

Agenda

Advisory Committee on Rules of Civil Procedure

June 23, 2021

4:00 to 6:00 p.m.

Via Webex

<i>Welcome and approval of minutes</i>	Tab 1	Jonathan Hafen, Chair
<i>Legislative standing agenda item</i> <i>Rule 6.1</i> <ul style="list-style-type: none"> • Discussion expedited procedures rule 	Tab 2	Nancy Sylvester, Susan Vogel, Leslie Slaugh
<i>Rule 5</i> <ul style="list-style-type: none"> • Discussion of email service 	Tab 3	Nathanael Player, Susan Vogel, Nancy Sylvester
<i>Rule 108</i> <ul style="list-style-type: none"> • Updates from Family Law Procedures Subcommittee • Constitutionality of new standard 	Tab 4	Judge Holmberg, Jim Hunnicutt, Nancy Sylvester
<i>Consent agenda</i> --		
<i>Pipeline items:</i> <ul style="list-style-type: none"> • Rules back from comment (Rule 5-cert of service, Rule 62)-September • Small Claims Rules (Judge McCullagh): September • Rule 45 and objections (Jen Tomchak): September • Federal Rule 30 amendments (Judge Holmberg)-September • Federal Rule 41 amendments (Judge Mettler and Judge Jones)-September • Rule 12 and counterclaims in evictions (Susan Vogel, Judge Parker) -October • Trial date setting (family law-Judge Holmberg, Jim Hunnicutt)-October • Definitions rule 7.1 (Susan Vogel)-October 		---

2021 Meeting Schedule: 4th Wednesday at 4pm unless otherwise scheduled

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

Tab 1

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

Summary Minutes – May 26, 2021

**DUE TO THE COVID-19 PANDEMIC AND PUBLIC HEALTH EMERGENCY
THIS MEETING WAS CONDUCTED ELECTRONICALLY VIA WEBEX**

Committee members, staff, and guests	Present	Excused	Appeared by Phone
Jonathan Hafen, Chair	X		
Robert Adler		X	
Rod N. Andreason	X		
Paul Barron	X		
Judge James T. Blanch	X		
Lauren DiFrancesco	X		
Judge Kent Holmberg	X		
James Hunnicutt	X		
Trevor Lee	X		
Judge Amber M. Mettler	X		
Brooke McKnight	X		
Ash McMurray	X		
Timothy Pack		X	
Bryan Pattison	X		
Michael Petrogeorge		X	
Judge Clay Stucki		X	
Judge Laura Scott	X		
Leslie W. Slauch	X		
Trystan B. Smith		X	
Paul Stancil		X	
Nick Stiles		X	
Judge Andrew H. Stone	X		
Justin T. Toth	X		
Susan Vogel	X		
Nancy Sylvester, Staff	X		
Kim Neville, Recording Secretary	X		
Troy Booher, Guest	X		
Jacqueline Carlton, Guest	X		

(1) APPROVAL OF MINUTES

Jonathan Hafen asked for approval of the minutes as amended with comments from Susan Vogel and the minutes sub-committee. Jim Hunnicutt moved to adopt the minutes as amended; Ron Andreason seconded. The minutes were approved unanimously.

(2) RULE 62

Troy Booher presented a proposed amendment to Rule 62. The proposal would extend the automatic stay from 14 days to 28 days to allow additional time for briefing. Mr. Booher noted that the comparable federal rule provides for a 30-day automatic stay. The proposed change would also allow for additional discretion by the trial judge to allow for alternative security under certain circumstances. In addition, the proposed change makes clear that the court can stay an injunction while an appeal is sought under Rule 5, as opposed to when the appeal is allowed, which can take months for consideration. The proposed change would further allow either party to request a hearing within five days – not just the creditor.

Leslie Slaugh commented that the proposed change would only apply when a writ is needed to enforce the judgment. Judge Holmberg also noted that the proposed change would not stay the accrual of post-judgment interest. Ms. Vogel commented that the additional time would be of benefit to self-represented parties as they often find out about judgments late, and need additional time to move to set aside the order.

Mr. Slaugh suggested a change to subsection (b)(2)(A) to clarify that the court may stay an order that is “not final.” Mr. Booher suggested that the wording be changed from “not final” to “certified” in order to avoid confusion as to whether the order is appealable.

With regard to subsections (c) and (d), Mr. Slaugh questioned whether the rule is intended to allow for an automatic stay when sought by the government. Mr. Slaugh proposed that subsection (d) be limited to money judgments. The Committee also discussed whether the subsection should be revised to clarify that the rule covers “governmental entities,” which could potentially include special service districts, municipalities, and counties. After further discussion, the Committee opted to return to the original language of subsection (d), except for adding “United States” to the title for internal consistency.

With respect to subsection (h)(3), Mr. Andreason questioned whether the change would limit the forms of security available to litigants. Mr. Slaugh suggested that the language of the preceding section would give the court broad latitude in establishing the type of security.

The Committee reviewed the remainder of the proposed changes, with no material comments.

At the conclusion of the discussion, Mr. Hafen called for the motion. Bryan Pattison moved to send the proposed amendments to the Supreme Court; Jim Hunnicutt seconded. The motion passed unanimously. The proposed amendments, which are attached as **Exhibit A**, will be sent to the Supreme Court for consideration.

(3) CRIMINAL RESTITUTION; STATE V. BILLINGS

Brooke McKnight reported on the working group's review of *State v. Billings* and its effect, if any, on rules governing restitution. Ms. McKnight reported that the working group has reviewed and discussed the decision, but is recommending no change to the existing rules, only to clerk of court practice.

(4) RULE 37

Judge Holmberg presented the feedback received by the working group on submission of proposed orders for discovery motions. Judge Holmberg reported that some judges have expressed concern that the proposed orders unnecessarily crowd the docket; the majority of judges, however, appear to favor the submission of proposed orders. After further consideration, the working group is recommending no change to the existing rules.

Ms. Vogel commented that the use of proposed orders is burdensome to self-represented parties, who frequently do not know what to ask for in terms of relief. Lauren DiFrancesco suggested that this concern could be addressed by including a form on court's website. After further discussion, no changes were recommended.

(5) RULE 5

Proposed Changes to Certificate of Service Requirements:

Trevor Lee reported on the proposed change to Rule 5, which would eliminate the need for a certificate of service when all parties are registered e-filers. Mr. Lee proposed that the Committee utilize the language of the analogous federal rule.

Ms. Vogel expressed concern that self-represented parties may not be properly served since they are rarely registered as e-filers. Mr. Lee clarified that the proposed change would not affect parties who are not registered e-filers; service of parties who are not registered e-filers would be governed by the other portions of the rules.

Ms. DiFrancesco expressed support for the change, but noted that attorneys admitted pro hac vice may not be registered e-filers and would also require documentation of service.

At the conclusion of discussion, Mr. Hafen called for the motion. Ms. DiFrancesco moved to send the proposed amendments to the Supreme Court; Jim Hunnicutt seconded. The motion passed unanimously. The proposed amendments, which are attached as Exhibit B, will be sent to the Supreme Court for consideration.

Supreme Court’s Feedback Regarding Methods of Service:

Ms. Sylvester also shared the Supreme Court’s feedback on the proposed changes to the methods of service identified in Rule 5. Ms. Sylvester reported that Justice Lee expressed concern regarding the proposed changes providing for alternative service when a party claims to lack access to email, and the potential for collateral litigation or misuse by litigants. Mr. Slaugh commented that some litigants intentionally choose not to use email, which would support the Justice’s policy concern. Ms. Vogel expressed the counter-view, indicating that inmates, elderly parties, low-income parties, and disabled parties often report difficulty accessing email.

Judge Holmberg suggested that the Committee consider allowing the parties to file a motion to be excused from e-mail service. Judge Stone commented that one of the reasons for the proposed rule change is that mischievous litigants can easily claim they did not receive documents when traditional mail service is allowed. Judge Stone expressed support for Judge Holmberg’s proposal, indicating that electronic service should be the default method of service and that it is often the most reliable method of communication for parties who lack a physical address.

After further discussion, Judge Stone proposed that subsection (C) be revised to provide for email service unless the person has been excused by the court from serving or receiving documents by email.

At the conclusion of discussion, Mr. Hafen called for the motion. Judge Holmberg moved to send the proposed amendments to the Supreme Court; Ms. DiFrancesco seconded. The motion passed with one dissent from Ms. Vogel. The proposed amendments, which are attached as Exhibit B, will be sent to the Supreme Court for consideration.

(6) RULE 108

Judge Holmberg presented a proposal from the family law subgroup, which includes both commissioners and family law practitioners. The group proposed a change to sub-part (c), which would change the standard of review of a commissioner’s findings. The proposed change would provide for review for clear error.

Judge Stone inquired as to whether there are Constitutional concerns with the proposed amendment in light of the limited role assigned to commissioners. Leslie Slaugh expressed concern that commissioners frequently resolve disputes by proffer, which also raises potential Constitutional implications. Judge Stone and Mr. Hunnicutt also commented on the potential for conflict with

legislative developments. Judge Holmberg and Judge Stone suggested that the Committee start with a review from the General Counsel's office as to any Constitutional implications associated with changing the standard of review and return to the issue after that analysis has been conducted.

(7) ADJOURNMENT

The meeting adjourned at 5:59 p.m.

Tab 2

1 **Rule 6.1. Expedited Procedures.**

2 **(a) Purpose.** The purpose of this rule is to provide standard time frames for hearings
3 and filings in case types that, by their nature, require expedited procedures.

4 **(b) Inconsistent time frames.** To the extent that statutory time frames are inconsistent
5 with this rule, the rule controls.

6 **(c) Consistency with Rule 6.** All timeframes must be read consistently with [Rule 6](#).

7 **(d) Remote proceedings.** All proceedings in expedited procedures cases will be held
8 remotely except to the extent that technology or other considerations render remote
9 proceedings impracticable or unfair.

10 **(e) Applicability.**

11 (1) This rule applies to the following case types or parts of a case unless exempted by
12 the judge:

13 (A) Title 77, Chapter 3a, Stalking Injunctions;

14 (B) Title 78B, Chapter 7, Protective Orders; }

15 (C) Title 78B, Chapter 6, Part 8, Forcible Entry and Detainer;

16 (D) Emergency adult guardianship (statutory provision); and

17 (E) Any statutory case type that contains expedited procedures inconsistent with
18 this rule.

19 (2) A judge may order expedited procedures in any other case type or part of a case
20 if the judge determines that the interests of justice demand it.

21 (3) This rule does not apply to the following procedures:

22 (A) Temporary restraining orders under Rule 65A; and }

23 (B) Writs under Rules 64, 64A, 64B, 64C, 64D, and 64E.

24 (C) Expedited discovery under Rule 37.

Comment [NS1]: Those case types or parts of a case include temporary restraining orders, emergency/temporary guardianship/conservatorship, protective orders, stalking injunctions, motions to stay default. (this is the landlord-tenant scenario when someone is wrongfully locked out). Any case where expedited proceedings are mandated in statute or when a judge determines it is appropriate. Look at TRO rules--

Comment [NS2]: Restrict personal liberty.

Comment [NS3]: Occupancy hearings are held within 10 days

Comment [NS4]: These can be huge—i.e. real estate. In family law, there are temporary orders but must show irreparable harm. Family law—writ of assistance (parent absconds to Canada) LL-T: forcing LL to let someone back in to apartment.

Comment [NS5]: Borrow statement of discovery issues for this rule. If expedited, don't want to dump 50 page memo on judge or parties with only a week to respond. Request for Rule 16 pretrial conference is something that comes up frequently. But Rule 37 already addresses this?

25 **(f) Court proceedings.**

26 **(1) Expedited hearings.**

27 (A) Except as provided in paragraph (f)(1)(B), an expedited hearing shall be held
28 within 7 calendar days of the case filing or within 7 calendar days after the request
29 for hearing is filed.

30 (B) In the event of a challenge to an order of restitution in a residential eviction case,
31 or a dispute concerning the manner of enforcement of the order, including a request
32 to access essential personal property sooner than is required under Utah Code
33 section 78B-6-812, a hearing must be held within 1 day. If a hearing cannot be held
34 within one day, the restitution order must be suspended until a hearing can be held.

35 **Alternative:**

36 (B) In a residential eviction case, a hearing must be held within the 1 day under the
37 following circumstances:

38 (i) a challenge to the restitution order;

39 (ii) a dispute concerning the manner of enforcement of the restitution order; or

40 (iii) a request to access essential personal property sooner than is required under
41 Utah Code section 78B-6-812.

42 If a hearing cannot be held within 1 day, the restitution order must be suspended
43 until a hearing can be held.

44 **(2) Expedited briefing schedule.** A defendant shall serve an answer within 7 days
45 after the service of the summons and complaint is complete within the state and
46 within 14 days after service of the summons and complaint is complete outside the
47 state.

48 **(3) Expedited motions and requests.** A nonmoving party may file a memorandum
49 opposing the motion or request within 7 days after the filing of any motion or

Comment [NS6]: Let's borrow from the statutes already on point: <https://le.utah.gov/xcode/Title78B/Chapter6/78B-6-P8.html>

Comment [NS7]: This is before an answer is filed

Comment [NS8]: "Making a litigant wait seven days in an eviction does not add anything. Here's why:

1. Utah Code 78B-6-812(1)(b) says the default time for execution of an order of restitution is three calendar days.

o This means if I'm not served with the summons and complaint for eviction I won't find out until the order of restitution is served, at which point I'll have to wait seven days for a hearing if I file a motion to set aside or a motion to stay. By the time the court considers my motion I will have been evicted, and at that point my life will be thrown into unimaginable chaos and I'll be unlikely to be able to attend the hearing because I will have been rendered homeless.

o URCP 1 says the rules are meant to be applied to ensure the just, speedy, and inexpensive determination of every action. It is patently unjust to make someone wait seven days for a hearing on an order that, by statute, should be executed within three days.

o As written, the draft rule means a tenant with a default in an eviction case will be entirely without remedy every single time the court follows the statute in issuing an order of restitution. It means a tenant will never be able to challenge the default and be heard by the court. This is the only area of the law where our rules operate this way, and it seems like a mistake and an oversight. The proposed rule 6.1 can address this abomination of justice, but there would need to be a special carve out for eviction actions with a shorter timeline.

2. Utah Code 78B-6-812(3)(b) says property left behind after an order of restitution is executed can be stored by the landlord and is subject to the 15 day abandonment time limit in Utah Code 78B-6-816. Section 78B-6-812 also requires that the landlord return things like clothing, medication, and identification immediately. The remedy for a landlord's failure to comply is for the tenant to file a request for hearing with the court, which must be scheduled within 10 days.

o The draft rule only accelerates this timeline by three days. However, the contemplated harm here is that someone has been evicted and is unable to access medication, which they might need to live, identification, which they probably need to make alternative arrangements, clothing, and financial documents. When a tenant asks for help in this context they are at ...

Comment [NS9]: Need to impose a limit on the motion itself.

50 request. Any opposition should not exceed 500 words exclusive of caption and
51 signature block. All other requirements are as provided in [Rule 7](#).

52

Tab 3

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

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

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

5 (A) a judgment;

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

7 (C) a pleading after the original complaint;

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

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

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

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

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

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

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

19 (D) a party in default for any reason must be served with notice of entry of
20 judgment under Rule [58A\(g\)](#); and

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

23 **(3) Service in actions begun by seizing property.** If an action is begun by seizing
24 property and no person is or need be named as defendant, any service required

25 before the filing of an answer, claim or appearance must be made upon the person
26 who had custody or possession of the property when it was seized.

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

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

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

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

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

39 **(3) Methods of service.** A paper is served under this rule by using one or more of
40 the following methods:

41 (A) **Electronic filing.** ~~except~~ Except in the juvenile court, a paper is served by
42 submitting it for electronic filing, or the court submitting it to the electronic filing
43 service provider, if the person being served has an electronic filing account.

44 (B) **Email.** A paper not electronically served under paragraph (b)(3)(A) is served
45 by emailing it to (i) the most recent email address provided by the person to the
46 court and other parties under Rule 10(a)(3) or Rule 76, or by other notice, or (ii) to
47 the email address on file with the Utah State Bar. If email service to the email
48 address is returned as undeliverable, service must then be made by regular mail
49 if the person to be served has provided a mailing address. Service is complete
50 upon the attempted email service for purposes of the sender meeting any time
51 period.

52 (C) ~~Mail and other methods.~~ If the person's email address has not been provided
 53 to the court and other parties, or if the person required to serve the document ~~or~~
 54 be served with the document has been excused by the court from serving and
 55 receiving documents by email ~~(C)~~ - a paper may be served under this rule by:

- 56 (i) mailing it to the person's last known mailing address provided by the
- 57 person to the court and other parties under Rule 10(a)(3) or Rule 76;
- 58 ~~(D)~~(ii) handing it to the person;
- 59 ~~(E)~~(iii) leaving it at the person's office with a person in charge or, if no one is
- 60 in charge, leaving it in a receptacle intended for receiving deliveries or in a
- 61 conspicuous place;
- 62 ~~(F)~~(iv) leaving it at the person's dwelling house or usual place of abode with a
- 63 person of suitable age and discretion who resides there; or
- 64 ~~(G)~~(v) any other method agreed to in writing by the parties.

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

67 (5) Who serves. Unless otherwise directed by the court or these rules:

- 68 (A) every paper required to be served must be served by the party preparing it;
- 69 and
- 70 (B) every paper prepared by the court will be served by the court.

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

- 73 (1) a defendant's pleadings and replies to them do not need to be served on the other
- 74 defendants;
- 75 (2) any cross-claim, counterclaim avoidance or affirmative defense in a defendant's
- 76 pleadings and replies to them are deemed denied or avoided by all other parties;

Comment [NS1]: SelfHelp Center expressed concern about requirement of court permission to be able to serve by traditional means.

Comment [NS2]: New proposal 6/10/2021: "or if the person required to serve or be served a paper is unable to send or receive documents by email"

Note: We have not yet resolved papers vs. documents. Other rules still reference papers, so I think it makes sense to keep "papers" here for the time being when referring to court documents.

I think the term "document" makes sense when talking about what you attach to an email. It is a broader term that encompasses not just court papers but other kinds of documents and email attachments.

Comment [NS3]: The state's report on statewide broadband availability: <https://business.utah.gov/wp-content/uploads/2020/10/Broadband-Availability-in-Utah.pdf>

Rule 10(a)(3) requires that an email address be provided to the court: "Every pleading and other paper filed with the court must state in the top left hand corner of the first page the name, address, email address, telephone number and bar number of the attorney or party filing the paper, and, if filed by an attorney, the party for whom it is filed."

Inmates don't have the ability to email, elderly, those without access to technology, people don't have the ability to check their email consistently.

Comment [NS4]: Justice Lee asked that the phrase "does not have the ability to email" be better drafted. Concern about satellite litigation and mischief. The proposal in (C) attempts to address his concern.

Suggestion to excuse the ability to email by motion so that it is clear that email is the default.

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

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

80 **(d) Certificate of service.** A paper required by this rule to be served, including
81 electronically filed papers, must include a signed certificate of service showing the
82 name of the document served, the date and manner of service and on whom it was
83 served. Except in the juvenile court, this paragraph does not apply to papers required to
84 be served under paragraph (b)(5)(B) when service to all parties is made under
85 paragraph (b)(3)(A).

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

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

94 (1) electronically file the original affidavit with a notary acknowledgment as
95 provided by Utah Code Section [46-1-16\(7\)](#);

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

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

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

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

104

105 **Advisory Committee Notes**

106 *Note adopted 2015*

107 Under paragraph (b)(3)(A), electronically filing a document has the effect of serving the
108 document on lawyers who have an e-filing account. (Lawyers representing parties in
109 the district court are required to have an account and electronically file documents.
110 Code of Judicial Administration Rule 4-503.) The 2015 amendment excepts from this
111 provision documents electronically filed in juvenile court.

112 Although electronic filing in the juvenile court presents to the parties the documents
113 that have been filed, the juvenile court e-filing application (CARE), unlike that in the
114 district court, does not deliver an email alerting the party to that fact. The Board of
115 Juvenile Court Judges and the Advisory Committee on the Rules of Juvenile Procedure
116 believe this difference renders electronic filing alone insufficient notice of a document
117 having been filed. So in the juvenile court, a party electronically filing a document must
118 serve that document by one of the other permitted methods.

119

Tab 4

Rule 108. Objection to Court Commissioner's Recommendation.

(a) A recommendation of a court commissioner is the order of the court until modified by the court.

(b) A party may file a written objection to the recommendation.

(1) The objection must be made within 14 days after the recommendation is made in open court or, if the court commissioner takes the matter under advisement, within 14 days after the minute entry of the recommendation is served. A judge's counter-signature on the commissioner's recommendation does not affect the review of an objection.

(2) The objection must identify succinctly and with particularity the findings of fact, the conclusions of law, or the part of the recommendation to which the objection is made and state the relief sought. The memorandum in support of the objection must explain succinctly and with particularity why the findings, conclusions, or recommendation are incorrect.

(3) The time for filing, length and content of memoranda, affidavits, and request to submit for decision are as stated for motions in Rule 7.

(c) **[Judicial review] [Standards for judicial review of commissioner findings].** The commissioner's factual findings will be reviewed for clear error. A commissioner's conclusions of law will be reviewed for correctness. If there is a mixed question of law and fact, the reviewing judge will determine the appropriate level of deference.

(d) If there has been a substantial change of circumstances since the commissioner's recommendation, the judge may, in the interests of judicial economy, consider new evidence. Otherwise, any evidence, whether by proffer, testimony or exhibit, not presented to the commissioner shall not be presented to the judge.

(e) The judge may hold a hearing on any objection.

Comment [NS1]: Need constitutional review from GC office regarding standard of review. Talk with Minhvan about Brent's research on this. Ward v. McGarry case.

~~(d)(1) If the hearing before the commissioner was in a domestic relations matter other than a cohabitant abuse protective order, any party may request and the judge may allow testimony or proffers of testimony on genuine issues of material fact relevant to custody and other relevant and pending issues.~~

(2) If the hearing before the commissioner was for entry of a protective order (abuse and/or domestic violence related), any party has the right, upon request, to present testimony and other evidence on genuine issues of material fact at a hearing before the

Comment [NS2]: How was this supposed to end?

(3) If the hearing before the commissioner was held under Utah Code Title 62A, Chapter 15, Part 6, Utah State Hospital and Other Mental Health Facilities, Utah Code Title 78B, Chapter 7, Protective Orders, or on an order to show cause for the enforcement of a judgment, any party has the right, upon request, to present testimony and other evidence on genuine issues of material fact.

~~(d)(3) If the hearing before the commissioner was in a domestic relations matter other than a cohabitant abuse protective order, any party has the right, upon request:~~

~~(d)(3)(A) to present testimony and other evidence on genuine issues of material fact relevant to custody; and~~

~~(d)(3)(B) to a hearing at which the judge may require testimony or proffers of testimony on genuine issues of material fact relevant to issues other than custody.~~

~~(e)(4) If a party does not request a hearing, the judge may hold a hearing or review the record of evidence, whether by proffer, testimony or exhibit, before the commissioner.~~

~~(f) The judge will make independent findings of fact and conclusions of law based on the evidence, whether by proffer, testimony or exhibit, presented to the judge, or, if there was no hearing before the judge, based on the evidence presented to the commissioner.~~