Agenda

Advisory Committee on Rules of Civil Procedure

May 26, 2021

4:00 to 6:00 p.m.

Via Webex

Welcome and approval of minutes	Tab 1	Jonathan Hafen, Chair
Legislative standing agenda item --		Jonathan Hafen, Nancy Sylvester
Rule 62 • Proposed updates to rule	Tab 2	Troy Booher
Criminal restitution and State v. Billings • Update from subcommittee	Tab 3	Brooke McKnight
Rule 37 • Proposal from Family Law Procedures Subcommittee to delete order requirement	Tab 4	Jim Hunnicutt, Judge Kent Holmberg
Rule 5 • Certificates of service	Tab 5	Trevor Lee
Rule 108 • Updates from Family Law Procedures Subcommittee	Tab 6	Judge Holmberg, Jim Hunnicutt
Consent agenda --		
Pipeline items: • Small Claims Rules (Judge McCullagh): June • Rule 45 and objections (Jen Tomchak): June • Rule 12 and counterclaims in evictions (Susan Vogel, Judge Parker) • Expungements (Salt Lake County): Subcommittee created with members of Criminal Rules Committee • Trial date setting (family law-Judge Holmberg, Jim Hunnicutt) • Expedited Procedures Rule (Nancy Sylvester, Susan Vogel, Leslie Slaugh) • Federal Rule 30 amendments (Judge Holmberg) • Federal Rule 41 amendments (Judge Mettler and Judge Jones)		---

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

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

Tab 1

UTAH SUPREME COURT ADVISORY COMMITTEE
ON RULES OF CIVIL PROCEDURE

Summary Minutes – April 28, 2021

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

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

Bridget Koza, Guest	**X**		
Nicole Salazar-Hall, Guest	**X**		
Brent Salazar-Hall, Guest	**X**		

(1) APPROVAL OF MINUTES

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

(2) ICWA AND RULE 24

Bridget Koza, Court Improvement Program Director, briefly explained the history of the rules governing juvenile court proceedings involving the Indian Child Welfare Act, and presented a proposed amendment to Rule 24 to allow for intervention by the child's Tribe in certain welfare proceedings. Ms. Koza clarified that the proposed rule would most likely apply in adoption or guardianship proceedings in the district court.

Judge Stone suggested that the title be simplified to "Intervention" as the concepts fall within the scope of the intervention rule. Judge Holmberg expressed support for the amendment, indicating that the district courts have worked diligently to coordinate with the appropriate Tribes to establish heritage in these proceedings. Judge Holmberg also noted that a statewide committee includes representatives from the Tribes, which have considered comparable language. Ms. Sylvester also noted that a comparable juvenile rule was previously amended to include similar language, with approval by the Supreme Court.

Dean Adler suggested that subsections 2D, 2E, and 3 be revised to include notice to other parties in addition to the Court. Ms. Koza noted that the forms committee has approved a form that includes notice to the parties. Judge Stone suggested that, alternatively, "to the Court" could be deleted. Judge Stone also recommended that the issue be flagged in presentation to the Supreme Court, so there is consistency with the juvenile rule. Mr. Andreason proposed additional linguistic revisions for clarity.

At the conclusion of discussion, Mr. Hafen called for the motion. Dean Alder moved to send the proposed amendment to the Supreme Court; Judge Stucki second. The motion passed unanimously. The proposed amendment, which is attached as Exhibit A, will be sent to the Supreme Court for consideration.

(3) FAMILY LAW AMENDMENTS

Brent Salazar-Hall and Nicole Salazar-Hall presented the comments to the proposed changes to the family law amendments. Mr. Hall indicated that the committee received less comments than

expected, and that it has incorporated a few changes to address those comments. The following public comments were discussed:

The Subcommittee received favorable comments from a number of experienced family law practitioners who supported the amendments.

The Subcommittee received a comment on the 14-day period to supplement disclosures. The Subcommittee indicates that the intent of the rule change is to improve the efficiency of the process for the majority of family law cases, which typically are not document intensive. No change is recommended in response to the comment.

The Subcommittee also received a comment regarding the 90-day discovery period in a domestic relations action. The Subcommittee indicates that a large majority of cases do not require extensive discovery, and that expanded discovery is available in more complex cases. The 90-day baseline is intended to prevent parties from delaying matters, which can occur when the rules allow for a lengthy mandatory discovery period.

The Subcommittee received a comment regarding the 4-hour deposition limit in the proposed rule change, questioning whether expert discovery depositions would be included within the limit. The Subcommittee's position is that expert discovery is separate, and therefore, they recommend no change.

With regard to Rule 100A, the Subcommittee received feedback regarding the mediation requirement. The Subcommittee has proposed minor revisions to clarify that a delay in mediating will not be a basis to delay setting a trial date. Judge Scott expressed support for the change, indicating that parties are often more likely to pursue meaningful mediation when a trial date has been set. Judge Stone indicated that he prefers that the parties complete mediation before setting the trial date so that trial dates are not unnecessarily blocked off on the docket. Judge Blanch indicated that he views the language as leaving the trial setting to the discretion of the trial judge. Judge Blanch suggested that the language be revised to indicate that a failure to mediate should not be a basis to "request a delay" in setting a trial date. Several Committee members expressed support for that change.

The Subcommittee received comments with respect to the use of temporary motions. The Subcommittee believes the comment was well-taken and struck the language in response to this comment.

The Subcommittee received additional comments from the public and a commissioner regarding the use of a tiered discovery process, with the commentators stating that attorneys should have the ability establish the case management deadlines on a case-by-case basis. The Subcommittee considered the comments but views this as a philosophical dispute that would be beyond the scope of the proposed rule changes. The Subcommittee further believes the proposed

amendments are consistent with recent audit findings and legislative guidance, which support a faster disposition of cases. Accordingly, the Subcommittee is not recommending any changes in response to these comments. Ms. Salazar-Hall also noted that parties always have an option to delay filing their petition for divorce if they are intimidated by the deadlines, as litigants can do much of their investigative work prior to filing. Susan Vogel commented that pro se litigants frequently express frustration by the notice of event due dates, as they feel that cases take a long time and do not understand disclosure requirements. Mr. Hall also noted that children are also affected by the length of the proceedings, as many guardian ad litem attorneys have noted.

With respect to Rule 10, the Subcommittee received comments regarding use of children's initials in pleadings from a commissioner and an attorney in the Office of Recovery Services, which was viewed as potentially confusing and problematic. The Subcommittee has revised this portion of the proposed rule to address these comments. Jim Hunnicutt suggested that language be revised to use the term "Track" instead of Tier, to avoid confusion with the broader discovery rules.

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

(4) RULE 26 COMMENTS

Mr. Andreason presented the public comments to the proposed changes to Rule 26, noting that most comments were supportive of the amendments.

The Committee received a comment regarding the pre-trial disclosure of deposition transcripts and concerns about privacy issues. The working group believes that this concern can be addressed by the existing rules, which allows for classification of records as private. Additional discussion was held as to what information can reasonably obtained through the public docket, with Ms. Vogel raising concerns as to the information available through mycase. Paul Barron noted that parties do have the right to ask the Court to classify records as private under the existing rules. Brooke McKnight indicated that most citations would already be classified as private. Lauren DiFrancesco suggested that the Committee may want to consider a standing protective order similar to that used in federal practice in order to reduce confidentiality disputes.

Judge Stone suggested that the language be revised to require parties to file their witness lists, but only serve deposition designations. Judge Holmberg expressed support for this approach, as deposition testimony typically only becomes at issue when the parties dispute the admissibility of certain deposition excerpts. Judge Holmberg also expressed concern regarding the need to balance the use of protective orders against the public's right to access under the Open Courts Clause, and the need to ensure that protective orders are used thoughtfully by litigants.

In order to address the confidentiality issue, the proposed language was revised to provide that the names of trial witnesses (whether presented live or by deposition) will be filed, while designations of deposition testimony will be served.

The Committee also received a series of comments from a practitioner regarding the use of rebuttal experts in a party's case-in-chief. The working group proposes that the language be modified to allow the judge to consider precluding a rebuttal expert from testifying in a party's case-in-chief, affording the trial judge the discretion to control order of proof and curb discovery misconduct.

The Committee also received a comment regarding a potential ambiguity in the language pertaining to filing and service of disclosures 28 days before trial. Mr. Andreason recommended minor stylistic changes to address this comment.

Finally, the Committee received a comment regarding the production of expert materials and models at the time of designation, instead of at the time of report or deposition. The Comment appears to be a request for an additional rule change, as the most recent proposed changes did not address this issue. Judge Holmberg raised a question as to how the rule is being used in practice, with practitioners on the Committee noting some variations as to how the rule is being implemented by practitioners.

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

(5) RULE 37

Judge Holmberg presented the feedback received from judges regarding the use of proposed orders on discovery motions. The working group received a number of responses, with most judges favoring the submission of a proposed order. Those criticizing the use proposed orders indicated that the use of proposed orders unnecessarily clogs the docket.

Ms. Vogel commented that the use of proposed order is inconsistent with what the courts customarily tell pro se litigants, which is to file a proposed order after the motion has been submitted. Judge Stone suggested that the order be filed as an attachment to the statement of discovery issues, as it assists the Court in ascertaining what the parties are asking for in their motion. Judge Blanch commented that the Rule 37 process is unique as it was intended to encourage the parties to be more reasonable in preparing a draft order, with the understanding that the judge would select one of the parties' competing submissions. Judge Blanch also noted that the process is often confusing to the clerks, as this is the only type of motion addressed in this manner.

Further discussion on the issue was deferred until the next meeting.

(6) ADJOURNMENT

The remaining agenda items were postponed until next month. The meeting adjourned at 6:02 p.m.

Tab 2

Rule 62 Proposal:
1. Extends the automatic stay from 14 days to 28 days to provide time to get a stay under rule 62. Currently, theopposing party has 14 days to respond to a motion, so you cannot get a stay within 14 days. The federal rule provides fora 30-day automatic stay.

2. Includes orders to pay money along with judgments because orders to pay money are enforced like a judgmentunder rule 7(i)(8). If an order to pay money can be enforced like a judgment, rule 62 should provide an opportunity to geta stay.

3. Deletes the "supersedeas" part for the bond to make clear that bonds are available for post-trial motions or othercircumstances. It also makes more clear the option of getting a personal bond and makes it easier for the court to orderother security (no more good cause needed, just the court's deciding security other than a bond is the best option)because commercial bonds are unavailable for amounts under $100k.
The current rule also implies that one cannot get astay with a bond until a notice of appeal is filed, which does not make much sense.

4. Combines the discretion to enter a stay for a judgment under 54(b) and during post-trial motions, and adds to thestays a court has discretion to enter (i) when a Rule 73 motion is pending, (ii) an order to pay money, (iii) and a temporarystay while the court considers a rule 62 motion to approve a bond amount.

5. Makes clear that a court can stay an injunction while one seeks an appeal under rule 5, not just once the appeal isallowed, which can take months.

6. Allows either party to request a hearing within 5 days – not just the creditor.
(This may be less necessary is courts know they can enter temporary stays while they consider a rule 62 motion, which typically takes longer than 28 days,particularly because our rules do not have a mechanism for expedited briefing and rulings.)

7. Otherwise, a few suggestions to streamline the language.

Rule 62. Stay of proceedings to enforce a judgment or order.

(a) Delay in execution. No execution or other writ to enforce a judgment or an order to pay money under Rule 7(j)(8) may issue until the expiration of ~~14~~ 28 days after entry of the judgment or order, unless the court in its discretion otherwise directs.

(b) Stay ~~on motion for new trial or for judgment~~by bond or other security; duration of stay. A party may obtain a stay of the enforcement of a judgment or order to pay money by providing a bond or other security, unless a stay is otherwise prohibited by law or these rules.

(b)(1) The stay takes effect when the court approves the bond or other security and remains in effect for the time specified in the order that approves the bond or other security.~~In its discretion and on such conditions for the security of the adverse party as are proper, the court may stay the execution of, or any proceedings to enforce, a judgment~~

(b)(2) In its discretion and on such conditions for the security of the adverse party as are proper, the court may stay:

(b)(2)(A) a judgment entered pursuant to Rule 54(b) until the entry of a subsequent judgment under Rule 58A;

(b)(2)(B) an order to pay money under Rule 7(j)(8) until the entry of a judgment under Rule 58A;

(b)(2)(C) a judgment until resolution of any motion made pursuant to Rule 50(b), Rule 52(b), Rule 59, Rule 60, or Rule 73; and

(b)(2)(D) a judgment until resolution of a motion made under this rule. ~~pending the disposition of a motion for a new trial or to alter or amend a judgment made pursuant to Rule 59, or of a motion for relief from a judgment or order made pursuant to Rule 60, or of a motion for judgment in accordance with a motion for a directed verdict made pursuant to Rule 50, or of a motion for amendment to the findings or for additional findings made pursuant to Rule 52(b).~~

(c) Injunction pending appeal. When a party seeks an appeal from an interlocutory order, or takes an appeal ~~is taken from an interlocutory order or final~~a judgment, granting, dissolving, or denying an injunction, the court in its discretion may suspend, modify, restore, or grant an injunction during the pendency of ~~the appeal~~appellate proceedings upon such conditions ~~as it considers proper~~ for the security of the rights of the adverse party.

~~**(d) Stay upon appeal.** When an appeal is taken, the appellant by giving a supersedeas bond may obtain a stay, unless such a stay is otherwise prohibited by law or these rules. The bond may be given at or after the time of filing the notice of appeal. The stay is effective when the supersedeas bond is approved by the court.~~

(d~~e~~) Stay in favor of the ~~state~~government, or agency thereof. When ~~an appeal is taken~~a stay is sought by the United States, the state of Utah, or an officer or agency of either, or by direction of any department of either, ~~and the operation or enforcement of the judgment is stayed,~~ the court shall enter a stay

without requiring a ~~no~~ bond, obligation, or other security ~~shall be required from the appellant~~.

(e~~f~~) Stay in quo warranto proceedings. Where the defendant is adjudged guilty of usurping, intruding into or unlawfully holding public office, civil or military, within this state, the execution of the judgment shall not be stayed on an appeal.

(f~~g~~) Power of appellate court not limited. The provisions in this rule do not limit any power of an appellate court or of a judge or justice thereof ~~to stay proceedings or to suspend, modify, restore, or grant an injunction, or extraordinary relief or to make any order appropriate to preserve the status quo or the effectiveness of the judgment subsequently to be entered~~.

~~**(h) Stay of judgment upon multiple claims.** When a court has ordered a final judgment on some but not all of the claims presented in the action under the conditions stated in Rule 54(b), the court may stay enforcement of that judgment until the entering of a subsequent judgment or judgments and may prescribe such conditions as are necessary to secure the benefit thereof to the party in whose favor the judgment is entered.~~

(h~~i~~) Form of ~~supersedeas bond~~bond; deposit in lieu of bond; ~~waiver of~~stipulation on ~~bond~~security; jurisdiction over sureties to be set forth in undertaking.

(h~~i~~)(1) A ~~supersedeas~~ bond given under Subdivision (b~~d~~) may be either a commercial bond having a surety authorized to transact insurance business under Title 31A, or a personal bond having one or more sureties who are residents of Utah having a collective net worth of at least twice the amount of the bond, exclusive of property exempt from execution. Sureties on personal bonds shall make and file a~~n affidavit~~ declaration setting forth in reasonable detail the assets and liabilities of the surety.

(h~~i~~)(2) ~~Upon motion and good cause shown, the~~The court may permit a deposit of money in court or other security to be given in lieu of giving a ~~supersedeas~~ bond~~. under Subdivision (d).~~

(h~~i~~)(3) The parties may by written stipulation ~~waive the requirement of giving a supersedeas bond under Subdivision (d) or~~ agree to ~~an~~ the ~~alternate~~ form and amount of security.

(h~~i~~)(4) A ~~supersedeas~~ bond ~~given pursuant to Subdivision (d)~~ shall provide that each surety submits to the jurisdiction of the court and irrevocably appoints the clerk of the court as the surety's agent upon whom any papers affecting the surety's liability on the bond may be served, and that the surety's liability may be enforced on motion and upon such notice as the court may require without the necessity of an independent action.

(i~~j~~) Amount of ~~supersedeas~~ bond or other security.

(i~~j~~)(1) Except as provided in subsection (i~~j~~)(2), a court shall set the ~~supersedeas~~ bond or other security in an amount that adequately protects the ~~judgment creditor~~adverse party against loss or damage occasioned by the ~~appeal~~ stay and assures payment ~~in the event the judgment is affirmed~~after the

stay ends. In setting the amount, the court may consider any relevant factor, including:

(ij)(1)(A) the ~~judgment~~ debtor's ability to pay the judgment or order to pay money;

(ij)(1)(B) the existence and value of other security;

(ij)(1)(C) the ~~judgment~~ debtor's opportunity to dissipate assets;

(ij)(1)(D) the ~~judgment~~ debtor's likelihood of success on appeal; and

(ij)(1)(E) the respective harm to the parties from setting a higher or lower amount.

(ij)(2) Notwithstanding subsection (ij)(1):

(ij)(2)(A) the presumptive amount of a bond or other security for compensatory damages is the amount of the compensatory damages plus costs and attorney fees, as applicable, plus 3 years of interest at the applicable interest rate;

(ij)(2)(B) the bond or other security for compensatory damages shall not exceed $25 million in an action by plaintiffs certified as a class under Rule 23 or in an action by multiple plaintiffs in which compensatory damages are not proved for each plaintiff individually; and

(ij)(2)(C) no bond or other security shall be required for punitive damages.

(ij)(3) If the court permits a bond or other security that is less than the presumptive amount ~~of compensatory damages~~in subsection (i)(2)(A), the court may ~~also~~ enter such orders as are necessary to protect the ~~judgment creditor during the appeal~~adverse party during the stay.

(ij)(4) If the court finds that the ~~judgment debtor~~party seeking the stay has violated an order or has otherwise dissipated assets, the court may set the amount of the bond or other security ~~under subsection (j)(1)~~ without regard to the presumptive amount under subsection (i)(1) and limits in subsection (ij)(2).

(jk) Objecting to sufficiency or amount of security. Any party whose judgment or order to pay money is stayed or sought to be stayed pursuant to Subdivision (bd) may object to the sufficiency of the sureties on ~~the~~ a ~~supersedeas~~ bond or the amount thereof, or to the sufficiency or amount of other security given to stay the judgment by filing and giving notice of such objection. ~~The party so objecting~~Either party shall be entitled to a hearing ~~thereon~~ on the objection upon five days notice or such shorter time as the court may order. The burden of justifying the sufficiency of the sureties or other security and the amount of the bond or other security, shall be borne by the party seeking the stay, unless the objecting party seeks a bond or other security in an amount greater than the presumed ~~limits~~ amount ~~of this rule~~in subsection (i)(2)(A). The fact that a ~~supersedeas~~ bond, its surety or other security is generally permitted under this rule shall not be conclusive as to its sufficiency or amount.

Rule 62. Stay of proceedings to enforce a judgment or order.

(a) Delay in execution. No execution or other writ to enforce a judgment or an order to pay money under Rule 7(j)(8) may issue until the expiration of 28 days after entry of the judgment or order, unless the court in its discretion otherwise directs.

(b) Stay by bond or other security; duration of stay. A party may obtain a stay of the enforcement of a judgment or order to pay money by providing a bond or other security, unless a stay is otherwise prohibited by law or these rules.

(b)(1) The stay takes effect when the court approves the bond or other security and remains in effect for the time specified in the order that approves the bond or other security.

(b)(2) In its discretion and on such conditions for the security of the adverse party as are proper, the court may stay:

(b)(2)(A) a judgment entered pursuant to Rule 54(b) until the entry of a subsequent judgment under Rule 58A;

(b)(2)(B) an order to pay money under Rule 7(j)(8) until the entry of a judgment under Rule 58A;

(b)(2)(C) a judgment until resolution of any motion made pursuant to Rule 50(b), Rule 52(b), Rule 59, Rule 60, or Rule 73; and

(b)(2)(D) a judgment until resolution of a motion made under this rule.

(c) Injunction pending appeal. When a party seeks an appeal from an interlocutory order, or takes an appeal from a judgment, granting, dissolving, or denying an injunction, the court in its discretion may suspend, modify, restore, or grant an injunction during the pendency of appellate proceedings upon such conditions for the security of the rights of the adverse party.

(d) Stay in favor of the government, or agency thereof. When a stay is sought by the United States, the state of Utah, or an officer or agency of either, or by direction of any department of either, the court shall enter a stay without requiring a bond, obligation, or other security.

(e) Stay in quo warranto proceedings. Where the defendant is adjudged guilty of usurping, intruding into or unlawfully holding public office, civil or military, within this state, the execution of the judgment shall not be stayed on an appeal.

(f) Power of appellate court not limited. The provisions in this rule do not limit any power of an appellate court or of a judge or justice thereof.

(h) Form of bond; deposit in lieu of bond; stipulation on security; jurisdiction over sureties to be set forth in undertaking.

(h)(1) A bond given under Subdivision (b) may be either a commercial bond having a surety authorized to transact insurance business under Title 31A, or a personal bond having one or more sureties who are residents of Utah having a collective net worth of at least twice the amount of the bond, exclusive of property exempt from execution. Sureties on personal bonds shall make and file a declaration setting forth in reasonable detail the assets and liabilities of the surety.

(h)(2) The court may permit a deposit of money in court or other security to be given in lieu of giving a bond.

(h)(3) The parties may by written stipulation agree to the form and amount of security.

(h)(4) A bond shall provide that each surety submits to the jurisdiction of the court and irrevocably appoints the clerk of the court as the surety's agent upon whom any papers affecting the surety's liability on the bond may be served, and that the surety's liability may be enforced on motion and upon such notice as the court may require without the necessity of an independent action.

(i) Amount of bond or other security.

(i)(1) Except as provided in subsection (i)(2), a court shall set the bond or other security in an amount that adequately protects the adverse party against loss or damage occasioned by the stay and assures payment after the stay ends. In setting the amount, the court may consider any relevant factor, including:

(i)(1)(A) the debtor's ability to pay the judgment or order to pay money;

(i)(1)(B) the existence and value of other security;

(i)(1)(C) the debtor's opportunity to dissipate assets;

(i)(1)(D) the debtor's likelihood of success on appeal; and

(i)(1)(E) the respective harm to the parties from setting a higher or lower amount.

(i)(2) Notwithstanding subsection (i)(1):

(i)(2)(A) the presumptive amount of a bond or other security for compensatory damages is the amount of the compensatory damages plus costs and attorney fees, as applicable, plus 3 years of interest at the applicable interest rate;

(i)(2)(B) the bond or other security for compensatory damages shall not exceed $25 million in an action by plaintiffs certified as a class under Rule 23 or in an action by multiple plaintiffs in which compensatory damages are not proved for each plaintiff individually; and

(i)(2)(C) no bond or other security shall be required for punitive damages.

(i)(3) If the court permits a bond or other security that is less than the presumptive amount in subsection (i)(2)(A), the court may enter such orders as are necessary to protect the adverse party during the stay.

(i)(4) If the court finds that the party seeking the stay has violated an order or has otherwise dissipated assets, the court may set the amount of the bond or other security without regard to the presumptive amount under subsection (i)(1) and limits in subsection (i)(2).

(j) Objecting to sufficiency or amount of security. Any party whose judgment or order to pay money is stayed or sought to be stayed pursuant to Subdivision (b) may object to the sufficiency of the sureties on a bond or the amount thereof, or to the sufficiency or amount of other security given to stay the judgment by filing and giving notice of such objection. Either party shall be entitled to a

hearing on the objection upon five days notice or such shorter time as the court may order. The burden of justifying the sufficiency of the sureties or other security and the amount of the bond or other security, shall be borne by the party seeking the stay, unless the objecting party seeks a bond or other security in an amount greater than the presumed amount in subsection (i)(2)(A). The fact that a bond, its surety or other security is generally permitted under this rule shall not be conclusive as to its sufficiency or amount.

Tab 3

Criminal Restitituion Subcommittee:

The subcommittee's task was to determine whether we need to create a process to address the step at which a criminal restitution becomes a civil judgment. The attached document called State v. Billings-Subcommittee on restitution helped guide the discussion.

In criminal cases, we currently enter civil judgments at sentencing for restitution, fines, fees (public defender fees, transportation fees) and private provider fees. HB260 clearly changes how civil judgments are entered in criminal cases.

Line 3014:
(b) within 90 days after the day on which a defendant's sentence is terminated, the court shall: (i) enter an order for a civil accounts receivable and a civil judgment of restitution for a defendant on the civil judgment docket;

The clerks of court discussed this issue and determined that the timing of entering judgment for restitution, fines, fees, etc. would need to change. Instead of entering restitution on the front end at sentencing, restitution should instead be entered at the back end, which would be termination of sentence and probation.

PARR BROWN GEE & LOVELESS
ATTORNEYS AT LAW

[Quoted text hidden]

Monica Diaz <monicadiaz@utah.gov> Fri, Mar 12, 2021 at 10:41 AM
To: Douglas Thompson <dougt@utcpd.com>
Cc: "Nick A. Falcone" <nfalcone@sllda.com>, William Hains <whains@agutah.gov>, Nancy Sylvester <nancyjs@utcourts.gov>

https://us02web.zoom.us/j/82224255403?pwd=V2E3RUc3S2hNbGNCZGgxVTlFM0ZKQT09
[Quoted text hidden]

Nancy Sylvester <nancyjs@utcourts.gov> Fri, Mar 12, 2021 at 5:01 PM
To: Douglas Thompson <dougt@utcpd.com>
Cc: "Jonathan O. Hafen" <jhafen@parrbrown.com>

Doug,
How did the meeting go? We're happy to get some Civil Rules brain power on this issue if you think it's necessary after meeting with Monica. And I'm sorry that I couldn't personally attend the meeting. It overlapped with another, unfortunately.
[Quoted text hidden]
[Quoted text hidden]

Douglas Thompson <dougt@utcpd.com> Mon, Mar 15, 2021 at 1:45 PM
To: Nancy Sylvester <nancyjs@utcourts.gov>
Cc: "Jonathan O. Hafen" <jhafen@parrbrown.com>

Hi Nancy,

Our meeting was very helpful. Monica and Will had a good handle on the new statute and helped us understand how the changes the issues implicated in the *Billings* case. We put together an explanation for the committees. Here it is.

> Our subcommittee (Will Hains, Monica Diaz, Nick Falcone, and myself) to review HB260 and what implications it will have on the Supreme Court's request that we consider a rule change to address the jurisdictional questions raised in the *Billings* case. After reviewing the new restitution scheme created by the new and amended statutes, it was our opinion that the jurisdictional questions raised in that case would no longer be an issue. This is primarily due to the fact that there will no longer be separate and competing court-ordered and complete restitution orders. Rather, the new scheme directs sentencing courts to determine the restitution amount (essentially what would have been the complete restitution amount) but it does not automatically create a civil judgment. The restitution order is connected to a criminal account receivable to be supervised by the court or by the board of pardons/OSDC during the term of the sentence (including jail time, probation, prison time, and parole). The defendant will be required to pay on that criminal account receivable at a rate determined by the court informed by the defendant's ability to pay and other relevant factors. At the end of the sentence (when the defendant's probation or parole ends and the case is closed, or the sentence is served out) any remaining balance in the criminal account receivable will be converted into a civil account receivable, except in certain cases where the defendant requests the criminal case to continue for the purposes of finishing paying the restitution through the criminal account receivable up until the expiration of the sentence. When the civil account receivable is created, it is then a civil judgment subject to civil enforcement. The statute specifies that the sentencing court has jurisdiction over civil enforcement proceedings on the civil judgment; however, in cases of restitution these proceedings will never commence while the criminal case is open.

We also concluded that because the restitution order does eventually become a civil judgment, albeit at a later time, the principles at play in the*Ogden* decision are still relevant and there should still be a process to ensure that the restitution amount determined at or soon after sentencing is accurate and is a result of a fair process.

My intention is to present this to the Criminal Rules Committee tomorrow. We'll see if the committee has an additional thoughts. Do you have anything else you think we need to consider?

- Doug

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Nancy Sylvester <nancyjs@utcourts.gov> Mon, Mar 15, 2021 at 5:16 PM
To: Douglas Thompson <dougt@utcpd.com>
Cc: "Jonathan O. Hafen" <jhafen@parrbrown.com>

That's a great explanation. Thanks, Doug. I wonder how many cases we will see convert to a civil judgment. Do you have any sense of that? And I am also wondering if our civil mechanisms are sufficient to address these cases now. I suppose that is a question for a subcommittee to present on briefly at our next meeting. Will you please follow up and let us know if

Tab 4

RULE 37 Discussion (From the April Draft Minutes):

Judge Holmberg presented the feedback received from judges regarding the use of proposed orders on discovery motions. The working group received a number of responses, with most judges favoring the submission of a proposed order. Those criticizing the use of proposed orders indicated that the use of proposed orders unnecessarily clogs the docket.

Ms. Vogel commented that the use of proposed order is inconsistent with what the courts customarily tell pro se litigants, which is to file a proposed order after the motion has been submitted. Judge Stone suggested that the order be filed as an attachment to the statement of discovery issues, as it assists the Court in ascertaining what the parties are asking for in their motion.

Judge Blanch commented that the Rule 37 process is unique as it was intended to encourage the parties to be more reasonable in preparing a draft order, with the understanding that the judge would select one of the parties' competing submissions. Judge Blanch also noted that the process is often confusing to the clerks, as this is the only type of motion addressed in this manner.

Further discussion was deferred until the May meeting.

Rule 37 original proposal from the Family Law Procedures Subcommittee:
The proposal is to delete the requirement that when filing a statement of discovery issues (SODI) one must also file a proposed order. Commissioners and judges get annoyed by all the proposed orders clogging up their queues. They typically get rejected immediately. That means litigants are paying their lawyers to prepare unnecessary and superfluous filings. After looking at this carefully, it was agreed that to carry out this goal, all we need to do is delete subpart (a)(5) of Rule 37, as shown on the attached.

Rule 37. Statement of discovery issues; Sanctions; Failure to admit, to attend deposition or to preserve evidence.

(a) Statement of discovery issues.

(1) A party or the person from whom discovery is sought may request that the judge enter an order regarding any discovery issue, including:

(A) failure to disclose under Rule 26;

(B) extraordinary discovery under Rule 26;

(C) a subpoena under Rule 45;

(D) protection from discovery; or

(E) compelling discovery from a party who fails to make full and complete discovery.

(2) Statement of discovery issues length and content. The statement of discovery issues must be no more than 4 pages, not including permitted attachments, and must include in the following order:

(A) the relief sought and the grounds for the relief sought stated succinctly and with particularity;

(B) a certification that the requesting party has in good faith conferred or attempted to confer with the other affected parties in person or by telephone in an effort to resolve the dispute without court action;

(C) a statement regarding proportionality under Rule 26(b)(2); and

(D) if the statement requests extraordinary discovery, a statement certifying that the party has reviewed and approved a discovery budget.

(3) Objection length and content. No more than 7 days after the statement is filed, any other party may file an objection to the statement of discovery issues. The objection must be no more than 4 pages, not including permitted attachments, and must address the issues raised in the statement.

(4) Permitted attachments. The party filing the statement must attach to the statement only a copy of the disclosure, request for discovery or the response at issue.

(5) Proposed order. [Once briefing is complete,] ~~E~~each party must file a proposed order concurrently with its statement or objection [as an attachment and not as a separate filing]. Proposal: file with request to submit. What about other party? File as attachment to motion?

(6) Decision. Upon filing of the objection or expiration of the time to do so, either party may and the party filing the statement must file a Request to Submit for Decision under Rule 7(g). The court will promptly:

(A) decide the issues on the pleadings and papers;

(B) conduct a hearing, preferably remotely and if remotely, then consistent with the safeguards in Rule 43(b); or

(C) order additional briefing and establish a briefing schedule.

(7) Orders. The court may enter orders regarding disclosure or discovery or to protect a party or person from discovery being conducted in bad faith or from annoyance, embarrassment, oppression, or undue burden or expense, or to achieve proportionality under Rule 26(b)(2), including one or more of the following:

(A) that the discovery not be had or that additional discovery be had;

(B) that the discovery may be had only on specified terms and conditions, including a designation of the time or place;

(C) that the discovery may be had only by a method of discovery other than that selected by the party seeking discovery;

(D) that certain matters not be inquired into, or that the scope of the discovery be limited to certain matters;

(E) that discovery be conducted with no one present except persons designated by the court;

(F) that a deposition after being sealed be opened only by order of the court;

(G) that a trade secret or other confidential information not be disclosed or be disclosed only in a designated way;

(H) that the parties simultaneously deliver specified documents or information enclosed in sealed envelopes to be opened as directed by the court;

(I) that a question about a statement or opinion of fact or the application of law to fact not be answered until after designated discovery has been completed or until a pretrial conference or other later time;

(J) that the costs, expenses and attorney fees of discovery be allocated among the parties as justice requires; or

(K) that a party pay the reasonable costs, expenses, and attorney fees incurred on account of the statement of discovery issues if the relief requested is granted or denied, or if a party provides discovery or withdraws a discovery request after a

statement of discovery issues is filed and if the court finds that the party, witness, or attorney did not act in good faith or asserted a position that was not substantially justified.

(8) Request for sanctions prohibited. A statement of discovery issues or an objection may include a request for costs, expenses and attorney fees but not a request for sanctions.

(9) Statement of discovery issues does not toll discovery time. A statement of discovery issues does not suspend or toll the time to complete standard discovery.

(b) Motion for sanctions. Unless the court finds that the failure was substantially justified, the court, upon motion, may impose appropriate sanctions for the failure to follow its orders, including the following:

(1) deem the matter or any other designated facts to be established in accordance with the claim or defense of the party obtaining the order;

(2) prohibit the disobedient party from supporting or opposing designated claims or defenses or from introducing designated matters into evidence;

(3) stay further proceedings until the order is obeyed;

(4) dismiss all or part of the action, strike all or part of the pleadings, or render judgment by default on all or part of the action;

(5) order the party or the attorney to pay the reasonable costs, expenses, and attorney fees, caused by the failure;

(6) treat the failure to obey an order, other than an order to submit to a physical or mental examination, as contempt of court; and

(7) instruct the jury regarding an adverse inference.

(c) Motion for costs, expenses and attorney fees on failure to admit. If a party fails to admit the genuineness of a document or the truth of a matter as requested under Rule 36, and if the party requesting the admissions proves the genuineness of the document or the truth of the matter, the party requesting the admissions may file a motion for an order requiring the other party to pay the reasonable costs, expenses and attorney fees incurred in making that proof. The court must enter the order unless it finds that:

(1) the request was held objectionable pursuant to Rule 36(a);

(2) the admission sought was of no substantial importance;

(3) there were reasonable grounds to believe that the party failing to admit might prevail on the matter;

(4) that the request was not proportional under Rule 26(b)(2); or

(5) there were other good reasons for the failure to admit.

(d) Motion for sanctions for failure of party to attend deposition. If a party or an officer, director, or managing agent of a party or a person designated under Rule 30(b)(6) to testify on behalf of a party fails to appear before the officer taking the deposition after service of the notice, any other party may file a motion for sanctions under paragraph (b). The failure to appear may not be excused on the ground that the discovery sought is objectionable unless the party failing to appear has filed a statement of discovery issues under paragraph (a).

(e) Failure to preserve evidence. Nothing in this rule limits the inherent power of the court to take any action authorized by paragraph (b) if a party destroys, conceals, alters, tampers with or fails to preserve a document, tangible item, electronic data or other evidence in violation of a duty. Absent exceptional circumstances, a court may not impose sanctions under these rules on a party for failing to provide electronically stored information lost as a result of the routine, good-faith operation of an electronic information system.

Advisory Committee Notes

The 2011 amendments to Rule 37 make two principal changes. First, the amended Rule 37 consolidates provisions for motions for a protective order (formerly set forth in Rule 26(c)) with provisions for motions to compel.

Second, the amended Rule 37 incorporates the new Rule 26 standard of "proportionality" as a principal criterion on which motions to compel or for a protective order should be evaluated.

Paragraph (a) adopts the expedited procedures for statements of discovery issues formerly found in Rule 4-502 of the Code of Judicial Administration. Statements of discovery issues replace discovery motions, and paragraph (a) governs unless the judge orders otherwise.

Tab 5

Certificates of Service in Rule 5

From Trevor:

We may want to keep on our radar this provision of Rule 5 below that deals with certificates of service. I may be misremembering, but I thought the purpose of this provision was to make clear that certificates of service are not required if service is made via electronic filing to all parties (i.e. all parties are e-filers). The current text seems to suggest that the only exempt documents are those "required to be served under paragraph (b)(5)(b)" (which states "an order or judgment prepared by the court will be served by the court) when service is made under (b)(3)(A) (which is electronic service). I'm not exactly sure what this means, but it seems to mean everything needs a certificate of service except orders/judgments served by the court when everyone is an e-filer. If the intent of the rule is to exempt all electronic filings from the certificate of service requirement when everyone is an e-filer, we should update the text. If the intent of the rule is not to exempt all electronic filings when everyone is an e-filer, I think we should revisit the rule to make that substantive change- -a change that was adopted recently in the federal rules. Here's the text of the current rule:

> **(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).

From Nancy:

I suspect this is a bit of a loaded question and may require some vetting. At this point, everyone who is an electronic filer is an attorney, but sometime soon (hopefully), electronic filing will expand to pro se parties. I suppose that won't really change the calculation, though. I personally think certificates of service are redundant when everyone is already getting notice via efiling anyway. I usually just put something at the end of my pleadings that says something to the effect that all parties have been served via the electronic filing system. The federal language implies that even that isn't necessary:

> (B) Certificate of Service. No certificate of service is required when a paper is served by filing it with the court's electronic-filing system. When a paper that is required to be served is served by other means:
>
> (i) if the paper is filed, a certificate of service must be filed with it or within a reasonable time after service; and
>
> (ii) if the paper is not filed, a certificate of service need not be filed unless filing is required by court order or by local rule.

Since we still kind of in the middle of Rule 5 (it will be effective November 1 on email service), I think we could put this on the agenda for this month and address it and potentially have it ready to go by November, too.

From Trevor:

Agree--I think courts are moving away from requiring certificates when everyone is a e-filer. They serve no purpose in that instance, as there is a docket record of service.

If people are in agreement as to that substantive outcome, we may be able to tweak the language by adding the word "or" below (in red). I think the provision's language in general could be cleaned up, but if we wanted to keep any changes minimal, the change below would probably suffice.

> **(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**)** **or** when service to all parties is made under paragraph (b)(3)(A).

From Nancy:

I like that change. It's simple. I will say that the federal rule has made this way more plain. Perhaps we could use language similar to the federal rule?

From Trevor:

Yes, I think all else being equal the federal language is better. I will think on this some before the meeting and let you know if I come up with anything different.

Best Fix:

(d) Certificate of service. No certificate of service is required when a paper is served by filing it with the court's electronic-filing system under paragraph (b)(3)(A). When a paper that is required to be served is served by other means:

(i) if the paper is filed, a certificate of service showing the date and manner of service must be filed with it or within a reasonable time after service; and

(ii) if the paper is not filed, a certificate of service need not be filed unless filing is required by court order or by local rule.

Quick Fix:

(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**)** **or** when service to all parties is made under paragraph (b)(3)(A).

Tab 6

The Family Law Procedures Subcommittee has completed the work on Rule 108 and has come up with the attached. The change is part (c) Judicial Review. This is what the working group came up with:

Judicial Review. The commissioner's factual findings will be reviewed for clear error. A commissioner's conclusions of law will be reviewed for correctness. If there is a mixed question of law and fact, the reviewing judge will determine the appropriate level of deference.

Maybe the heading should be expanded to read "Standards for judicial review of commissioner findings."

This has been approved by the subcommittee and is recommended to the Rule Committee for amendment.

Rule 108. Objection to Court Commissioner's Recommendation.

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

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

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

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

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

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

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

(~~d~~)(~~1~~e) The judge may hold a hearing on any objection.

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

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

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

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

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

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

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

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