Agenda

Advisory Committee on Rules of Civil Procedure

September 27, 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

Welcome to new members, fond farewell to old, and approval of minutes	Tab 1	Jonathan Hafen
Principles of Rulemaking	Tab 2	Jonathan Hafen, Nancy Sylvester
Comments to Rules 6, 26.3, 45	Tab 3	Nancy Sylvester
Update on FRCP Rule 37(e). Failure to Preserve ESI		Jonathan Hafen and Nancy Sylvester
Introduction of Rule 73 amendments	Tab 4	Nancy Sylvester

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

Meeting Schedule:

October 18, 2017 (rescheduled from Oct. 25)

November 15, 2017

January 24, 2018

February 28, 2018

March 28, 2018

April 25, 2018

May 23, 2018

June 27, 2018

September 26, 2018

October 24, 2018

November 28, 2018

Tab 1

UTAH SUPREME COURT ADVISORY COMMITTEE ON RULES OF CIVIL PROCEDURE

Meeting Minutes – May 24, 2017

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

ABSENT: Judge Laura Scott, Judge Kate Toomey, Justin Toth, Sammi Anderson, Amber Mettler, Dawn Hautamaki

STAFF: Nancy Sylvester, Lauren Hosler

GUESTS: Russ Pearson (for Dawn Hautamaki)

(1) WELCOME, APPROVAL OF MINUTES

Chair Jonathan Hafen welcomed the committee. Heather Sneddon suggested one change to the April, 2017 meeting minutes. Ms. Sneddon then moved to approve the minutes as amended; Rod Andreason seconded. The motion was approved unanimously.

(2) PRISONER MAILBOX RULE: CIVIL RULE 6 AND APPELLATE RULE 21, AND CIVIL RULE 45

Nancy Sylvester and Judge James Blanch provided an update based on their meeting with the Advisory Committee on the Utah Rules of Appellate Procedure. The Committee on Rules of Appellate Procedure is in favor of adopting the proposed changes to Rule 6 with their suggested language regarding more precisely defining what an "inmate" is, contemporaneously filed declarations, and changing "and" to "or" on the legal mail requirement.

With respect to the proposed changes to Rule 6, the committee discussed removing the proposed language on line 69 that reads "plus any time added under paragraph (b)." The committee also corrected line 70 of proposed (e)(3) to refer to paragraph (e)(2) instead of (d)(1). The committee then changed the following language of proposed (e)(2) from "… contemporaneously filed notarized statement or written declaration setting forth …" to "… contemporaneously filed written declaration or notarized statement setting forth …" The committee discussed the definition of inmate in proposed Rule 6(e)(1) and the meaning of legal confinement and agreed with the proposed language. The committee agreed with the remaining proposed changes to Rule 6. The committee also agreed to the language in the proposed draft form for the declaration of inmate filing.

With respect to the proposed changes to Rule 45, the committee proposed changing "as that term is defined in Rule 6(e)(1)" to "as defined in Rule 6(e)(1)."

Leslie Slaugh moved to send the proposed amendments to Rules 6 and 45, with the foregoing changes, back to the Utah Supreme Court for consideration and then out for additional public comment; James Hunnicutt seconded. The motion was approved unanimously.

(3) HB 376: POTENTIAL AMENDMENTS TO RULE 26.3 AND RULE 6.

Mr. Slaugh provided a summary of recent legislative changes to Utah Code section 78B-6-810, and the potential need for changes to Rule 26.3 as a result.

The committee proposed changing the language in paragraphs (b)(2) and (c) from "occupancy hearing" to "evidentiary hearing" and removing the language "to determine occupancy" in those paragraphs. The committee also proposed removing the reference to commercial tenants in paragraph (a). Ms. Sneddon moved to send the foregoing proposed change to the Utah Supreme Court for consideration; Mr. Andreason seconded the motion. The committee approved the motion unanimously.

(4) RULE 37 AND ESI: DISCUSSION PERIOD REVIEW

Paul Stancil presented a summary of the public comments submitted on the prior proposed changes. The committee discussed the proposed changes again at length. Ultimately the committee decided to send the following three options to the Utah Supreme Court with a message indicating that Option 3 yielded a majority, but not unanimous, vote from the committee:

Option 1: No amendments at all to Rule 37 (i.e., not adopting Federal Rule 37(e)).

Option 2: Adopt the federal amendments to Rule 37(e) with the following changes:

1. Remove "may or" from proposed (e)(1)(B)(2) (Federal Rule 37(e)(2)(B)) for it to read "instruct the jury that it must presume the information was unfavorable to the party;"
2. Add "including, in appropriate circumstances, permitting the factfinder to infer that the lost information was unfavorable to the party" after "to cure the prejudice" to proposed (e)(1)(A); and
3. Remove (e)(1)(B)(1) (Federal Rule 37(e)(2)(A)) and renumber (e)(1)(B)(2) and (3) to (e)(1)(B)(1) and (2), respectively.
4. Remove what had become (e)(1)(C), but was a holdover from current Utah Rule 37 ("Absent exceptional circumstances, a court may not impose sanctions under these rules on a party for failing to provide electronically stored information lost as a result of the routine, good-faith operation of an electronic information system.").

Option 3: Adopt the proposed amendments to Rule 37 with the following change: remove what had become (e)(1)(C), but was a holdover from current Rule 37 ("Absent exceptional circumstances, a court may not impose sanctions under these rules on a party for failing to provide electronically stored information lost as a result of the routine, good-faith operation

of an electronic information system."). This option is the same as the current version of the corresponding federal rule.

Both Options 2 and 3 would include the following note:

> The 2017 amendments to paragraph (e) merged the 2015 amendments to Federal Rule of Civil Procedure 37(e). The federal amendments "addressed the serious problems resulting from the continued exponential growth in the volume of [electronically stored] information" by providing "measures a court may employ if information that should have been preserved is lost." Fed. R. Civ. P. 37, Advisory Committee Notes, 2015 Amendment. Unlike the federal rule, Utah's Rule 37(e) also addressed non-electronically stored evidence; the committee preserved the language addressing that subject.
>
> It is the advisory committee's view 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., 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 from 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.

Judge Blanch moved to send the three options, along with the suggested note, to the Utah Supreme Court for consideration. Judge John Baxter seconded the motion; the motion was approved by the committee unanimously.

(5) ADJOURNMENT

The remaining matters were deferred, and the committee adjourned at 5:55 pm. The next meeting will be held on September 27, 2017 at 4:00 pm at the Administrative Office of the Courts, Level 3.

Tab 2

Principles of Rulemaking

(1) Certainty

The rules should provide a predictable process.

(2) Clarity

The rules should be written using plain language principles, adopting the federal style amendments when appropriate.

(3) Comprehensiveness

The rules should provide complete answers to questions about procedures.

(4) Consistency

The rules should be internally consistent. There is value to state rules that conform to the federal rules. Lawyers practicing in both courts benefit from a uniform procedure. The state courts can rely on a large body of federal caselaw. The state rules should establish procedures different from the federal rule only when there is a sound reason for doing so.

(5) Improvement

An amendment should solve an identifiable problem.

(6) Input

Before the 45-day comment period, the committee should try to obtain comments and suggestions from lawyers and judges who might be particularly affected by an amendment. The committee will consider all comments.

(7) Priority

The committee will assign a priority to each request to amend the rules. Requests from the Legislature, Supreme Court and Board of District Court Judges will take priority over other priorities. Within a priority, the committee will consider the requests in the order in which they are made, unless combining requests will better address the matter.

(8) Simplicity

The process established by the rule should reach its outcome as simply as possible while allowing every party an equitable opportunity to investigate and present its case. Exceptions and options should be limited and clearly stated.

(9) Stability

The rules should not be amended unless there is sufficient need.

Tab 3

URCP 6

URCP006.Time. Amend. *Adopts the prisoner mailbox rule, which provides that pleadings and papers filed or served by an inmate confined in an institution are timely if they are deposited in the institution's internal mail system on or before the last day for filing. Also provides that if an unrepresented party does not have an electronic filing account, has been served by mail under rule 5(b)(3)(C), and response time is calculated from the filing date, response time will instead be calculated by the service date plus the 3 days under paragraph (c).*

Posted by Kyle Kaiser

Dear Members of the Rules Committee and the Honorable Justices of the Supreme Court:

I write to comment on the addition of the Prison Mailbox Rule into Rule 6(e) of the Utah Rules of Civil Procedure.

Please note that these comments are my own and not those of my employer.

In February, I made comments to a previous draft of the rule, which was proposed to be inserted into Rule 5.

http://www.utcourts.gov/utc/rules-comment/2017/01/03/rules-of-civil-procedure-comment-period-closes-february-17-2017/#comment-1182

I appreciate the incorporation of my suggestions into proposed rule Rule 6(e). The rule, as presently drafted, will insure that institutionalized persons have access to the courts and will provide clarity in calculating response times to legal papers filed or served by inmates. I urge the Committee and the Court to adopt the proposed rule.

Nancy's comment:

Mr. Kaiser is simply expressing his support. No changes needed.

Posted by Nathan Whittaker

Rule 6(d) (lines 54-58):

Consider rewording as follows:

> *(d)* ***Unrepresented parties****. When a party may or must act within a specified time after filing, and that party is not represented by an attorney and does not have an electronic filing account, the time period is triggered by service and not by filing.*

Nancy's comment: Compare comment version:

d) Additional time after filing for unrepresented parties*. When a party is unrepresented, does not have an electronic filing account, and may or must act within a specified time after the filing of a document and service of that document is made by mail under Rule 5(b)(3)(C), the period of time within which the unrepresented party may or must act is calculated from the service date and not the filing date of the document, and the extra 3 days under paragraph (c) would apply.*

1) Consider deleting "service of that document is made by mail under Rule 5(b)(3)(C)" in line 56, as it should not be a requirement for application of the rule–if the document is filed and served on two different days, the date of service should govern for unrepresented parties regardless of whether it was served by mail.

Nancy's comment:

I agree.

2) Consider deleting "and the extra 3 days under paragraph (c) would apply" as it is redundant. If the committee thinks that it is necessary to clarify that paragraph (c) applies, it could be clarified in the advisory committee notes.

Nancy's comment:

I agree.

3) Consider deleting "Additional time after filing" from the title–as explained above, this change will not necessarily result in additional time if service is not made by mail.

Nancy's comment:

I agree.

4) The phrases "is unrepresented" and "does not have an electronic filing account" are the two requirements that must be met for the rule to apply, where the phrase "may or must act within a specified time after the filing of a document" is merely the circumstance that the rule applies to. As such, the circumstance the rule applies to should come first, and it should not be in the same series as the requirements that must be met for the rule to apply.

Nancy's comment:

I agree.

5) Consider replacing "unrepresented" in line 54 with "not represented by an attorney"–that makes it consistent with the language of Rule 5(b)(1).

Nancy's comment:

I agree.

6) Consider replacing "the filing of a document" with "filing". First, the shorter form is consistent with Rule 6(c)'s usage of "service" rather than "service of the document." Second, under Rule 5(e), "documents" are not filed, "papers" are.

Nancy's comment:

I agree.

7) Consider replacing "the period of time within which the unrepresented party may or must act" with "the time period" or perhaps just "the period". The shorter phrases are used in Rule 6(a) and 6(c) and are sufficient to convey the intended meaning.

Nancy's comment:

I agree.

8) Consider replacing "is calculated from" with "is triggered by" so that it matches the language of Rule 6(a)(1)(A).

Nancy's comment:

I agree.

9) Consider replacing "the service date and not the filing date of the document" with "service and not by filing". The word "date" should probably be avoided since Rule 6(a)(2) allows time to be counted in hours as well as days, and it is not used elsewhere in the rule.

Nancy's comment:

Initially I thought Mr. Whittaker's suggestion was oversimplified, but after reading all of Mr. Whittaker's reasons for his suggestion, I tend to agree. I recommend that the committee adopt his language above.

Rule 6(e) (lines 59-71):

First, consider placing this at the end of Rule 5. This deals with filing and service as both are defined by Rule 5–in fact, it is an exception to Rule 5(b)(4) and 5(e). Additionally, it would cause less confusion over whether "service" only means Rule 5 service or both Rule 4 and 5 service if this rule were placed in Rule 5. (That said, the following suggested changes are formatted as though this were to be placed in Rule 6.)

Nancy's comment:

We already considered Rule 5 and nixed that idea.

Consider rewording as follows:

(e) ***Filing or service by inmate.***

(e)(1)As used in these rules, an inmate is a person confined to an institution or committed to a place of legal confinement.

(e)(2) A paper filed or served under Rule 5 by an inmate is timely filed or served if it is deposited in the institution's internal mail system on or before the last day for filing or service.

(e)(3) For purposes of computing time under Rule 6, a paper filed or served under this paragraph (e) is filed when it is accepted by the court and is served when it is placed in the mail as indicated by the date of the postmark.

(e)(4) A paper filed or served under this paragraph (e) must include a notarized statement or written declaration stating:

(e)(4)(A) the date of deposit and that first-class postage is being prepaid; or

(e)(4)(B) that the inmate has complied with any applicable requirements for legal mail set by the institution.

Nancy's comment: Compare the current language:

(e) ***Filing or service by inmate.***

(e)(1) For purposes of Rule 45(i) and this paragraph (e), an inmate is a person confined to an institution or committed to a place of legal confinement.

(e)(2) Papers filed or served by an inmate 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 contemporaneously filed notarized statement or written declaration setting forth the date of deposit and stating that first-class postage has been, or is being, prepaid, or 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.

(e)(3) The provisions of paragraph (e)(2) do not apply to service of process, which is governed by Rule 4.

1) Consider replacing “For purposes of Rule 45(i) and this paragraph (e)” with “As used in these rules”–this language is consistent with indicating definitions in the rules (see Rule 17(f), Rule 54(a)). As I don’t believe that this definition must apply only to Rule 45(i) and 6(e), the more general language is probably preferable.

Nancy’s comment:

I agree.

2) Consider replacing “Papers”, “are timely”, and “they are” in line 62 with “A paper”, “is timely”, and “it is”, respectively. See Garner, Guidelines for Drafting and Editing Court Rules, Para. 2.1 (“Draft in the singular number unless the sense is undeniably plural.”).

Nancy’s comment:

I agree.

3) Consider inserting “under Rule 5” or “under Rule 5(b)” after “service” on line 62. This clarifies what type of service this applies to and obviates (or at least lessens) the need for Paragraph (e)(3).

Nancy’s comment:

I agree.

4) Consider replacing “Timely filing or service may be shown by a contemporaneously filed” with “A paper filed or served under this paragraph (e) must include a”. First, the word “may” is misleading–this provision must be complied with in order for this exception to the time of filing. Second, this statement or declaration is basically a specialized certificate of service and should be “included” in the paper as stated in Rule 5(d) rather than contemporaneously filed” as a separate document (I’m sure the judges would rather not have the separate documents cluttering up their dockets).

Nancy’s comment:

My recollection is that a judge wouldn’t want to kick out an inmate’s filing simply because they did not contemporaneously file the statement or declaration. A later filed statement or declaration could be considered. But if we do not have a compelling reason for using “may,” Mr. Whittaker’s edits may be helpful, especially in terms of readability.

5) Consider replacing “setting forth” in Line 64 with “stating” and deleting “stating” in line 65, or just replace “setting forth” with “setting out” as in Fed. R. App. P. 25(a)(2)(C)–I personally think the former option is more compact and preferable, as I can discern no difference between setting out and stating, but that’s just my opinion.

Nancy’s comment:

I agree.

6) Consider deleting "has been, or" in Line 65–it seems unnecessary and is omitted from Fed. R. App. P. 25(a)(2)(C)(i).

Nancy's comment:

I agree.

7) Consider replacing "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" with "For purposes of computing time under Rule 6, a paper filed or served under this paragraph (e) is filed when it is received by the court and is served when it is placed in the mail as indicated by the date of the postmark". First, "response time" is not used elsewhere in the rules, and Rule 6(a) "computes" rather than "calculates" time periods. Second, as explained above, "date" should be avoided if possible (although I don't think I can avoid it when talking about the postmark). Third, under Rule 5(e), the court "accepts" rather than "receives" papers. Fourth, making the date of filing the date of service seems unadvisable, especially if the opposing party is pro se and does not have easy access to the date that the paper was filed. Finally, "mail" rather than "U.S. mail" is the language used in Rules 5(b)(3)(C) and 6(c).

Nancy's comment:

I agree except instead of "under Rule 6," we could say "under this rule" and instead of "under this paragraph (e)," I would say "under paragraph (e)."

8) Consider deleting "The provisions of paragraph (e)(2) do not apply to service of process, which is governed by Rule 4" from the text of the rule, and place in the advisory committee notes.

Nancy's comment:

I agree, but I'm not sure we need the note.

URCP 26.3

URCP026.03. Subpoena. Amend. *In response to recent legislative updates to Utah Code section 78B-6-810, changes the language in paragraphs (b)(2) and (c) from "occupancy hearing" to "evidentiary hearing" and removes the language "to determine occupancy" in those paragraphs. Also removes the reference to commercial tenants in paragraph (a).*

Posted by Carol Hopper

Paragraph (b)(2)(A)(ii) also needs the word “occupancy” changed to “evidentiary.”

Nancy's comment:

I agree. This was an oversight.

Posted by Richard Terry

Why was the word “occupancy” removed from some parts of Rule 26.3 but then left intact in other parts of the rule? See (b)(2)(A)(ii) and (c)(1)(B) – just saying

Nancy's comment:

I agree. This was an oversight.

URCP 45

URCP045. Subpoena. Amend. *Makes a technical amendment in conformity with Rule 6.*

No comments.

Rule 6. Time.

(a) Computing time. The following rules apply in computing any time period specified in these rules, any local rule or court order, or in any statute that does not specify a method of computing time.

(a)(1) When the period is stated in days or a longer unit of time:

(a)(1)(A) exclude the day of the event that triggers the period;

(a)(1)(B) count every day, including intermediate Saturdays, Sundays, and legal holidays; and

(a)(1)(C) include the last day of the period, but if the last day is a Saturday, Sunday, or legal holiday, the period continues to run until the end of the next day that is not a Saturday, Sunday or legal holiday.

(a)(2) When the period is stated in hours:

(a)(2)(A) begin counting immediately on the occurrence of the event that triggers the period;

(a)(2)(B) count every hour, including hours during intermediate Saturdays, Sundays, and legal holidays; and

(a)(2)(C) if the period would end on a Saturday, Sunday, or legal holiday, the period continues to run until the same time on the next day that is not a Saturday, Sunday, or legal holiday.

(a)(3) Unless the court orders otherwise, if the clerk's office is inaccessible:

(a)(3)(A) on the last day for filing under Rule 6(a)(1), then the time for filing is extended to the first accessible day that is not a Saturday, Sunday or legal holiday; or

(a)(3)(B) during the last hour for filing under Rule 6(a)(2), then the time for filing is extended to the same time on the first accessible day that is not a Saturday, Sunday, or legal holiday.

(a)(4) Unless a different time is set by a statute or court order, filing on the last day means:

(a)(4)(A) for electronic filing, before midnight; and

(a)(4)(B) for filing by other means, the filing must be made before the clerk's office is scheduled to close.

(a)(5) The "next day" is determined by continuing to count forward when the period is measured after an event and backward when measured before an event.

(a)(6) "Legal holiday" means the day for observing:

(a)(6)(A) New Year's Day;

(a)(6)(B) Dr. Martin Luther King, Jr. Day;

(a)(6)(C) Washington and Lincoln Day;

(a)(6)(D) Memorial Day;

(a)(6)(E) Independence Day;

(a)(6)(F) Pioneer Day;

(a)(6)(G) Labor Day;

(a)(6)(H) Columbus Day;

(a)(6)(I) Veterans' Day;

(a)(6)(J) Thanksgiving Day;

(a)(6)(K) Christmas; and

(a)(6)(L) any day designated by the Governor or Legislature as a state holiday.

(b) Extending time.

(b)(1) When an act may or must be done within a specified time, the court may, for good cause, extend the time:

(b)(1)(A) with or without motion or notice if the court acts, or if a request is made, before the original time or its extension expires; or

(b)(1)(B) on motion made after the time has expired if the party failed to act because of excusable neglect.

(b)(2) A court must not extend the time to act under Rules 50(b) and (d), 52(b), 59(b), (d) and (e), and 60(c).

(c) Additional time after service by mail. When a party may or must act within a specified time after service and service is made by mail under Rule 5(b)(3)(C), 3 days are added after the period would otherwise expire under paragraph (a).

(d) Unrepresented parties. When a party may or must act within a specified time after filing, and that party is not represented by an attorney and does not have an electronic filing account, the time period is triggered by service and not by filing.

(e) **Filing or service by inmate.**

(e)(1) As used in these rules, an inmate is a person confined to an institution or committed to a place of legal confinement.

(e)(2) A paper filed or served under Rule 5 by an inmate is timely filed or served if it is deposited in the institution's internal mail system on or before the last day for filing or service.

(e)(3) For purposes of computing time under this rule, a paper filed or served under paragraph (e) is filed when it is accepted by the court and is served when it is placed in the mail as indicated by the date of the postmark.

(e)(4) A paper filed or served under paragraph (e) must include a notarized statement or written declaration stating:

(e)(4)(A) the date of deposit and that first-class postage is being prepaid; or

(e)(4)(B) that the inmate has complied with any applicable requirements for legal mail set by the institution.

Rule 26.3. Disclosure in unlawful detainer actions.

(a) Scope. This rule applies to all actions for eviction or damages arising out of an unlawful detainer under Title 78B, Chapter 6, Part 8, Forcible Entry and Detainer ~~when the tenant is not a commercial tenant~~.

(b) Plaintiff's disclosures.

(b)(1) Disclosures served with complaint and summons. Instead of the disclosures and timing of disclosures required by Rule 26(a), and unless included in the complaint, the plaintiff must serve on the defendant with the summons and complaint:

(b)(1)(A) any written rental agreement;

(b)(1)(B) the eviction notice that was served;

(b)(1)(C) an itemized calculation of rent past due, damages, costs and attorney fees at the time of filing;

(b)(1)(D) an explanation of the factual basis for the eviction; and

(b)(1)(E) notice to the defendant of the defendant's obligation to serve the disclosures required by paragraph (c).

(b)(2) Disclosures for ~~occupancy~~ evidentiary hearing.

(b)(2)(A) If the plaintiff requests an evidentiary hearing ~~to determine occupancy~~ under Section 78B-6-810, the plaintiff must serve on the defendant with the request:

(b)(2)(A)(i) any document not yet disclosed that the plaintiff will offer at the hearing; and

(b)(2)(A)(ii) the name and, if known, the address and telephone number of each fact witness the plaintiff may call at the ~~occupancy~~ evidentiary hearing and, except for an adverse party, a summary of the expected testimony.

(b)(2)(B) If the defendant requests an evidentiary hearing ~~to determine occupancy~~ under Section 78B-6-810, the plaintiff must serve the disclosures required by paragraph (b)(2)(A) on the defendant no less than 2 days before the hearing. The plaintiff must serve the disclosures by the method most likely to be promptly received.

(c) Defendant's disclosures for ~~occupancy~~ evidentiary hearing.

(c)(1) If the defendant requests an evidentiary hearing ~~to determine occupancy~~ under Section 78B-6-810, the defendant must serve on the plaintiff with the request:

(c)(1)(A) any document not yet disclosed that the defendant will offer at the hearing; and

(c)(1)(B) the name and, if known, the address and telephone number of each fact witness the defendant may call at the ~~occupancy~~ evidentiary hearing and, except for an adverse party, a summary of the expected testimony.

(c)(2) If the plaintiff requests an evidentiary hearing ~~to determine occupancy~~ under Section 78B-6-810, the defendant must serve the disclosures required by paragraph (c)(1) on the plaintiff no less than 2 days before the hearing. The defendant must serve the disclosures by the method most likely to be promptly received.

(d) Pretrial disclosures; objections. No later than 14 days before trial, the parties must serve the disclosures required by Rule 26(a)(5)(A). No later than 7 days before trial, each party must serve and file counter designations of deposition testimony, objections and grounds for the objections to the use of a deposition and to the admissibility of exhibits.

Rule 45. Subpoena.

(a) Form; issuance.

(a)(1) Every subpoena shall:

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

(a)(1)(B) state the title and case number of the action, the name of the court from which it is issued, and the name and address of the party or attorney responsible for issuing the subpoena;

(a)(1)(C) command each person to whom it is directed

(a)(1)(C)(i) to appear and give testimony at a trial, hearing or deposition, or

(a)(1)(C)(ii) to appear and produce for inspection, copying, testing or sampling documents, electronically stored information or tangible things in the possession, custody or control of that person, or

(a)(1)(C)(iii) to copy documents or electronically stored information in the possession, custody or control of that person and mail or deliver the copies to the party or attorney responsible for issuing the subpoena before a date certain, or

(a)(1)(C)(iv) to appear and to permit inspection of premises;

(a)(1)(D) if an appearance is required, specify the date, time and place for the appearance; and

(a)(1)(E) include a notice to persons served with a subpoena in a form substantially similar to the approved subpoena form. A subpoena may specify the form or forms in which electronically stored information is to be produced.

(a)(2) The clerk shall issue a subpoena, signed but otherwise in blank, to a party requesting it, who shall complete it before service. An attorney admitted to practice in Utah may issue and sign a subpoena as an officer of the court.

(b) Service; fees; prior notice.

(b)(1) A subpoena may be served by any person who is at least 18 years of age and not a party to the case. Service of a subpoena upon the person to whom it is directed shall be made as provided in Rule 4(d).

(b)(2) If the subpoena commands a person's appearance, the party or attorney responsible for issuing the subpoena shall tender with the subpoena the fees for one day's attendance and the mileage allowed by law. When the subpoena is issued on behalf of the United States, or this state, or any officer or agency of either, fees and mileage need not be tendered.

(b)(3) If the subpoena commands a person to copy and mail or deliver documents or electronically stored information, to produce documents, electronically stored information or tangible things for inspection, copying, testing or sampling or to permit inspection of premises, the party or attorney responsible for issuing the subpoena shall serve each party with the subpoena by delivery or other method of actual notice before serving the subpoena.

(c) Appearance; resident; non-resident.

(c)(1) A person who resides in this state may be required to appear:

(c)(1)(A) at a trial or hearing in the county in which the case is pending; and

(c)(1)(B) at a deposition, or to produce documents, electronically stored information or tangible things, or to permit inspection of premises only in the county in which the person resides, is employed, or transacts business in person, or at such other place as the court may order.

(c)(2) A person who does not reside in this state but who is served within this state may be required to appear:

(c)(2)(A) at a trial or hearing in the county in which the case is pending; and

(c)(2)(B) at a deposition, or to produce documents, electronically stored information or tangible things, or to permit inspection of premises only in the county in which the person is served or at such other place as the court may order.

(d) Payment of production or copying costs. The party or attorney responsible for issuing the subpoena shall pay the reasonable cost of producing or copying documents, electronically stored information or tangible things. Upon the request of any other party and the payment of reasonable costs, the party or attorney responsible for issuing the subpoena shall provide to the requesting party copies of all documents, electronically stored information or tangible things obtained in response to the subpoena or shall make the tangible things available for inspection.

(e) Protection of persons subject to subpoenas; objection.

(e)(1) The party or attorney responsible for issuing a subpoena shall take reasonable steps to avoid imposing an undue burden or expense on the person subject to the subpoena. The court shall enforce this duty and impose upon the party or attorney in breach of this duty an appropriate sanction, which may include, but is not limited to, lost earnings and a reasonable attorney fee.

(e)(2) A subpoena to copy and mail or deliver documents or electronically stored information, to produce documents, electronically stored information or tangible things, or to permit inspection of premises shall comply with Rule 34(a) and (b)(1), except that the person subject to the subpoena must be allowed at least 14 days after service to comply.

(e)(3) The person subject to the subpoena or a non-party affected by the subpoena may object under Rule 37 if the subpoena:

(e)(3)(A) fails to allow reasonable time for compliance;

(e)(3)(B) requires a resident of this state to appear at other than a trial or hearing in a county in which the person does not reside, is not employed, or does not transact business in person;

(e)(3)(C) requires a non-resident of this state to appear at other than a trial or hearing in a county other than the county in which the person was served;

(e)(3)(D) requires the person to disclose privileged or other protected matter and no exception or waiver applies;

(e)(3)(E) requires the person to disclose a trade secret or other confidential research, development, or commercial information;

(e)(3)(F) subjects the person to an undue burden or cost;

(e)(3)(G) requires the person to produce electronically stored information in a form or forms to which the person objects;

(e)(3)(H) requires the person to provide electronically stored information from sources that the person identifies as not reasonably accessible because of undue burden or cost; or

(e)(3)(I) requires the person to disclose an unretained expert's opinion or information not describing specific events or occurrences in dispute and resulting from the expert's study that was not made at the request of a party.

(e)(4)(A) If the person subject to the subpoena or a non-party affected by the subpoena objects, the objection must be made before the date for compliance.

(e)(4)(B) The objection shall be stated in a concise, non-conclusory manner.

(e)(4)(C) If the objection is that the information commanded by the subpoena is privileged or protected and no exception or waiver applies, or requires the person to disclose a trade secret or other confidential research, development, or commercial information, the objection shall sufficiently describe the nature of the documents, communications, or things not produced to enable the party or attorney responsible for issuing the subpoena to contest the objection.

(e)(4)(D) If the objection is that the electronically stored information is from sources that are not reasonably accessible because of undue burden or cost, the person from whom discovery is sought must show that the information sought is not reasonably accessible because of undue burden or cost.

(e)(4)(E) The objection shall be served on the party or attorney responsible for issuing the subpoena. The party or attorney responsible for issuing the subpoena shall serve a copy of the objection on the other parties.

(e)(5) If objection is made, or if a party requests a protective order, the party or attorney responsible for issuing the subpoena is not entitled to compliance but may request an order to compel compliance under Rule 37(a). The objection or request shall be served on the other parties and on the person subject to the subpoena. An order compelling compliance shall protect the person subject to or affected by the subpoena from significant expense or harm. The court may quash or modify the subpoena. If the party or attorney responsible for issuing the subpoena shows a substantial need for the information that cannot be met without undue hardship, the court may order compliance upon specified conditions.

(f) Duties in responding to subpoena.

(f)(1) A person commanded to copy and mail or deliver documents or electronically stored information or to produce documents, electronically stored information or tangible things shall serve on the party or attorney responsible for issuing the subpoena a declaration under penalty of law stating in substance:

(f)(1)(A) that the declarant has knowledge of the facts contained in the declaration;

(f)(1)(B) that the documents, electronically stored information or tangible things copied or produced are a full and complete response to the subpoena;

(f)(1)(C) that the documents, electronically stored information or tangible things are the originals or that a copy is a true copy of the original; and

(f)(1)(D) the reasonable cost of copying or producing the documents, electronically stored information or tangible things.

(f)(2) A person commanded to copy and mail or deliver documents or electronically stored information or to produce documents, electronically stored information or tangible things shall copy or produce them as they are kept in the usual course of business or shall organize and label them to correspond with the categories in the subpoena.

(f)(3) If a subpoena does not specify the form or forms for producing electronically stored information, a person responding to a subpoena must produce the information in the form or forms in which the person ordinarily maintains it or in a form or forms that are reasonably usable.

(f)(4) If the information produced in response to a subpoena is subject to a claim of privilege or of protection as trial-preparation material, the person making the claim may notify any party who received the information of the claim and the basis for it. After being notified, the party must promptly return, sequester, or destroy the specified information and any copies of it and may not use or disclose the information until the claim is resolved. A receiving party may promptly present the information to the court under seal for a determination of the claim. If the receiving party disclosed the information before being notified, it must take reasonable steps to retrieve the information. The person who produced the information must preserve the information until the claim is resolved.

(g) Contempt. Failure by any person without adequate excuse to obey a subpoena served upon that person is punishable as contempt of court.

(h) Procedure when witness evades service or fails to attend. If a witness evades service of a subpoena or fails to attend after service of a subpoena, the court may issue a warrant to the sheriff of the county to arrest the witness and bring the witness before the court.

(i) Procedure when witness is an inmate. If the witness is an inmate ~~confined in an institution~~ as defined in Rule 6(e)(1), a party may move for an order to examine the witness in the institution or to produce the witness before the court or officer for the purpose of being orally examined.

(j) Subpoena unnecessary. A person present in court or before a judicial officer may be required to testify in the same manner as if the person were in attendance upon a subpoena.

Advisory Committee Notes

Tab 4

Rule 73 and the Fee Schedule

(Originally Submitted 12/2015, Updated and Revised 9/20/17)

(The comments below refer to exhibits which can be downloaded at:
https://www.dropbox.com/s/2qx2xsvay8ter37/rule73exhibits.pdf)

My name is Mark Olson. I'm a debt collection attorney and former chair of the collection section of the bar. I would like to propose an additional change: that the Rule 73 fee schedule be revised to reflect increased costs since the last adjustment 13 years ago.

For some the default fee schedule may be a quaint artifact, anachronistic and not worth considering. Most attorneys will rarely, if ever, use the schedule. However, the schedule is likely used in a majority of court filings, and for many collection attorneys, myself included, the schedule has become the default fee for their services. For that segment of the bar, keeping the schedule relatively up-to-date is vital to their livelihood.

HISTORY OF THE FEE SCHEDULE

In fact, the schedule was actually created with the collection bar in mind. The idea originated in 1991 by the Board of Circuit Court Judges to address several problems caused by the vast number of default judgments filed by collection attorneys. Those issues, presented to the Judicial Council as outlined in the minutes of their meeting on September 10, 1991 were: "1) The volume of cases makes it particularly burdensome for Circuit Court Judges to individually review and approve all of the affidavits in each case; 2) creates lack of uniformity between the judges; 3) creates an impediment toward consolidation, and 4) does not provide a way to challenge an attorney for the attorney fees sought." (Exhibit A) The proposal, originally outlined in a memo by then Circuit Court Judge Michael Hutchings, went through a few iterations before finally being approved as a part of Rule 4-505 of the Code of Judicial Administration (Exhibit B).

The schedule worked well for several years, not only for the courts, but for collection attorneys as well. The collection bar appreciates the consistent, simplified method of obtaining fee awards. Over time, however, inflationary pressures eroded the value of the schedule for those of us relying on the schedule. Many of us stopped using the schedule in favor of routinely filing fee affidavits. As the schedule lost effectiveness due to reduced utilization, the time came for it to be updated.

As the then chair of the collection section, I took it upon myself to approach first the Judicial Council via letter, and subsequently the Rules Committee, where I appeared as a guest on March 26, 2003, to explain why the schedule needed to be updated (Exhibit C).

The committee considered a variety of ways to revise the schedule, including making no changes whatsoever. One member’s thought was that over time inflation would increase the size of awards and move them up the schedule, thus resulting in higher fee awards. Such an approach, however, would do nothing for the vast number of small cases which would never reach the

threshold principal where fees begin to increase; those would have been stuck at $150 (then the fee schedule starting point).

In the end the committee decided to eliminate the first tier of the schedule, thus eliminating the tier awarding $150 at a principal balance of $750. The new schedule started with the former second tier: $250 in fees for cases with a principal balance below $2000. The new schedule and other changes went into effect on November 1, 2003.

TIME FOR AN ADJUSTMENT TO THE SCHEDULE

Now, 14 years later, the time has come once more to revise the fee schedule. As in 2003, so much time has passed since the last revision that the minimum fee no longer realistically reflects the cost of obtaining a default judgment. Not only that, several new requirements have been added to the process, making it more involved, time consuming and, thus, expensive to take a case to default judgment.

MORE WORK IS REQUIRED TO OBTAIN A DEFAULT JUDGMENT NOW COMPARED TO THE TIME OF THE LAST REVISION

Several additional steps have been added to the process since 2003, both formal and informal, making default judgments more costly.

First, we are now required to prepare and file an affidavit certifying that the defendant is not a member of the military. As part of this affidavit, judges require a printout from the Servicemenbers Civil Relief Act website showing the Defendant's military status. To obtain this printout, the request must be made one at a time and we must provide both the date of birth and social security number of the Defendant. If these data items are not known, my staff must spend additional time trying to discover this information.

Many courts have also instituted their own various requirements. The Second District Court in Odgen, for example, requires us to prepare and file a Judgment Information Statement with every default judgment. Park City requires motions for entry of all default judgments. Salt Lake requires separate affidavits detailing any collection fee included in the principal (in other jurisdictions we are able to include that statement in our complaints).

Most recent is an affidavit newly required by URCP 55(b)(1)(D). This rule requires the additional work of researching items for the affidavit, creating the affidavit, working with the affiant to obtain a signature, and ultimately electronically filing it with the other default documents. (The requirement can alternatively be satisfied via verified complaint, a process which requires the same amount of work.) Courts interpret this rule differently, which has required hearings and further communications to ascertain what is required by each court, as well as additional work to fulfill those requirements.

That brings us to the issue of electronic filing, which takes a lot more staff time than the old process. For example, instead of our prior practice of simply preparing a complaint, having it served, and dropping it in the messenger box for delivery to court, it now involves preparing hard

copies for service, generating electronic pdf and rtf versions, saving and maintaining those copies, not to mention the cumbersome filing process.

THE COSTS OF DOING BUSINESS HAVE INCREASED

The costs of doing business have increased significantly since 2003, to the point that attorneys are once again beginning to file fee affidavits in lieu of seeking fees under the schedule. That trend is bound to continue, counteracting some of the very reasons the rule was created in the first place. The schedule must be updated; the question is how to quantify how much the schedule should be increased.

We could look to attorney salaries as one general measure of inflation in the practice of law. According to Bureau of Labor Statistics figures, mean attorney annual wages nationally have increased 50.8% from 2003 to 2016. I tried finding similar data for Utah, but the closest I could find was for the category of "Professional, Scientific & Technical Services" wages in the Utah Department of Workforce Services Industry and Employment Wage database. Wages in that category have gone up 82% from 2003 to 2017.

How about hourly rates for attorney fees? More so than general attorney salaries, increases in hourly rates have a stronger correlation to the Rule 73 fee schedule. I can't find any hard Utah data comparing rates over the period in question, but one corollary we can consider is the "Laffey Matrix," a table of hourly attorney rates, broken down by years of practice, used by the District of Columbia Federal Court in making attorney fee awards. The Matrix has also been adapted for local use by several other courts around the country. Comparing Laffey Matrices from 2002-03 and 2017-18, the hourly rate for attorneys with 4-7 years of practice, for example, has risen 64.8%.

Now let's break down what inflation has done to some of the biggest expenses for anyone trying to maintain a law practice, starting with wages. One place to look for data is the Employment Cost Index, a national measure of changes in prices paid for the compensation of labor. It shows that employment costs of all workers over all industries have risen 35.75% through June of 2017. To narrow the focus to what attorneys actually pay staff in Utah, I turned to Utah Workforce Services data. I found that "Administrative and Support Services" wages have increased 61.61% from 2003 to 2015.

Rent and health insurance premiums are two more major components of the cost of running a law practice, and they too have seen significant increases. According to a market analysis performed annually by Coldwell Banker Real Estate, office lease rates in Salt Lake City have risen 31.02% during the period in question. Health insurance premiums have also risen dramatically. I haven't found and hard data limited to the years in question, but according to the Kaiser Family Foundation health insurance premiums increased 13.1% *per year* during the years 1999 to 2009.

I have faced similar cost increases of my own in running my practice, even though I have fought to keep costs down as much as possible. The average rate I pay paralegals and support staff has risen 33.6% from 2003 to the present. Firm paid health insurance premiums per employee have

gone up a staggering 146 %. We have managed to keep our lease costs relatively in check, but only by moving twice in search of cheaper rent: first from downtown to the airport area, and then to our current home in West Valley City. When our lease expires in two years we will be facing a steep increase in lease costs.

From these various statistics, we see that attorney salaries and billing rates have gone up somewhere in the range of 50% to 82%. Major costs of doing business have gone up anywhere from 35% for salaries (based on averages for all workers in the US), 31% for rent in the Salt Lake valley, and something north of 100% for health insurance. During this time the schedule has not changed.

HOW THE SCHEDULE SHOULD BE REVISED

I propose a simple tweak: slide the "Attorney Fees Allowed" figures up one row, and eliminate the top and bottom lines of the schedule. That is similar to what was done 13 years ago (when the top line was eliminated, effectively raising the starting attorney fee from $150 to $250). Shifting the Attorney Fees Allowed figures up one spot would also provide a modest increase to the fees allowed on each line. The resulting starting fee of $400 for principal balances up to $2000 would represent an increase of 60% at the starting point of the schedule. That increase is generally in line with many of the statistical increases I have laid out, and is less than the 2003 fee increase of 66.7% ($150 to $250).

Amount of Damages, Exclusive of Costs, Attorney Fees and Post-Judgment Interest, Between	and:	Current Attorney Fees Allowed	Proposed Attorney Fees Allowed
Eliminate this line	1,500.00	250	Eliminate this line
0	2,000.00	325	400
2,000.01	2,500.00	400	475
2,500.01	3,000.00	475	550
3,000.01	3,500.00	550	625
3,500.01	4,000.00	625	700
4,000.01	or more	700	775
4,500.01	Eliminate this line	775	Eliminate this line

One thing to consider is that whatever increase is adopted, it is likely to remain the same for the next decade or more. We aren't asking for annual adjustments, we can live with requesting a periodic review. However, from the day it goes into effect the schedule will start depreciating and falling behind the current equivalent.

The existing schedule has been in effect long enough that its value to collection attorneys has eroded and some are starting to file fee affidavits. As more attorneys resort to affidavits reflecting their true fees, a greater burden will be imposed on the courts. The first update to the fee schedule was done some 11 years after the original. It has now been 14 years since that last revision. My recommendation is that the Supreme Court adjust the current schedule by adjusting the schedule as outlined above, starting at a more reasonable $400.