

**UTAH SUPREME COURT ADVISORY COMMITTEE
ON RULES OF CIVIL PROCEDURE**

Meeting Minutes – January 22, 2020

Committee members & staff	Present	Excused	Appeared by Phone
Jonathan Hafen, Chair	X		
Rod N. Andreason		X	
Judge James T. Blanch	X		
Lauren DiFrancesco			X
Judge Kent Holmberg	X		
James Hunnicutt	X		
Larissa Lee		X	
Trevor Lee	X		
Judge Amber M. Mettler	X		
Timothy Pack		X	
Bryan Pattison			X
Michael Petrogeorge	X		
Judge Clay Stucki	X		
Judge Laura Scott	X		
Leslie W. Slaugh	X		
Trystan B. Smith	X		
Heather M. Sneddon	X		
Paul Stancil	X		
Judge Andrew H. Stone	X		
Justin T. Toth	X		
Susan Vogel	X		
Brooke McKnight	X		
Ash McMurray, Recording Secretary	X		
Nancy Sylvester, Staff	X		

(1) WELCOME AND APPROVAL OF MINUTES

Jonathan Hafen welcomed the committee and asked for approval of the minutes as amended. Jim Hunnicutt moved to adopt the minutes. The minutes were approved unanimously.

(2) RULE 68 SUBCOMMITTEE REPORT

Representative Brady Brammer, Judge Clay Stucki, and Doug Cannon led the continued discussion of a proposed amendment to Rule 68 to create new settlement and fee-shifting rules. Representative Brammer emphasized that the purpose of the proposed change is to alleviate overburdened district courts by incentivizing early settlements and thereby reducing caseloads. Representative Brammer also reiterated that the proposed rule change would require accompanying legislation to address contract-right implications, but explained that he plans to wait until the 2021 general legislative session to run a bill because he would prefer to allow the current rule-making process to move forward and to obtain more stakeholder feedback of his plan.

Susan Vogel expressed support for rules and legislation that aid self-represented parties, and suggested the possibility of incorporating an easy-to-use calculator to help pro se litigants determine the financial outcome of making and responding to offers of judgment, similar to the calculator used in child-support cases. Representative Brammer and Judge Stone noted the challenge of calculating reasonable fees without more data.

Paul Stancil raised concerns regarding the imposition of sanctions for rejecting an offer of judgment in cases where the primary dispute centers on liability rather than the quantum of damages. Representative Brammer reemphasized that the policy underlying the rule change is to encourage litigants to understand their cases early and that typical offers of judgment will be well-substantiated because parties will be required to demonstrate to the judge that an offer is reasonable or, alternatively, that an offer cannot yet be evaluated without further discovery.

Judge Holmberg raised additional concerns regarding the extent to which the proposed rule change may create additional barriers for pro se litigants to the extent the rule would limit judicial discretion to give pro se parties the benefit of the doubt in matters of offers of judgment.

Judge Stucki recommend that the Rule 68 subcommittee meet again to work on the rule before the whole committee votes to send it to the Supreme court. Representative Brammer requested committee members to recommend other ways that the legislature can help district courts manage caseloads, such as appropriating funds for additional law clerks.

(3) RULE 64 BOARD OF DISTRICT COURT JUDGES REQUEST

Judge Stone and Judge Lawrence presented on a proposed Rule 64 amendment from the Board of District Court Judges to require Rule 4 service of notice of a hearing and a motion under Rule 7 before a bench warrant is processed for a party who fails to appear in supplemental proceedings. The amendment was proposed in response to a recent news article criticizing how bench warrants sometimes are used in Utah, particularly with regard to collections cases.

During the discussion, Judge Stucki noted that the Board of Justice Court Judges has discussed this issue and found that a bench warrant is issued only it becomes clear that a debtor has refused to appear after being personally served with an order to appear and show cause. Judge Lawrence raised concerns that current warrant practice may disproportionately implicate individuals' liberty interests when compared to the actual debt owed. Judge Scott, Judge Stucki, Judge Stone, and Judge Lawrence shared their experiences related to warrant practice. Lauren DiFrancesco raised concerns that changing current warrant practice may make collecting child-support and alimony more difficult. After further discussion, Mr. Hafen summarized the committee's consensus that adequate notice should be given to debtors of the consequences under the rules for failure to appear.

In response to the discussion, Judge Amber Mettler and Leslie Slaugh recommended revisions to the proposed amendments. Judge Holmberg moved to adopt the proposed amendments as revised by the committee. Judge Stone seconded the motion. The motion passed unanimously.

Rule 64. Writs in general.

(a) Definitions. As used in Rules [64](#), [64A](#), [64B](#), [64C](#), [64D](#), [64E](#), [69A](#), [69B](#) and [69C](#):

(a)(1) "Claim" means a claim, counterclaim, cross claim, third party claim or any other claim.

(a)(2) "Defendant" means the party against whom a claim is filed or against whom judgment has been entered.

(a)(3) "Deliver" means actual delivery or to make the property available for pick up and give to the person entitled to delivery written notice of availability.

(a)(4) "Disposable earnings" means that part of earnings for a pay period remaining after the deduction of all amounts required by law to be withheld.

(a)(5) "Earnings" means compensation, however denominated, paid or payable to an individual for personal services, including periodic payments pursuant to a pension or retirement program. Earnings accrue on the last day of the period in which they were earned.

(a)(6) "Notice of exemptions" means a form that advises the defendant or a third person that certain property is or may be exempt from seizure under state or federal law. The notice shall list examples of exempt property and indicate that other exemptions may be available. The notice shall instruct the defendant of the deadline for filing a reply and request for hearing.

(a)(7) "Officer" means any person designated by the court to whom the writ is issued, including a sheriff, constable, deputy thereof or any person appointed by the officer to hold the property.

(a)(8) "Plaintiff" means the party filing a claim or in whose favor judgment has been entered.

(a)(9) "Property" means the defendant's property of any type not exempt from seizure. Property includes but is not limited to real and personal property, tangible and intangible property, the right to property whether due or to become due, and an obligation of a third person to perform for the defendant.

(a)(10) "Serve" with respect to parties means any method of service authorized by Rule 5, unless otherwise specified in this rule, and with respect to non-parties means any manner of service authorized by Rule 4.

(b) Security.

(b)(1) Amount. When security is required of a party, the party shall provide security in the sum and form the court deems adequate. For security by the plaintiff the amount should be sufficient to reimburse other parties for damages, costs and attorney fees incurred as a result of a writ wrongfully obtained. For security by the defendant, the amount should be equivalent to the amount of the claim or judgment or the value of the defendant's interest in the property. In fixing the amount, the court may consider any relevant factor. The court may relieve a party from the necessity of providing security if it appears that none of the parties will incur damages, costs or attorney fees as a result of a writ wrongfully obtained or if there exists some other substantial reason for dispensing with security. The amount of security does not establish or limit the amount of damages, costs or attorney fees recoverable if the writ is wrongfully obtained.

(b)(2) Jurisdiction over surety. A surety submits to the jurisdiction of the court and irrevocably appoints the clerk of the court as agent upon whom papers affecting the surety's liability may be served. The surety shall file with the clerk of the court the address to which the clerk may mail papers. The surety's liability may be enforced on motion without the necessity of an independent action. If the opposing party recovers judgment or if the writ is wrongfully obtained, the surety will pay the judgment, damages, costs and attorney fees not to exceed the sum specified in the contract. The surety is responsible for return of property ordered returned.

(b)(3) Objection. The court may issue additional writs upon the original security subject to the objection of the opposing party. The opposing party may object to the sufficiency of the security or the sufficiency of the sureties within five days after service of the writ. The burden to show the sufficiency of the security and the sufficiency of the sureties is on the proponent of the security.

(b)(4) Security of governmental entity. No security is required of the United States, the State of Utah, or an officer, agency, or subdivision of either, nor when prohibited by law.

(c) Procedures in aid of writs.

(c)(1) Referee. The court may appoint a referee to monitor hearings under this subsection.

(c)(2) Hearing; witnesses; discovery. The court may conduct hearings as necessary to identify property and to apply the property toward the satisfaction of the judgment or order. Witnesses may be subpoenaed to appear, testify, and produce records. The notice of the hearing must be served under Rule 4. The court may permit discovery.

(c)(3) Restraint. The court may forbid any person from transferring, disposing or interfering with the property.

(c)(4) Enforcement. A failure to appear or cooperate in proceedings under this subsection may only be enforced by proceeding by motion under [Rule 7(q)] [new Rule 7A], and may not be heard by a referee. All sanctions and remedies for contempt may be considered on such a motion, and a bench warrant may issue for failure to appear at such motion hearing.

(d) Issuance of writ; service

(d)(1) Clerk to issue writs. The clerk of the court shall issue writs. A court in which a transcript or abstract of a judgment or order has been filed has the same authority to issue a writ as the court that entered the judgment or order. If the writ directs the seizure of real property, the clerk of the court shall issue the writ to the sheriff of the county in which the real property is located. If the writ directs the seizure of personal property, the clerk of the court may issue the writ to an officer of any county.

(d)(2) Content. The writ may direct the officer to seize the property, to keep the property safe, to deliver the property to the plaintiff, to sell the property, or to take other specified actions. If the writ is to enforce a judgment or order for the payment of money, the writ shall specify the amount ordered to be paid and the amount due.

(d)(2)(A) If the writ is issued ex parte before judgment, the clerk shall attach to the writ plaintiff's affidavit, detailed description of the property, notice of hearing, order authorizing the writ, notice of exemptions and reply form.

(d)(2)(B) If the writ is issued before judgment but after a hearing, the clerk shall attach to the writ plaintiff's affidavit and detailed description of the property.

(d)(2)(C) If the writ is issued after judgment, the clerk shall attach to the writ plaintiff's application, detailed description of the property, the judgment, notice of exemptions and reply form.

(d)(3) Service.

(d)(3)(A) Upon whom; effective date. The officer shall serve the writ and accompanying papers on the defendant, and, as applicable, the garnishee and any person named by the plaintiff as claiming an interest in the property. The officer may simultaneously serve notice of the date, time and place of sale. A writ is effective upon service.

(d)(3)(B) Limits on writs of garnishment.

(d)(3)(B)(i) A writ of garnishment served while a previous writ of garnishment is in effect is effective upon expiration of the previous writ; otherwise, a writ of garnishment is effective upon service.

(d)(3)(B)(ii) Only one writ of garnishment of earnings may be in effect at one time. One additional writ of garnishment of earnings for a subsequent pay period may be served on the garnishee while an earlier writ of continuing garnishment is in effect.

(d)(3)(C) Return; inventory. Within 14 days after service, the officer shall return the writ to the court with proof of service. If property has been seized, the officer shall include an inventory of the property and whether the property is held by the officer or the officer's designee. If a person refuses to give the officer an affidavit describing the property, the officer shall indicate the fact of refusal on the return, and the court may require that person to pay the costs of any proceeding taken for the purpose of obtaining such information.

(d)(3)(D) Service of writ by publication. The court may order service of a writ by publication upon a person entitled to notice in circumstances in which service by publication of a summons and complaint would be appropriate under Rule 4.

(d)(3)(D)(i) If service of a writ is by publication, substantially the following shall be published under the caption of the case:

To _____, [Defendant/Garnishee/Claimant]:

A writ of _____ has been issued in the above-captioned case commanding the officer of _____ County as follows:

[Quoting body of writ]

Your rights may be adversely affected by these proceedings. Property in which you have an interest may be seized to pay a judgment or order. You have the right to claim property exempt from seizure under statutes of the United States or this state, including Utah Code, [Title 78B, Chapter 5, Part 5](#).

(d)(3)(D)(ii) The notice shall be published in a newspaper of general circulation in each county in which the property is located at least 14 days prior to the due date for the reply or at least 14 days prior to the date of any sale, or as the court orders. The date of publication is the date of service.

(e) Claim to property by third person.

(e)(1) Claimant's rights. Any person claiming an interest in the property has the same rights and obligations as the defendant with respect to the writ and with respect to providing and objecting to security. Any claimant named by the plaintiff and served with the writ and accompanying papers shall exercise those rights and obligations within the same time allowed the defendant. Any claimant not named by the plaintiff and not served with the writ and accompanying papers may exercise those rights and obligations at any time before the property is sold or delivered to the plaintiff.

(e)(2) Join claimant as defendant. The court may order any named claimant joined as a defendant in interpleader. The plaintiff shall serve the order on the claimant. The claimant is thereafter a defendant to the action and shall answer within 14 days, setting forth any claim or defense. The court may enter judgment for or against the claimant to the limit of the claimant's interest in the property.

(e)(3) Plaintiff's security. If the plaintiff requests that an officer seize or sell property claimed by a person other than the defendant, the officer may request that the court require the plaintiff to file security.

(f) Discharge of writ; release of property.

(f)(1) By defendant. At any time before notice of sale of the property or before the property is delivered to the plaintiff, the defendant may file security and a motion to discharge the writ. The plaintiff may object to the sufficiency of the security or the sufficiency of the sureties within 7 days after service of the motion. At any time before notice of sale of the property or before the property is delivered to the plaintiff, the defendant may file a motion to discharge the writ on the ground that the writ was wrongfully obtained. The court shall give the plaintiff reasonable opportunity to correct a defect. The defendant shall serve the order to discharge the writ upon the officer, plaintiff, garnishee and any third person claiming an interest in the property.

(f)(2) By plaintiff. The plaintiff may discharge the writ by filing a release and serving it upon the officer, defendant, garnishee and any third person claiming an interest in the property.

(f)(3) Disposition of property. If the writ is discharged, the court shall order any remaining property and proceeds of sales delivered to the defendant.

(f)(4) Copy filed with county recorder. If an order discharges a writ upon property seized by filing with the county recorder, the officer or a party shall file a certified copy of the order with the county recorder.

(f)(5) Service on officer; disposition of property. If the order discharging the writ is served on the officer:

(f)(5)(A) before the writ is served, the officer shall return the writ to the court;

(f)(5)(B) while the property is in the officer's custody, the officer shall return the property to the defendant; or

(f)(5)(C) after the property is sold, the officer shall deliver any remaining proceeds of the sale to the defendant.

(4) RULES 4, 7, 36 & 55 NOTICE REQUIREMENTS REQUESTS

Judge Lawrence, Nathanael Player, and Jonathan Felt presented on amendments to Rules 4, 7, 36, and 55 to require more notice to parties when a response is required. The presenters explained to the committee that, for example, pro se parties often have no notice that they must respond to a counterclaim, thereby obstructing their access to justice. As a solution, the presenters proposed amending the rules to require notice prior to an entry of default judgment.

The committee discussed what form and substance the notice should have. Mr. Slaugh recommended that the requirement for notice be extended to every document requiring a response and not be limited to only cases involving pro se litigants. Mr. Slaugh also suggested that the notice should appear as a response due date in the top corner of relevant documents. Mr. Hunnicut agreed that lawyers would also benefit from the required notices. In contrast, Mr. Felt and Mr. Player recommended that a separate notice be given using a standard form approved by the Online Court Assistance Program (OCAP) Forms Committee. Judge Lawrence suggested that notice on the front of a document would provide more effective notice than additional documents. Mr. Player noted that a separate notice could provide additional information, including instructions to help pro se litigants. Judge Stone and Mr. Slaugh raised concerns that providing detailed explanations could be burdensome and might risk inappropriately providing legal advice.

Mr. Stancil raised concerns that some research shows that disclosures can sometimes be ineffective or create greater confusion. In particular, Mr. Stancil observed that while trained attorneys may benefit from a small notice in the corner of a filing, pro se litigants may not. Accordingly, Mr. Stancil recommended that the committee study what form of notice would be most effective. Mr. Player informed the committee that the OCAP Forms Committee has non-lawyer members to help ensure that pro se litigants also receive fair notice.

Justin Toth raised concerns that requiring a response due date could create opportunities for abuse or incentivize lawyers to provide incorrect due dates, which could be especially harmful to pro se litigants. The committee debated how response due dates would be calculated and penalties for failure to provide the correct date. Judge Scott explained that a document with a missing or incorrect due date would likely be treated akin to a missing certificate of service: the court would reject the filing and require a correct resubmission.

After further discussion, Judge Blanch proposed a general rule that if a party is subject to a deadline as a result of a filing, the filing party must provide notice of the deadline. The notice would

include the number of days that the responding party has to respond rather than an exact date, thereby avoiding or minimizing concerns that filing parties might purposefully or accidentally provide incorrect deadlines. Judge Blanch noted that this form of notice is standard practice in many contexts, including criminal cases and other practical situations such as tax- and banking-related cases where substantive rights are at stake.

The committee will continue to discuss this item in February.

(6) ADJOURNMENT

The remaining items were deferred until the next meeting. The meeting adjourned at 6:00 p.m. The next meeting will be held February 26, 2020.