically filed papers, must include a signed certificate of service showing the name of the document served, the date and manner of service and on whom it was served. Except in the juvenile court, an electronic notice generated by the court has the same force and effect as a certificate of service as long as the electronic notice contains the same information as a certificate of service.

**(e) Filing.** Except as provided in Rule 7(j) and Rule 26(f), all papers after the complaint that are required to be served must be filed with the court. Parties with an electronic filing account must file a paper electronically. A party without an electronic filing account may file a paper by delivering it to the clerk of the court or to a judge of the court. Filing is complete upon the earliest of acceptance by the electronic filing system, the clerk of court or the judge.

**(f) Filing an affidavit or declaration.** If a person files an affidavit or declaration, the filer may:

(f)(1) electronically file the original affidavit with a notary acknowledgment as provided by Utah Code Section 46-1-16(7);

(f)(2) electronically file a scanned image of the affidavit or declaration;

(f)(3) electronically file the affidavit or declaration with a conformed signature; or

(f)(4) if the filer does not have an electronic filing account, present the original affidavit or declaration to the clerk of the court, and the clerk will electronically file a scanned image and return the original to the filer.

The filer must keep an original affidavit or declaration of anyone other than the filer safe and available for inspection upon request until the action is concluded, including any appeal or until the time in which to appeal has expired.

**Advisory Committee Notes**

****** IMPORTANT NOTICE - READ THIS INFORMATION *****
NOTICE OF CASE ACTIVITY

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**Activity has occured RE:** 141900002
**Judge:** ELIZABETH A JONES

| | |
|---|---|
| **Date:** | 01-27-2017 |
| **Court:** | Ogden<br>District |
| **Case Title:** | STATE OF UTAH vs. SPICE, MINTY LEAF |
| **Event(s):** | |
| | Filed: Amended Information<br>Filed: Citation (copy)<br>Filed: Victim Impact Statement<br>SENTENCING HEARING set on 01/18/2017 at 09:00 with Judge ELIZABETH A JONES |

This notice was automatically generated by the courts auto-notification system.

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**The following people were notified electronically:**

Like2 Bowl for MINTY LEAF SPICE
TEST LAWYER for JULIA ROBINSON
TEST FILER for STATE OF UTAH
RICHARD F ARMKNECHT for JULIA ROBINSON
TEST EFILATTY for MINTY LEAF SPICE

**The following people have not been notified by electronic means. Therefore, if service or notification is required, it must be completed according to rule:**

BARNEY FIFE BAIL BONDS

# Tab 3

# 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 Rules Committee
**From:** Nancy Sylvester
**Date:** January 21, 2017
**Re:** Rules 7 and 101: "filed" versus "served"

Both Mary Jane Ciccarello and Brent Johnson raised concerns about the "filed" versus "served" language in Rule 7. At the September meeting, Mary Jane addressed how the term "filed" unfairly impacts pro se litigants and requested that where it is used to calculate response time it should be changed to "served." She also raised the same concern with Rule 101, which uses the term, "filed and served." Using both terms, she said, is even more confusing. She requested uniformity between the two rules.

Attached are the two rules with the proposed amendments. Because service happens simultaneously with filing when both parties are represented, this should have no impact on attorneys' current practice in that situation. Rule 6(c) also already controls when service is made by mail and at least one party is unrepresented.



450 South State Street / P.O. Box 140241 / Salt Lake City, Utah 84114-0241 / Tel: 801-578-3808 / Fax: 801-578-3843 / email: nancyjs@utcourts.gov

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

**(a) Pleadings.** Only these pleadings are allowed:

(a)(1) a complaint;

(a)(2) an answer to a complaint;

(a)(3) an answer to a counterclaim designated as a counterclaim;

(a)(4) an answer to a crossclaim;

(a)(5) a third-party complaint;

(a)(6) an answer to a third-party complaint; and

(a)(7) a reply to an answer if ordered by the court.

**(b) Motions.** A request for an order must be made by motion. The motion must be in writing unless made during a hearing or trial, must state the relief requested, and must state the grounds for the relief requested. Except for the following, a motion must be made in accordance with this rule.

(b)(1) A motion, other than a motion described in paragraphs (b)(2), (b)(3) or (b)(4), made in proceedings before a court commissioner must follow Rule 101.

(b)(2) A request under Rule 26 for extraordinary discovery must follow Rule 37(a).

(b)(3) A request under Rule 37 for a protective order or for an order compelling disclosure or discovery—but not a motion for sanctions—must follow Rule 37(a).

(b)(4) A request under Rule 45 to quash a subpoena must follow Rule 37(a).

(b)(5) A motion for summary judgment must follow the procedures of this rule as supplemented by the requirements of Rule 56.

**(c) Name and content of motion.**

(c)(1) The rules governing captions and other matters of form in pleadings apply to motions and other papers. The moving party must title the motion substantially as: “Motion [short phrase describing the relief requested].” The motion must include the supporting memorandum. The motion must include under appropriate headings and in the following order:

(c)(1)(A) a concise statement of the relief requested and the grounds for the relief requested; and

(c)(1)(B) one or more sections that include a concise statement of the relevant facts claimed by the moving party and argument citing authority for the relief requested.

(c)(2) If the moving party cites documents, interrogatory answers, deposition testimony, or other discovery materials, relevant portions of those materials must be attached to or submitted with the motion.

(c)(3) If the motion is for relief authorized by Rule 12(b) or 12(c), Rule 56 or Rule 65A, the motion may not exceed 25 pages, not counting the attachments, unless a longer motion is permitted by the court. Other motions may not exceed 15 pages, not counting the attachments, unless a longer motion is permitted by the court.

**(d) Name and content of memorandum opposing the motion.**

(d)(1) A nonmoving party may file a memorandum opposing the motion within 14 days after the motion is ~~filed~~served. The nonmoving party must title the memorandum substantially as: "Memorandum opposing motion [short phrase describing the relief requested]." The memorandum must include under appropriate headings and in the following order:

(d)(1)(A) a concise statement of the party's preferred disposition of the motion and the grounds supporting that disposition;

(d)(1)(B) one or more sections that include a concise statement of the relevant facts claimed by the nonmoving party and argument citing authority for that disposition; and

(d)(1)(C) objections to evidence in the motion, citing authority for the objection.

(d)(2) If the non-moving party cites documents, interrogatory answers, deposition testimony, or other discovery materials, relevant portions of those materials must be attached to or submitted with the memorandum.

(d)(3) If the motion is for relief authorized by Rule 12(b) or 12(c), Rule 56 or Rule 65A, the memorandum opposing the motion may not exceed 25 pages, not counting the attachments, unless a longer memorandum is permitted by the court. Other opposing memoranda may not exceed 15 pages, not counting the attachments, unless a longer memorandum is permitted by the court.

**(e) Name and content of reply memorandum.**

(e)(1) Within 7 days after the memorandum opposing the motion is ~~filed~~served, the moving party may file a reply memorandum, which must be limited to rebuttal of new matters raised in the memorandum opposing the motion. The moving party must title the memorandum substantially as "Reply memorandum supporting motion [short phrase describing the relief requested]." The memorandum must include under appropriate headings and in the following order:

(e)(1)(A) a concise statement of the new matter raised in the memorandum opposing the motion;

(e)(1)(B) one or more sections that include a concise statement of the relevant facts claimed by the moving party not previously set forth that respond to the opposing party's statement of facts and argument citing authority rebutting the new matter;

(e)(1)(C) objections to evidence in the memorandum opposing the motion, citing authority for the objection; and

(e)(1)(D) response to objections made in the memorandum opposing the motion, citing authority for the response.

(e)(2) If the moving party cites documents, interrogatory answers, deposition testimony, or other discovery materials, relevant portions of those materials must be attached to or submitted with the memorandum.

(e)(3) If the motion is for relief authorized by Rule 12(b) or 12(c), Rule 56 or Rule 65A, the reply memorandum may not exceed 15 pages, not counting the attachments, unless a longer

memorandum is permitted by the court. Other reply memoranda may not exceed 10 pages, not counting the attachments, unless a longer memorandum is permitted by the court.

**(f) Objection to evidence in the reply memorandum; response.** If the reply memorandum includes an objection to evidence, the nonmoving party may file a response to the objection no later than 7 days after the reply memorandum is ~~filed~~served. If the reply memorandum includes evidence not previously set forth, the nonmoving party may file an objection to the evidence no later than 7 days after the reply memorandum is ~~filed~~served, and the moving party may file a response to the objection no later than 7 days after the objection is ~~filed~~served. The objection or response may not be more than 3 pages.

**(g) Request to submit for decision.** When briefing is complete or the time for briefing has expired, either party may file a "Request to Submit for Decision, but, if no party files a request, the motion will not be submitted for decision. The request to submit for decision must state whether a hearing has been requested and the dates on which the following documents were filed:

(g)(1) the motion;

(g)(2) the memorandum opposing the motion, if any;

(g)(3) the reply memorandum, if any; and

(g)(4) the response to objections in the reply memorandum, if any.

**(h) Hearings.** The court may hold a hearing on any motion. A party may request a hearing in the motion, in a memorandum or in the request to submit for decision. A request for hearing must be separately identified in the caption of the document containing the request. The court must grant a request for a hearing on a motion under Rule 56 or a motion that would dispose of the action or any claim or defense in the action unless the court finds that the motion or opposition to the motion is frivolous or the issue has been authoritatively decided.

**(i) Notice of supplemental authority.** A party may file notice of citation to significant authority that comes to the party's attention after the party's motion or memorandum has been filed or after oral argument but before decision. The notice may not exceed 2 pages. The notice must state the citation to the authority, the page of the motion or memorandum or the point orally argued to which the authority applies, and the reason the authority is relevant. Any other party may promptly file a response, but the court may act on the motion without waiting for a response. The response may not exceed 2 pages.

**(j) Orders.**

**(j)(1) Decision complete when signed; entered when recorded.** However designated, the court's decision on a motion is complete when signed by the judge. The decision is entered when recorded in the docket.

**(j)(2) Preparing and serving a proposed order.** Within 14 days of being directed by the court to prepare a proposed order confirming the court's decision, a party must serve the proposed order on the other parties for review and approval as to form. If the party directed to prepare a proposed order fails to timely serve the order, any other party may prepare a proposed order confirming the court's decision and serve the proposed order on the other parties for review and approval as to form.

**(j)(3) Effect of approval as to form.** A party's approval as to form of a proposed order certifies that the proposed order accurately reflects the court's decision. Approval as to form does not waive objections to the substance of the order.

**(j)(4) Objecting to a proposed order.** A party may object to the form of the proposed order by filing an objection within 7 days after the order is served.

**(j)(5) Filing proposed order.** The party preparing a proposed order must file it:

(j)(5)(A) after all other parties have approved the form of the order (The party preparing the proposed order must indicate the means by which approval was received: in person; by telephone; by signature; by email; etc.);

(j)(5)(B) after the time to object to the form of the order has expired (The party preparing the proposed order must also file a certificate of service of the proposed order.); or

(j)(5)(C) within 7 days after a party has objected to the form of the order (The party preparing the proposed order may also file a response to the objection.).

**(j)(6) Proposed order before decision prohibited; exceptions.** A party may not file a proposed order concurrently with a motion or a memorandum or a request to submit for decision, but a proposed order must be filed with:

(j)(6)(A) a stipulated motion;

(j)(6)(B) a motion that can be acted on without waiting for a response;

(j)(6)(C) an ex parte motion;

(j)(6)(D) a statement of discovery issues under Rule 37(a); and

(j)(6)(E) the request to submit for decision a motion in which a memorandum opposing the motion has not been filed.

**(j)(7) Orders entered without a response; ex parte orders.** An order entered on a motion under paragraph (l) or (m) can be vacated or modified by the judge who made it with or without notice.

**(j)(8) Order to pay money.** An order to pay money can be enforced in the same manner as if it were a judgment.

**(k) Stipulated motions.** A party seeking relief that has been agreed to by the other parties may file a stipulated motion which must:

(k)(1) be titled substantially as: "Stipulated motion [short phrase describing the relief requested];

(k)(2) include a concise statement of the relief requested and the grounds for the relief requested;

(k)(3) include a signed stipulation in or attached to the motion and;

(k)(4) be accompanied by a request to submit for decision and a proposed order that has been approved by the other parties.

**(l) Motions that may be acted on without waiting for a response.**

(l)(1) The court may act on the following motions without waiting for a response:

(l)(1)(A) motion to permit an over-length motion or memorandum;

(l)(1)(B) motion for an extension of time if filed before the expiration of time;

(l)(1)(C) motion to appear pro hac vice; and

(l)(1)(E) other similar motions.

(l)(2) A motion that can be acted on without waiting for a response must:

(l)(2)(A) be titled as a regular motion;

(l)(2)(B) include a concise statement of the relief requested and the grounds for the relief requested;

(l)(2)(C) cite the statute or rule authorizing the motion to be acted on without waiting for a response; and

(l)(2)(D) be accompanied by a request to submit for decision and a proposed order.

**(m) Ex parte motions.** If a statute or rule permits a motion to be filed without serving the motion on the other parties, the party seeking relief may file an ex parte motion which must:

(m)(1) be titled substantially as: “Ex parte motion [short phrase describing the relief requested];

(m)(2) include a concise statement of the relief requested and the grounds for the relief requested;

(m)(3) cite the statute or rule authorizing the ex parte motion;

(m)(4) be accompanied by a request to submit for decision and a proposed order.

**(n) Motion in opposing memorandum or reply memorandum prohibited.** A party may not make a motion in a memorandum opposing a motion or in a reply memorandum. A party who objects to evidence in another party’s motion or memorandum may not move to strike that evidence. Instead, the party must include in the subsequent memorandum an objection to the evidence.

**(o) Overlength motion or memorandum.** The court may permit a party to file an overlength motion or memorandum upon a showing of good cause. An overlength motion or memorandum must include a table of contents and a table of authorities with page references.

**(p) Limited statement of facts and authority.** No statement of facts and legal authorities beyond the concise statement of the relief requested and the grounds for the relief requested required in paragraph (c) is required for the following motions:

(p)(1) motion to allow an over-length motion or memorandum;

(p)(2) motion to extend the time to perform an act, if the motion is filed before the time to perform the act has expired;

(p)(3) motion to continue a hearing;

(p)(4) motion to appoint a guardian ad litem;

(p)(5) motion to substitute parties;

(p)(6) motion to refer the action to or withdraw it from alternative dispute resolution under Rule 4-510.05;

(p)(7) motion for a conference under Rule 16; and

(p)(8) motion to approve a stipulation of the parties.

**(q) 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. Nothing in this rule is intended to limit or alter the inherent power of the court to initiate order to show cause proceedings to assess whether cases should be dismissed for failure to prosecute or to otherwise manage the court's docket.

**Advisory Committee Notes**

Proposed Advisory Committee Note

The 2017 amendments to Rule 7 replaced "filed" with "served" where response time was calculated from filing. It is the advisory committee's view that the term "filed" may be prejudicial to self-represented litigants who do not have the benefit of electronic filing. For example, when a document is filed with the court, it has not always been clear to a self-represented litigant when the time for response runs. But response time from service is clearer. This amendment is not intended to supplant Rule 5(b), which governs how, when, and to whom service is made, nor Rule 6(c), which provides for the addition of 3 days when service is made by mail.

**Rule 101. Motion practice before court commissioners.**

**(a) Written motion required.** An application to a court commissioner for an order must be by motion which, unless made during a hearing, must be made in accordance with this rule. A motion must be in writing and state succinctly and with particularity the relief sought and the grounds for the relief sought. Any evidence necessary to support the moving party's position must be presented by way of one or more affidavits or declarations or other admissible evidence. The moving party may also file a supporting memorandum.

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

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

**(d) Reply.** The moving party may file a reply, consisting of any reply memorandum, affidavit(s) or declaration(s). The reply must be ~~filed and~~ served on the responding party at least 7 days before the hearing. The contents of the reply must be limited to rebuttal of new matters raised in the response to the motion.

**(e) Counter motion.** Responding to a motion is not sufficient to grant relief to the responding party. A responding party may request affirmative relief by way of a counter motion. A counter motion need not be limited to the subject matter of the original motion. All of the provisions of this rule apply to counter motions except that a counter motion must be ~~filed and~~ served with the response. Any response to the counter motion must be ~~filed and~~ served no later than the reply to the motion. Any reply to the response to the counter motion must be ~~filed and~~ served at least 3 business days before the hearing. The reply must be served in a manner that will cause the reply to be actually received by the party responding to the counter motion (i.e. hand-delivery, fax or other electronic delivery as allowed by rule or agreed by the parties) at least 3 business days before the hearing. A separate notice of hearing on counter motions is not required.

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

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

**(h) Exhibits; objection to failure to attach.**

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

(h)(2) If papers or exhibits referred to in a motion or necessary to support the moving party’s position are not served with the motion, the responding party may file and serve an

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

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

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

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

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

**(l) Hearings.**

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

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

**(m) Motions to judge.** The following motions must be to the judge to whom the case is assigned: motion for alternative service; motion to waive 90-day waiting period; motion to waive divorce education class; motion for leave to withdraw after a case has been certified as ready for trial; and motions in limine. A court may provide that other motions be considered by the judge.

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

Proposed Advisory Committee Note

The 2017 amendments to Rule 101 replace “filed and served” with simply “served.” It is the advisory committee’s view that the term “filed” in that phrase is unnecessary and may be confusing. Paragraph (b) governs when to file and serve motions in practice before commissioners and Rule 5(e) sets forth the documents that must be filed with the court.

# Tab 4

# 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 Rules Committee
**From:** Nancy Sylvester
**Date:** November 10, 2016
**Re:** Rule 63 and the presiding officer of the Judicial Council

Brent Johnson, who staffs the Criminal Rules Committee, recently sent me a copy of Criminal Rule 29 with a proposed amendment. He brought it to my attention because he thought this committee might want to consider a similar change.

According to Mr. Johnson, sometime last year a district court judge referred a motion to disqualify to the Chief Justice. The procedure is permitted under the rules. However the Chief Justice was uncomfortable deciding the motion, in part because such an issue might subsequently come up on appeal. There were also practical difficulties, for example access to the court filing system for the purpose of entering an order, and therefore the Chief referred the motion to another district court judge.

The Criminal Rules Committee proposed amendments to Rule 29 that eliminated the option of referring these motions to the presiding officer of the Judicial Council. Rule 63 contains similar language, so I have made the same amendments to it and the rule is attached for your review. The criminal rule was circulated for comment and received no comments. Mr. Johnson expects it to be adopted effective May 1.

**Rule 63. Disability or disqualification of a judge.**

**(a) Substitute judge; Prior testimony.** If the judge to whom an action has been assigned is unable to perform his or her duties, then any other judge of that district or any judge assigned pursuant to Judicial Council rule is authorized to perform those duties. The judge to whom the case is reassigned may rehear the evidence or some part of it.

**(b) Motion to disqualify; affidavit or declaration.**

(b)(1) A party to an action or the party's attorney may file a motion to disqualify a judge. The motion must be accompanied by a certificate that the motion is filed in good faith and must be supported by an affidavit or declaration under penalty of Utah Code Section 78B-5-705 stating facts sufficient to show bias, prejudice or conflict of interest. The motion must also be accompanied by a request to submit for decision.

(b)(2)) The motion must be filed after commencement of the action, but not later than 21 days after the last of the following:

(b)(2)(A) assignment of the action or hearing to the judge;

(b)(2)(B) appearance of the party or the party's attorney; or

(b)(2)(C) the date on which the moving party knew or should have known of the grounds upon which the motion is based.

If the last event occurs fewer than 21 days before a hearing, the motion must be filed as soon as practicable.

(b)(3) Signing the motion or affidavit or declaration constitutes a certificate under Rule 11 and subjects the party or attorney to the procedures and sanctions of Rule 11.

(b)(4) No party may file more than one motion to disqualify in an action, unless the second or subsequent motion is based on grounds that the party did not know of and could not have known of at the time of the earlier motion.

(b)(5) If timeliness of the motion is determined under paragraph (b)(2)(C) or paragraph (b)(4), the affidavit or declaration supporting the motion must state when and how the party came to know of the reason for disqualification.

**(c) Reviewing judge.**

(c)(1) The judge who is the subject of the motion must, without further hearing or a response from another party, enter an order granting the motion or certifying the motion and affidavit or declaration to a reviewing judge. The judge must take no further action in the case until the motion is decided. If the judge grants the motion, the order will direct the presiding judge of the court or, if the court has no presiding judge, the presiding officer of the Judicial Council to assign another judge to the action or hearing. The presiding judge of the court, any judge of the district, or any judge of a court of like jurisdiction~~, or the presiding officer of the Judicial Council~~ may serve as the reviewing judge.

(c)(2) If the reviewing judge finds that the motion and affidavit or declaration are timely filed, filed in good faith and legally sufficient, the reviewing judge shall assign another judge to the action or hearing or request the presiding judge, or if the court has no presiding judge the presiding officer of the Judicial Council, to do so.

(c)(3) In determining issues of fact or of law, the reviewing judge may consider any part of the record of the action and may request of the judge who is the subject of the motion an affidavit or declaration responding to questions posed by the reviewing judge.

(c)(4) The reviewing judge may deny a motion not filed in a timely manner.

**Rule 29. Disability and disqualification of a judge or change of venue.**

(a) If, by reason of death, sickness, or other disability, the judge before whom a trial has begun is unable to continue with the trial, any other judge of that court or any judge assigned by the presiding officer of the Judicial Council, upon certifying that the judge is familiar with the record of the trial, may, unless otherwise disqualified, proceed with and finish the trial, but if the assigned judge is satisfied that neither he nor another substitute judge can proceed with the trial, the judge may, in his discretion, grant a new trial.

(b) If, by reason of death, sickness, or other disability, the judge before whom a defendant has been tried is unable to perform the duties required of the court after a verdict of guilty, any other judge of that court or any judge assigned by the presiding officer of the Judicial Council may perform those duties.

(c)(1)(A) A party to any action or the party's attorney may file a motion to disqualify a judge. The motion shall be accompanied by a certificate that the motion is filed in good faith and shall be supported by an affidavit stating facts sufficient to show bias or prejudice, or conflict of interest.

(c)(1)(B) The motion shall be filed after commencement of the action, but not later than 21 days after the last of the following:

(c)(1)(B)(i) assignment of the action or hearing to the judge;

(c)(1)(B)(ii) appearance of the party or the party's attorney; or

(c)(1)(B)(iii) the date on which the moving party learns or with the exercise of reasonable diligence should have learned of the grounds upon which the motion is based.

If the last event occurs fewer than 21 days prior to a hearing, the motion shall be filed as soon as practicable.

(c)(1)(C) Signing the motion or affidavit constitutes a certificate under Rule 11, Utah Rules of Civil Procedure and subjects the party or attorney to the procedures and sanctions of Rule 11. No party may file more than one motion to disqualify in an action.

(c)(1)(D) The other parties to the action may not file an opposition to the motion and if any response is filed it will not be considered. The moving party need not file a Request to Submit for Decision under Rule 12. The motion will be submitted for decision upon filing,

(c)(2) The judge against whom the motion and affidavit are directed shall, without further hearing, enter an order granting the motion or certifying the motion and affidavit to a reviewing judge. The judge shall take no further action in the case until the motion is decided. If the judge grants the motion, the order shall direct the presiding judge of the court or, if the court has no presiding judge, the presiding officer of the Judicial Council to assign another judge to the action or hearing. Assignment in justice court cases shall be in accordance with Utah Code Ann. §78A-7-208. The presiding judge of the court, any judge of the district, or any judge of a court of like jurisdiction~~, or the presiding officer of the Judicial Council~~ may serve as the reviewing judge.

(c)(3)(A) If the reviewing judge finds that the motion and affidavit are timely filed, filed in good faith and legally sufficient, the reviewing judge shall assign another judge to the action or hearing or request the presiding judge or if the court has no presiding judge, the presiding officer of the Judicial Council to do so. Assignment in justice court cases shall be in accordance with Utah Code Ann. §78A-7-208.

(c)(3)(B) In determining issues of fact or of law, the reviewing judge may consider any part of the record of the action and may request of the judge who is the subject of the motion and affidavit an affidavit responsive to questions posed by the reviewing judge.

(c)(3)(C) The reviewing judge may deny a motion not filed in a timely manner.

(d)(1) In the courts of record, if a party believes that a fair and impartial trial cannot be had in the court location or in the county where the action is pending, that party may move to have the trial of the case take place with a jury from another county or the case transferred to a court location in a county where a fair trial may be held. Such motion shall be supported by an affidavit setting forth facts.

(d)(2) If the court is satisfied that the representations made in the affidavit required by subsection (1) are true and justify a change of jury pool or location, the court shall enter an order transferring the case, or selecting a jury from a county free from the objection. If the court is not satisfied that the representations justify an alternate jury pool or transfer of the case, the court shall either enter an order denying the motion or order a hearing to receive further evidence with respect to the alleged prejudice and resolve the matter.

(d)(3) In the justice courts, if a party believes that a fair and impartial trial cannot be had in the court location or in the county where the action is pending, that party may move to have the trial

of the case take place with a jury from another county or in a court location where a fair trial may be held. Such motion shall be supported by an affidavit setting forth facts.

(d)(4) If the court is satisfied that the representations made in the affidavit required by subsection (3) are true and justify a change of jury pool or location, the court shall enter an order selecting a jury from a county free from the objection; or directing that trial proceedings be held in a court location free from the objection. If the court is not satisfied that the representations justify an alternate jury pool or relocation of the trial, the court shall either enter an order denying the motion or order a hearing to receive further evidence with respect to the alleged prejudice and resolve the matter.

(d)(5) A motion filed pursuant to this subsection (d) shall be filed not later than 14 days after the party learns or with the exercise of reasonable diligence should have learned of the grounds upon which the motion is based.

(e) When a change of judge or place of trial is ordered all documents of record concerning the case shall, without delay, be transferred or made available in the new location.