Agenda

Advisory Committee on Rules of Civil Procedure

November 15, 2017

4:00 to 6:00 p.m.

Scott M. Matheson Courthouse

450 South State Street

Judicial Council Room

Administrative Office of the Courts, Suite N31

Welcome and approval of minutes	Tab 1	Jonathan Hafen, Chair
Comments to Rule 5	Tab 2	Nancy Sylvester, Clayson Quigley
Rule 73. Attorney Fees.	Tab 3	Mark Olson, Charles Stormont, Nancy Sylvester
Logue Subcommittee Update and Recommendation	Tab 4	Judge Kent Holmberg, Nancy Sylvester
Rule 26(a)(5). Pretrial Disclosures.	Tab 5	Judge Kent Holmberg
Rule 24. Intervention.	Tab 6	Leslie Slaugh, Nancy Sylvester
Other business		Jonathan Hafen

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

Meeting Schedule:

November 15, 2017

January 24, 2018

February 28, 2018

March 28, 2018

April 25, 2018

May 23, 2018

June 27, 2018

September 26, 2018

October 24, 2018

November 28, 2018

Tab 1

UTAH SUPREME COURT ADVISORY COMMITTEE ON RULES OF CIVIL PROCEDURE

Meeting Minutes – September 27, 2017

PRESENT: Chair Jonathan Hafen, Judge Andrew Stone, Judge James Blanch, Judge Kent Holmberg, Judge Laura Scott, Judge Kate Toomey, Judge Clay Stucki, Amber Mettler, Dawn Hatamaki, James Hunnicutt, Heather Sneddon, Rod Andreason, Michael Petrogeorge, Lauren DiFrancesco, Timothy Pack, Susan Vogel, Trystan Smith

EXCUSED: Lincoln Davies, Barbara Townsend, Leslie Slaugh, Justin Toth, Paul Stancil

STAFF: Nancy Sylvester, James Ishida

GUESTS: Chief Justice Matthew B. Durrant, Patricia Owen

(1) WELCOME, APPROVAL OF MINUTES

Chair Jonathan Hafen welcomed the committee to the meeting. Chief Justice Matthew B. Durrant thanked the committee members for their service, remarking on the departing members' contributions and the role new members, Judge Clay Stucki, Michael Petrogeorge, Lauren DiFrancesco, Timothy Pack, and Susan Vogel, have with the committee. Chairman Hafen invited all members of the committee to introduce themselves. Judge James Blanch then moved to approve the minutes; Heather Sneddon seconded. The motion passed unanimously.

(2) PRINCIPLES OF RULEMAKING

Chairman Hafen reviewed the committee's Principles of Rulemaking and invited comments and questions from the committee.

(3) UPDATE ON FRCP RULE 37(e). FAILURE TO PRESERVE ESI

Chairman Hafen then provided a brief history on the discussions and debate regarding proposed changes to Rule 37, including the Utah Supreme Court's response to the committee's prior suggestion. After the Utah Supreme Court considered the three proposed options sent by the committee, the Court decided not to make any changes to Rule 37.

(4) COMMENTS TO RULES 6, 26.3, 45

Nancy Sylvester explained the rule change and public comment period process, as well as introduced a new "public discussion period" process available to the committee to use for the purpose of eliciting public comments prior to Utah Supreme Court approval.

RULE 6

Ms. Sylvester presented comments to the rule on timing for unrepresented parties to respond to papers filed with the Court. The committee considered a number of additional changes to proposed Rule 6(d) and 6(e). The committee rested on the following language for Rule 6(d):

> (d) Response time for an unrepresented party. When a party is not represented by an attorney, does not have an electronic filing account, and may or must act within a specified time after the filing of a paper, the period of time within which the party may or must act is counted from the service date and not the filing date of the paper.

Judge Blanch moved to approve the foregoing language; Timothy Pack seconded the motion. The motion was approved unanimously.

James Ishida presented a summary on the background of the prisoner mailbox rule, including the interplay between the prisoner mailbox rule in the Utah Rules of Civil Procedure and Utah Rules of Appellate Procedure. Ms. Sylvester presented comments to the proposed changes to the prisoner mailbox rule. The committee considered the proposed changes and decided to not make any further changes to proposed Rule 6(e). Judge Kate Toomey moved to approve the prisoner mailbox rule as written; Judge Blanch seconded. The committee passed the motion unanimously.

RULES 26.3 AND 45

Chairman Hafen presented on the two comments suggesting consistency edits to the proposed amendments in Rule 26.3 and noted that there were no comments to the proposed changes to Rule 45. Judge Andrew Stone moved to approve both rules without further changes; Judge Toomey seconded the motion. The motion was approved unanimously.

(5) INTRODUCTION OF RULE 73 AMENDMENTS

Chairman Hafen briefly addressed the proposed changes to Rule 73 and sought input from the committee on attorneys who represent defendants in debt collection that could be invited to next month's meeting. Mark Olson will present the plaintiff attorneys' perspective.

(6) ADJOURNMENT

The remaining matters were deferred, and the committee adjourned at 5:50 pm. The next meeting is scheduled for October 25, 2017 at 4:00 pm at the Administrative Office of the Courts, Level 3.

Tab 2

URCP 5

URCP005. Service and filing of pleadings and other papers. Amend.
Provides that certificates of service are not required for papers that are prepared and served by the court. Also provides that the court submitting a paper to the electronic filing service provider is a valid method of service if the person being served has an electronic filing account.

https://www.utcourts.gov/utc/rules-comment/2017/04/20/rules-of-civil-procedure-comment-period-closes-june-4-2017/

Posted by Dallas Young

As long as the court submitting the paper to an electronic filing provider generates the automatic notice of the filing to all counsel of record, this is a fantastic idea and I wish it would have been implemented years ago.

I have had a couple of cases in the last year where something was filed by handing a physical copy to a court clerk, who then scanned and e-filed the document. I've seen judges and pro se litigants do it. Currently, that will not generate electronic notice to counsel of record. And since that's where we all look to keep tabs on what is happening on our files, it's very easy to miss such an event.

So I whole-heartedly support allowing the courts to use an e-filing provider. That should, if I understand correctly, remedy part of that problem.

On a similar note, this same solution should be applied to allow clerks to use an e-filing provider for pro se pleadings. Pro se litigants frequently neglect to serve opposing counsel with filed documents. In that scenario, the opposing counsel won't know about the filing unless s/he fortuitously checks the docket and stumbles onto it. Allowing the clerks to use an e-filing service provider would similarly remedy that problem.

Posted by Alex Leeman

The problem with this rule is that some court orders and decisions do not automatically generate an e-filing notice, depending on how the document is uploaded by the clerk. If court electronically approves an order that is submitted by counsel, the e-filing system sends notice to everyone. However, I find that when the judge writes a memorandum decision or its own order and the clerk then scans and uploads the document to the docket, the e-filing system generally does not send notice to anyone. Sometimes I check in on the dockets for my cases when I am anticipating a decision, and I often find rulings on the docket that have been sitting there for several days unknown to anyone. This amendment to Rule 5 is only a good idea if the e-filing system can be changed (or clerks

can be trained) to ensure that every court decision automatically generates an e-filing notice to all parties.

Posted by Kevin Worthy

If certificates of service are not required for papers that are prepared and served by the court, why should they be required for papers that are prepared and served by counsel of record? What is the basis for requiring attorneys to do it while allowing the courts to leave it undone?

Posted by Daniel Young

I think Courts should be required to follow the same electronic filing rules as the parties. I have had many cases where there has been confusion caused because the Court does not file an order or notice electronically.

Also, I don't understand the reasoning for not requiring the court sign a certificate of service. Once I appeared for a hearing and the opposing party was not there. It turned out that the notice of the hearing was not sent to the opposing attorney and the only way to show that was referencing the certificate of service. If there had been no certificate of service there would not have been a way to show the court's error. A certificate of service may also be critical in determining whether appeal deadlines have been met, etc. Certificates of service are just as necessary for Courts as for the parties. Certificates of service provide a valuable record and courts should be required to certify that documents have been sent to the appropriate parties.

Posted by Tom Seiler

Removing the Court from the certificate of service provision of URCP is a particularly bad idea. Of everyone except unsophisticated Pro Se litigants,the Courts are the most likely to overlook serving one or more of the parties.

Further, the Courts should be required to serve counsel through the efiling system. Whether the Courts are understaffed or the Courts staff are under trained, the times when parties are not served with court filings are nearly always because the Courts fail to serve or the party required to serve is a Pro Se litigant.

Further, the Courts' coris system is often filtered out by spam filters. Because the Courts do not use the efiling system, I check my spam (junk) file a couple of times a day when I am in the office. Also, by the Courts not using efiling, Court notices usually go to one attorney per firm who has made an appearance in a case, excluding the other attorneys who have made an appearance and excluding staff. This is contrary to the malpractice insurers requirement for a two layer calendaring system. It results in some calendaring being missed.

Posted by John Bogart

Currently in the Fourth District there is a practice by some judges of instructing clerks not to include third-parties on service lists. One represents a subpoena recipient, e.g., but the judge directs that no documents be served by filing on you. This practice should be barred. And with this Rule change, the third-party will be deemed to have been served (with orders, motions, etc,) when in fact they have not been served. So the third-party may be under order to act when it has not been served with the order and may have no notice of the order.

I doubt that is consistent with due process.

Posted by Tom Seiler

Earlier I posted that this was a bad idea. This week this was confirmed. In a Sixth District Court case filed in Manti, opposing counsel instructed me to release a Lis Pendens in the case because the case had been dismissed. I carefully reviewed all my emails, even my spam folder, and found no notice from the Court.

I went to the Utah Court Xchange and there was a line item entry of a Notice of Intent to Dismiss, but the Notice itself could not be printed. I found the Notice of Dismissal and was able to print that. There was a certificate of service. I was not listed, nor was the pro se defendant – although the other Defendants' four counsel were listed.

After multiple telephone calls to the Court Clerk's Office, I was able to speak with an assistant Court Clerk. After research, the Assistant Court Clerk confirmed that I had not been sent notice of the intent to dismiss nor of the notice of dismiss. The only solution, according to the Assistant Court Clerk, was to file a Motion to set Aside the Dismissal, with full briefing and my affidavit that I had not received notice , which I did.

All in all, it took up around six hours. If there is a hearing, that will be another three to five hours.

Comment to Clayson Quigley from Maureen Magagna

Can you help me understand how someone would know that a "paper prepared by the court" was served on a pro se person if there is no certificate of servce?

Comment to Judges Stone, Scott, and Blanch from Judge Kara Pettit

hmmm. I think I am missing something. The proposed rule does not seem to have any exceptions for court prepared documents served on nonefilers I was reading it as every court prepared document does not have to have a mailing certificate?

And is there some new system feature being implemented where a court prepared document in CORIS, such as a notice or a ruling, communicates with the efiling systems so the efiling system will generate a confirmation? Hooray if so. Right now as I understand it, the clerks generate a mailing certificate in CORIS, but a Return of Electronic Notification is currently not generated. The only time such a Return of

Electronic Notification is generated is when the court executes an order prepared by counsel in efiling, but not orders or notices or other papers prepared by the court.

But maybe that is all changing soon?

I had a case this week in which I had to set an expedited possession bond hearing and one of the counsel is an efiler but his email is not listed with the Bar, therefore we could not send him electronic notification of the hearing notice because CORIS gets its list of emails for counsel from the Bar and not from efiling. (And he did not have his email on his filing so we had to call him.) So it does not appear that efiling is generating confirmations yet when the court prepares and issues a document.

Nancy's Comments:

The comments above appear to boil down to a single conclusion: certificates of service are still necessary when there are both attorneys and pro se litigants in a case. No matter what our technological capabilities, there are still litigants who do not have access to e-filing and so to make it clear that all parties have been served, a certificate of service should be created when there is a mix of represented and unrepresented parties in a case.

I propose amending paragraph (d) to say the following:

Except in the juvenile court, this paragraph does not apply to papers required to be served under paragraph (b)(5)(B) **when service to all parties is made under paragraph (b)(3)(A).**

The (b)(3)(A) reference is to the paragraph that discusses the court submitting a paper to the electronic filing service provider. What this does is says if all parties are served via e-filing, none will need a certificate of service because it will be obvious who was served. But if even one party is pro se, the certificate of service will be created.

Both Judge Pettit and Maureen Magagna said my proposed language addressed their concerns.

As an aside, the language above may require amendment if the court ever requires e-filing for all litigants.

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

(a) When service is required.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

(b) How service is made.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Advisory Committee Notes

Tab 3

Administrative Office of the Courts

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

Richard H. Schwermer
State Court Administrator
Raymond H. Wahl
Deputy Court Administrator

MEMORANDUM

To: Civil Rules Committee
From: Nancy Sylvester
Date: November 9, 2017
Re: Rule 73 and Attorney Fees

At our September meeting, we introduced the proposal by Mark Olson to amend Rule 73's attorney fee schedule to increase recoverable fees in debt collection cases. That proposal is attached.

At the committee's request, I contacted several attorneys who practice in the area of debt collection defense: Brian Rothschild and Charles Stormont. Charles will join us at the meeting. Brian weighed in with a suggestion that attorney fees that are collectible under the civil rules (as opposed to collectible by contract) could, in no event, exceed the principal amount of the debt upon commencement of the case. This would eliminate the $35 debt and $350 collection fee. Brian said he will send some proposed language to me before our meeting, which I will circulate by email.

Additionally, in reviewing this committee's queue in preparation for this meeting, I noted that Judge Samuel Chiara had contacted me in 2016 about a related issue. He requested that language be added that would allow the court to sua sponte determine the reasonableness of a request for fees.

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Rule 73 and the Fee Schedule

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

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

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

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

HISTORY OF THE FEE SCHEDULE

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

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

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

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

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

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

TIME FOR AN ADJUSTMENT TO THE SCHEDULE

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

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

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

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

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

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

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

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

THE COSTS OF DOING BUSINESS HAVE INCREASED

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

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

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

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

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

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

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

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

HOW THE SCHEDULE SHOULD BE REVISED

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

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

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

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

Rule 73. Attorney fees.

(a) Time in which to claim. 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 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. The motion must:

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

(b)(2) 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 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 will not share the fee 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. The court may sua sponte determine the reasonableness of the request for fees.

(e) Fees claimed in complaint. If a party claims attorney fees under paragraph (f), the complaint 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 in violation of Rule of Professional Conduct 5.4.

(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~~2,000	~~250~~400.00
~~1,500.01~~	~~2,000.00~~	~~325.00~~
2,000.01	2,500.00	~~400~~475.00

Amount of Damages, Exclusive of Costs, Attorney Fees and Post-Judgment Interest, Between	and:	Attorney Fees Allowed
2,500.01	3,000.00	~~475~~550.00
3,000.01	3,500.00	~~550~~625.00
3,500.01	4,000.00	~~625~~700.00
4,000.01	~~4,500.00~~or more	~~700~~775.00
~~4,500.01~~	~~or more~~	~~775.00~~

Advisory Committee Notes

Tab 4

Logue Subcommittee Conclusions

Final Draft

October 31, 2017

Subcommittee Members:

Nancy Sylvester (staff-URCP), Jeff Gray (URCrP), Mark Field (URAP), Jensie Anderson (URCrP), Lori Seppi (URAP), Kent Holmberg (URCP)

Rules at play: Criminal Rule 24(c), Civil Rule 60(b)(2), (c).

Background:

In *Logue v. Court of Appeals*, 2016 UT 44, the Utah Supreme Court stated, "It appears that criminal defendants, like Mr. Logue, who discover new evidence more than ninety days after sentencing must await the conclusion of their appeal before attempting to seek relief based on this evidence, even if it would likely entitle them to a new trial." It then directed the appropriate advisory committee on the rules of procedure to consider revising the rules so that they do not act as a categorical bar to motions for new trials.

The advisory committees for the rules of civil, criminal, and appellate procedure formed a joint subcommittee to consider revising the rules.

Conclusion:

The joint subcommittee has determined that no action should be taken at this time.

Reasoning:

The joint subcommittee considered adopting a provision for the rules of criminal procedure like that laid out in *White v. State*, 795 P.2d 648, and *Baker v. Western Sur. Co.*, 757 P.2d 878, which discuss Utah Rule of Civil Procedure 60(b) motions filed while a case is on appeal. Under Rule 60(b), you have 90 days to set aside a judgment based on newly discovered evidence. If the case is on appeal and it looks like the 60(b) motion is going to be granted, the parties notify the appellate court and the appellate court remands the case for a ruling on the 60(b) motion. In other words, while the appeal is pending, jurisdiction is not all or nothing. The district court retains some jurisdiction under Civil Rule 60.

The subcommittee decided that Utah Rule of Criminal Procedure 24 was the mostly likely place to adopt such a provision. Rule 24(c) currently says:

> (c) A motion for a new trial shall be made not later than 14 days after entry of the sentence, or within such further time as the court may fix before expiration of the time for filing a motion for new trial.

Mark Field and Jeff Gray prepared the first draft of the proposed amendment to rule 24 as follows:

> (c)**(1)** A motion for a new trial shall be made not later than 14 days after entry of the sentence, or within such further time as the court may fix before expiration of the **14-day period** for filing a motion for new trial.
>
> **(c)(2) Provided, however, a motion for new trial based solely on newly discovered material evidence that could not, with reasonable diligence, have been discovered and produced at trial, shall be made within 28 days of discovery, but no later than the date of oral argument if a direct appeal is pending in the case.**

Anticipated procedure: While a defendant's direct appeal is pending, if new evidence is discovered that could not have been discovered by the time of trial through the exercise of reasonable diligence, then the defendant may file a new trial motion with the trial court at any time up to the date of oral argument in the pending appeal.

1. The defendant is not required to seek permission from the appellate court to file the new trial motion. See *White v. State*, 795 P.2d 648, 649-50 (Utah 1990); *Baker v. Western Sur. Co.*, 757 P.2d 878, 880 (Utah Ct. App. 1988).
2. The appeal is not automatically stayed. A party may, however, request a stay.
3. The trial court has jurisdiction to consider the new trial motion. *See White*, 757 P.2d at 649; *Baker*, 757 P.2d at 880.
4. If the motion is denied, the defendant may file a separate appeal challenging the trial court's order. See *Baker*, 757 P.2d at 880.
5. If "the motion has merit, the trial court must so advise the appellate court, and the moving party may then request a remand." *White*, 795 P.2d at 650.
6. If the motion is granted, the State may file a separate appeal challenging the trial court's order. *See* Utah Code Ann. § 77-18a-1(3)(f).

Jensie Anderson and Lori Seppi disagreed with the procedure and timing requirements set forth in the first draft. They said that both parties—not just the state—should be permitted to appeal from the decision on the motion for new trial. They also stated that 28 days was too little time to conduct a newly discovered evidence investigation. They prepared a second draft as follows:

> (c)**(1)** A motion for a new trial shall be made not later than 14 days after entry of the sentence, or within such further time as the court may fix before expiration of the **14-day period** for filing a motion for new trial.
>
> **(c)(2) Provided, however, a motion for new trial based solely on newly discovered material evidence that could not, with reasonable diligence, have been discovered**

and produced at trial, may be made up to the date of oral argument if a direct appeal is pending in the case.

The subcommittee discussed both drafts and came up with a third draft that reached a middle ground as follows:

(c)**(1)** A motion for a new trial shall be made not later than 14 days after entry of the sentence, or within such further time as the court may fix before expiration of the **14-day period** for filing a motion for new trial.

(c)(2) A motion for new trial based solely on newly discovered material evidence that could not, with reasonable diligence, have been discovered and produced at trial, shall be made within 60 days of discovery or within such further time as the court may fix for good cause shown, but no later than up to the date of oral argument, or up to the date of disposition of the appeal if no oral argument is scheduled, if a direct appeal is pending in the case.

However, in discussing the merits of the third draft, the subcommittee turned to how the proposed rule change would affect cases in post-conviction. Mr. Field and Ms. Anderson, who both practice in post-conviction, stated that if the new rule is adopted it likely would create a procedural bar for post-conviction. In other words, the new rule would create a duty on the defendant's appellate counsel to conduct an investigation and file a motion for new trial due to newly discovered evidence.

Ms. Anderson and Ms. Seppi both expressed concern about such a rule change. The rule would permit a criminal defendant to raise newly discovered evidence while he still has a right to counsel. But appellate counsel is ill-equipped to conduct a full newly discovered evidence investigation. Appellate counsel—particularly appellate counsel for the indigent—lack the time, resources, and investigative tools necessary to fully investigate newly discovered evidence.

The subcommittee discussed how other jurisdictions handle newly-discovered evidence. Ms. Anderson explained that Utah is unique from the federal system and other states. In other states, motions for new trial based on newly discovered evidence can be brought at any time before the statute of limitations expires, whether immediately after conviction, during appeal, or in the post-conviction. For example, Wyoming has a 2-year statute of limitations to bring a motion for new trial based upon newly discovered evidence[1]; and Nevada has a tiered system of bringing it (1 year, 5 years with a rebuttable presumption of prejudice to the state, or 10 years in the interest of justice). In Utah, however, we have set up a system where newly discovered evidence is essentially limited to a post-conviction claim in the PCRA.

[1] During its next session, the Wyoming Legislature will consider a bill that removes the statute of limitations completely for a motion for new trial based upon newly discovered evidence.

The subcommittee also discussed the growing possibility that criminal defendants will receive the right to counsel in post-conviction or, at least, that trial courts will be encouraged to appoint counsel in many more post-conviction cases than they currently do. The Judicial Council recently met and voted to support such action. If criminal defendants will have better access to counsel in post-conviction, the argument that a defendant ought to be able to raise newly discovered evidence while he still has a right to counsel on appeal is less compelling.

In the end, Ms. Anderson, Ms. Seppi, Mr. Gray, and Mr. Field voted not to amend the rules to permit motions for newly discovered evidence on appeal. Judge Holmberg abstained.

Tab 5

Administrative Office of the Courts

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

Richard H. Schwermer
State Court Administrator
Raymond H. Wahl
Deputy Court Administrator

MEMORANDUM

To: Civil Rules Committee
From: Nancy Sylvester
Date: November 9, 2017
Re: Rule 26

Judge Kent Holmberg contacted me about an issue with Rule 26. He said that Rule 26 has an apparent hole in it with respect to pretrial disclosures and witnesses. He proposed the following language:

(a)(5)Pretrial disclosures.

(a)(5)(A) A party shall, without waiting for a discovery request, serve on the other parties:

(a)(5)(A)(i) the name and, if not previously provided, the address and telephone number of each witness, unless solely for impeachment, separately identifying witnesses the party will call and witnesses the party may call;

(a)(5)(A)(ii) the name of witnesses whose testimony is expected to be presented by transcript of a deposition and a copy of the transcript with the proposed testimony designated; and

(a)(5)(A)(iii) a copy of each exhibit, including charts, summaries and demonstrative exhibits, unless solely for impeachment, separately identifying those which the party will offer and those which the party may offer.

(a)(5)(B) Disclosure required by paragraph (a)(5) shall be served on the other parties at least 28 days before trial. At least 14 days before trial, a party shall serve and file counter designations of deposition testimony, objections and grounds for the objections to the use of a deposition, to witnesses, and to the admissibility of exhibits. Other than objections under Rules 402 and 403 of the Utah Rules of Evidence, objections not listed are waived unless excused by the court for good cause.

Rule 26. General provisions governing disclosure and discovery.

(a) Disclosure. This rule applies unless changed or supplemented by a rule governing disclosure and discovery in a practice area.

(a)(1) Initial disclosures. Except in cases exempt under paragraph (a)(3), a party shall, without waiting for a discovery request, serve on the other parties:

(a)(1)(A) the name and, if known, the address and telephone number of:

(a)(1)(A)(i) each individual likely to have discoverable information supporting its claims or defenses, unless solely for impeachment, identifying the subjects of the information; and

(a)(1)(A)(ii) each fact witness the party may call in its case-in-chief and, except for an adverse party, a summary of the expected testimony;

(a)(1)(B) a copy of all documents, data compilations, electronically stored information, and tangible things in the possession or control of the party that the party may offer in its case-in-chief, except charts, summaries and demonstrative exhibits that have not yet been prepared and must be disclosed in accordance with paragraph (a)(5);

(a)(1)(C) a computation of any damages claimed and a copy of all discoverable documents or evidentiary material on which such computation is based, including materials about the nature and extent of injuries suffered;

(a)(1)(D) a copy of any agreement under which any person may be liable to satisfy part or all of a judgment or to indemnify or reimburse for payments made to satisfy the judgment; and

(a)(1)(E) a copy of all documents to which a party refers in its pleadings.

(a)(2) Timing of initial disclosures. The disclosures required by paragraph (a)(1) shall be served on the other parties:

(a)(2)(A) by the plaintiff within 14 days after filing of the first answer to the complaint; and

(a)(2)(B) by the defendant within 42 days after filing of the first answer to the complaint or within 28 days after that defendant's appearance, whichever is later.

(a)(3) Exemptions.

(a)(3)(A) Unless otherwise ordered by the court or agreed to by the parties, the requirements of paragraph (a)(1) do not apply to actions:

(a)(3)(A)(i) for judicial review of adjudicative proceedings or rule making proceedings of an administrative agency;

(a)(3)(A)(ii) governed by Rule 65B or Rule 65C;

(a)(3)(A)(iii) to enforce an arbitration award;

(a)(3)(A)(iv) for water rights general adjudication under Title 73, Chapter 4, Determination of Water Rights.

(a)(3)(B) In an exempt action, the matters subject to disclosure under paragraph (a)(1) are subject to discovery under paragraph (b).

(a)(4) Expert testimony.

(a)(4)(A) Disclosure of expert testimony. A party shall, without waiting for a discovery request, serve on the other parties the following information regarding any person who may be used at trial to present evidence under Rule 702 of the Utah Rules of Evidence and who is retained or specially employed to provide expert testimony in the case or whose duties as an employee of the party regularly involve giving expert testimony: (i) the expert's name and

qualifications, including a list of all publications authored within the preceding 10 years, and a list of any other cases in which the expert has testified as an expert at trial or by deposition within the preceding four years, (ii) a brief summary of the opinions to which the witness is expected to testify, (iii) all data and other information that will be relied upon by the witness in forming those opinions, and (iv) the compensation to be paid for the witness's study and testimony.

(a)(4)(B) Limits on expert discovery. Further discovery may be obtained from an expert witness either by deposition or by written report. A deposition shall not exceed four hours and the party taking the deposition shall pay the expert's reasonable hourly fees for attendance at the deposition. A report shall be signed by the expert and shall contain a complete statement of all opinions the expert will offer at trial and the basis and reasons for them. Such an expert may not testify in a party's case-in-chief concerning any matter not fairly disclosed in the report. The party offering the expert shall pay the costs for the report.

(a)(4)(C) Timing for expert discovery.

(a)(4)(C)(i) The party who bears the burden of proof on the issue for which expert testimony is offered shall serve on the other parties the information required by paragraph (a)(4)(A) within seven days after the close of fact discovery. Within seven days thereafter, the party opposing the expert may serve notice electing either a deposition of the expert pursuant to paragraph (a)(4)(B) and Rule 30, or a written report pursuant to paragraph (a)(4)(B). The deposition shall occur, or the report shall be served on the other parties, within 28 days after the election is served on the other parties. If no election is served on the other parties, then no further discovery of the expert shall be permitted.

(a)(4)(C)(ii) The party who does not bear the burden of proof on the issue for which expert testimony is offered shall serve on the other parties the information required by paragraph (a)(4)(A) within seven days after the later of (A) the date on which the election under paragraph (a)(4)(C)(i) is due, or (B) receipt of the written report or the taking of the expert's deposition pursuant to paragraph (a)(4)(C)(i). Within seven days thereafter, the party opposing the expert may serve notice electing either a deposition of the expert pursuant to paragraph (a)(4)(B) and Rule 30, or a written report pursuant to paragraph (a)(4)(B). The deposition shall occur, or the report shall be served on the other parties, within 28 days after the election is served on the other parties. If no election is served on the other parties, then no further discovery of the expert shall be permitted.

(a)(4)(C)(iii) If the party who bears the burden of proof on an issue wants to designate rebuttal expert witnesses it shall serve on the other parties the information required by paragraph (a)(4)(A) within seven days after the later of (A) the date on which the election under paragraph (a)(4)(C)(ii) is due, or (B) receipt of the written report or the taking of the expert's deposition pursuant to paragraph (a)(4)(C)(ii). Within seven days thereafter, the party opposing the expert may serve notice electing either a deposition of the expert pursuant to paragraph (a)(4)(B) and Rule 30, or a written report pursuant to paragraph (a)(4)(B). The deposition shall occur, or the report shall be served on the other parties, within 28 days after the election is served on the other parties. If no election is served on the other parties, then no further discovery of the expert shall be permitted.

(a)(4)(D) Multiparty actions. In multiparty actions, all parties opposing the expert must agree on either a report or a deposition. If all parties opposing the expert do not agree, then further discovery of the expert may be obtained only by deposition pursuant to paragraph (a)(4)(B) and Rule 30.

(a)(4)(E) Summary of non-retained expert testimony. If a party intends to present evidence at trial under Rule 702 of the Utah Rules of Evidence from any person other than an expert witness who is retained or specially employed to provide testimony in the case or a person whose duties as an employee of the party regularly involve giving expert testimony, that party

must serve on the other parties a written summary of the facts and opinions to which the witness is expected to testify in accordance with the deadlines set forth in paragraph (a)(4)(C). A deposition of such a witness may not exceed four hours.

(a)(5) Pretrial disclosures.

(a)(5)(A) A party shall, without waiting for a discovery request, serve on the other parties:

(a)(5)(A)(i) the name and, if not previously provided, the address and telephone number of each witness, unless solely for impeachment, separately identifying witnesses the party will call and witnesses the party may call;

(a)(5)(A)(ii) the name of witnesses whose testimony is expected to be presented by transcript of a deposition and a copy of the transcript with the proposed testimony designated; and

(a)(5)(A)(iii) a copy of each exhibit, including charts, summaries and demonstrative exhibits, unless solely for impeachment, separately identifying those which the party will offer and those which the party may offer.

(a)(5)(B) Disclosure required by paragraph (a)(5) shall be served on the other parties at least 28 days before trial. At least 14 days before trial, a party shall serve and file counter designations of deposition testimony, objections and grounds for the objections to the use of a deposition, to witnesses, and to the admissibility of exhibits. Other than objections under Rules 402 and 403 of the Utah Rules of Evidence, objections not listed are waived unless excused by the court for good cause.

(b) Discovery scope.

(b)(1) In general. Parties may discover any matter, not privileged, which is relevant to the claim or defense of any party if the discovery satisfies the standards of proportionality set forth below. Privileged matters that are not discoverable or admissible in any proceeding of any kind or character include all information in any form provided during and created specifically as part of a request for an investigation, the investigation, findings, or conclusions of peer review, care review, or quality assurance processes of any organization of health care providers as defined in the Utah Health Care Malpractice Act for the purpose of evaluating care provided to reduce morbidity and mortality or to improve the quality of medical care, or for the purpose of peer review of the ethics, competence, or professional conduct of any health care provider.

(b)(2) Proportionality. Discovery and discovery requests are proportional if:

(b)(2)(A) the discovery is reasonable, considering the needs of the case, the amount in controversy, the complexity of the case, the parties' resources, the importance of the issues, and the importance of the discovery in resolving the issues;

(b)(2)(B) the likely benefits of the proposed discovery outweigh the burden or expense;

(b)(2)(C) the discovery is consistent with the overall case management and will further the just, speedy and inexpensive determination of the case;

(b)(2)(D) the discovery is not unreasonably cumulative or duplicative;

(b)(2)(E) the information cannot be obtained from another source that is more convenient, less burdensome or less expensive; and

(b)(2)(F) the party seeking discovery has not had sufficient opportunity to obtain the information by discovery or otherwise, taking into account the parties' relative access to the information.

(b)(3) Burden. The party seeking discovery always has the burden of showing proportionality and relevance. To ensure proportionality, the court may enter orders under Rule 37.

(b)(4) Electronically stored information. A party claiming that electronically stored information is not reasonably accessible because of undue burden or cost shall describe the source of the electronically stored information, the nature and extent of the burden, the nature of the information not provided, and any other information that will enable other parties to evaluate the claim.

(b)(5) Trial preparation materials. A party may obtain otherwise discoverable documents and tangible things prepared in anticipation of litigation or for trial by or for another party or by or for that other party's representative (including the party's attorney, consultant, surety, indemnitor, insurer, or agent) only upon a showing that the party seeking discovery has substantial need of the materials and that the party is unable without undue hardship to obtain substantially equivalent materials by other means. In ordering discovery of such materials, the court shall protect against disclosure of the mental impressions, conclusions, opinions, or legal theories of an attorney or other representative of a party.

(b)(6) Statement previously made about the action. A party may obtain without the showing required in paragraph (b)(5) a statement concerning the action or its subject matter previously made by that party. Upon request, a person not a party may obtain without the required showing a statement about the action or its subject matter previously made by that person. If the request is refused, the person may move for a court order under Rule 37. A statement previously made is (A) a written statement signed or approved by the person making it, or (B) a stenographic, mechanical, electronic, or other recording, or a transcription thereof, which is a substantially verbatim recital of an oral statement by the person making it and contemporaneously recorded.

(b)(7) Trial preparation; experts.

(b)(7)(A) Trial-preparation protection for draft reports or disclosures. Paragraph (b)(5) protects drafts of any report or disclosure required under paragraph (a)(4), regardless of the form in which the draft is recorded.

(b)(7)(B) Trial-preparation protection for communications between a party's attorney and expert witnesses. Paragraph (b)(5) protects communications between the party's attorney and any witness required to provide disclosures under paragraph (a)(4), regardless of the form of the communications, except to the extent that the communications:

(b)(7)(B)(i) relate to compensation for the expert's study or testimony;

(b)(7)(B)(ii) identify facts or data that the party's attorney provided and that the expert considered in forming the opinions to be expressed; or

(b)(7)(B)(iii) identify assumptions that the party's attorney provided and that the expert relied on in forming the opinions to be expressed.

(b)(7)(C) Expert employed only for trial preparation. Ordinarily, a party may not, by interrogatories or otherwise, discover facts known or opinions held by an expert who has been retained or specially employed by another party in anticipation of litigation or to prepare for trial and who is not expected to be called as a witness at trial. A party may do so only:

(b)(7)(C)(i) as provided in Rule 35(b); or

(b)(7)(C)(ii) on showing exceptional circumstances under which it is impracticable for the party to obtain facts or opinions on the same subject by other means.

(b)(8) Claims of privilege or protection of trial preparation materials.

(b)(8)(A) Information withheld. If a party withholds discoverable information by claiming that it is privileged or prepared in anticipation of litigation or for trial, the party shall make the claim expressly and shall describe the nature of the documents, communications, or things not produced in a manner that, without revealing the information itself, will enable other parties to evaluate the claim.

(b)(8)(B) Information produced. If a party produces information that the party claims is privileged or prepared in anticipation of litigation or for trial, the producing party may notify any receiving party of the claim and the basis for it. After being notified, a receiving party must promptly return, sequester, or destroy the specified information and any copies it has and may not use or disclose the information until the claim is resolved. A receiving party may promptly present the information to the court under seal for a determination of the claim. If the receiving party disclosed the information before being notified, it must take reasonable steps to retrieve it. The producing party must preserve the information until the claim is resolved.

(c) Methods, sequence and timing of discovery; tiers; limits on standard discovery; extraordinary discovery.

(c)(1) Methods of discovery. Parties may obtain discovery by one or more of the following methods: depositions upon oral examination or written questions; written interrogatories; production of documents or things or permission to enter upon land or other property, for inspection and other purposes; physical and mental examinations; requests for admission; and subpoenas other than for a court hearing or trial.

(c)(2) Sequence and timing of discovery. Methods of discovery may be used in any sequence, and the fact that a party is conducting discovery shall not delay any other party's discovery. Except for cases exempt under paragraph (a)(3), a party may not seek discovery from any source before that party's initial disclosure obligations are satisfied.

(c)(3) Definition of tiers for standard discovery. Actions claiming $50,000 or less in damages are permitted standard discovery as described for Tier 1. Actions claiming more than $50,000 and less than $300,000 in damages are permitted standard discovery as described for Tier 2. Actions claiming $300,000 or more in damages are permitted standard discovery as described for Tier 3. Absent an accompanying damage claim for more than $300,000, actions claiming non-monetary relief are permitted standard discovery as described for Tier 2.

(c)(4) Definition of damages. For purposes of determining standard discovery, the amount of damages includes the total of all monetary damages sought (without duplication for alternative theories) by all parties in all claims for relief in the original pleadings.

(c)(5) Limits on standard fact discovery. Standard fact discovery per side (plaintiffs collectively, defendants collectively, and third-party defendants collectively) in each tier is as follows. The days to complete standard fact discovery are calculated from the date the first defendant's first disclosure is due and do not include expert discovery under paragraphs(a)(4)(C) and (D).

Tier	Amount of Damages	Total Fact Deposition Hours	Rule 33 Interrogatories including all discrete subparts	Rule 34 Requests for Production	Rule 36 Requests for Admission	Days to Complete Standard Fact Discovery
1	$50,000 or less	3	0	5	5	120
2	More than $50,000 and less than $300,000 or non-monetary relief	15	10	10	10	180

3	$300,000 or more	30	20	20	20	210

(c)(6) Extraordinary discovery. To obtain discovery beyond the limits established in paragraph (c)(5), a party shall file:

(c)(6)(A) before the close of standard discovery and after reaching the limits of standard discovery imposed by these rules, a stipulated statement that extraordinary discovery is necessary and proportional under paragraph (b)(2) and that each party has reviewed and approved a discovery budget; or

(c)(6)(B) before the close of standard discovery and after reaching the limits of standard discovery imposed by these rules, a request for extraordinary discovery under Rule 37(a).

(d) Requirements for disclosure or response; disclosure or response by an organization; failure to disclose; initial and supplemental disclosures and responses.

(d)(1) A party shall make disclosures and responses to discovery based on the information then known or reasonably available to the party.

(d)(2) If the party providing disclosure or responding to discovery is a corporation, partnership, association, or governmental agency, the party shall act through one or more officers, directors, managing agents, or other persons, who shall make disclosures and responses to discovery based on the information then known or reasonably available to the party.

(d)(3) A party is not excused from making disclosures or responses because the party has not completed investigating the case or because the party challenges the sufficiency of another party's disclosures or responses or because another party has not made disclosures or responses.

(d)(4) If a party fails to disclose or to supplement timely a disclosure or response to discovery, that party may not use the undisclosed witness, document or material at any hearing or trial unless the failure is harmless or the party shows good cause for the failure.

(d)(5) If a party learns that a disclosure or response is incomplete or incorrect in some important way, the party must timely serve on the other parties the additional or correct information if it has not been made known to the other parties. The supplemental disclosure or response must state why the additional or correct information was not previously provided.

(e) Signing discovery requests, responses, and objections. Every disclosure, request for discovery, response to a request for discovery and objection to a request for discovery shall be in writing and signed by at least one attorney of record or by the party if the party is not represented. The signature of the attorney or party is a certification under Rule 11. If a request or response is not signed, the receiving party does not need to take any action with respect to it. If a certification is made in violation of the rule, the court, upon motion or upon its own initiative, may take any action authorized by Rule 11 or Rule 37(b).

(f) Filing. Except as required by these rules or ordered by the court, a party shall not file with the court a disclosure, a request for discovery or a response to a request for discovery, but shall file only the certificate of service stating that the disclosure, request for discovery or response has been served on the other parties and the date of service.

Advisory Committee Notes

Legislative Note

Tab 6

Administrative Office of the Courts

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

Richard H. Schwermer
State Court Administrator
Raymond H. Wahl
Deputy Court Administrator

MEMORANDUM

To: Civil Rules Committee
From: Nancy Sylvester
Date: November 9, 2017
Re: Rule 24(d) and Appellate Rule 25A

Leslie Slaugh contacted me on behalf of one of his colleagues about amending Utah R. Civ. P. 24(d) to be consistent with Utah R. App. P. 25A(a)(4). Rule 24(d) (Intervention) of the Utah Rules of Civil Procedure states:

(d) Constitutionality of statutes and ordinances.

(d)(1) If a party challenges the constitutionality of a statute in an action in which the Attorney General has not appeared, the party raising the question of constitutionality shall notify the Attorney General of such fact. The court shall permit the state to be heard upon timely application.

Appellate rule 25A(a)(4), which deals with the same subject of intervention to challenge the constitutionality of a statute, states:

(a)(4) Every party must serve its brief on the Attorney General by email or mail at the following address and must file proof of service with the court.

Email
notices@agutah.gov
Mail
Office of the Utah Attorney General
Attn: Utah Solicitor General
320 Utah State Capitol
P.O. Box 142320
Salt Lake City, Utah 84114-2320

Leslie noted some pros and cons:

Pros: The website for the Utah Attorney General gives three different addresses. He suspects the AG may prefer that the notice go directly to a certain department. Specifying an address would be helpful to both sides.

> Cons: The appellate rule technically deals with where to send a brief, so it is not exactly analogous to the Civil Procedure rule which requires giving notice of a constitutional challenge to a statute. And Rule 24(d)(3) requires notice to a "county or municipal attorney" of any constitutional challenge to a county or municipal ordinance, and it would be unworkable to also give the addresses for each of those. Where the rule can't give all applicable addresses, it [may make] sense to omit all addresses.

I have contacted the Attorney General's Office and the Appellate Rules Committee for their feedback on this rule proposal and will update the committee with those perspectives when I have them.

Incidentally, in drafting some proposed language, I came across an old draft of Tim Shea's from September 2015. There was apparently a proposal to create a new Appellate Rule 23D at some point and this language was intended to mirror that. I have included both his draft and the draft I created to incorporate Rule 25A(a)(4)'s language. Tim's draft does seem to contain some improved language generally, so the committee should consider both in this discussion.

Rule 24. Intervention.

(a) Intervention of right. Upon timely application anyone shall be permitted to intervene in an action: (1) when a statute confers an unconditional right to intervene; or (2) when the applicant claims an interest relating to the property or transaction which is the subject of the action and he is so situated that the disposition of the action may as a practical matter impair or impede his ability to protect that interest, unless the applicant's interest is adequately represented by existing parties.

(b) Permissive intervention. Upon timely application anyone may be permitted to intervene in an action: (1) when a statute confers a conditional right to intervene; or (2) when an applicant's claim or defense and the main action have a question of law or fact in common. When a party to an action relies for ground of claim or defense upon any statute or executive order administered by a governmental officer or agency or upon any regulation, order, requirement, or agreement issued or made pursuant to the statute or executive order, the officer or agency upon timely application may be permitted to intervene in the action. In exercising its discretion the court shall consider whether the intervention will unduly delay or prejudice the adjudication of the rights of the original parties.

(c) Procedure. A person desiring to intervene shall serve a motion to intervene upon the parties as provided in Rule 5. The motions shall state the grounds therefor and shall be accompanied by a pleading setting forth the claim or defense for which intervention is sought.

(d) Constitutionality of statutes and ordinances.

(d)(1) If a party challenges the constitutionality of a statute in an action in which the Attorney General has not appeared, the party raising the question of constitutionality shall notify the Attorney General of such fact by email or mail at the following address and must file proof of service with the court:

Email

notices@agutah.gov

Mail

Office of the Utah Attorney General

Attn: Utah Solicitor General

320 Utah State Capitol

P.O. Box 142320

Salt Lake City, Utah 84114-2320

The court shall permit the state to be heard upon timely application.

(d)(2) If a party challenges the constitutionality of a county or municipal ordinance in an action in which the county or municipal attorney has not appeared, the party raising the question of constitutionality shall notify the county or municipal attorney of such fact. The court shall permit the county or municipality to be heard upon timely application.

(d)(3) Failure of a party to provide notice as required by this rule is not a waiver of any constitutional challenge otherwise timely asserted.

Rule 24. Intervention.

(a) Intervention of right. Upon timely ~~application~~ motion the court must permit anyone ~~shall be permitted~~ to intervene ~~in an action~~ who:

(a)(1) ~~when a statute confers~~ is given an unconditional right to intervene by statute or rule; or

(a)(2) ~~when the applicant~~ claims an interest relating to ~~the property or transaction which is~~ the subject of the action and ~~he is so situated that the disposition of the action may as a practical matter impair or impede his ability to protect that interest, unless~~ the ~~applicant's~~ moving party's interest is not adequately represented by existing parties.

(b) Permissive intervention. Upon timely ~~application~~ motion the court may permit anyone ~~may be permitted~~ to intervene ~~in an action~~ who:

(b)(1) ~~when a statute confers~~ is given a conditional right to intervene by statute or rule; or

(b)(2) ~~when an applicant's~~ has a claim or defense ~~and~~ that shares with the main action ~~have~~ a common question of law or fact ~~in common. When~~;

(b)(3) is a government officer or agency and a party's ~~to an action relies for ground of~~ claim or defense ~~upon any~~ is based on a statute or executive order administered by ~~a~~ the governmen~~al~~ officer or agency or ~~up~~on a~~ny~~ regulation, order, requirement, or agreement ~~issued or~~ made ~~pursuant to~~ under the statute or executive order~~, the officer or agency upon timely application may be permitted to intervene in the action~~. ~~In exercising its discretion the court shall consider whether the intervention will unduly delay or prejudice the adjudication of the rights of the original parties.~~

(c) Procedure. A person ~~desiring to intervene shall serve~~ must file a motion to intervene and serve it ~~up~~on the parties as provided in Rule 5. The motion~~s shall~~ must state the grounds ~~therefor and shall~~ for intervention, the moving party's interest in the subject of the action, and the reason why that interest is not adequately represented by the existing parties. The motion must be accompanied by a pleading setting forth the moving party's claim or defense ~~for which intervention is sought~~. In exercising its discretion the court will consider whether the intervention will unduly delay the action or prejudice the existing parties' rights.

(d) Constitutionality of statutes and ordinances; notice to attorney general or county or municipal attorney; intervention.

(d)(1) If a party ~~challenges~~ files a pleading, written motion, or other paper drawing into question the constitutionality of a statute in an action in which the ~~A~~attorney ~~G~~general has not appeared, the party ~~raising the question of constitutionality shall notify~~ must promptly serve the ~~A~~attorney ~~G~~general ~~of such fact~~ with a statement of the question and the paper in which it is raised. ~~The court shall permit the state to be heard upon timely application.~~

(d)(2) If a party ~~challenges~~ files a pleading, written motion, or other paper drawing into question the constitutionality of a county or municipal ordinance in an action in which the county or municipal attorney has not appeared, the party ~~raising the question of constitutionality shall notify~~ must promptly serve the county or municipal attorney ~~of such fact~~ with a statement of the question and the paper in

which it is raised. ~~The court shall permit the county or municipality to be heard upon timely application.~~

(d)(3) The attorney general and county or municipal attorney have the right to intervene by filing notice of intervention no later than 14 days after receipt of the party's question and the paper in which it is raised or after the court's request, whichever is later. The attorney general or county or municipal attorney must file a response to the paper raising the question no later than 28 days after filing the notice of intervention.

(d)(4) Unless the record shows that the party has notified the attorney general or county or municipal attorney, the court will require notice before deciding the issue. Before the time of the attorney general or county or municipal attorney to file a response expires, the court may enter a decision rejecting the constitutional challenge, but may not enter a decision holding the statute or ordinance unconstitutional.

~~(d)(3)~~ (d)(5) Failure of a party to provide notice as required by this rule is not a waiver of any constitutional challenge otherwise timely asserted, but if a party fails to provide notice, the court may vacate its decision on motion by a party or intervenor or on its initiative.