Agenda

Advisory Committee on Rules of Civil Procedure

March 23, 2016

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 and approval of minutes.	Tab 1	Jonathan Hafen
Review comments to Rules 54, 58A, 58C, 73	Tab 2	Nancy Sylvester
Review comments to Rules 13, 15, 26.03	Tab 3	Nancy Sylvester
Rule 4. Process.	Tab 4	Tim Shea, Lane Gleave, Leslie Slaugh, Kent Holmberg
Rule 35. Physical and mental examination of persons.	Tab 5	Trystan Smith, David Bridge, John Ray
Review of changes to federal rules of civil procedure	Tab 6	Paul Stancil, Lincoln Davies, James Hunnicutt, Evelyn Furse
Rule 7A. Motion for order to show cause.	Tab 7	Nancy Sylvester
Rule 7. Pleadings allowed; motions, memoranda, hearings, orders.	Tab 8	Nancy Sylvester

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

Meeting Schedule:

April 27, 2016

May 25, 2016

June 22, 2016

September 28, 2016

October 26, 2016

November 16, 2016

Tab 1

Minutes

Advisory Committee on the Rules of Civil Procedure

February 24, 2016

Draft: Subject to change

Present: Lyle Anderson, Rod Andreason, John Baxter, Evelyn Furse, Jonathan Hafen, Presiding, Kent Holmberg, James Hunnicutt, Terrie McIntosh, Amber Mettler, Leslie Slaugh, Trystan Smith, Kate Toomey, Lori Woffinden

Excused: Sammi Anderson, Steven Marsden, Derek Pullan, Heather Sneddon, Barbara Townsend,

Staff: Tim Shea, Nancy Sylvester

Guests: Lane Gleave

(1) APPROVAL OF MINUTES.

The minutes of January 27, 2016 were approved as amended.

(2) RULE 4. PROCESS

Mr. Shea reviewed the changes that the committee had requested at the last meeting.

Mr. Gleave proposed an amendment that would expressly mention "electronic download" as a permissible method of personal service and a permissible method of service by mail. Mr. Shea said that he had anticipated electronic download as a permissible method of delivery for the proposed acceptance of service. He does not see an electronic download as the equivalent of personal service. He said that the committee, when first reviewing the proposal, saw electronic download as the equivalent of acceptance of service.

Mr. Slaugh said that the proposed requirements for acceptance of service were too burdensome, and that they would interfere with the common practice among lawyers of accepting service on behalf of a client. Mr. Andreason agreed. Mr. Shea said that the draft was modeled after waiver of service, but that if the conditions required for waiver were inappropriate for acceptance, those conditions should be removed.

Mr. Shea said the rule needs to be platform-neutral, so that Mr. Gleave's method would qualify, but so would other methods that meet the requirements. He is concerned that "electronic download" does not sufficiently describe the requirements that will give the court the assurance that the defendant has been served. With personal service, that assurance is provided by the statement of a third-party. With waiver, service by mail and the proposed acceptance of service, that assurance is provided by an acknowledgment from the defendant.

Mr. Slaugh volunteered to draft a proposal for acceptance of service.

Judge Furse said there does not appear to be proof of service required for service by mail. Mr. Slaugh said that it is included in paragraph (e)(2), proposed for amendment as (f)(2). The committee decided it would be clearer to have that as a separate paragraph.

Judge Furse asked whether the existing paragraphs (d)(1)(J) and (d)(1)(K), governing service on the state and an agency of the state, were correct. Mr. Holmberg said that they were not, and he volunteered to draft an amendment.

(3) RULE 35. PHYSICAL AND MENTAL EXAMINATION OF PERSONS

Mr. Shea briefly described his understanding of the committee's intent to treat the Rule 35 report as different from an expert's report under Rule 26. He said that if there is ambiguity in the rule, it should be clarified so that the point does not have to be litigated in each case.

Mr. Smith said that there are some disputes over whether satisfying the report requirement of Rule 35 also satisfies the expert report requirement of Rule 26(a)(4). He said the primary dispute is over the deadline for delivering the Rule 35 report. There is no deadline in Rule 35. The district court judges are split. Some require the report to be delivered within a reasonable time after the examination; others do not require that it be delivered until the time for an expert's report under Rule 26(a)(4). Mr. Smith said this sometimes affects the burden of proof depending on whether a report is used to establish or rebut an element of the case.

Ms. Mettler suggested that if the Rule 35 report is treated as the equivalent of an expert's report, but the examiner is not designated as an expert, the report would never have to be delivered. If there are facts or conclusions adverse to the defendant, the plaintiff would never learn of them. Mr. Slaugh said that an examination under Rule 35 is different from other expert examinations because the examiner is not of the plaintiff's choosing and yet he or she will conduct an invasive medical exam. For this reason a Rule 35 report should always be delivered.

Mr. Hunnicutt asked whether the plaintiff ever benefits medically from the Rule 35 examiner's report. Mr. Smith said that this happens occasionally since the Rule 35 examiner sometimes is able to develop a more complete history and prognosis that the plaintiff's physician.

Judge Furse reviewed federal Rule 35, which requires that the report be delivered "upon request." She said this would likely be treated as a request for the production of a document, with the deadline for delivery established by that rule.

The committee decided to invite Mr. David Bridge and Mr. John Ray to a future meeting to discuss the policies. Mr. Shea said that the options seemed limited: adopt something similar to the federal rule; anticipate that the request would be made immediately after the examination and establish a deadline of 28 days after the exam; or establish the deadline as simultaneous with the expert's report under Rule 26(a)(4).

(4) REVIEW COMMENTS TO RULES 9, 26.1, 26.2, 41, 54, 58A, 58C, 73

Ms. Sylvester described the changes she had already incorporated based on the comments. These are indicated by the comment being struck through. She reviewed with the committee the comments to Rules 9, 26.1, and 26.2. The committee further amended Rule 9 and 26.2 in accordance with some of the comments. Other comments were discussed, but the committee made no changes as a result. The committee decided that a comment suggesting substantive changes to text not proposed for amendment would be treated as a new request. These will be added to the request list. There were no comments to Rule 41. The committee will resume with the comments to Rule 54.

(5) ADJOURNMENT

The remaining matters were deferred, and the committee adjourned at 6:00.

Tab 2

Administrative Office of the Courts

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

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

MEMORANDUM

To: Civil Rules Committee
From: Nancy Sylvester
Date: March 18, 2016
Re: Comments to Rules 54, 58A, 58C, and 73

At the February 2016 committee meeting, the committee reviewed comments to rules 9, 26.1, 26.2, and 41 and made appropriate edits to the rules. The committee left off on rule 54, which had one comment from Nathan Whittaker.

Rule 54

In the first part of Mr. Whittaker's comment dealing with lines 21-26, he suggests changing (d)(2) to say, "not later than 14 days" to mirror the language of rule 59. He is concerned that since the language in (d)(2) and (d)(3) suggest a memorandum of costs cannot be ruled upon until after a judgment is entered, there will be an amended judgment in nearly every case under paragraph (e). I have made the change to the language in (d)(2) but did not delete paragraph (d)(3) as he also suggested.

In lines 28-29, Mr. Whittaker suggests deleting "to include the award in the judgment" because it is unnecessary and confusing. I made the edit.

Rule 58C

Rule 58C had a comment about guidance on the statutory interest rates from Graeme Abraham. This is likely just a new issue, so it can be placed on the priority list.

Rule 73

The vast majority of comments to Rule 73 had to do with raising the presumptive attorney fee limits. As with other comments request a new substantive change to the rule, these requests will go on the priority list.

The one comment that dealt with some clarifying language with respect to the amendments was Mr. Whittaker's. He suggested that the rule or a committee note should distinguish between a motion for attorney fees versus a request for attorney fees made pursuant to a motion under Rules 11(c) or 37(a)(7)(K) or under Utah Code section 78B-5-825. He suggests that there is an efficiency consideration in having parties file

motions under those rules and statute and then having to file another motion under Rule 73 for attorney fees. Some clarifying language in paragraph (a) may be helpful. I have not come up with any language yet.

Comments to Rules 54, 58A, 58C, 73

Rule 54

Nathan Whittaker
December 30, 2015 at 2:27 pm

Rule 54:

~~ll. 21-26: Paragraphs (d)(2) and (d)(3) suggest that a memorandum of costs cannot be ruled upon until after a judgment is entered. When considered with Paragraph (e), this means that there will be an amended judgment in nearly every case. I would recommend changing the proposed rules so that they run from the recording of the verdict or decision that provides the basis for entry of judgment rather than the judgment itself, or at least provide the prevailing party with the option of filing a memorandum of costs before the entry of judgment without tolling the opposing party's time to respond to the memorandum until after the entry of the judgment. Perhaps change "within 14 days" on line 21 to "not later than 14 days" to mirror the language of Rule 59, see Hudema v. Carpenter, 1999 UT 290, ¶ 18, 989 P.2d 491 (Utah App. 1999) (holding that "not later than 10 days after the entry of judgment" specifically allows a party to file before the entry of the judgment),~~ and delete (d)(3).

~~ll. 28-29: Consider deleting "to include the award in the judgment" as unnecessary – it makes the sentence hard to read, and it makes it ambiguous whether a party must amend a judgment to include costs and attorney fees or whether it can get an award in a separate order pursuant to Rule 7(j)(8).~~

~~l. 29: Add the word "prevailing" between "the" and "party".~~

~~ll. 29-30: Replace "fees, and the court" with "fees. The court".~~

Rule 58A

Rule 58C
Graeme Abraham
December 17, 2015 at 4:14 pm

URCP 058C
My office has been getting varying and inconsistent rulings regarding how interest is to be treated in a renewed judgment. Some judges allow contractual interest rates to carry over while others require the U.C.A. 15-1-4 statutory rates carrying forward. Regarding the U.C.A. 15-1-4 rates, there is also a discrepancy in whether the rate from the year the judgment originally entered or the year when the judgment renews should apply. It would be nice to have some guidance on this issue in the rule itself.

Nathan Whittaker
December 30, 2015 at 2:27 pm

Rule 58C:

~~ll. 2 & 10: Add the words "under Rule 7" between "motion" and "in"; delete paragraph (c).~~

Rule 73

Keisuke Ushijima
December 24, 2015 at 11:16 am

Regarding URCP 73, the fee schedule [tentatively (f)] should be updated.

For instance, the allowed $250 amount for the range for 0 to 1,500, should be eliminated.

At minimum, we should use the $325 amount (if not more) and extend the range for judgment amounts of 0 to 2,000. It could match Court Filing Fees for suits $2000 or less.

Nathan Whittaker
January 21, 2016 at 12:04 pm

Rule 73:

The rule (or perhaps just the advisory committee note) may want to distinguish between a motion for attorney fees, which includes a full statement of grounds, affidavit, etc., and a subsidiary request for attorney fees pursuant to a motion, such as one made under URCP 11(c) or 37(a)(7)(K), or in response to a meritless or dilatory motion under UCA § 78B-5-825 (see Rohan v. Boseman, 2000 UT App 109, ¶¶ 36-40, 46 P.3d 753 (applying statute to motions)). I'm certain that the courts would not want parties filing separate motions for attorney fees (along with an affidavit of fees that would have to be revised) every time they sought fees in a motion or in response to a motion. In considering this, the committee may also want to consider whether URCP 7(n) is applicable to a nonmoving party's request for attorney fees for the necessity of responding to a meritless or dilatory motion. Again, filing such a request as a separate motion would likely have the effect of unnecessarily multiplying the filings in the case, and the committee may want to nip it in the bud.

Mark Olson
January 29, 2016 at 11:41 am

(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 have no comments concerning the proposed changes to Rule 73 per se, but 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 probably 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 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 be 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, 13 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 of all, we are now required to check a military database to ensure that the defendant is not in the military, and to file a copy of the results with a separate affidavit.

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 default judgment. 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, but that requires the same work.)

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 printing a complaint, having it served, and dropping it in the messenger box for delivery to court, it now involves printing 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 22.96% from 2003 to 2014, the last year for which statistics are available. 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 41.32% from 2003 to 2015.

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 2015-16, the hourly rate for attorneys with 4-7 years of practice, for example, has risen 52.06%.

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 32.48% through June of 2015. 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 36.32% during the period in question. Health insurance premiums have also risen dramatically. I haven't found and hard data covering 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 27.01% from 2003 to the present. Firm paid health insurance premiums per employee have gone up a staggering 123.5 %. 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.

From these various statistics we see that attorney salaries and billing rates have gone up somewhere in the range of 23% to 52%. Major costs of doing business have gone up anywhere from 32% for salaries (based on averages for all workers in the US), 36% 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 one simple tweak: eliminate the first two lines of the schedule. That is essentially what was done 13 years ago (except that we would now remove two lines instead of one.) The result would be a fee of $400 for principal balances up to $2500, with the balance of the schedule remaining the same. This would represent an increase of 60% in the starting point of the schedule. That increase is generally in line with many of the statistical increases I have laid out, and is actually less than the 2003 fee increase of 66.7% ($150 to $250). That should also be adequate to compensate for the additional work now required to reach default judgment.

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 review ever decade or so. 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 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 over 12 years since that last revision. My recommendation is that the Supreme Court adjust the current schedule by eliminating the first two tiers and bringing the starting point up to a more reasonable $400. Also, I would be happy to meet with the committee at its convenience to discuss this issue further.

Chip Shaner
January 29, 2016 at 2:51 pm

Rule 73:

The Rule 73 chart for fees has not been updated in over 10 years and does not reflect the costs of doing business in 2016. Since Rule 73 was last updated the cost of doing business has risen greatly. Employee and healthcare costs have contributed greatly to this increase. Furthermore, the courts have imposed burdens on attorneys that simply did not exist 10 years ago. This includes additional effort for default affidavits, military service affidavits, collection fee affidavits, and the additional time and cost for mandatory electronic filing. Given that the amount of fees awarded under Rule 73 is inadequate, I would strongly suggest that the Utah Supreme Court seriously look at raising the baseline amount of attorney's fees that are awarded under this rule.

Quinn Kofford
January 29, 2016 at 3:45 pm

The process and pleadings now required to obtain default have changed significantly since the fee schedule was last revised. Additionally, it has been several years since this schedule was analyzed against the backdrop of inflation, increased filing fees, increased costs, and increased attorney fee rates.

I personally believe that the starting tier should either be combined with the second tier, or that all tiers be upwardly adjusted by at least $50.

Without appropriate adjustments to the schedule, the purpose, predicability and "judicial ease" of the schedule will become moot as more and more attorney's choose to file individual affidavits which would

then need to be reviewed on a case-by-case basis.

Rebecca Mader
February 1, 2016 at 12:13 pm

Re URCP 073:

Subsection (d) of this rule should be revised and brought up to date. Costs of doing business have gone up in the last ten years, and those attorneys who rely on this schedule to collect attorney fees are struggling due to the low fee awards provided for.

Those attorneys in private practice who charge their clients by billable hours are able to increase their fees as their costs increase; debt collection attorneys who work on a contingency basis often do not have this luxury. I would propose that each section (0-1500, 1500-2000, 2000-2500 and so on) be increased by at least $50.00 per amount range, to assist in offsetting increased costs for attorneys who collect attorney fees based on this schedule.

Spencer Lythgoe
February 1, 2016 at 4:08 pm

I agree with the others below who have commented that the fee schedule in Rule 73 needs to be updated to account for inflation and the increased costs of obtaining a default judgment due to recent rule changes. Thirteen years without any adjustment is a substantial period of time. It seems like fairness dictates increasing the fees that can be requested under the table. Otherwise, attorneys may discontinue using the fee table and start filing affidavits of costs that could bog down the court system.

Kirk Cullimore Jr
February 1, 2016 at 4:15 pm

The Rule 73 fee schedule needs to be updated. The costs of doing business have substantially increased since the fee schedule was last visited, including substantial increases in court filing fees. Additionally, the amount of work and process to even be awarded a default has substantially increased with SCRA requirements, e-filing requirements, new Rule 55 requirements, etc. The lower tiers of the schedule simply do not represent a reasonable estimation of attorney fees in today's market. This is requiring my office to file affidavits with more and more cases which defeats the judicial efficiency principles sought by the Rule 73 schedule.

Kirk A. Cullimore
February 1, 2016 at 4:19 pm

The original purpose behind the attorney's fee schedule was not only to provide a minimum basis of attorneys fees but to allow the judges to allow court clerks to sign off on the default judgments. It was really more for judicial economy. Since the last revision of the schedule was more than 13 years ago, the current schedule needs to be adjusted. All costs associated with filing cases has increased for an attorney. The addition of electronic filing has dramatically increased the costs of filing cases. All costs of operations of a law firm have significant increases since 2013 including staff, office space, filing fees, insurance costs, etc.

Our office has already started to file attorneys fee affidavits and not use the schedule because it no longer is sufficiently close to what our actual costs are on most cases. I anticipate that many other

attorneys are in the same boat. If the schedule is not updated, then the purpose of saving the judges time via use of the schedule will be lost.

I have reviewed other comments. I believe that Mark Olson, who has been involved in this for some time, has stated effectively the reasons for schedule to be revised.

I support the changes to Rule 73. I further believe that the schedule needs revision concurrently and that the starting tier should be at the $400 level.

Edwin Parry
February 2, 2016 at 6:09 pm

It seems that this is a good opportunity to review the fee schedule set forth in Rule 73 URCP. It has been approximately ten years (possibly more) since the schedule has been addressed. The costs of doing business have increased dramatically since that time. Additionally, as frame of reference the costs of filing a complaint have increase by 50-100% during that same period of time.

It seems to me that a recalculation of the attorney's fees with the minimum fee starting at $325.00 for damages sought of $0.00 to $1,500.00 and then shifting the present attorney fees authorized up one level with a new cap of $825.00 for amounts $4,500.01 up.

G. Scott Jensen
February 2, 2016 at 6:48 pm

My name is Scott Jensen, I am the current chair of the Collection Section for the Utah State Bar. The Rule 73 fee schedule , which was set up for collections is in need of an update. Mark Olson has done a great job of researching the history of the Rule above. I also believe that the Rule as it stands is outdated. Our expenses as collection attorneys has become increasingly more burdensome. I believe that the lowest category for attorneys fees should begin at least at $400.00 for debts from $1.00 to $1,500.00

Richard Frandsen
February 2, 2016 at 6:48 pm

The amounts and thresholds of Rule 73 need to be updated. This rule is important as it saves valuable court time and frankly attorney time. But these amounts need to be updated occasionally as are court fees and default interest rates. It's hard to imagine handling even a tiny case from start to finish for an attorney fee of $250.

Derek Barclay
February 2, 2016 at 8:14 pm

I concur with others that the Rule 73 fee schedule needs to be updated and the minimum fee allowed increased. In addition to increased costs since the fee schedule was first implemented, more work is now required in order to obtain a default judgment. When you also consider increased attorney salaries/billing rates, the minimum fee is no longer reasonable and in many cases results in the need to file an attorney fee affidavit, which also increases the workload for the courts/judges. In light of these reasons and those expressed by others, the minimum fee for cases under $1500 should be at least $350 and the rest of the scale adjusted accordingly.

Jefferson Cannon

February 2, 2016 at 11:44 pm

Rule 73:

In joining what others have posted, the Rule 73 chart for fees has not been updated in over 10 years and does not reflect the costs of doing business in 2016. We have seen the cost of business rise in every sector of our businesses. A few years ago the courts addressed their needs in rising costs of business by raising the filing fees significantly; however, the attorneys fees chart in rule 73 has not been addressed to reflect the rising cost of business for attorneys. It is now an appropriate time for the Supreme Court to review the fee chart and raise the compensation allowed for attorneys.

Rule 54. Judgments; costs.

(a) Definition; form. "Judgment" as used in these rules includes a decree or order that adjudicates all claims and the rights and liabilities of all parties or any other order from which an appeal of right lies. A judgment should not contain a recital of pleadings, the report of a master, or the record of prior proceedings.

(b) Judgment upon multiple claims and/or involving multiple parties. When an action presents more than one claim for relief—whether as a claim, counterclaim, cross claim, or third party claim—and/or when multiple parties are involved, the court may enter judgment as to one or more but fewer than all of the claims or parties only if the court expressly determines that there is no just reason for delay. Otherwise, any order or other decision, however designated, that adjudicates fewer than all the claims or the rights and liabilities of fewer than all the parties does not end the action as to any of the claims or parties, and may be changed at any time before the entry of judgment adjudicating all the claims and the rights and liabilities of all the parties.

(c) Demand for judgment. A default judgment must not differ in kind from, or exceed in amount, what is demanded in the pleadings. Every other judgment should grant the relief to which each party is entitled, even if the party has not demanded that relief in its pleadings.

(d) Costs.

(d)(1) To whom awarded. Unless a statute, these rules, or a court order provides otherwise, costs should be allowed to the prevailing party. Costs against the state of Utah, its officers and agencies may be imposed only to the extent permitted by law.

(d)(2) How assessed. The party who claims costs must ~~within~~ not later than 14 days after the entry of judgment file and serve a verified memorandum of costs. A party dissatisfied with the costs claimed may, within 7 days after service of the memorandum of costs, object to the claimed costs.

(d)(3) Memorandum filed before judgment. A memorandum of costs served and filed after the verdict, or at the time of or subsequent to the service and filing of the findings of fact and conclusions of law, but before the entry of judgment, is deemed served and filed on the date judgment is entered.

(e) Amending the judgment to add costs or attorney fees. If the court awards costs under paragraph (d) or attorney fees under Rule 73 after the judgment is entered~~, to include the award in the judgment~~, the prevailing party must file and serve an amended judgment including the costs or attorney fees~~,~~. ~~and t~~The court will enter the amended judgment unless another party objects within 7 days after the amended judgment is filed.

Advisory Committee Notes

2016 amendments

Paragraph (e) describes the process by which the determination of costs or fees becomes part of the judgment. If there is legal error in entering judgment for costs or attorney fees, that error is reviewable on appeal just like any other. But if the underlying basis for the award of costs or attorney fees, such as the

defendant's liability in the action, is not upheld on appeal, the party should not be liable for costs or fees even if the award of costs or fees was entered without error or was not reviewed.

Rule 58A. Entry of judgment; abstract of judgment.

(a) Separate document required. Every judgment and amended judgment must be set out in a separate document ordinarily titled "Judgment"—or, as appropriate, "Decree."

(b) Separate document not required. A separate document is not required for an order disposing of a post-judgment motion:

(b)(1) for judgment under Rule 50(b);

(b)(2) to amend or make additional findings under Rule 52(b);

(b)(3) for a new trial, or to alter or amend the judgment, under Rule 59; ~~or~~

(b)(4) for relief under Rule 60; or

(b)(5) for attorney fees under Rule 73.

(c) Preparing a judgment.

(c)(1) Preparing and serving a proposed judgment. The prevailing party or a party directed by the court must prepare and serve on the other parties a proposed judgment for review and approval as to form. The proposed judgment shall be served within 14 days after the jury verdict or after the court's decision. If the prevailing party or party directed by the court fails to timely serve a proposed judgment, any other party may prepare a proposed judgment and serve it on the other parties for review and approval as to form.

(c)(2) Effect of approval as to form. A party's approval as to form of a proposed judgment certifies that the proposed judgment accurately reflects the verdict or the court's decision. Approval as to form does not waive objections to the substance of the judgment.

(c)(3) Objecting to a proposed judgment. A party may object to the form of the proposed judgment by filing an objection within 7 days after the judgment is served.

(c)(4) Filing proposed judgment. The party preparing a proposed judgment must file it:

(c)(4)(A) after all other parties have approved the form of the judgment; (The party preparing the proposed judgment must indicate the means by which approval was received: in person; by telephone; by signature; by email; etc.)

(c)(4)(B) after the time to object to the form of the judgment has expired; (The party preparing the proposed judgment must also file a certificate of service of the proposed judgment.) or

(c)(4)(C) within 7 days after a party has objected to the form of the judgment. (The party preparing the proposed judgment may also file a response to the objection.)

(d) Judge's signature; judgment filed with the clerk. Except as provided in paragraph (h) and Rule 55(b)(1), all judgments must be signed by the judge and filed with the clerk. The clerk must promptly record all judgments in the docket.

(e) Time of entry of judgment.

(e)(1) If a separate document is not required, a judgment is complete and is entered when it is signed by the judge and recorded in the docket.

(e)(2) If a separate document is required, a judgment is complete and is entered at the earlier of these events:

(e)(2)(A) the judgment is set out in a separate document signed by the judge and recorded in the docket; or

(e)(2)(B) 150 days have run from the clerk recording the decision, however designated, that provides the basis for the entry of judgment.

(f) Award of attorney fees. A motion or claim for attorney fees does not affect the finality of a judgment for any purpose, but, under Rule of Appellate Procedure 4, the time in which to file the notice of appeal runs from the disposition of the motion or claim.

(g) Notice of judgment. The party preparing the judgment shall promptly serve a copy of the signed judgment on the other parties in the manner provided in Rule 5 and promptly file proof of service with the court. Except as provided in Rule of Appellate Procedure 4(g), the time for filing a notice of appeal is not affected by this requirement.

~~(g)~~ **(h) Judgment after death of a party.** If a party dies after a verdict or decision upon any issue of fact and before judgment, judgment may nevertheless be entered.

~~(h)~~ **(i) Judgment by confession.** If a judgment by confession is authorized by statute, the party seeking the judgment must file with the clerk a statement, verified by the defendant, as follows:

~~(h)(1)~~ (i)(1) If the judgment is for money due or to become due, the statement must concisely state the claim and that the specified sum is due or to become due.

~~(h)(2)~~ (i)(2) If the judgment is for the purpose of securing the plaintiff against a contingent liability, the statement must state concisely the claim and that the specified sum does not exceed the liability.

~~(h)(3)~~ (i)(3) The statement must authorize the entry of judgment for the specified sum.

The clerk must sign the judgment for the specified sum.

~~(i)~~ **(j) Abstract of judgment.** The clerk may abstract a judgment by a signed writing under seal of the court that:

~~(i)(1)~~ (j)(1) identifies the court, the case name, the case number, the judge or clerk that signed the judgment, the date the judgment was signed, and the date the judgment was recorded in the registry of actions and the registry of judgments;

~~(i)(2)~~ (j)(2) states whether the time for appeal has passed and whether an appeal has been filed;

~~(i)(3)~~ (j)(3) states whether the judgment has been stayed and when the stay will expire; and

~~(i)(4)~~ (j)(4) if the language of the judgment is known to the clerk, quotes verbatim the operative language of the judgment or attaches a copy of the judgment.

Advisory Committee Note

2015 amendments

The 2015 amendments to Rule 58A adopt the requirement, found in Rule 58 of the Federal Rules of Civil Procedure, that a judgment be set out in a separate document. In the past, problems have arisen when the district court entered a decision with dispositive language, but without the other formal elements

of a judgment, resulting in uncertainty about whether the decision started the time for appeals. This problem was compounded by uncertainty under Rule 7 about whether the decision was the court's final ruling on the matter or whether the prevailing party was expected to prepare an order confirming the decision.

The 2015 amendments of Rule 7, Rule 54 and Rule 58A are intended to reduce this confusion by requiring "that there be a judgment set out on a separate document—distinct from any opinion or memorandum—which provides the basis for the entry of judgment." See Advisory Committee Notes to 1963 Amendments to Fed. R. Civ. P. 58. Courts and practitioners are encouraged to use appropriate titles with separate documents intended to operate as judgments, such as "Judgment" or "Decree," and to avoid using such titles on documents that are not appealable. The parties should consider the form of judgment included in the Appendix of Forms. On the question of what constitutes a separate document, the Committee refers courts and practitioners to existing case law interpreting Fed. R. Civ. P. 58. For example, *In re Cendant Corp.*, 454 F.3d 235, 242-244 (3d Cir. 2006) offers three criteria:

1) the judgment must be set forth in a document that is independent of the court's opinion or decision;

2) it must contain ordering clauses stating the relief to which the prevailing party is entitled, and not merely refer to orders made in other documents or state that a motion has been granted; and

3) it must substantially omit recitation of facts, procedural history, and the reasons for disposing of the parties' claims.

While "some trivial departures" from these criteria—such as a one-sentence explanation of reasoning, a single citation to authority, or a reference to a separate memorandum decision—"must be tolerated in the name of common sense," any explanation must be "very sparse." *Kidd v. District of Columbia*, 206 F.3d 35, 39 (D.C. Cir. 2000).

The concurrent amendments to Rule 7 remove the separate document requirement formerly applicable to interlocutory orders. Henceforward, the separate document requirement will apply only to judgments, a change that should reduce the tendency to confuse judgments with other orders. Rule 7 has also been amended to modify the process by which orders on motions are prepared. The process for preparing judgments is the same.

Under amended Rule 7(j), a written decision, however designated, is complete—is the judge's last word on the motion—when it is signed, unless the court expressly requests a party to prepare an order confirming the decision. But this should not be confused with the need to prepare a separate judgment when the decision has the effect of disposing of all clams in the case. If a decision disposes of all claims in the action, a separate judgment is required whether or not the court directs a party to prepare an order confirming the decision.

~~Rule 58A is similar to Fed. R. Civ. P. 58 in listing the instances where a separate document is not required. The state rule differs from the federal rule regarding an order for attorney fees. Fed. R. Civ. P. 58 includes an order for attorney fees as one of the orders not requiring a separate document. That particular order is omitted from the Utah rule because under Utah law a judgment does not become final~~

~~for purposes of appeal until the trial court determines attorney fees. See *ProMax Development Corporation v. Raile*, 2000 UT 4, 998 P.2d 254. See also Utah Rule of Appellate Procedure 4, which states that the time in which to appeal post-trial motions is from the disposition of the motion.~~

State Rule 58A is ~~also~~ similar to Fed. R. Civ. P. 58 in determining the time of entry of judgment when a separate document is required but not prepared. This situation involves the "hanging appeals" problem that the Supreme Court asked this Committee to address in *Central Utah Water Conservancy District v. King*, 2013 UT 13, ¶27. Under the 2015 amendments, if a separate document is required but is not prepared, judgment is deemed to have been entered 150 days from the date the decision—or the order confirming the decision—was entered on the docket.

2016 amendments

The 2016 amendments in paragraphs (b) and (f) are part of a coordinated effort with the Advisory Committee on the Rules of Appellate Procedure to change the effect of a motion for attorney fees on the appealability of a judgment. The combined amendments of this rule and Rule of Appellate Procedure 4 effectively overturn *ProMax Development Corp. v. Raile*, 2000 UT 4, 998 P.2d 254 and *Meadowbrook, LLC v. Flower*, 959 P.2d 115 (Utah 1998). Paragraph (f) also addresses any doubts about the enforceability of a judgment while a motion for attorney fees is pending.

Under *ProMax* and *Meadowbrook* a judgment was not final until the claim for attorney fees had been resolved. An appeal filed before a claim for attorney fees had been resolved was premature and would be dismissed. Under the 2016 amendments, the time to appeal runs from the order disposing of a timely motion for attorney fees, just as it does timely motions under Rules 50, 52 and 59. The 2016 amendments to appellate Rule 4(b) also add a motion under Rule 60(b), but only if the motion is filed within 28 days after the judgment.

If a notice of appeal is filed before the order resolving the timely motion, the appeal is not dismissed; it is treated as filed on the day the order ultimately is entered, although the party must file an amended notice of appeal to appeal from the order disposing of the motion.

Although this change overturns *ProMax* and *Meadowbrook*, it is not the same as the federal rule. Under Federal Rule of Civil Procedure 58(e):

> Ordinarily, the entry of judgment may not be delayed, nor the time for appeal extended, in order to tax costs or award fees. But if a timely motion for attorney's fees is made under Rule 54(d)(2), the court may act before a notice of appeal has been filed and become effective to order that the motion have the same effect under Federal Rule of Appellate Procedure 4 (a)(4) as a timely motion under Rule 59.

In other words, a motion for attorney fees extends the time to appeal, but only if the trial court judge rules that it does. In the 2016 amendment of the state rules, a timely motion for attorney fees automatically has that effect.

Although the 2016 amendments change a policy of long standing in the Utah state courts, the amendments will help to protect the appellate rights of parties and avoid the cost of premature appeals.

Rule 58C. Motion to renew judgment.

(a) Motion. A judgment creditor may renew a judgment by filing a motion under Rule 7 in the original action before the statute of limitations on the original judgment expires. A copy of the judgment must be filed with the motion.

(b) Affidavit. The motion must be supported by an affidavit:

(b)(1) accounting for the original judgment and all post-judgment payments, credits, and other adjustments provided for by law or contained in the original judgment; and

(b)(2) affirming that notice was sent to the most current address known for the judgment debtor, stating what efforts the creditor has made to determine whether it is the debtor's correct address.

~~**(c) Rule 7 applies.** The procedures and time limits of Rule 7 apply.~~

(d) Effective date of renewed judgment. If the court grants the motion, the court will enter an order renewing the original judgment from the date of entry of the order or from the scheduled expiration date of the original judgment, whichever occurs first. The statute of limitations on the renewed judgment runs from the date the order is signed and entered.

Advisory Committee Note

The Renewal of Judgment Act (Utah Code Sections 78B-6-1801 through 78B-6-1804) allows a domestic judgment to be renewed by motion, and Section 78B-5-302 governs domesticating a foreign judgment, which can then be renewed by motion. The statute of limitations on an action for failure to pay a judgment is governed by Section 78B-2-311.

Rule 73. Attorney fees.

(a) Time in which to claim. ~~When attorney fees are authorized by contract or by law, a request for attorney fees shall be supported by affidavit or testimony~~ Attorney fees must be claimed by filing a motion for attorney fees no later than 14 days after the judgment is entered unless the party claims attorney fees in accordance with the schedule in ~~subsection (d)~~ paragraph (f) or in accordance with Utah Code Section 75-3-718 and no objection to the fee has been made.

(b) Content of motion. ~~An affidavit supporting a request for or augmentation of attorney fees shall set forth~~ The motion must:

(b)(1) ~~the basis for~~ specify the judgment and the statute, rule, contract, or other grounds entitling the party to the award;

(b)(2) ~~a reasonably detailed description of the time spent and work performed, including for each item of work the name, position (such as attorney, paralegal, administrative assistant, etc.) and hourly rate of the persons who performed the work~~ disclose, if the court orders, the terms of any agreement about fees for the services for which the claim is made;

(b)(3) specify factors showing the reasonableness of the fees, if applicable;

(b)(4) specify the amount of attorney fees claimed and any amount previously awarded; and

(b)(5) disclose if the ~~affidavit is in support of~~ attorney fees are for services rendered to an assignee or a debt collector, the terms of any agreement for sharing the fee and a statement that the attorney ~~is not sharing~~ will not share the fee ~~or any portion thereof~~ in violation of Rule of Professional Conduct 5.4.

(c) Supporting affidavit. The motion must be supported by an affidavit or declaration that reasonably describes the time spent and work performed, including for each item of work the name, position (such as attorney, paralegal, administrative assistant, etc.) and hourly rate of the persons who performed the work.

(d) Liability for fees. The court may decide issues of liability for fees before receiving submissions on the value of services. If the court has established liability for fees, the party claiming them may file an affidavit and a proposed order. The court will enter an order for the claimed amount unless another party objects within 7 days after the affidavit and proposed order are filed.

~~(c)~~ (e) Fees claimed in complaint. If a party ~~requests~~ claims attorney fees ~~in accordance with the schedule in subsection (d)~~ under paragraph (f), the ~~party's~~ complaint ~~shall~~ must state the basis for attorney fees, state the amount of attorney fees allowed by the schedule, cite the law or attach a copy of the contract authorizing the award, and, if the attorney fees are for services rendered to an assignee or a debt collector, a statement that the attorney will not share the fee ~~or any portion thereof~~ in violation of Rule of Professional Conduct 5.4.

~~(d)~~ (f) Schedule of fees. Attorney fees awarded under the schedule may be augmented only for considerable additional efforts in collecting or defending the judgment and only after further order of the court.

Amount of Damages, Exclusive of Costs, Attorney Fees and Post-Judgment Interest, Between	and:	Attorney Fees Allowed
0.00	1,500.00	250.00
1,500.01	2,000.00	325.00
2,000.01	2,500.00	400.00
2,500.01	3,000.00	475.00
3,000.01	3,500.00	550.00
3,500.01	4,000.00	625.00
4,000.01	4,500.00	700.00
4,500.01	or more	775.00

Advisory Committee Notes

Tab 3

Administrative Office of the Courts

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

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

MEMORANDUM

To: Civil Rules Committee
From: Nancy Sylvester
Date: March 18, 2016
Re: Comments to Rules 13, 15, 26.3

The committee received only one comment to Rules 13, 15, and 26.3. Axel Trumbo commented on Rule 26.3. He said he did not believe mobile home park cases should be captured under the rule since they have already have expedited procedures under Utah Code section 57-16-15 and an immediate occupancy hearing will occur only if the party elects to sue under the unlawful detainer statutes. He also noted that the expedited procedures in the unlawful detainer statutes only apply when the tenant remains in possession of the property. He suggested amending the scope of the rule to mirror the possession language of Utah Code section 78B-6-810. The statutes appear to support his suggested changes so I amended paragraph (a).

Comment

Axel Trumbo January 29, 2016 at 4:00 pm Rule 26.3:

I would amend the scope. There are only certain circumstances in which Mobile Home Park cases follow the expedited procedures of the unlawful detainer statutes. See Utah Code Ann. sec. 57-16-15(1) and (2). And its only under section 810 of the unlawful detainer statutes that an immediate occupancy hearing is provided for. So we don't need to include a reference to the Mobile Home Park Residency Act because an immediate occupancy hearing will occur only if the party elected to sue under the unlawful detainer statutes.Also, the immediate occupancy hearings and the requirement to have trial within 60 days applies only when the tenant remains on the property. See Utah Code Ann. sec. 78B-6-810(1) ("In an action under this chapter in which the tenant remains in possession of the property . . ."). There can be cases in which an unlawful detainer action is filed, but the tenant isn't in the property anymore. I would add to the scope of rule 26.3 that the rule applies to cases brought under the unlawful detainer statutes in cases "in which the tenant remains in possession of the property." Using the same language of section 810 will create consistency.

Rule 13. Counterclaim and cross-claim.

(a) Compulsory counterclaim~~s~~.

(a)(1) A pleading ~~shall~~ must state as a counterclaim any claim ~~which~~ that—at the time of ~~serving the pleading~~ its service—the pleader has against an~~y~~ opposing party~~,~~ if ~~it~~ the claim:

(a)(1)(A) arises out of the transaction or occurrence that is the subject~~-~~ matter of the opposing party's claim; and

(a)(1)(B) does not require ~~for its adjudication the presence of third parties of~~ adding another party over whom the court cannot acquire jurisdiction.

(a)(2) ~~But the~~ The pleader need not state the claim if:

(a)(2)(A) ~~(1) at the time~~ when the action was commenced, the claim was the subject of another pending action, or

(a)(2)(B) ~~(2)~~ the opposing party ~~brought suit upon his~~ sued on its claim by attachment or other process ~~by which the court~~ that did not ~~acquire~~ establish personal jurisdiction ~~to render a personal judgment~~ over the pleader on that claim, and the pleader ~~is not stating~~ does not assert any counterclaim under this ~~R~~rule ~~13~~.

(b) Permissive counterclaim. A pleading may state as a counterclaim ~~any claim~~ against an opposing party ~~not arising out of the transaction or occurrence that is the subject-matter of the opposing party's claim~~ any claim that is not compulsory.

(c) ~~Counterclaim exceeding opposing claim~~Relief sought in a counterclaim. A counterclaim ~~may or may~~ need not diminish or defeat the recovery sought by the opposing party. It may ~~claim~~ request relief ~~exceeding~~ that exceeds in amount or ~~different~~ differs in kind from ~~that~~ the relief sought ~~in the pleading of~~ by the opposing party.

(d) Counterclaim maturing or acquired after pleading. ~~A claim which either~~ The court may permit a party to file a supplemental pleading asserting a counterclaim that matured or was acquired by the ~~pleader~~ party after serving ~~his~~ an earlier pleading ~~may, with the permission of the court, be presented as a counterclaim by supplemental pleading~~.

~~**(e) Omitted counterclaim.** When a pleader fails to set up a counterclaim through oversight, inadvertence, or excusable neglect, or when justice requires, he may by leave of court set up the counterclaim by amendment.~~

~~(f)~~ (e) Cross-claim against co-party. A pleading may state as a cross~~-~~claim any claim by one party against a co~~-~~party ~~arising~~ if the claim arises out of the transaction or occurrence that is the subject~~-~~ matter ~~either~~ of the original action or of a counterclaim, ~~therein or relating to~~ or if the claim relates to any property that is the subject~~-~~ matter of the original action. ~~Such~~ The cross~~-~~claim may include a claim that the coparty ~~against whom it is asserted~~ is or may be liable to the cross~~-~~claimant for all or part of a claim asserted in the action against the cross~~-~~claimant.

~~(g)~~ (f) ~~A~~Joining additional parties ~~may be brought in.~~ ~~When the presence of parties other than those to the original action is required for the granting of complete relief in the determination of a~~

~~counterclaim or cross-claim, the court shall order them to be brought in as defendants as provided in these rules, if jurisdiction of them can be obtained.~~ Rules 19 and 20 govern the addition of a person as a party to a counterclaim or crossclaim.

~~(h)~~ (g) Separate trials; separate judgments. ~~Judgment on a counterclaim or cross-claim may be rendered in accordance with the terms of~~ If the court orders separate trials under Rule 42, it may enter judgment on a counterclaim or crossclaim under Rule 54(b) when it has jurisdiction to do so, even if the ~~claims of the~~ opposing party's claims have been dismissed or otherwise ~~disposed of~~ resolved.

~~**(i) Cross demands not affected by assignment or death.** When cross demands have existed between persons under such circumstances that, if one had brought an action against the other, a counterclaim could have been set up, the two demands shall be deemed compensated so far as they equal each other, and neither can be deprived of the benefit thereof by the assignment or death of the other, except as provided in Subdivision (j) of this rule.~~

~~**(j) Claims against assignee.** Except as otherwise provided by law as to negotiable instruments and assignments of accounts receivable, any claim, counterclaim, or cross-claim which could have been asserted against an assignor at the time of or before notice of such assignment, may be asserted against his assignee, to the extent that such claim, counterclaim, or cross-claim does not exceed recovery upon the claim of the assignee.~~

Rule 15. Amended and supplemental pleadings.

(a) Amendments before trial.

(a)(1) A party may amend ~~his~~ its pleading once as a matter of course ~~at any time before a responsive pleading is served or, if the pleading is one to which no responsive pleading is permitted and the action has not been placed upon the trial calendar, he may so amend it at any time~~ within:

(a)(1)(A) 21 days after serving it ~~is served~~; or

(a)(1)(B) if the pleading is one to which a responsive pleading is required, 21 days after service of a responsive pleading or 21 days after service of a motion under Rule 12(b), (e), or (f), whichever is earlier.

(a)(2) ~~Otherwise~~ In all other cases, a party may amend ~~his~~ its pleading only ~~by leave of~~ with the court's permission or ~~by written consent of~~ the ~~adverse party; and leave shall be freely given~~ opposing party's written consent. The party must attach its proposed amended pleading to the motion to permit an amended pleading. The court should freely give permission when justice ~~so~~ requires.

(a)(3) ~~A party shall plead in response to an amended pleading~~ Any required response to an amended pleading must be filed within the time remaining ~~for response~~ to respond to the original pleading or within 14 days after service of the amended pleading, whichever ~~period may be the longer, unless the court otherwise orders~~ is later.

(b) Amendments ~~to conform to the evidence~~ during and after trial.

(b)(1) When an issue~~s~~ not raised ~~by~~ in the pleadings ~~are~~ is tried by the parties' express or implied consent ~~of the parties~~, ~~they shall~~ it must be treated in all respects as if ~~they had been~~ raised in the pleadings. ~~Such amendments of the pleadings as may be necessary to cause them to conform to the evidence and to raise these issues may be made upon motion of any party at any time, even after judgment; but~~ A party may move—at any time, even after judgment—to amend the pleadings to conform them to the evidence and to raise an unpleaded issue. But failure ~~so~~ to amend does not affect the result of the trial of ~~these~~ that issue~~s~~.

(b)(2) If, at trial, a party objects that evidence is ~~objected to at the trial on the ground that it is~~ not within the issues ~~made by~~ raised in the pleadings, the court may ~~allow~~ permit the pleadings to be amended ~~when the presentation of the merits of the action will be subserved thereby~~. The court should freely permit an amendment when doing so will aid in presenting the merits and the objecting party fails to satisfy the court that the ~~admission of such~~ evidence would prejudice ~~him in maintaining his~~ that party's action or defense ~~up~~on the merits. The court ~~shall~~ may grant a continuance~~, if necessary,~~ to enable the objecting party to meet ~~such~~ the evidence.

(c) Relation back of amendments. ~~Whenever~~ An amendment to a pleading relates back to the date of the original pleading when:

(c)(1) the law that provides the applicable statute of limitations allows relation back;

(c)(2) ~~the claim or defense asserted in the amended pleading~~ the amendment asserts a claim or defense that arose out of the conduct, transaction, or occurrence set ~~forth~~ out—or attempted to be set ~~forth~~ out—in the original pleading~~, the amendment relates back to the date of the original pleading~~; or

(c)(3) the amendment changes the party or the naming of the party against whom a claim is asserted, if paragraph (c)(2) is satisfied and if, within the period provided by Rule 4(b) for serving the summons and complaint, the party to be brought in by amendment:

(c)(3)(A) received such notice of the action that it will not be prejudiced in defending on the merits; and

(c)(3)(B) knew or should have known that the action would have been brought against it, but for a mistake concerning the proper party's identity.

(d) Supplemental pleadings. ~~Upon~~ On motion ~~of a party~~ and reasonable notice, the court may, ~~upon reasonable notice and upon such terms as are~~ on just terms, permit ~~him~~ a party to ~~serve~~ file a supplemental pleading setting ~~forth~~ out any transaction~~s~~, ~~or~~ occurrence~~s~~, or event~~s~~ ~~which have~~ that happened ~~since~~ after the date of the pleading ~~sought~~ to be supplemented. ~~Permission may be granted~~ The court may permit supplementation even though the original pleading is defective in ~~its statement of~~ stating a claim ~~for relief~~ or defense. ~~If the court deems it advisable that the adverse~~ The court may order that the opposing party plead to the supplemental pleading~~, it shall so order, specifying the time therefor~~ within a specified time.

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 and remains in possession of the property.~~or Title 57, Chapter 16, Mobile Home Park Residency Act.~~

(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 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 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, 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 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 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, 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.

Tab 4

Administrative Office of the Courts

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

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

MEMORANDUM

To: Civil Rules Committee
From: Nancy Sylvester
Date: March 18, 2016
Re: Amendments to Rule 4

At the February committee meeting, Leslie Slaugh volunteered to draft a proposal for acceptance of service that would replace the one Tim Shea drafted in paragraph (d). For organization purposes, though, Mr. Shea and I decided to take Mr. Slaugh's proposed paragraph (d) and make it a new paragraph (d)(3). So the paragraph (d) that Mr. Shea had made paragraph (e) changed back to paragraph (d) and former paragraph (d)(3) became (d)(4). The reason we saw this as an organizationally better fit is that, conceptually, new (d)(3) is a method of service so it seemed to fit well under paragraph (d) as a whole. If the committee agrees with this change, it may be appropriate to change the title of paragraph (d)(3) to "Service by Acceptance," or something to that effect to better reflect the purpose of the paragraph.

Kent Holmberg also suggested some changes to current (d)(1)(J) and (d)(1)(K) to better capture service on the state and an agency of the state. Those are reflected in those paragraphs.

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

Rule 4. Process.

(a) Signing of summons. The summons ~~shall~~ must be signed and issued by the plaintiff or the plaintiff's attorney. Separate summonses may be signed and ~~served~~ issued.

(b)~~(i)~~ Time of service. ~~In~~ Unless the summons and complaint are accepted, the summons and complaint in an action commenced under Rule 3(a)(1)~~, the summons together with a copy of the complaint shall~~ must be served no later than 120 days after ~~the filing of~~ the complaint is filed. ~~unless the~~ The court may allow~~s~~ a longer period of time for good cause shown. If the summons and complaint are not timely served, the action ~~shall~~ against the unserved defendant will be dismissed~~,~~ without prejudice on ~~application~~ motion of any party or ~~upon~~ on the court's own initiative.

~~(b)(ii) In any action brought against two or more defendants on which service has been timely obtained upon one of them,~~

~~(b)(ii)(A) the plaintiff may proceed against those served, and~~

~~(b)(ii)(B) the others may be served or appear at any time prior to trial.~~

(c) Contents of summons.

(c)(1) The summons ~~shall~~ must:

(c)(1)(A) contain the name and address of the court, ~~the address of the court,~~ the names of the parties to the action, and the county in which it is brought~~. It shall~~;

(c)(1)(B) be directed to the defendant~~,~~;

(c)(1)(C) state the name, address and telephone number of the plaintiff's attorney, if any, and otherwise the plaintiff's address and telephone number~~. It shall~~;

(c)(1)(D) state the time within which the defendant is required to answer the complaint in writing~~, and shall~~;

(c)(1)(E) notify the defendant that in case of failure to ~~do so~~ answer in writing, judgment by default will be ~~rendered~~ entered against the defendant~~. It shall~~; and

(c)(1)(F) state either that the complaint is on file with the court or that the complaint will be filed with the court within ~~ten~~ 10 days ~~of~~ after service.

(c)(2) If the action is commenced under Rule 3(a)(2), the summons ~~shall~~ must also:

(c)(2)(A) state that the defendant need not answer if the complaint is not filed within 10 days after service; and ~~shall~~

(c)(2)(B) state the telephone number of the clerk of the court where the defendant may call at least 14 days after service to determine if the complaint has been filed.

(c)(3) If service is ~~made~~ by publication, the summons ~~shall~~ must also briefly state the subject matter and the sum of money or other relief demanded, and that the complaint is on file with the court.

(d) Method~~s~~ of service. The summons and complaint may be served in any state or judicial district of the United States. Unless ~~waived in writing~~ service is accepted, service of the summons and complaint ~~shall~~ must be by one of the following methods:

(d)(1) Personal service. The summons and complaint may be served ~~in any state or judicial district of the United States by the sheriff or constable or by the deputy of either, by a United States Marshal or by the marshal's deputy, or~~ by any ~~other~~ person 18 years of age or older at the time of service and not a party to the action or a party's attorney. If the person to be served refuses to accept ~~a copy of the process~~ the summons and complaint, service ~~shall be~~ is sufficient if the person serving them ~~same shall~~ states the name of the process and offers to deliver ~~a copy thereof~~ them. Personal service ~~shall~~ must be made as follows:

(d)(1)(A) Upon any individual other than one covered by ~~sub~~paragraphs (d)(1)(B), (d)(1)(C) or (d)(1)(D) ~~below~~, by delivering ~~a copy of~~ the summons and ~~the~~ complaint to the individual personally, or by leaving ~~a copy~~ them at the individual's dwelling house or usual place of abode with ~~some~~ a person of suitable age and discretion who resides there ~~residing~~, or by delivering ~~a copy of the summons and the complaint~~ them to an agent authorized by appointment or by law to receive ~~service of~~ process;

(d)(1)(B) Upon ~~an infant (being a person~~ a minor under 14 years~~)~~ old by delivering ~~a copy of~~ the summons and ~~the~~ complaint to the ~~infant~~ minor and also to the ~~infant's~~ minor's father, mother, or guardian or, if none can be found within the state, then to any person having the care and control of the ~~infant~~ minor, or with whom the ~~infant~~ minor resides, or ~~in whose service~~ by whom the ~~infant~~ minor is employed;

(d)(1)(C) Upon an individual judicially declared to be incapacitated, of unsound mind, or incapable of conducting the ~~person's~~ individual's own affairs, by delivering ~~a copy of~~ the summons and ~~the~~ complaint to the ~~person~~ individual and to the guardian or conservator of the individual if one has been appointed; the ~~person's~~ individual's legal representative if one has been appointed, and, in the absence of ~~such~~ a guardian, conservator, or legal representative, to the ~~individual~~ person, if any, who has care, custody, or control of the ~~person~~ individual;

(d)(1)(D) Upon an individual incarcerated or committed at a facility operated by the state or any of its political subdivisions, by delivering ~~a copy of~~ the summons and ~~the~~ complaint to the person who has the care, custody, or control of the individual ~~to be served~~, or to that person's designee or to the guardian or conservator of the individual ~~to be served~~ if one has been appointed. ~~, who shall, in any case,~~ The person to whom the summons and complaint are delivered must promptly deliver them ~~process~~ to the individual ~~served~~;

(d)(1)(E) Upon ~~any~~ a corporation not ~~herein~~ otherwise provided for in this rule, ~~upon~~ a limited liability company, a partnership, or ~~upon~~ an unincorporated association ~~which is~~ subject to suit under a common name, by delivering ~~a copy of~~ the summons and ~~the~~ complaint to an officer, a managing or general agent, or other agent authorized by appointment or ~~by~~ law to receive ~~service of~~ process and ~~, if the agent is one authorized by statute to receive service and the statute so requires,~~ by also mailing ~~a copy of~~ the summons and ~~the~~ complaint to the defendant, if the agent is one authorized by statute to receive process and the statute so requires. If no ~~such~~ officer or

agent can be found within the state, and the defendant has, or advertises or holds itself out as having, ~~an office or~~ a place of business within the state or elsewhere, or does business within this state or elsewhere, then upon the person in charge of ~~such office or~~ the place of business;

(d)(1)(F) Upon an incorporated city or town, by delivering ~~a copy of~~ the summons and ~~the~~ complaint to the recorder;

(d)(1)(G) Upon a county, by delivering ~~a copy of~~ the summons and ~~the~~ complaint to the county clerk ~~of such county~~;

(d)(1)(H) Upon a school district or board of education, by delivering ~~a copy of~~ the summons and ~~the~~ complaint to the superintendent or ~~business~~ administrator of the board;

(d)(1)(I) Upon an irrigation or drainage district, by delivering ~~a copy of~~ the summons and ~~the~~ complaint to the president or secretary of its board;

(d)(1)(J) Upon the state of Utah or its department or agency~~, in such cases as by law are authorized to be brought against the state,~~ by delivering ~~a copy of~~ the summons and ~~the~~ complaint to the attorney general and any other person or agency required by statute to be served; and

(d)(1)(K) Upon ~~a department or agency of the state of Utah, or upon any~~ a public board, commission or body~~, subject to suit,~~ by delivering ~~a copy of~~ the summons and ~~the~~ complaint to any member of its governing board, or to its executive employee or secretary.

(d)(2) Service by mail or commercial courier service.

(d)(2)(A) The summons and complaint may be served upon an individual other than one covered by paragraphs (d)(1)(B) or (d)(1)(C) by mail or commercial courier service in any state or judicial district of the United States provided the defendant signs a document indicating receipt.

(d)(2)(B) The summons and complaint may be served upon an entity covered by paragraphs (d)(1)(E) through (d)(1)(I) by mail or commercial courier service in any state or judicial district of the United States provided defendant's agent authorized by appointment or by law to receive service of process signs a document indicating receipt.

(d)(2)(C) Service by mail or commercial courier service shall be complete on the date the receipt is signed as provided by this rule.

(d)(3) Acceptance of service.

(d)(3)(A) Duty to avoid expenses. All parties have a duty to avoid unnecessary expenses of serving the summons and complaint.

(d)(3)(B) Acceptance of service by party. Unless the person to be served is a minor under 14 years old or an individual judicially declared to be incapacitated, of unsound mind, or incapable of conducting the individual's own affairs, a party may accept service of a summons and complaint by signing a document that acknowledges receipt of the summons and complaint and states the time for response.

(d)(3)(C) Acceptance of service by attorney for party. An attorney may accept service of a summons and complaint on behalf of a party by signing a document that acknowledges receipt of the summons and complaint and states the time for response.

(d)(3)(D) Effect of acceptance, proof of acceptance. A person who accepts service of the complaint retains all defenses and objections. Filing the acceptance of service with the court constitutes proof of service under Rule 4(f).

(d)(~~3~~4) Service in a foreign country. Service in a foreign country ~~shall~~ must be made as follows:

(d)(~~3~~4)(A) by any internationally agreed means reasonably calculated to give notice, such as those means authorized by the Hague Convention on the Service Abroad of Judicial and Extrajudicial Documents;

(d)(~~3~~4)(B) if there is no internationally agreed means of service or the applicable international agreement allows other means of service, provided that service is reasonably calculated to give notice:

(d)(~~3~~4)(B)(i) in the manner prescribed by the law of the foreign country for service in that country in an action in any of its courts of general jurisdiction;

(d)(~~3~~4)(B)(ii) as directed by the foreign authority in response to a ~~letter rogatory or~~ letter of request issued by the court; or

(d)(~~3~~4)(B)(iii) unless prohibited by the law of the foreign country, by ~~delivery to the individual personally of a copy of~~ delivering the summons and ~~the~~ complaint to the individual personally or by any form of mail requiring a signed receipt, ~~to be~~ addressed and dispatched by the clerk of the court to the party to be served; or

(d)(~~3~~4)(C) by other means not prohibited by international agreement as may be directed by the court.

(d)(4~~5~~) Other service.

(d)(4~~5~~)(A) ~~Where~~ If the identity or whereabouts of the person to be served are unknown and cannot be ascertained through reasonable diligence, ~~where~~ if service upon all of the individual parties is impracticable under the circumstances, or ~~where~~ if there ~~exists~~ is good cause to believe that the person to be served is avoiding service ~~of process~~, the party seeking service ~~of process~~ may file a motion ~~supported by affidavit requesting an order allowing~~ to allow service ~~by publication or~~ by some other means. ~~The~~ An affidavit or declaration supporting ~~affidavit shall~~ the motion must set forth the efforts made to identify, locate, ~~or~~ and serve the party ~~to be served~~, or the circumstances ~~which~~ that make it impracticable to serve all of the individual parties.

(d)(4~~5~~)(B) If the motion is granted, the court ~~shall~~ will order service of ~~process~~ the complaint and summons by means reasonably calculated, under all the circumstances, to apprise the ~~interested~~ named parties ~~of the pendency~~ of the action ~~to the extent reasonably possible or practicable~~. The court's order ~~shall also~~ must specify the content of the process to be served and the event ~~or events as of which service shall be deemed complete~~ upon which service is

complete. Unless service is by publication, a copy of the court's order ~~shall~~ must be served ~~upon the defendant~~ with the process specified by the court.

(d)(~~4~~5)(C) ~~In any proceeding where~~ If the summons is required to be published, the court ~~shall~~, upon the request of the party applying for ~~publication~~ service by other means, must designate ~~the newspaper in which publication shall be made. The newspaper selected shall be~~ a newspaper of general circulation in the county ~~where such~~ in which publication is required ~~to be made~~.

(e) Proof of service.

(e)(1) ~~If service is not waived, the~~ The person effecting service ~~shall~~ must file proof ~~with the court. The proof of service must state~~ of service stating the date, place, and manner of service, including a copy of the summons. ~~Proof of service made pursuant to paragraph (d)(2) shall include a receipt signed by the defendant or defendant's agent authorized by appointment or by law to receive service of process.~~ If service is made by a person other than by an attorney, ~~the~~ sheriff, ~~or~~ constable, ~~or by the deputy of either, by a~~ United States Marshal, or by the sheriff's, constable's or marshal's deputy, the proof of service ~~shall~~ must be ~~made~~ by affidavit or declaration under penalty of Utah Code Section 78B-5-705.

(e)(2) Proof of service in a foreign country ~~shall~~ must be made as prescribed in these rules for service within this state, or by the law of the foreign country, or by order of the court.

(e)(3) When service is made pursuant to paragraph (d)(~~3~~4)(C), proof of service ~~shall~~ must include a receipt signed by the addressee or other evidence of delivery to the addressee satisfactory to the court.

(e)(~~3~~4) Failure to ~~make~~ file proof of service does not affect the validity of the service. The court may allow proof of service to be amended.

~~**(f) Waiver of service; Payment of costs for refusing to waive.**~~

~~(f)(1) A plaintiff may request a defendant subject to service under paragraph (d) to waive service of a summons. The request shall be mailed or delivered to the person upon whom service is authorized under paragraph (d). It shall include a copy of the complaint, shall allow the defendant at least 21 days from the date on which the request is sent to return the waiver, or 30 days if addressed to a defendant outside of the United States, and shall be substantially in the form of the Notice of Lawsuit and Request for Waiver of Service of Summons set forth in the Appendix of Forms attached to these rules.~~

~~(f)(2) A defendant who timely returns a waiver is not required to respond to the complaint until 45 days after the date on which the request for waiver of service was mailed or delivered to the defendant, or 60 days after that date if addressed to a defendant outside of the United States.~~

~~(f)(3) A defendant who waives service of a summons does not thereby waive any objection to venue or to the jurisdiction of the court over the defendant.~~

~~(f)(4) If a defendant refuses a request for waiver of service submitted in accordance with this rule, the court shall impose upon the defendant the costs subsequently incurred in effecting service.~~

Advisory Committee Notes

Tab 5

Administrative Office of the Courts

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

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

MEMORANDUM

To: Civil Rules Committee
From: Nancy Sylvester
Date: March 18, 2016
Re: Rule 35 Report

At the February meeting, the committee discussed Rule 35 and how it interrelates with an expert's report under Rule 26. According to Trystan Smith, there are some disputes over whether satisfying the report requirement of Rule 35 also satisfies the expert report requirement of Rule 26(a)(4). The primary dispute, it seems, is over the time frame for delivering the Rule 35 report since there is no deadline. The committee is exploring whether the Utah Supreme Court should adopt language similar to Federal Rule of Civil Procedure 35, which requires that the report be delivered "upon request," or whether the deadline should be simultaneous with the expert's report under Rule 26(a)(4). The committee has asked both the defense and the plaintiffs' bar to weigh in.

Rule 35. Physical and mental examination of persons.

(a) Order for examination. When the mental or physical condition or attribute of a party or of a person in the custody or control of a party is in controversy, the court may order the party to submit to a physical or mental examination by a suitably licensed or certified examiner or to produce for examination the person in the party's custody or control. The order may be made only on motion for good cause shown. All papers related to the motion and notice of any hearing ~~shall~~ must be served on a nonparty to be examined. The order ~~shall~~ must specify the time, place, manner, conditions, and scope of the examination and the person by whom the examination is to be made. The person being examined may record the examination by audio or video means unless the party requesting the examination shows that the recording would unduly interfere with the examination.

(b) Report. The party requesting the examination ~~shall~~ must disclose a detailed written report of the examiner, setting out the examiner's findings, including results of all tests made, diagnoses and conclusions. If the party requesting the examination wishes to call the examiner as an expert witness, the party ~~shall~~ must disclose the examiner as an expert as required by Rule ~~26(a)(3)~~ 26(a)(4).

(c) Sanctions. If a party or a person in the custody or under the legal control of a party fails to obey an order entered under paragraph (a), the court on motion may take any action authorized by Rule ~~37(e)~~ 37(b), except that the failure cannot be treated as contempt of court.

Advisory Committee Notes

Rule 35 has been substantially revised. A medical examination is not a matter of right, but should only be permitted by the trial court upon a showing of good cause. Rule 35 has always provided, and still provides, that the proponent of an examination must demonstrate good cause for the examination. And, as before, the motion and order should detail the specifics of the proposed examination.

The parties and the trial court should refrain from the use of the phrase "independent medical examiner," using instead the neutral appellation "medical examiner," "Rule 35 examiner," or the like.

The ~~C~~committee has determined that the benefits of recording generally outweigh the downsides in a typical case. The amended rule therefore provides that recording shall be permitted as a matter of course unless the person moving for the examination demonstrates the recording would unduly interfere with the examination.

Nothing in the rule requires that the recording be conducted by a professional, and it is not the intent of the committee that this extra cost should be necessary. The committee also recognizes that recording may require the presence of a third party to manage the recording equipment, but this must be done without interference and as unobtrusively as possible.

The former requirement of Rule 35(c) providing for the production of prior reports on other examinees by the examiner was a source of great confusion and controversy. It is the ~~C~~committee's view that this provision is better eliminated, and in the amended rule there is no longer an automatic requirement for the production of prior reports of other examinations. ~~Medical examiners will be treated as other expert~~

~~witnesses are treated, with the required disclosure under Rule 26 and the option of a report or a deposition.~~

A report must be provided for all medical examinations under this rule. If the medical examiner is going to be called as an expert witness at trial, then the designation and disclosures under Rule 26(a)(4) also are required, and the opposing party has the option of requiring, in addition to the Rule 35(b) report, the expert's report or deposition under Rule 26(a)(4)(C).

Tab 6

Summary of December 2015 Amendments
To
Federal Rules of Civil Procedure

Federal Rule	Subject Matter	"Substantive" Change?	Summary of Changes
1	Purpose of Rules	No	Adds "employed by the courts and parties" to purpose statement
4(d)(1)(C)	Waiver of Service	No	Requires service of specific waiver form (appended to rule).
4(m)	Time Limit for Service	Yes	Shortens ordinary service time limit to 90 days; adds real estate condemnation proceedings to list of actions exempted from ordinary time limit
16(b)(1)(B);	Scheduling Conference	??	Eliminates language authorizing telephonic, mail or other form of scheduling conference prerequisite to issuance of scheduling order
16(b)(2)	Scheduling Order	Yes	Allows delay for good cause but shortens deadlines for scheduling order to earlier of 90 days after any defendant served/60 days after any defendant appears (from 120/90)
16(b)(3)(B) (iii)	Scheduling Order	Yes	Expands powers to order disclosure, discovery, *or preservation* of ESI
16(b)(3)(iv)	Scheduling Order	No	Allows scheduling order to include party "snap-back" agreements reached under F.R.E. 502 (deals with attorney-client privilege/work product, and scope of waiver)
26(b)(1)	Scope of Discovery	Yes	Converts "proportionality" from objection available to producing party to prima facie element of "discoverability." (Largely tracks URCP 26(b)(2)); replaces "reasonably calculated to lead. . . ." with "need not be admissible in evidence to be discoverable."
26(b)(2)(C)(iii)	Limitations on Frequency/Extent of Discovery	Yes	Deletes old proportionality provision and requires court to limit discovery if request falls "outside the scope permitted by Rule 26(b)(1)."
26(c)(1)(B)	Protective Orders	Yes	Expressly allows court to allocate

			expenses of authorized discovery in addition to specifying time and place.
26(d)(2)(A)	Early Rule 34 Requests	Yes	Inserts provision allowing parties to issue Rule 34 Requests for Production "[m]ore than 21 days after" service of summons and complaint. (Old rule: generally no discovery allowed until after first Rule 26(f) conference).
26(d)(2)(B)	Early Rule 34 Requests	Yes	Early Rule 34 requests considered served at first Rule 26(f) conference.
26(d)(3)	Sequence of Discovery	Yes	Retains default "any sequence" approach, but instead of old "on motion" trigger, allows exceptions when "the parties stipulate or the court orders otherwise for the parties' and witnesses' convenience and in the interest of justice."
26(f)(3)(C)	Discovery Plan	Yes	Requires that parties' discovery plan address issues relating to preservation of ESI, not just disclosure and discovery.
26(f)(3)(D)	Discovery Plan	??	Mirrors amendment to 16(b)(3)(iv); requires discovery plan to ask court for order under F.R.E. 502 if parties agree on a privilege/work product snap-back procedure.
30(a)(2)	Oral Depositions	Yes	Explicitly requires court to consider Rule 26(b)(1) discoverability standard in deciding whether to permit depositions allowable only with leave of court (i.e., more than ten per "side," redeposition of same deponent, depositions before first Rule 26 conference, deposition of imprisoned deponent).
30(d)(1)	Oral Deposition Duration	No	Conforms rule to new discoverability structure by requiring court to allow additional deposition time "consistent with Rule 26(b)(1) and (2)" rather than "consistent with Rule 26(b)(2)" alone.
31(a)(2)	Deposition by Written Questions	Yes	Conforms "with leave" requirements to approach set forth in 30(a)(2) (i.e., court must consider R.26(b)(1)

			discoverability standard in deciding whether to order "with leave" deposition by written questions).
33(a)(1)	Interrogatories to Parties	Yes	Conforms "with leave" authorization to serve more than 25 written interrogatories as above (i.e., leave "may be granted" if "consistent with Rule 26(b)(1) and (2)."
34(b)(2)(A)	Requests for Production	Yes	Default response time for "early Rule 34 Request" is within 30 days after first Rule 26(f) conference.
34(b)(2)(B)	Requests for Production	Yes	Requires that responding party "state with specificity the grounds for objecting to" a request. Expressly allows responding party to state that it will produce copies of documents/ESI rather than permitting inspection. Production must be completed "no later than the time for inspection specified in the request or another reasonable time specified in the response."
34(b)(2)(C)	Requests for Production	Yes	Objections must state whether responsive materials are being withheld on basis of that objection. Objection to part of request must specify objectionable part and permit inspection of remainder.
37(a)(3)(B)(iv)	Motion to Compel	No	Closes technical loophole. Old rule seemingly allowed motion to compel if party produced documents, by tying motion only to failure "to respond that inspection will be permitted" or actual failure to permit inspection. New rule does not permit motion to compel if party has produced responsive documents.
37(e)	Failure to Preserve ESI	Yes	Significant shift in treatment of ESI preservation obligations (see below for detailed summary)
55	Default; Default Judgment	Maybe	Clarifies/limits court ability to set aside default *judgment* under Rule 60(b) approach to "*final* default judgment;" old rule otherwise identical save for omission of "final."

84	Forms	Yes	All forms abrogated; Forms 5 and 6 moved to Rule 4

Tab 7

Timothy M. Shea
Appellate Court Administrator

Andrea R. Martinez
Clerk of Court

Supreme Court of Utah

450 South State Street
P.O. Box 140210
Salt Lake City, Utah 84114-0210
Appellate Clerks' Office
Telephone 801-578-3900

March 18, 2016

To: Civil Rules Committee

From: Tim Shea

Re: Motion for order to show cause

The Code of Judicial Administration has two rules governing the process for a motion for an order to show cause. The rules are identical, but they cover only the 5th and 6th judicial districts. I believe that this motion should be governed by a rule of procedure rather than a rule of administration. I have used the existing CJA rule as the baseline with some further suggested amendments.

Rule 7A. Motion for order to show cause.

(a) Motion. To obtain an order to show cause for violation of an order or judgment, a party must file a motion for an order to show cause following the procedures of this rule.

(b) Affidavit or declaration. The motion must be accompanied by at least one affidavit made on personal knowledge or declaration under Utah Code Section 78B-5-705 made on personal knowledge showing that the affiant or declarant is competent to testify on the matters set forth. At least one affidavit or declaration must state the title and date of entry of the order or judgment that the moving party seeks to enforce. Collectively, the affidavits or declarations must set forth facts that would be admissible in evidence and that would support a finding that the party has violated the order or judgment.

(c) Order to show cause. The motion must be accompanied by a proposed order to show cause, which must:

(c)(1) state the title and date of entry of the order or judgment that the moving party seeks to enforce;

(c)(2) state the relief sought by the moving party;

(c)(3) state whether the moving party has requested that the nonmoving party be held in contempt and, if that request has been made, state that the penalties for contempt may include, but are not limited to, a fine of up to $1000 and confinement in jail for up to 30 days.

(c)(4) order the nonmoving party to appear personally or through counsel at a specific date, time and place to explain whether the nonmoving party has violated the order or judgment;

(c)(5) state that no written response is required;

(c)(6) state that the hearing is not an evidentiary hearing, but is for the purpose of determining:

(c)(6)(A) whether the nonmoving party denies the claims made by the moving party;

(c)(6)(B) whether an evidentiary hearing is needed;

(c)(6)(C) the issues on which evidence needs to be submitted; and

(c)(6)(D) the estimated length of an evidentiary hearing.

(d) Service of the order. The moving party must have the order, the motion and all affidavits and declarations personally served on the nonmoving party in a manner provided in Rule 4 at least 7 days before the hearing. For good cause the court may order that service be made on the nonmoving party's counsel of record in a manner provided in Rule 5. The court may order less than 7 days' notice of the hearing if:

(d)(1) the motion requests an earlier date; and

(d)(2) it clearly appears from specific facts shown by affidavit or declaration that immediate and irreparable injury, loss, or damage will result to the moving party if the hearing is not held sooner.

(e) First hearing.

(e)(1) At the hearing, the court will determine:

(e)(1)(A)whether the nonmoving party denies the claims made by the moving party;

(e)(1)(B) whether an evidentiary hearing is needed;

(e)(1)(C) the issues on which evidence needs to be submitted; and

(e)(1)(D) the estimated length of an evidentiary hearing.

(e)(2) The court may enter an order regarding any claim that the nonmoving party does not deny. The court may order the parties to file memoranda before the evidentiary hearing. Memoranda must follow the requirements of Rule 7.

(f) Evidentiary hearing. The moving party bears the burden of proof on all claims made in the motion.

(g) Limitations. A motion for an order to show cause may not be used to obtain any order other than an order to show cause. This rule does not apply to an order to show cause issued by the court on its own initiative. A motion for an order to show cause presented to a court commissioner must follow Rule 101.

Tab 8

Administrative Office of the Courts

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

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

MEMORANDUM

To: Civil Rules Committee
From: Nancy Sylvester
Date: February 17, 2016
Re: Rule 7

Brent Johnson brought up a concern about the effect of Rule 7 on pro se litigants. The rule appeared to prejudice those litigants who did not have the benefit of e-filing because it contained references throughout to filing, rather than service. Tim changed the time to respond to the date of service so people have the benefit of the 3-day mailing provision in Rule 6. He believes Rule 7 is the only rule affected.

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

(a) Pleadings. Only these pleadings are allowed:

(a)(1) a complaint;

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

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

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

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

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

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

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

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

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

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

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

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

(c) Name and content of motion.

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

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

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

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

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

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

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

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

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

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

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

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

(e) Name and content of reply memorandum.

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

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

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

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

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

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

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

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

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

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

(g)(1) the motion;

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

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

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

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

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

(j) Orders.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

(p)(5) motion to substitute parties;

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

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

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

Advisory Committee Notes