Agenda

Supreme Court Advisory Committee
Utah Rules of Civil Procedure
October 26, 2022
4:00 to 6:00 p.m.
Via Webex

Welcome and approval of minutes	Tab 1	Lauren DiFrancesco
Rule 47 – attorney voir dire	Tab 2	Kara North / Brandon Baxter
Rule 26 – edits to comments	Tab 3	Judge Stucki
Two New Member Seats at direction of the Supreme Court	Tab 4	Lauren DiFrancesco
Rule 12(a)(1) – Supreme Court direction to review filing of an answer	Tab 5	Lauren DiFrancesco
Rule 26.1(h) – Supreme Court direction to clarify when disclosures are required	Tab 6	Lauren DiFrancesco
Rule 104 – Supreme Court direction to consider repealing or clarifying when sworn pleading would suffice for affidavit	Tab 7	Lauren DiFrancesco
Rule 59(e) - inconsistency with UC 78B-6-811	Tab 8	Lauren DiFrancesco
Rule 6(a)(6) – adding Juneteenth holiday	Tab 9	Lauren DiFrancesco
Rule 60 – finality and whether fraud on the court can be effectively addressed	Tab 10	Judge Holmberg / Lauren DiFrancesco
Other Business • Meetings in November & December		Lauren DiFrancesco
Consent agenda - *None*		
Verify Pipeline items: • Rule 83 - Notice of Appeal (Nick Stiles) • Rule 26 "any damages claimed" (Judge Stone and Judge Holmberg) • Rule 30(b)(6) (Justin, Rod, Tonya, Kim)		Lauren DiFrancesco

Next Meeting: November ____

Future Meetings: November ___, December ____

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

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

Tab 1

Tab 2

Aug 22, 2022

Fact sheet on Attorney-Conducted Voir Dire:

Utah is in the minority

As of 2007, Utah was one of only 10 states in which judges predominantly conducted voir dire.[1]

Table 21: Who Conducts Voir Dire in State Courts?	
Predominantly or Exclusively Judge-Conducted Voir Dire	AZ, DC, DE, MA, MD, ME, NH, NJ, SC, UT
Judge and Attorney Conduct Voir Dire Equally	CA, CO, HI, ID, IL, KY, MI, MN, MS, NM, NV, NY, OH, OK, PA, VA, WI, WV
Predominantly or Exclusively Attorney-Conducted Voir Dire	AK, AL, AR, CT, FL, GA, IA, IN, KS, LA, MO, MT, NC, ND, NE, OR, RI, SD, TN, TX, VT, WA, WY

That number has decreased at least by one though since Massachusetts adopted attorney-conducted voir dire in 2015 (see article and rule below).

Length of Attorney-Conducted Voir Dire

The Center for Jury Studies conducted a study on how much time attorney-conducted voir dire adds to a trial. As a reference point, they calculated that the average 12 person civil jury trial with equal time between judge and attorney-conducted questioning and three peremptoriness takes 114 minutes, or approximately 2 hours to complete.[2]

When voir dire is conducted predominantly by attorneys the average times increase by 70 minutes.[4] This additional time, little more than an hour, is a relatively small price to pay in the grand scheme of the importance impartial jurors play to the process. Since the attorneys on the case are more likely to know the finite details of their case, which the Judge may not be aware of, it makes sense that questions the attorneys have are not always the same as those a judge may ask.

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[1] Center for Jury Studies, *State of the States Survey of Jury Improvement Efforts*, 27, available at https://www.ncsc-jurystudies.org/state-of-the-states/state-of-states-survey?SQ_VARIATION_5888=0.
[2] See *Id.* at 30 showing a table of how different variables increase or decrease the average time for voir dire when compared to the reference.
[3] *Id.*
[4] *Id.* Using the table, when judges conduct voir dire exclusively, it saves 47 minutes compared to the reference, and when attorneys predominantly conduct voir dire, it adds 25 minutes. By comparison, when attorneys exclusively conduct voir dire, it adds 105 minutes instead of 25.

The Benefit of Attorney Conducted Voir Dire

Repeated studies show that attorney-conducted voir dire elicit far more truthfulness about juror biases than judge-conducted voir dire.[5]

Jurors are twice as honest when attorneys ask them questions than with judges ask the identical questions.[6]

Jurors are significantly more likely to face the pressure of "evaluation anxiety" when asked questions by judges as well as an "expectancy effect" that when they are asked by a judge if they can be impartial that the judge is implicitly encouraging them to answer "yes."[7]

Attorney-conducted Voir Dire is encouraged in Utah[8] but rarely permitted by courts outside of a few jurisdictions.

In *State v. Williams*, the Utah Court of Appeals has given guidance on how Utah courts should oversee attorney-conducted voir dire, with details about what should, and shouldn't, be allowed based on how other jurisdictions handle attorney-conducted voir dire.[9] Although criminal in nature, this case and its guidelines can be equally as informative to the use of attorney-conducted voir dire in civil cases.

The proposed rule change adopts guidance by *Williams* while also looking to other jurisdictions as supplemental guidance to construct a comprehensive rule.

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[5] John Campbell et. al., *An Empirical Examination of Civil Voir Dire: Implications for Meeting Constitutional Guarantees and Suggested Best Practices,* U DENVER LEGAL STUDIES RESEARCH PAPER NO. 20-11 (April 24, 2020), available at SSRN: https://ssrn.com/abstract=3584582 or http://dx.doi.org/10.2139/ssrn.3584582; Susan E. Jones, *Judge-Versus Attorney-Conducted Voir Dire An Empirical Investiga**tion** of Juror Candor,* 11 LAW AND HUMAN BEHAVIOR, 131 (1987); Richard Seltzer, et. al. *Juror Honesty During the Voir Dire,* JOURNAL OF CRIMINAL JUSTICE 451, 453 (1991); Roger W. Shuy, *How a Judge's Voir Dire can Teach a Jury What to Say,* 6 DISCOURSE & SOCIETY, 207 *(1995).*

[6] Susan E. Jones, *Judge-Versus Attorney-Conducted Voir Dire An Empirical Investiga**tion** of Juror Candor,* 11 LAW AND HUMAN BEHAVIOR, 131 (1987).

[7] *Id.*

[8] *State v. Williams,* 2018 UT App 96, ¶ 37, n. 14 ("In Utah's trial courts, the days of perfunctory — and often insufficient — judge-only-conducted juror examination are gone. Indeed, our rules now expressly provide for attorney-conducted juror examination, *see* Utah R. Crim. P. 18(b), and many judges and attorneys wisely embrace the conscientious use of a well-drafted questionnaire.").

[9] *State v. Williams,* 2018 UT App 96,

Rule 47. Jurors.

(a) Examination of jurors. Upon a motion by either party, t~~T~~he court ~~shall~~ shall ~~may~~ permit the parties or their attorneys to conduct the examination of prospective jurors. If such a motion is made, the court shall permit the parties or their attorneys to make a preliminary statement of the case and notify the parties in advance of trial. If no motion is made, the court ~~or~~ may itself conduct the examination. In the latter event, the court shall permit the parties or their attorneys to supplement the examination by such further inquiry as is material and proper or shall itself submit to the prospective jurors such additional questions of the parties or their attorneys as is material and proper. Prior to examining the jurors, the court may make a preliminary statement of the case. ~~The court may permit the parties or their attorneys to make a preliminary statement of the case and notify the parties in advance of trial.~~

(b) Procedure for Attorney-Conducted Jury Selection.

(b)(1) The Court may impose reasonable restrictions on attorney-conducted jury selection; including, a reasonable time limited allotted to each side. In determining a reasonable time limit, the court should consider the complexity of the issues in the case, the length of the overall trial, and any stipulations of the parties.

(b)(2) A party may give a preliminary statement of the case to the entire panel. The statement should orient the panel to the questions that will be asked without commenting on specific facts to be presented during trial. The statement may not be used as a tool to persuade members of the panel to adopt a position or predisposition to the evidence, or bolster an anticipated witness's credibility. The party may inform the panel about a relevant law, such as an anticipated defense, if needed to inquire into any bias on following that law. The party may make additional statements during the time allotted for questioning as needed to orient the panel to new topics.

(b)(3) Questions should be targeted to reveal prospective jurors' biases or prejudices. The court may not prohibit a questions simply because the bias or prejudice of concern is not related to a for-cause strike or because the questions relates to a sensitive topic. Either by objection from opposing counsel, or by the court acting sua sponte, the court may prohibit a question that:

(b)(3)(A) may confuse the person asked;

(b)(3)(B) is rhetorical or waits for no answer;

(b)(3)(C) may harass, embarrass, inflame, or ask highly personal information about a juror;

(b)(3)(D) makes repetitive inquires of a juror;

Commented [KN1]: State v. Purdy, 491 N.W.2d 402 (N.D. 1992):

Rule 24(a), N.D.R.Crim.P., provides that "[t]he court shall permit the defendant or the defendant's attorney and the prosecuting attorney to participate in the examination of prospective jurors." However, the right to voir dire is not without limitations. It is properly within a trial court's discretion to impose reasonable restrictions on the exercise of voir dire, such as placing reasonable time limits on the voir dire examination and preventing the propounding of vexatious or repetitious questions. *See, e.g., Hatchett v. State,* 503 N.E.2d 398, 402 (Ind.1987); *People v. Jean,* 75 N.Y.2d 744, 551 N.Y.S.2d 889, 890, 551 N.E.2d 90, 91 (1989); *Maddux v. State,* 825 S.W.2d 511, 514 (Tex.Ct.App.1992). Nevertheless, because the purpose of voir dire is to obtain a fair and impartial jury [*see State v. Gross,* 351 N.W.2d 428, 433 (N.D.1984); Explanatory Note to Rule 24, N.D.R.Crim.P.], placing arbitrary and unreasonable time limits on voir dire can result in reversible error. *See, e.g., State v. Petersen,* 368 N.W.2d 320, 322 (Minn.Ct.App.1985); *State v. Evans,* 352 N.W.2d 824, 826 (Minn.Ct.App.1984). We agree with those jurisdictions which hold that to establish prejudi ... [1]

Commented [KN2]: Mass. Rule 6(4)(e)

"i. If the parties have obtained approval to ask voir dire questions about the law, the trial judge shall take appropriate measures to ensure that the jury is accurately and effectively instructed on the law. Such measures may include, but are not limited to: a brief precharge; requiring the questioner to use the words specifically approved by the judge; stating the law in a ... [2]

Commented [KN3]: Michael J. Ahlen, Voir Dire: What Can I Ask and What Can I Say?, 72 N.D.L.Rev. 631.

"Some judges allow attorneys to discuss the law of the case in voir dire, particularly in criminal cases in which the entire defense rests upon burden of proof or presumption of innocence. Nationally, there is a trend toward restricting attorneys' discussion of law. . . A growing number of North Dakota courts have avoided or minimized the problem ... [3]

Commented [KN4]: *State v. Ball,* 685 P.2d 1055, 1059 (Utah 1984).

"[T]he peremptory challenge performs a valuable function in our jury system. . .". The peremptory challenge is meant to give parties opportunity to strike jurors "on a broad spectrum of evidence suggestive of juror partiality." *Id.* But "[i]ts efficacy is necessarily vitiated when a party is not permitted to gather enough information from prospec ... [4]

Commented [KN5]: State v. Williams, 2018 UT App 96, ¶ 27

Commented [KN6]: Michael J. Ahlen, Voir Dire: What Can I Ask and What Can I Say?, 72 N.D.L.Rev. 631

(b)(3)(E) was already asked in a questionnaire, except to have the juror explain an answer;

(b)(3)(F) has no apparent link to uncovering a potential bias;

(b)(3)(G) seeks to influence how a juror may decide the case by doing any of the following:

(b)(3)(G)(i) raises a hypothetical that closely approximates the facts of the case;
(b)(3)(G)(ii) invites the juror to predict how he or she may ultimately decide the case;
(b)(3)(G)(iii) asks the juror to judge the weight to be given to an operative face; or
(b)(3)(G)(iv) seeks to have a juror commit to, pledge, or otherwise maintain a particular position in advance of the actual presentation of the evidence, unless that position is to follow the judge's instructions, or to be fair and impartial during the trial.

(b)(4) A question about how a particular piece of evidence may affect a juror's predisposition to one side is not equivalent to asking the juror to indicate how much weight that evidence would have in deciding the outcome of the case.

(b)(5) If a party asks a question that requests highly personal information from a juror, may embarrass a juror, or may cause a bias or prejudice to form in the minds of other jurors, the court may instruct that the juror be questioned outside of the presence of the panel. The court may require that the juror answer the question if the question is highly relevant to the issue of bias. The court should not impose time restrictions on questions to individuals outside the presence of the jury. The party's presence is not required if the answer may relate to information that the juror does not wish a party to hear.

(b)(6) The plaintiff goes first in attorney-conducted voir dire.

(b)(7) The court may sanction a party for violating this subsection by prohibiting the question, admonishing the party, giving a curative instruction, declaring a mistrial, or any other sanction as appropriate or required under the circumstances.

(c) Procedures for use of a supplemental jury questionnaire

(c)(1) Upon timely request, the court may permit a party to submit a questionnaire to aid in the discovery of bias or prejudices. The court may set reasonable limits on the length of the questionnaire or number of questions in considering the complexity of the issues in the case, the length of the overall trial, the seriousness of the offense, and any stipulation of the parties.

Commented [KN7]: Wyo R. Crim P. 24

Commented [KN8]: *State v. Saunders*, 1999 UT 59, ¶ 43

"As a general rule, trial judges have some discretion in limiting voir dire inquiry. *See, e.g., Worthen*, 765 P.2d at 845. That discretion is most broad when it is exercised with respect to questions that have no apparent link to any potential bias. However, the trial judge's discretion narrows to the extent that questions do have some possible link to possible bias, and when proposed voir dire questions go directly to the existence of an actual bias, that discretion disappears."

Commented [KN9]: State v. Janis, 880 NW 2d 76, 82-83 (SD 2016) -this case is cited with approval in State v. Williams.

"Prospective jurors may not be questioned about hypothetical facts to be proved at trial, but may be questioned about their mental attitudes regarding certain types of evidence. "

Commented [KN10]: Haarhuis v. Cheek, 805 SE 2d 720, 726 (NC App 2017) - this case is reference with approval in State v. Williams

Commented [KN11]: Hyundai Motor Co. v. Vasquez,189 S.W.3d 743, 753 (2006) - this case is referenced with approval in State v. Williams

Commented [KN12]: *State v. Broyhill,* 803 S.E.2d 832, 841 (N.C. App 2017) - this case is cited with approval in State v. Williams.

See also John T. Bibb, *Voir Dire: What Constitutes an Impermissible Attempt to Commit A Prospective Juror to A Particular Result*, 48 Baylor L. Rev. 857, 874 (1996)

"Texas lawyers will exceed the scope of permissible voir dire examination by asking questions that tend to elicit a pledge from a prospective juror as to how much weight the juror will give to such evidence in the determination of the final verdict. Texas courts generally prohibit any voir dire questions which ask prospective jurors to indicate their views on certain facts, and thereby commit themselves to certain views or conclusions.84 The rule denying committal inquiries on the weight of evidence supports the underlying policy of voir dire: to obtain a fair trial from an unbiased jury by preventing jurors from determining critical issues based on a previous commitment as to the weight of particular evidence."

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(c)(2) Before issuing the questionnaire, the court may strike any question that follows one of the prohibited questions described in subsection (b). The court should not modify, or require that a party modify, a question unless doing so is necessary to avoid asking a prohibited question. The court may not strike a question simply because that questions serves only the function of a peremptory challenge.

(c)(3) The Court must allow the parties a reasonable opportunity to review the answers to the questionnaires in advance of making questions to the panel.

(d) Rehabilitation prohibited. When a juror admits to a bias, further inquiry may be made to allow the juror to elaborate or clarify the answer without an attempt to commit the juror to impartiality.

(eb) Alternate jurors. The court may direct that alternate jurors be impaneled. Alternate jurors, in the order in which they are called, shall replace jurors who, prior to the time the jury retires to consider its verdict, become unable or disqualified to perform their duties. Alternate jurors shall be selected at the same time and in the same manner, shall have the same qualifications, shall be subject to the same examination and challenges, shall take the same oath, and shall have the same functions, powers, and privileges as principal jurors. An alternate juror who does not replace a principal juror shall be discharged when the jury retires to consider its verdict unless the parties stipulate otherwise and the court approves the stipulation. The court may withhold from the jurors the identity of the alternate jurors until the jurors begin deliberations.

(fc) Challenge defined; by whom made. A challenge is an objection made to the trial jurors and may be directed (1) to the panel or (2) to an individual juror.

(gd) Challenge to panel; time and manner of taking; proceedings. A challenge to the panel can be founded only on a material departure from the forms prescribed in respect to the drawing and return of the jury, or on the intentional omission of the proper officer to summon one or more of the jurors drawn. It must be taken before a juror is sworn. It must be in writing or be stated on the record, and must specifically set forth the facts constituting the ground of challenge. If the challenge is allowed, the court must discharge the jury so far as the trial in question is concerned.

(he) Challenges to individual jurors; number of peremptory challenges. The challenges to individual jurors are either peremptory or for cause. Each party shall be entitled to three peremptory challenges. Several defendants or several plaintiffs shall be considered as a single party for the purposes of making peremptory challenges unless there is a substantial controversy between them, in which case the court shall allow as many additional peremptory challenges as is just. If one or two alternate jurors are called, each party is entitled to one peremptory challenge in addition to those otherwise allowed.

Commented [KN13]: Barrett v. Peterson, 868 P.2d 96 (Utah Ct. App. 1993) (assigning error when a court changed the wording of proposed questions when the changes to wording changed the bias that the litigant intended to uncover).

Commented [KN14]: Current advisory committee notes:

"Although thorough questioning of a juror to determine the existence, nature and extent of a bias is appropriate, it is not the judge's duty to extract the "right" answer from or to "rehabilitate" a juror."

However, see *State v. Fletcher*, 2015 UT App 167, ¶ 23

"When an inference of bias is raised, the inference is generally not rebutted simply by a subsequent general statement by the juror that he or she can be fair and impartial," but instead, "[t]he level of investigation necessary once voir dire reveals potential juror bias will vary from case to case and is necessarily dependent on the juror's responses to the questions asked." *State v. Woolley, 810 P.2d 440, 445 (Utah Ct. App. 1991), overruled on other grounds as recognized by Robertson, 2005 UT App 419, 122 P.3d 895.*

Also see discussion in State v. Jonas, 904 N.W.2d 566 (Iowa 2017).

"As noted in People v. Merrow, answers to the trial judge's generalized and leading questions "may suggest overt acquiescence in the trial court's efforts to elicit a commitment to neutrality" but are unreliable."

(if) Challenges for cause. A challenge for cause is an objection to a particular juror and shall be heard and determined by the court. The juror challenged and any other person may be examined as a witness on the hearing of such challenge. A challenge for cause may be taken on one or more of the following grounds. On its own motion the court may remove a juror upon the same grounds.

(if)(1) A want of any of the qualifications prescribed by law to render a person competent as a juror.

(if)(2) Consanguinity or affinity within the fourth degree to either party, or to an officer of a corporation that is a party.

(fi)(3) Standing in the relation of debtor and creditor, guardian and ward, master and servant, employer and employee or principal and agent, to either party, or united in business with either party, or being on any bond or obligation for either party; provided, that the relationship of debtor and creditor shall be deemed not to exist between a municipality and a resident thereof indebted to such municipality by reason of a tax, license fee, or service charge for water, power, light or other services rendered to such resident.

(if)(4) Having served as a juror, or having been a witness, on a previous trial between the same parties for the same cause of action, or being then a witness therein.

(if)(5) Pecuniary interest on the part of the juror in the result of the action, or in the main question involved in the action, except interest as a member or citizen of a municipal corporation.

(if)(6) Conduct, responses, state of mind or other circumstances that reasonably lead the court to conclude the juror is not likely to act impartially. No person may serve as a juror, if challenged, unless the judge is convinced the juror can and will act impartially and fairly.

(ig) Selection of jury. The judge shall determine the method of selecting the jury and notify the parties at a pretrial conference or otherwise prior to trial. The following methods for selection are not exclusive.

(ig)(1) Strike and replace method. The court shall summon the number of jurors that are to try the cause plus such an additional number as will allow for any alternates, for all peremptory challenges permitted, and for all challenges for cause that may be granted. At the direction of the judge, the clerk shall call jurors in random order. The judge may hear and determine challenges for cause during the course of questioning or at the end thereof. The judge may and, at the request of any party, shall hear and determine challenges for cause outside the hearing of the jurors. After each challenge for cause sustained, another juror shall be called to fill the vacancy , and any such new juror may be challenged for cause. When the challenges for cause are completed, the clerk shall provide a list of the jurors remaining, and each side, beginning with the plaintiff, shall indicate thereon its peremptory challenge to one juror at a time in regular turn until all peremptory challenges are exhausted or waived. The clerk shall then call the remaining jurors, or so many of them as shall be necessary to constitute the jury, including any alternate jurors, and the persons whose names are so called shall constitute the jury. If alternate jurors have been selected, the last jurors called shall be the alternates, unless otherwise ordered by the court prior to voir dire.

(ig)(2) Struck method. The court shall summon the number of jurors that are to try the cause plus such an additional number as will allow for any alternates, for all peremptory challenges permitted and for all challenges for cause that may be granted. At the direction of the judge, the clerk shall call jurors in random order. The judge may hear and determine challenges for cause during the course of questioning or at the end thereof. The judge may and, at the request of any party, shall hear and determine challenges for cause outside the hearing of the jurors. When the challenges for cause are completed, the clerk shall provide a list of the jurors remaining, and each side, beginning with the plaintiff, shall indicate thereon its peremptory challenge to one juror at a time in regular turn until all peremptory challenges are exhausted or waived. The clerk shall then call the remaining jurors, or so many of them as shall be necessary to constitute the jury, including any alternate jurors, and the persons whose names are so called shall constitute the jury. If alternate jurors have been selected, the last jurors called shall be the alternates, unless otherwise ordered by the court prior to voir dire.

(ig)(3) In courts using lists of prospective jurors generated in random order by computer, the clerk may call the jurors in that random order.

(h) Oath of jury. As soon as the jury is selected an oath must be administered to the jurors, in substance, that they and each of them will well and truly try the matter in issue between the parties, and render a true verdict according to the evidence and the instructions of the court.

(i) Proceedings when juror discharged. If, after impaneling the jury and before verdict, a juror becomes unable or disqualified to perform the duties of a juror and there is no alternate juror, the parties may agree to proceed with the other jurors, or to swear a new juror and commence the trial anew. If the parties do not so agree the court shall discharge the jury and the case shall be tried with a new jury.

(j) Questions by jurors. A judge may invite jurors to submit written questions to a witness as provided in this section.

(j)(1) If the judge permits jurors to submit questions, the judge shall control the process to ensure the jury maintains its role as the impartial finder of fact and does not become an investigative body. The judge may disallow any question from a juror and may discontinue questions from jurors at any time.

(j)(2) If the judge permits jurors to submit questions, the judge should advise the jurors that they may write the question as it occurs to them and submit the question to the bailiff for transmittal to the judge. The judge should advise the jurors that some questions might not be allowed.

(j)(3) The judge shall review the question with counsel and unrepresented parties and rule upon any objection to the question. The judge may disallow a question even though no objection is made. The judge shall preserve the written question in the court file. If the question is allowed, the judge shall ask the question or permit counsel or an unrepresented party to ask it. The question may be rephrased into proper form. The judge shall allow counsel and unrepresented parties to examine the witness after the juror's question.

(k) View by jury. When in the opinion of the court it is proper for the jury to have a view of the property which is the subject of litigation, or of the place in which any

material fact occurred, it may order them to be conducted in a body under the charge of an officer to the place, which shall be shown to them by some person appointed by the court for that purpose. While the jury are thus absent no person other than the person so appointed shall speak to them on any subject connected with the trial.

(l) Communication with jurors. There shall be no off-the-record communication between jurors and lawyers, parties, witnesses or persons acting on their behalf. Jurors shall not communicate with any person regarding a subject of the trial. Jurors may communicate with court personnel and among themselves about topics other than a subject of the trial. It is the duty of jurors not to form or express an opinion regarding a subject of the trial except during deliberation. The judge shall so admonish the jury at the beginning of trial and remind them as appropriate.

(m) Deliberation of jury. When the case is finally submitted to the jury they may decide in court or retire for deliberation. If they retire they must be kept together in some convenient place under charge of an officer until they agree upon a verdict or are discharged, unless otherwise ordered by the court. Unless by order of the court, the officer having charge of them must not make or allow to be made any communication to them with respect to the action, except to ask them if they have agreed upon their verdict, and the officer must not, before the verdict is rendered, communicate to any person the state of deliberations or the verdict agreed upon.

(n) Exhibits taken by jury; notes. Upon retiring for deliberation the jury may take with them the instructions of the court and all exhibits which have been received as evidence in the cause, except exhibits that should not, in the opinion of the court, be in the possession of the jury, such as exhibits of unusual size, weapons or contraband. The court shall permit the jury to view exhibits upon request. Jurors are entitled to take notes during the trial and to have those notes with them during deliberations. As necessary, the court shall provide jurors with writing materials and instruct the jury on taking and using notes.

(o) Additional instructions of jury. After the jury have retired for deliberation, if there is a disagreement among them as to any part of the testimony, or if they desire to be informed on any point of law arising in the cause, they may require the officer to conduct them into court. Upon their being brought into court the information required must be given in the presence of, or after notice to, the parties or counsel. Such information must be given in writing or stated on the record.

(p) New trial when no verdict given. If a jury is discharged or prevented from giving a verdict for any reason, the action shall be tried anew.

(q) Court deemed in session pending verdict; verdict may be sealed. While the jury is absent the court may be adjourned from time to time in respect to other business, but it shall be open for every purpose connected with the cause submitted to the jury, until a verdict is rendered or the jury discharged. The court may direct the jury to bring in a sealed verdict at the opening of the court, in case of an agreement during a recess or adjournment for the day.

(r) Declaration of verdict. When the jury or three-fourths of them, or such other number as may have been agreed upon by the parties pursuant to Rule 48, have agreed upon a verdict they must be conducted into court, their names called by the clerk, and

the verdict rendered by their foreperson; the verdict must be in writing, signed by the foreperson, and must be read by the clerk to the jury, and the inquiry made whether it is their verdict. Either party may require the jury to be polled, which shall be done by the court or clerk asking each juror if it is the juror's verdict. If, upon such inquiry or polling there is an insufficient number of jurors agreeing therewith, the jury must be sent out again; otherwise the verdict is complete and the jury shall be discharged from the cause.
(s) Correction of verdict. If the verdict rendered is informal or insufficient, it may be corrected by the jury under the advice of the court, or the jury may be sent out again.

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(b)(3)(D) makes repetitive inquires of a juror;

Commented [KN1]: State v. Purdy, 491 N.W.2d 402 (N.D. 1992):

Rule 24(a), N.D.R.Crim.P., provides that "[t]he court shall permit the defendant or the defendant's attorney and the prosecuting attorney to participate in the examination of prospective jurors." However, the right to voir dire is not without limitations. It is properly within a trial court's discretion to impose reasonable restrictions on the exercise of voir dire, such as placing reasonable time limits on the voir dire examination and preventing the propounding of vexatious or repetitious questions. *See, e.g., Hatchett v. State,* 503 N.E.2d 398, 402 (Ind.1987); *People v. Jean,* 75 N.Y.2d 744, 551 N.Y.S.2d 889, 890, 551 N.E.2d 90, 91 (1989); *Maddux v. State,* 825 S.W.2d 511, 514 (Tex.Ct.App.1992). Nevertheless, because the purpose of voir dire is to obtain a fair and impartial jury [*see State v. Gross,* 351 N.W.2d 428, 433 (N.D.1984); Explanatory Note to Rule 24, N.D.R.Crim.P.], placing arbitrary and unreasonable time limits on voir dire can result in reversible error. *See, e.g., State v. Petersen,* 368 N.W.2d 320, 322 (Minn.Ct.App.1985); *State v. Evans,* 352 N.W.2d 824, 826 (Minn.Ct.App.1984). We agree with those jurisdictions which hold that to establish prejudicial ...

Commented [KN2]: Mass. Rule 6(4)(e)

"i. If the parties have obtained approval to ask voir dire questions about the law, the trial judge shall take appropriate measures to ensure that the jury is accurately and effectively instructed on the law. Such measures may include, but are not limited to: a brief precharge; requiring the questioner to use the words specifically approved by the judge; stating the law in a ...

Commented [KN3]: Michael J. Ahlen, Voir Dire: What Can I Ask and What Can I Say?, 72 N.D.L.Rev. 631.

"Some judges allow attorneys to discuss the law of the case in voir dire, particularly in criminal cases in which the entire defense rests upon burden of proof or presumption of innocence. Nationally, there is a trend toward restricting attorneys' discussion of law. . . A growing number of North Dakota courts have avoided or minimized the problem of ...

Commented [KN4]: *State v. Ball*, 685 P.2d 1055, 1059 (Utah 1984).

"[T]he peremptory challenge performs a valuable function in our jury system. . .". The peremptory challenge is meant to give parties opportunity to strike jurors "on a broad spectrum of evidence suggestive of juror partiality." *Id*. But "[i]ts efficacy is necessarily vitiated when a party is not permitted to gather enough information from prospective ...

Commented [KN5]: State v. Williams, 2018 UT App 96, ¶ 27

Commented [KN6]: Michael J. Ahlen, Voir Dire: What Can I Ask and What Can I Say?, 72 N.D.L.Rev. 631

(b)(3)(E) was already asked in a questionnaire, except to have the juror explain an answer;

(b)(3)(F) has no apparent link to uncovering a potential bias;

(b)(3)(G) seeks to influence how a juror may decide the case by doing any of the following:

(b)(3)(G)(i) raises a hypothetical that closely approximates the facts of the case;
(b)(3)(G)(ii) invites the juror to predict how he or she may ultimately decide the case;
(b)(3)(G)(iii) asks the juror to judge the weight to be given to an operative face; or
(b)(3)(G)(iv) seeks to have a juror commit to, pledge, or otherwise maintain a particular position in advance of the actual presentation of the evidence, unless that position is to follow the judge's instructions, or to be fair and impartial during the trial.

(b)(4) A question about how a particular piece of evidence may affect a juror's predisposition to one side is not equivalent to asking the juror to indicate how much weight that evidence would have in deciding the outcome of the case.

(b)(5) If a party asks a question that requests highly personal information from a juror, may embarrass a juror, or may cause a bias or prejudice to form in the minds of other jurors, the court may instruct that the juror be questioned outside of the presence of the panel. The court may require that the juror answer the question if the question is highly relevant to the issue of bias. The court should not impose time restrictions on questions to individuals outside the presence of the jury. The party's presence is not required if the answer may relate to information that the juror does not wish a party to hear.

(b)(6) The plaintiff goes first in attorney-conducted voir dire.

(b)(7) The court may sanction a party for violating this subsection by prohibiting the question, admonishing the party, giving a curative instruction, declaring a mistrial, or any other sanction as appropriate or required under the circumstances.

(c) Procedures for use of a supplemental jury questionnaire

(c)(1) Upon timely request, the court may permit a party to submit a questionnaire to aid in the discovery of bias or prejudices. The court may set reasonable limits on the length of the questionnaire or number of questions in considering the complexity of the issues in the case, the length of the overall trial, the seriousness of the offense, and any stipulation of the parties.

Commented [KN7]: Wyo R. Crim P. 24

Commented [KN8]: *State v. Saunders*, 1999 UT 59, ¶ 43

"As a general rule, trial judges have some discretion in limiting voir dire inquiry. *See, e.g., Worthen,* 765 P.2d at 845. That discretion is most broad when it is exercised with respect to questions that have no apparent link to any potential bias. However, the trial judge's discretion narrows to the extent that questions do have some possible link to possible bias, and when proposed voir dire questions go directly to the existence of an actual bias, that discretion disappears."

Commented [KN9]: State v. Janis, 880 NW 2d 76, 82-83 (SD 2016) -this case is cited with approval in State v. Williams.

"Prospective jurors may not be questioned about hypothetical facts to be proved at trial, but may be questioned about their mental attitudes regarding certain types of evidence. "

Commented [KN10]: Haarhuis v. Cheek, 805 SE 2d 720, 726 (NC App 2017) - this case is reference with approval in State v. Williams

Commented [KN11]: Hyundai Motor Co. v. Vasquez,189 S.W.3d 743, 753 (2006) - this case is referenced with approval in State v. Williams

Commented [KN12]: *State v. Broyhill,* 803 S.E.2d 832, 841 (N.C. App 2017) - this case is cited with approval in State v. Williams.

See also John T. Bibb, *Voir Dire: What Constitutes an Impermissible Attempt to Commit A Prospective Juror to A Particular Result*, 48 Baylor L. Rev. 857, 874 (1996)

"Texas lawyers will exceed the scope of permissible voir dire examination by asking questions that tend to elicit a pledge from a prospective juror as to how much weight the juror will give to such evidence in the determination of the final verdict. Texas courts generally prohibit any voir dire questions which ask prospective jurors to indicate their views on certain facts, and thereby commit themselves to certain views or conclusions.84 The rule denying committal inquiries on the weight of evidence supports the underlying policy of voir dire: to obtain a fair trial from an unbiased jury by preventing jurors from determining critical issues based on a previous commitment as to the weight of particular evidence."

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(c)(2) Before issuing the questionnaire, the court may strike any question that follows one of the prohibited questions described in subsection (b). The court should not modify, or require that a party modify, a question unless doing so is necessary to avoid asking a prohibited question. The court may not strike a question simply because that questions serves only the function of a peremptory challenge.

(c)(3) The Court must allow the parties a reasonable opportunity to review the answers to the questionnaires in advance of making questions to the panel.

(d) Rehabilitation prohibited. When a juror admits to a bias, further inquiry may be made to allow the juror to elaborate or clarify the answer without an attempt to commit the juror to impartiality.

Commented [KN13]: Barrett v. Peterson, 868 P.2d 96 (Utah Ct. App. 1993) (assigning error when a court changed the wording of proposed questions when the changes to wording changed the bias that the litigant intended to uncover).

Commented [KN14]: Current advisory committee notes:

"Although thorough questioning of a juror to determine the existence, nature and extent of a bias is appropriate, it is not the judge's duty to extract the "right" answer from or to "rehabilitate" a juror."

However, see *State v. Fletcher*, 2015 UT App 167, ¶ 23

"When an inference of bias is raised, the inference is generally not rebutted simply by a subsequent general statement by the juror that he or she can be fair and impartial," but instead, "[t]he level of investigation necessary once voir dire reveals potential juror bias will vary from case to case and is necessarily dependent on the juror's responses to the questions asked." *State v. Woolley, 810 P.2d 440, 445 (Utah Ct. App. 1991), overruled on other grounds as recognized by Robertson, 2005 UT App 419, 122 P.3d 895.*

Also see discussion in State v. Jonas, 904 N.W.2d 566 (Iowa 2017).

"As noted in People v. Merrow, answers to the trial judge's generalized and leading questions "may suggest overt acquiescence in the trial court's efforts to elicit a commitment to neutrality" but are unreliable."

(eb) Alternate jurors. The court may direct that alternate jurors be impaneled. Alternate jurors, in the order in which they are called, shall replace jurors who, prior to the time the jury retires to consider its verdict, become unable or disqualified to perform their duties. Alternate jurors shall be selected at the same time and in the same manner, shall have the same qualifications, shall be subject to the same examination and challenges, shall take the same oath, and shall have the same functions, powers, and privileges as principal jurors. An alternate juror who does not replace a principal juror shall be discharged when the jury retires to consider its verdict unless the parties stipulate otherwise and the court approves the stipulation. The court may withhold from the jurors the identity of the alternate jurors until the jurors begin deliberations.

(fc) Challenge defined; by whom made. A challenge is an objection made to the trial jurors and may be directed (1) to the panel or (2) to an individual juror.

(gd) Challenge to panel; time and manner of taking; proceedings. A challenge to the panel can be founded only on a material departure from the forms prescribed in respect to the drawing and return of the jury, or on the intentional omission of the proper officer to summon one or more of the jurors drawn. It must be taken before a juror is sworn. It must be in writing or be stated on the record, and must specifically set forth the facts constituting the ground of challenge. If the challenge is allowed, the court must discharge the jury so far as the trial in question is concerned.

(he) Challenges to individual jurors; number of peremptory challenges. The challenges to individual jurors are either peremptory or for cause. Each party shall be entitled to three peremptory challenges. Several defendants or several plaintiffs shall be considered as a single party for the purposes of making peremptory challenges unless there is a substantial controversy between them, in which case the court shall allow as many additional peremptory challenges as is just. If one or two alternate jurors are called, each party is entitled to one peremptory challenge in addition to those otherwise allowed.

(if) Challenges for cause. A challenge for cause is an objection to a particular juror and shall be heard and determined by the court. The juror challenged and any other person may be examined as a witness on the hearing of such challenge. A challenge for cause may be taken on one or more of the following grounds. On its own motion the court may remove a juror upon the same grounds.

(if)(1) A want of any of the qualifications prescribed by law to render a person competent as a juror.

(if)(2) Consanguinity or affinity within the fourth degree to either party, or to an officer of a corporation that is a party.

(f~~i~~)(3) Standing in the relation of debtor and creditor, guardian and ward, master and servant, employer and employee or principal and agent, to either party, or united in business with either party, or being on any bond or obligation for either party; provided, that the relationship of debtor and creditor shall be deemed not to exist between a municipality and a resident thereof indebted to such municipality by reason of a tax, license fee, or service charge for water, power, light or other services rendered to such resident.

(if)(4) Having served as a juror, or having been a witness, on a previous trial between the same parties for the same cause of action, or being then a witness therein.

(if)(5) Pecuniary interest on the part of the juror in the result of the action, or in the main question involved in the action, except interest as a member or citizen of a municipal corporation.

(if)(6) Conduct, responses, state of mind or other circumstances that reasonably lead the court to conclude the juror is not likely to act impartially. No person may serve as a juror, if challenged, unless the judge is convinced the juror can and will act impartially and fairly.

(ig) Selection of jury. The judge shall determine the method of selecting the jury and notify the parties at a pretrial conference or otherwise prior to trial. The following methods for selection are not exclusive.

(ig)(1) Strike and replace method. The court shall summon the number of jurors that are to try the cause plus such an additional number as will allow for any alternates, for all peremptory challenges permitted, and for all challenges for cause that may be granted. At the direction of the judge, the clerk shall call jurors in random order. The judge may hear and determine challenges for cause during the course of questioning or at the end thereof. The judge may and, at the request of any party, shall hear and determine challenges for cause outside the hearing of the jurors. After each challenge for cause sustained, another juror shall be called to fill the vacancy , and any such new juror may be challenged for cause. When the challenges for cause are completed, the clerk shall provide a list of the jurors remaining, and each side, beginning with the plaintiff, shall indicate thereon its peremptory challenge to one juror at a time in regular turn until all peremptory challenges are exhausted or waived. The clerk shall then call the remaining jurors, or so many of them as shall be necessary to constitute the jury, including any alternate jurors, and the persons whose names are so called shall constitute the jury. If alternate jurors have been selected, the last jurors called shall be the alternates, unless otherwise ordered by the court prior to voir dire.

(ig)(2) Struck method. The court shall summon the number of jurors that are to try the cause plus such an additional number as will allow for any alternates, for all peremptory challenges permitted and for all challenges for cause that may be granted. At the direction of the judge, the clerk shall call jurors in random order. The judge may hear and determine challenges for cause during the course of questioning or at the end thereof. The judge may and, at the request of any party, shall hear and determine challenges for cause outside the hearing of the jurors. When the challenges for cause are completed, the clerk shall provide a list of the jurors remaining, and each side, beginning with the plaintiff, shall indicate thereon its peremptory challenge to one juror at a time in regular turn until all peremptory challenges are exhausted or waived. The clerk shall then call the remaining jurors, or so many of them as shall be necessary to constitute the jury, including any alternate jurors, and the persons whose names are so called shall constitute the jury. If alternate jurors have been selected, the last jurors called shall be the alternates, unless otherwise ordered by the court prior to voir dire.

(ig)(3) In courts using lists of prospective jurors generated in random order by computer, the clerk may call the jurors in that random order.

(h) Oath of jury. As soon as the jury is selected an oath must be administered to the jurors, in substance, that they and each of them will well and truly try the matter in issue between the parties, and render a true verdict according to the evidence and the instructions of the court.

(i) Proceedings when juror discharged. If, after impaneling the jury and before verdict, a juror becomes unable or disqualified to perform the duties of a juror and there is no alternate juror, the parties may agree to proceed with the other jurors, or to swear a new juror and commence the trial anew. If the parties do not so agree the court shall discharge the jury and the case shall be tried with a new jury.

(j) Questions by jurors. A judge may invite jurors to submit written questions to a witness as provided in this section.

(j)(1) If the judge permits jurors to submit questions, the judge shall control the process to ensure the jury maintains its role as the impartial finder of fact and does not become an investigative body. The judge may disallow any question from a juror and may discontinue questions from jurors at any time.

(j)(2) If the judge permits jurors to submit questions, the judge should advise the jurors that they may write the question as it occurs to them and submit the question to the bailiff for transmittal to the judge. The judge should advise the jurors that some questions might not be allowed.

(j)(3) The judge shall review the question with counsel and unrepresented parties and rule upon any objection to the question. The judge may disallow a question even though no objection is made. The judge shall preserve the written question in the court file. If the question is allowed, the judge shall ask the question or permit counsel or an unrepresented party to ask it. The question may be rephrased into proper form. The judge shall allow counsel and unrepresented parties to examine the witness after the juror's question.

(k) View by jury. When in the opinion of the court it is proper for the jury to have a view of the property which is the subject of litigation, or of the place in which any

material fact occurred, it may order them to be conducted in a body under the charge of an officer to the place, which shall be shown to them by some person appointed by the court for that purpose. While the jury are thus absent no person other than the person so appointed shall speak to them on any subject connected with the trial.

(l) Communication with jurors. There shall be no off-the-record communication between jurors and lawyers, parties, witnesses or persons acting on their behalf. Jurors shall not communicate with any person regarding a subject of the trial. Jurors may communicate with court personnel and among themselves about topics other than a subject of the trial. It is the duty of jurors not to form or express an opinion regarding a subject of the trial except during deliberation. The judge shall so admonish the jury at the beginning of trial and remind them as appropriate.

(m) Deliberation of jury. When the case is finally submitted to the jury they may decide in court or retire for deliberation. If they retire they must be kept together in some convenient place under charge of an officer until they agree upon a verdict or are discharged, unless otherwise ordered by the court. Unless by order of the court, the officer having charge of them must not make or allow to be made any communication to them with respect to the action, except to ask them if they have agreed upon their verdict, and the officer must not, before the verdict is rendered, communicate to any person the state of deliberations or the verdict agreed upon.

(n) Exhibits taken by jury; notes. Upon retiring for deliberation the jury may take with them the instructions of the court and all exhibits which have been received as evidence in the cause, except exhibits that should not, in the opinion of the court, be in the possession of the jury, such as exhibits of unusual size, weapons or contraband. The court shall permit the jury to view exhibits upon request. Jurors are entitled to take notes during the trial and to have those notes with them during deliberations. As necessary, the court shall provide jurors with writing materials and instruct the jury on taking and using notes.

(o) Additional instructions of jury. After the jury have retired for deliberation, if there is a disagreement among them as to any part of the testimony, or if they desire to be informed on any point of law arising in the cause, they may require the officer to conduct them into court. Upon their being brought into court the information required must be given in the presence of, or after notice to, the parties or counsel. Such information must be given in writing or stated on the record.

(p) New trial when no verdict given. If a jury is discharged or prevented from giving a verdict for any reason, the action shall be tried anew.

(q) Court deemed in session pending verdict; verdict may be sealed. While the jury is absent the court may be adjourned from time to time in respect to other business, but it shall be open for every purpose connected with the cause submitted to the jury, until a verdict is rendered or the jury discharged. The court may direct the jury to bring in a sealed verdict at the opening of the court, in case of an agreement during a recess or adjournment for the day.

(r) Declaration of verdict. When the jury or three-fourths of them, or such other number as may have been agreed upon by the parties pursuant to Rule 48, have agreed upon a verdict they must be conducted into court, their names called by the clerk, and

the verdict rendered by their foreperson; the verdict must be in writing, signed by the foreperson, and must be read by the clerk to the jury, and the inquiry made whether it is their verdict. Either party may require the jury to be polled, which shall be done by the court or clerk asking each juror if it is the juror's verdict. If, upon such inquiry or polling there is an insufficient number of jurors agreeing therewith, the jury must be sent out again; otherwise the verdict is complete and the jury shall be discharged from the cause.
(s) Correction of verdict. If the verdict rendered is informal or insufficient, it may be corrected by the jury under the advice of the court, or the jury may be sent out again.

Tab 3

Rule 26

Request and amendment history:

A proposal to amend (a)(1)(C) to include “economic” before damages was made by Judge Stone and this was approved by the Committee at the April 2022 meeting.

A proposed change was sent from Todd Weiler about the comments and referencing (a)(3) instead of (a)(4). As the Committee reviewed the comments there were some discrepancies noticed. Judge Stucki agreed to review the comments for discrepancies and has presented changes for the Committee to review.

Email from Michael Drechsel re: Amending a Legislative Note:

Hi Stacy! Thanks for emailing. The Supreme Court absolutely has the authority to amend anything in Rule 26, including the notes. No question about that. The question isn't "can they?" but rather "should they?" There is a risk that by amending the note it starts a tug-of-war over certain language, because the legislature has authority to amend the rule again and put the language right back.

Why the desire to amend the note and remove the legislature's SJR015 intent language? Is there a shift in the scope / intent of rule 26? Is the language simply seen as unnecessary / outdated? Is it a stylistics thing? Sometimes the "why" is more important than anything. A solid "why" can help diffuse any concerns the legislature may later have about the amendment.

Also, the reference in the first paragraph of the Legislative Note shouldn't be to all of "(b)(2)," since much of (b)(2) was added just last session. The only part that the legislature identified in SJR015 is (b)(2)(A)(i). Just FYI.

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.

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

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

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

(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;

(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);

(C) a computation of any economic 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;

(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

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

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

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

(B) by a defendant within 42 days after the filing of that defendant's first answer to the complaint.

(3) Exemptions.

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

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

(ii) governed by Rule 65B or Rule 65C;

(iii) to enforce an arbitration award;

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

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

(4) Expert testimony.

(A) Disclosure of retained expert testimony. A party must, 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) the facts,

data, and other information specific to the case 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.

(B) Limits on expert discovery. Further discovery may be obtained from an expert witness either by deposition or by written report. A deposition must not exceed four hours and the party taking the deposition must pay the expert's reasonable hourly fees for attendance at the deposition. A report must be signed by the expert and must 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 must pay the costs for the report.

(C) Timing for expert discovery.

(i) The party who bears the burden of proof on the issue for which expert testimony is offered must serve on the other parties the information required by paragraph (a)(4)(A) within 14 days after the close of fact discovery. Within 14 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 must occur, or the report must be served on the other parties, within 42 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 must be permitted.

(ii) The party who does not bear the burden of proof on the issue for which expert testimony is offered must serve on the other parties the information required by paragraph (a)(4)(A) within 14 days after the later of (A) the date on which the disclosure under paragraph (a)(4)(C)(i) is due, or (B) service of the written report or the taking of the expert's deposition pursuant to paragraph (a)(4)(C)(i). Within 14 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 must occur, or the report must be served on the other parties, within 42 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 must be permitted.

(iii) If the party who bears the burden of proof on an issue wants to designate rebuttal expert witnesses, it must serve on the other parties the information required by paragraph (a)(4)(A) within 14 days after the later of (A) the date on which the election under paragraph (a)(4)(C)(ii) is due or (B) service of the written report or the taking of the expert's deposition pursuant to paragraph (a)(4)(C)(ii). Within 14 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 must occur, or the report must be served on the other parties, within 42 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 must be permitted. The court may preclude an expert disclosed only as a rebuttal expert from testifying in the case in chief.

(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.

(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). Such a witness cannot be required to provide a report pursuant to paragraph (a)(4)(B). A deposition of such a witness may not exceed four hoursand, unless manifest injustice would result, the party taking the deposition must pay the expert's reasonable hourly fees for attendance at the deposition.

(5) Pretrial disclosures.

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

(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;

(ii) the name of witnesses whose testimony is expected to be presented by transcript of a deposition;

(iii) designations of the proposed deposition testimony; and

(iv) 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.

(B) Disclosure required by paragraph (a)(5)(A) must be served on the other parties at least 28 days before trial. Disclosures required by paragraph (a)(5)(A)(i) and (a)(5)(A)(ii) must also be filed on the date that they are served. At least 14 days before trial, a party must serve any counter designations of deposition testimony and any objections and grounds for the objections to the use of any deposition, witness, or exhibit if the grounds for the objection are apparent before trial. Other than objections under Rules 402 and 403 of the Utah Rules of Evidence, other objections not listed are waived unless excused by the court for good cause.

(6) Form of disclosure and discovery production. Rule 34 governs the form in which all documents, data compilations, electronically stored information, tangible things, and evidentiary material should be produced under this Rule.

(b) Discovery scope.

(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.

(2) Privileged matters.

(A) Privileged matters that are not discoverable or admissible in any proceeding of any kind or character include:

(i) 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 Utah Code Title 78B, Chapter 3, Part 4, 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; and

(ii) except as provided in paragraph (b)(2)(C), (D), or (E), all communications, materials, and information in any form specifically created for or during a medical candor process under Utah Code Title 78B, Chapter 3, Part 4a, Utah Medical Candor Act, including any findings or conclusions from the investigation and any offer of compensation.

(B) Disclosure or use in a medical candor process of any communication, material, or information in any form that contains any information described in paragraph (b)(2)(A)(i) does not waive any privilege or protection against admissibility or discovery of the information under paragraph (b)(2)(A)(i).

(C) Any communication, material, or information in any form that is made or provided in the ordinary course of business, including a medical record or a business record, that is otherwise discoverable or admissible and is not created for or during a medical candor process is not privileged by the use or disclosure of the communication, material or information during a medical candor process.

(D) (i) Any information that is required to be documented in a patient's medical record under state or federal law is not privileged by the use or disclosure of the information during a medical candor process.

(ii) Information described in paragraph (b)(2)(D)(i) does not include an individual's mental impressions, conclusions, or opinions that are formed outside the course and scope of the patient's care and treatment and are used or disclosed in a medial candor process.

(E) (i) Any communication, material or information in any form that is provided to an affected party before the affected party's written agreement to participate in a medical candor process is not privileged by the use or disclosure of the communication, material, or information during a medical candor process.

(ii) Any communication, material, or information described in paragraph (b)(2)(E)(i) does not include a written notice described in Utah Code section 78B-3-452.

(F) The terms defined in Utah Code section 78B-3-450 apply to paragraphs (b)(2)(A)(ii), (B), (C), (D), and (E).

(G) Nothing in this paragraph (b)(2) shall prevent a party from raising any other privileges provided by law or rule as to the admissibility or discovery of any communication, information, or material described in paragraph (b)(2)(A), (B), (C), (D), or (E).

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

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

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

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

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

(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.

(4) 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.

(5) Electronically stored information. A party claiming that electronically stored information is not reasonably accessible because of undue burden or cost must 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.

(6) 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 must protect against disclosure of the mental impressions, conclusions, opinions, or legal theories of an attorney or other representative of a party.

(7) 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.

(8) Trial preparation; experts.

(A) Trial-preparation protection for draft reports or disclosures. Paragraph (b)(6) protects drafts of any report or disclosure required under paragraph (a)(4), regardless of the form in which the draft is recorded.

(B) Trial-preparation protection for communications between a party's attorney and expert witnesses. Paragraph (b)(6) 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:

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

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

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

(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:

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

(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.

(9) Claims of privilege or protection of trial preparation materials.

(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 must make the claim expressly and must 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) 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.

(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.

(2) Sequence and timing of discovery. Methods of discovery may be used in any sequence, and the fact that a party is conducting discovery must 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.

(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. Domestic relations actions are permitted standard discovery as described for Tier 4.

(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.

(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	$300,00 or more	30	20	20	20	210
4	Domestic relations actions	4	10	10	10	90

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

(A) before the close of standard discovery and after reaching the limits of standard discovery imposed by these rules, file a stipulated statement that extraordinary discovery is necessary and proportional under paragraph (b)(2)

and, for each party represented by an attorney, a statement that the attorney consulted with the client about the request for extraordinary discovery;

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

(C) obtain an expanded discovery schedule under Rule 100A.

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

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

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

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

(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.

(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 must 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 must not file with the court a disclosure, a request for discovery, or a response to a request for discovery, but must 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.

Effective: 5/4/2022

Advisory Committee Notes

Note Adopted 2011

Disclosure requirements and timing. Rule 26(a)(1).

Not all information will be known at the outset of a case. If discovery is serving its proper purpose, additional witnesses, documents, and other information will be identified. The scope and the level of detail required in the initial Rule 26(a)(1) disclosures should be viewed in light of this reality. A party is not required to interview every witness it ultimately may call at trial in order to provide a summary of the witness's expected testimony. As the information becomes known, it should be

disclosed. No summaries are required for adverse parties, including management level employees of business entities, because opposing lawyers are unable to interview them and their testimony is available to their own counsel. For uncooperative or hostile witnesses any summary of expected testimony would necessarily be limited to the subject areas the witness is reasonably expected to testify about. For example, defense counsel may be unable to interview a treating physician, so the initial summary may only disclose that the witness will be questioned concerning the plaintiff's diagnosis, treatment and prognosis. After medical records have been obtained, the summary may be expanded or refined.

Subject to the foregoing qualifications, the summary of the witness's expected testimony should be just that– a summary. The rule does not require prefiled testimony or detailed descriptions of everything a witness might say at trial. On the other hand, it requires more than the broad, conclusory statements that often were made under the prior version of Rule 26(a)(1)(e.g., "The witness will testify about the events in question" or "The witness will testify on causation."). The intent of this requirement is to give the other side basic information concerning the subjects about which the witness is expected to testify at trial, so that the other side may determine the witness's relative importance in the case, whether the witness should be interviewed or deposed, and whether additional documents or information concerning the witness should be sought. *See RJW Media Inc. v. Heath*, 2017 UT App 34, ¶¶ 23-25, 392 P.3d 956. This information is important because of the other discovery limits contained in Rule 26.

Likewise, the documents that should be provided as part of the Rule 26(a)(1) disclosures are those that a party reasonably believes it may use at trial, understanding that not all documents will be available at the outset of a case. In this regard, it is important to remember that the duty to provide documents and witness information is a continuing one, and disclosures must be promptly supplemented as new evidence and witnesses become known as the case progresses.

Early disclosure of damages information is important. Among other things, it is a critical factor in determining proportionality. The committee recognizes that damages often require additional discovery, and typically are the subject of expert testimony. The Rule is not intended to require expert disclosures at the outset of a case. At the same time, the subject of damages should not simply be deferred until expert discovery. Parties should make a good faith attempt to compute damages to the extent it is possible to do so and must in any event provide all discoverable information on the subject, including materials related to the nature and extent of the damages.

The penalty for failing to make timely disclosures is that the evidence may not be used in the party's case-in-chief. To make the disclosure requirement meaningful, and to discourage sandbagging, parties must know that if they fail to disclose important information that is helpful to their case, they will not be able to use that information at trial. The courts will be expected to enforce them unless the failure is harmless or the party shows good cause for the failure.

The purpose of early disclosure is to have all parties present the evidence they expect to use to prove their claims or defenses, thereby giving the opposing party the ability to better evaluate the case and determine what additional discovery is necessary and proportional.

Expert disclosures and timing. Rule 26(a)(4~~3~~). Disclosure of the identity and subjects of expert opinions and testimony is automatic under Rule 26(a)(4~~3~~) and parties are not required to serve interrogatories or use other discovery devices to obtain this information.

Experts frequently will prepare demonstrative exhibits or other aids to illustrate the expert's testimony at trial, and the costs for preparing these materials can be substantial. For that reason, these types of demonstrative aids may be prepared and disclosed later, as part of the Rule 26(a)~~(4)~~(5)(iv) pretrial disclosures when trial is imminent.

If a party elects a written report, the expert must provide a signed report containing a complete statement of all opinions the expert will express and the basis and reasons for them. The intent is not to require a verbatim transcript of exactly what the expert will say at trial; instead the expert must fairly disclose the substance of and basis for each opinion the expert will offer. The expert may not testify in a party's case in chief concerning any matter that is not fairly disclosed in the report. To achieve the goal of making reports a reliable substitute for depositions, courts are expected to enforce this requirement. If a party elects a deposition, rather than a report, it is up to the party to ask the necessary questions to "lock in" the expert's testimony. But the expert is expected to be fully prepared on all aspects of his/her trial testimony at the time of the deposition and may not leave the door open for additional testimony by qualifying answers to deposition questions.

There are a number of difficulties inherent in disclosing expert testimony that may be offered from fact witnesses. First, there is often not a clear line between fact and expert testimony. Many fact witnesses have scientific, technical or other specialized knowledge, and their testimony about the events in question often will cross into the area of expert testimony. The rules are not intended to erect artificial barriers to the admissibility of such testimony. Second, many of these fact witnesses will not be within the control of the party who plans to call them at trial. These witnesses may not be cooperative, and may not be willing to discuss opinions they have with counsel. Where this is the case, disclosures will necessarily be more limited. On the other hand, consistent with the overall purpose of the 2011 amendments, a party should receive advance notice if their opponent will solicit expert opinions from a particular witness so they can plan their case accordingly. In an effort to strike an appropriate balance, the rules require that such witnesses be identified and the information about their anticipated testimony should include that which is required under Rule 26(a)(1)(A)(ii), which should include any opinion testimony that a party expects to elicit from them at trial. If a party has disclosed possible opinion testimony in its Rule 26(a)(1)(A)(ii)

disclosures, that party is not required to prepare a separate Rule 26 (a)(4)(E) disclosure for the witness. And if that disclosure is made in advance of the witness's deposition, those opinions should be explored in the deposition and not in a separate expert deposition. Otherwise, the timing for disclosure of non-retained expert opinions is the same as that for retained experts under Rule 26(a)(4)(C) and depends on whether the party has the burden of proof or is responding to another expert.

Scope of discovery—Proportionality. Rule 26(b). Proportionality is the principle governing the scope of discovery. Simply stated, it means that the cost of discovery should be proportional to what is at stake in the litigation.

In the past, the scope of discovery was governed by "relevance" or the "likelihood to lead to discovery of admissible evidence." These broad standards may have secured just results by allowing a party to discover all facts relevant to the litigation. However, they did little to advance two equally important objectives of the rules of civil procedure—the speedy and inexpensive resolution of every action. Accordingly, the former standards governing the scope of discovery have been replaced with the proportionality standards in subpart (b)(~~1~~3).

The concept of proportionality is not new. The prior rule permitted the Court to limit discovery methods if it determined that "the discovery was unduly burdensome or expensive, taking into account the needs of the case, the amount in controversy, limitations on the parties' resources, and the importance of the issues at stake in the litigation." The Federal Rules of Civil Procedure contains a similar provision. See Fed. R. Civ. P. 26(b)(2)-(C).

Any system of rules which permits the facts and circumstances of each case to inform procedure cannot eliminate uncertainty. Ultimately, the trial court has broad discretion in deciding whether a discovery request is proportional. The proportionality standards in subpart (b)(~~2~~3) and the discovery tiers in subpart (c) mitigate uncertainty by guiding that discretion. The proper application of the proportionality standards will be defined over time by trial and appellate courts.

Standard and extraordinary discovery. Rule 26(c). As a counterpart to requiring more detailed disclosures under Rule 26(a), the 2011 amendments place new limitations on additional discovery the parties may conduct. Because the committee expects the enhanced disclosure requirements will automatically permit each party to learn the witnesses and evidence the opposing side will offer in its case-in-chief, additional discovery should serve the more limited function of permitting parties to find witnesses, documents, and other evidentiary materials that are harmful, rather than helpful, to the opponent's case.

Parties are expected to be reasonable and accomplish as much as they can during standard discovery. A statement of discovery issues may result in additional discovery and sanctions at the expense of a party who unreasonably fails to respond or otherwise frustrates discovery. After the expiration of the applicable time limitation, a case is presumed to be ready for trial. Actions for nonmonetary relief, such as injunctive relief, are subject to the standard discovery limitations of Tier 2, absent an accompanying monetary claim of $300,000 or more, in which case Tier 3 applies.

Consequences of failure to disclose. Rule 26(d). If a party fails to disclose or to supplement timely its discovery responses, that party cannot use the undisclosed witness, document, or material at any hearing or trial, absent proof that non-disclosure was harmless or justified by good cause. More complete disclosures increase the likelihood that the case will be resolved justly, speedily, and inexpensively. Not being able to use evidence that a party fails properly to disclose provides a powerful incentive to make complete disclosures. This is true only if trial courts hold parties to this standard. Accordingly, although a trial court retains discretion to determine how properly to address this issue in a given case, the usual and expected result should be exclusion of the evidence.

Legislative Note

Note adopted 2012

S.J.R. 15

(1) The ~~amended~~ language in paragraph (b)(~~1~~2) is intended to incorporate long-standing protections against discovery and admission into evidence of privileged matters connected to medical care review and peer review into the Utah Rules of Civil Procedure, which protections were placed in part (b) pursuant to Senate Joint Resolution 15 upon approval by a constitutional two-thirds vote of all members elected to each house on March 6, 2012. These privileges, found in both Utah common law and statute, include Sections 26-25-3, 58-13-4, and 58-13-5, UCA, 1953. The language is intended to ensure the confidentiality of peer review, care review, and quality assurance processes and to ensure that the privilege is limited only to documents and information created specifically as part of the processes. It does not extend to knowledge gained or documents created outside or independent of the processes. The language is not intended to limit the court's existing ability, if it chooses, to review contested documents in camera in order to determine whether the documents fall within the privilege. The language is not intended to alter any existing law, rule, or regulation relating to the confidentiality, admissibility, or disclosure of proceedings before the Utah Division of Occupational and Professional Licensing. The Legislature intends that these privileges apply to all pending and future proceedings governed by court rules, including administrative proceedings regarding licensing and reimbursement.

~~(2) The Legislature does not intend that the amendments to this rule be construed to change or alter a final order concerning discovery matters entered on or before the effective date of this amendment.~~

~~(3) The Legislature intends to give the greatest effect to its amendment, as legally permissible, in matters that are pending on or may arise after the effective date of this amendment, without regard to when the case was filed.~~

~~Effective date. Upon approval by a constitutional two-thirds vote of all members elected to each house. [March 6, 2012]~~

Tab 4

Supreme Court of Utah
450 South State Street
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Salt Lake City, Utah 84114-0210

Telephone 801-578-3900
Email:supremecourt@utcourts.gov

Nicholas Stiles
Appellate Court Administrator

Nicole J. Gray
Clerk of Court

To: Lauren DiFrancesco, Chair, Advisory Committee on the Rules of Civil Procedure
From: Nick Stiles, Appellate Court Administrator
Re: Request from Utah Supreme Court
Date: September 2, 2022

Dear Lauren –

The Supreme Court has recently considered court data surrounding self-represented parties in civil actions. As you're aware from your experience in practice and time on the Court's Advisory Committee, self-represented litigants make up a large percentage of parties interacting with our civil justice system. Because of this, the Court would like to modify the composition of your Committee to include two new members that bring in the perspective of self-represented litigants. The new members can be either former self-represented litigants or someone in a position to offer the relevant perspective. This might include: front counter clerks, community-based organizations, social services agencies (libraries, homeless shelters, community action agencies, senior centers, and independent non-profits), and legal clinics (Timpanogos Legal Center, Utah Legal Services, the Legal Aid Society of Salt Lake City, the Utah Bar's Access to Justice office, S. J. Quinney College of Law's Pro Bono Initiative, and J. Reuben Clark Law School's Community Legal Clinic). Would you mind placing this item on an upcoming committee meeting for discussion? I am glad to come and present the issue and field questions. I would also encourage the invitation of Nathanael Player of the Administrative Office of the Court's Self-Help Center as the Court has looked to him for guidance on this issue.

The Court would also like your Committee to study the following three rules with a focus on eliminating the hurdles that self-represented parties face. The three rules include:

URCP 12(a)(1) directs a defendant to serve an answer within a specific time. However, the rule does not tell the defendant to file the answer as well, often leading to default. We would like the Committee to evaluate whether adding the requirement in the rule that the answer be filed would reduce the number of cases ending in default.

URCP 26.1(h) requires parties in domestic relations actions to be served with notice of the requirements to exchange initial disclosures and financial declarations. However, in practice, when parties agree on all terms, the disclosure are not required. The Court would like the Committee to consider amending the rule to clarify that the disclosures are only required if the responding party files an answer or otherwise disagrees with the petition.

URCP 104 requires the filing of a separate affidavit in support of a divorce decree, even though court form pleadings articulate the grounds for jurisdiction and for divorce as sworn statements under the Unsworn Declarations Act, Utah Code Title 78B, Chapter 18a. This rule duplications work, adds more generation of paperwork, and more confusion in divorce actions. The Court would like the Committee to consider

repealing this rule or amending it to clarify that a sworn pleading can suffice for the affidavit mentioned in the rule.

Please let me know if you have questions or if I can assist in any way!

Respectfully,

Nick Stiles
Administrator, Utah Appellate Courts

Tab 5

Supreme Court of Utah
450 South State Street
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Nicholas Stiles
Appellate Court Administrator

Nicole J. Gray
Clerk of Court

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Respectfully,

Nick Stiles
Administrator, Utah Appellate Courts

Rule 12. Defenses and objections.

Effective: 11/1/2021

(a) **When presented.**

(1) **In actions other than domestic relations.** Unless otherwise provided by statute or order of the court, a defendant must serve an answer within 21 days after the service of the summons and complaint is complete within the state and within 30 days after service of the summons and complaint is complete outside the state. A party served with a pleading stating a cross-claim must serve an answer thereto within 21 days after the service. The plaintiff must serve an answer to a counterclaim in the answer within 21 days after service of the answer or, if a reply is ordered by the court, within 21 days after service of the order, unless the order otherwise directs. The service of a motion under this rule alters these periods of time as follows, unless a different time is fixed by order of the court, but a motion directed to fewer than all of the claims in a pleading does not affect the time for responding to the remaining claims:

(A) If the court denies the motion or postpones its disposition until the trial on the merits, the responsive pleading must be served within 14 days after notice of the court's action;

(B) If the court grants a motion for a more definite statement, the responsive pleading must be served within 14 days after the service of the more definite statement.

(2) **In domestic relations actions.** A party served with a domestic relations action must serve an answer within 21 days after service of the summons and petition is complete within the state and within 30 days after service of the summons and petition is complete outside the state. Any counterpetition must be filed with the answer. A party served with a counterpetition must serve an answer within 21 days after service of the counterpetition.

(b) **How presented.** Every defense, in law or fact, to claim for relief in any pleading, whether a claim, counterclaim, cross-claim, or third-party claim, must be asserted in the responsive pleading thereto if one is required, except that the following defenses may at the option of the pleader be made by motion: (1) lack of jurisdiction over the subject matter, (2) lack of jurisdiction over the person, (3) improper venue, (4) insufficiency of process, (5) insufficiency of service of process, (6) failure to state a claim upon which relief can be granted, (7) failure to join an indispensable party. A motion making any of these defenses must be made before pleading if a further pleading is permitted. No defense or objection is waived by being joined with one or more other defenses or objections in a responsive pleading or motion or by further pleading after the denial of such motion or objection. If a pleading sets forth a claim for relief to which the adverse party is not required to serve a responsive pleading, the adverse party may assert at the trial any defense in law or fact to that claim for relief. If, on a motion asserting the defense numbered (6) to dismiss for failure of the pleading to state a claim upon which relief can be granted, matters outside the pleading are presented to and not excluded by the court, the motion must be treated as one for summary judgment and disposed of as provided in Rule 56, and all parties must be given reasonable opportunity to present all material made pertinent to such a motion by Rule 56.

(c) **Motion for judgment on the pleadings.** After the pleadings are closed, but within such time as not to delay the trial, any party may move for judgment on the pleadings. If, on a motion for judgment on the pleadings, matters outside the pleadings are presented to and not excluded by the court, the motion must be treated as one for summary judgment and disposed of as provided in Rule 56, and all parties must be given reasonable opportunity to present all material made pertinent to such a motion by Rule 56.

(d) **Preliminary hearings.** The defenses specifically enumerated (1) - (7) in subdivision (b) of this rule, whether made in a pleading or by motion, and the motion for judgment mentioned in subdivision (c) of this rule must be heard and determined before trial on

application of any party, unless the court orders that the hearings and determination thereof be deferred until the trial.

(e) **Motion for more definite statement.** If a pleading to which a responsive pleading is permitted is so vague or ambiguous that a party cannot reasonably be required to frame a responsive pleading, the party may move for a more definite statement before interposing a responsive pleading. The motion must point out the defects complained of and the details desired. If the motion is granted and the order of the court is not obeyed within 14 days after notice of the order or within such other time as the court may fix, the court may strike the pleading to which the motion was directed or make such order as it deems just.

(f) **Motion to strike.** Upon motion made by a party before responding to a pleading or, if no responsive pleading is permitted by these rules, upon motion made by a party within 21 days after the service of the pleading, the court may order stricken from any pleading any insufficient defense or any redundant, immaterial, impertinent, or scandalous matter.

(g) **Consolidation of defenses.** A party who makes a motion under this rule may join with it the other motions herein provided for and then available. If a party makes a motion under this rule and does not include therein all defenses and objections then available which this rule permits to be raised by motion, the party must not thereafter make a motion based on any of the defenses or objections so omitted, except as provided in subdivision (h) of this rule.

(h) **Waiver of defenses.** A party waives all defenses and objections not presented either by motion or by answer or reply, except (1) that the defense of failure to state a claim upon which relief can be granted, the defense of failure to join an indispensable party, and the objection of failure to state a legal defense to a claim may also be made by a later pleading, if one is permitted, or by motion for judgment on the pleadings or at the trial on the merits, and except (2) that, whenever it appears by suggestion of the parties or otherwise that the court lacks jurisdiction of the subject matter, the court must

dismiss the action. The objection or defense, if made at the trial, must be disposed of as provided in Rule 15(b) in the light of any evidence that may have been received.

(i) **Pleading after denial of a motion.** The filing of a responsive pleading after the denial of any motion made pursuant to these rules must not be deemed a waiver of such motion.

(j) **Security for costs of a nonresident plaintiff.** When the plaintiff in an action resides out of this state, or is a foreign corporation, the defendant may file a motion to require the plaintiff to furnish security for costs and charges which may be awarded against such plaintiff. Upon hearing and determination by the court of the reasonable necessity therefor, the court must order the plaintiff to file a $300.00 undertaking with sufficient sureties as security for payment of such costs and charges as may be awarded against such plaintiff. No security must be required of any officer, instrumentality, or agency of the United States.

(k) **Effect of failure to file undertaking.** If the plaintiff fails to file the undertaking as ordered within 30 days of the service of the order, the court must, upon motion of the defendant, enter an order dismissing the action.

Tab 6

Nicholas Stiles
Appellate Court Administrator

Nicole J. Gray
Clerk of Court

Supreme Court of Utah
450 South State Street
P.O. Box 140210
Salt Lake City, Utah 84114-0210

Telephone 801-578-3900
Email:supremecourt@utcourts.gov

Matthew B. Durrant
Chief Justice
John A. Pearce
Associate Chief Justice
Paige Petersen
Justice
Diana Hagen
Justice
Jill M. Pohlman
Justice

To: Lauren DiFrancesco, Chair, Advisory Committee on the Rules of Civil Procedure
From: Nick Stiles, Appellate Court Administrator
Re: Request from Utah Supreme Court
Date: September 2, 2022

Dear Lauren –

The Supreme Court has recently considered court data surrounding self-represented parties in civil actions. As you're aware from your experience in practice and time on the Court's Advisory Committee, self-represented litigants make up a large percentage of parties interacting with our civil justice system. Because of this, the Court would like to modify the composition of your Committee to include two new members that bring in the perspective of self-represented litigants. The new members can be either former self-represented litigants or someone in a position to offer the relevant perspective. This might include: front counter clerks, community-based organizations, social services agencies (libraries, homeless shelters, community action agencies, senior centers, and independent non-profits), and legal clinics (Timpanogos Legal Center, Utah Legal Services, the Legal Aid Society of Salt Lake City, the Utah Bar's Access to Justice office, S. J. Quinney College of Law's Pro Bono Initiative, and J. Reuben Clark Law School's Community Legal Clinic). Would you mind placing this item on an upcoming committee meeting for discussion? I am glad to come and present the issue and field questions. I would also encourage the invitation of Nathanael Player of the Administrative Office of the Court's Self-Help Center as the Court has looked to him for guidance on this issue.

The Court would also like your Committee to study the following three rules with a focus on eliminating the hurdles that self-represented parties face. The three rules include:

URCP 12(a)(1) directs a defendant to serve an answer within a specific time. However, the rule does not tell the defendant to file the answer as well, often leading to default. We would like the Committee to evaluate whether adding the requirement in the rule that the answer be filed would reduce the number of cases ending in default.

URCP 26.1(h) requires parties in domestic relations actions to be served with notice of the requirements to exchange initial disclosures and financial declarations. However, in practice, when parties agree on all terms, the disclosure are not required. The Court would like the Committee to consider amending the rule to clarify that the disclosures are only required if the responding party files an answer or otherwise disagrees with the petition.

URCP 104 requires the filing of a separate affidavit in support of a divorce decree, even though court form pleadings articulate the grounds for jurisdiction and for divorce as sworn statements under the Unsworn Declarations Act, Utah Code Title 78B, Chapter 18a. This rule duplications work, adds more generation of paperwork, and more confusion in divorce actions. The Court would like the Committee to consider

repealing this rule or amending it to clarify that a sworn pleading can suffice for the affidavit mentioned in the rule.

Please let me know if you have questions or if I can assist in any way!

Respectfully,

Nick Stiles
Administrator, Utah Appellate Courts

Rule 26.1. Disclosure and discovery in domestic relations actions.

(a) Scope. This rule applies to the following domestic relations actions: divorce; temporary separation; separate maintenance; parentage; custody; child support; and modification. This rule does not apply to adoptions, enforcement of prior orders, cohabitant abuse protective orders, child protective orders, civil stalking injunctions, or grandparent visitation.

(b) Time for disclosure. ~~In addition to the Initial Disclosures required in Rule 26, in all domestic relations actions, the documents required in this rule~~ In all domestic relations actions, the disclosures required by Rule 26 and this rule must be served on the other parties within 14 days after filing of the first answer to the complaint.

(c) Financial declaration. Each party must serve on all other parties a fully completed Financial Declaration, using the court-approved form, and attachments. Each party must attach to the Financial Declaration the following:

(1) For every item and amount listed in the Financial Declaration, excluding monthly expenses, copies of statements verifying the amounts listed on the Financial Declaration that are reasonably available to the party.

(2) For the two tax years before the petition was filed, complete federal and state income tax returns, including Form W-2 and supporting tax schedules and attachments, filed by or on behalf of that party or by or on behalf of any entity in which the party has a majority or controlling interest, including, but not limited to, Form 1099 and Form K-1 with respect to that party.

(3) Pay stubs and other evidence of all earned and un-earned income for the 12 months before the petition was filed.

(4) All loan applications and financial statements prepared or used by the party within the 12 months before the petition was filed.

(5) Documents verifying the value of all real estate in which the party has an interest, including, but not limited to, the most recent appraisal, tax valuation and refinance documents.

(6) All statements for the 3 months before the petition was filed for all financial accounts, including, but not limited to checking, savings, money market funds, certificates of deposit, brokerage, investment, retirement, regardless of whether the account has been closed including those held in that party's name, jointly with another person or entity, or as a trustee or guardian, or in someone else's name on that party's behalf.

(7) If the foregoing documents are not reasonably available or are in the possession of the other party, the party disclosing the Financial Declaration must estimate the amounts entered on the Financial Declaration, the basis for the estimation and an explanation why the documents are not available.

(d) Certificate of service. Each party must file a Certificate of Service with the court certifying that he or she has provided the Financial Declaration and attachments to the other party.

(e) Exemptions.

(1) Agencies of the State of Utah are not subject to these disclosure requirements.

(2) In cases where assets are not at issue, such as paternity, modification, and grandparents' rights, a party must only serve:

(A) the party's last three current paystubs and the previous year tax return;

(B) six months of bank and profit and loss statements if the party is self-employed; and

(C) proof of any other assets or income relevant to the determination of a child support award.

The court may require the parties to complete a full Financial Declaration for purposes of determining an attorney fee award or for any other reason. Any party may by motion or through the discovery process also request completion of a full Financial Declaration.

(f) Sanctions. Failure to fully disclose all assets and income in the Financial Declaration and attachments may subject the non-disclosing party to sanctions under Rule 37 including an award of non-disclosed assets to the other party, attorney's fees or other sanctions deemed appropriate by the court.

(g) Failure to comply. Failure of a party to comply with this rule does not preclude any other party from obtaining a default judgment, proceeding with the case, or seeking other relief from the court.

(h) Notice of requirements. Notice of the requirements of this rule must be served on the other party and all joined parties with the initial petition.

Effective November 1, 2021

Tab 7

Nicholas Stiles
Appellate Court Administrator

Nicole J. Gray
Clerk of Court

Supreme Court of Utah
450 South State Street
P.O. Box 140210
Salt Lake City, Utah 84114-0210

Telephone 801-578-3900
Email:supremecourt@utcourts.gov

To: Lauren DiFrancesco, Chair, Advisory Committee on the Rules of Civil Procedure
From: Nick Stiles, Appellate Court Administrator
Re: Request from Utah Supreme Court
Date: September 2, 2022

Dear Lauren –

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repealing this rule or amending it to clarify that a sworn pleading can suffice for the affidavit mentioned in the rule.

Please let me know if you have questions or if I can assist in any way!

Respectfully,

Nick Stiles
Administrator, Utah Appellate Courts

Rule 104. Divorce decree upon affidavit.

Effective: 11/1/2021

A party in a divorce case may apply for entry of a decree without a hearing in cases in which the other party fails to make a timely appearance after service of process or other appropriate notice, waives notice, stipulates to the withdrawal of the answer, or stipulates to the entry of the decree or entry of default. An affidavit in support of the decree must accompany the application. The affidavit must contain evidence sufficient to support necessary findings of fact and a final judgment.

Tab 8

Rule 59(e)

URCP Rule 59(e) states a motion to alter or amend the judgment must be filed no later than 28 days after entry of judgment, which may conflict with Utah Code 78B-6-811(5)(b) which states the court may modify a judgment for additional amounts owed if a motion is submitted within 180 days.

Request sent Lauren DiFrancesco by Kim Paulding

Rule 59. New trial; altering or amending a judgment.

Effective: 5/1/2016

(a) **Grounds.** Except as limited by Rule 61, a new trial may be granted to any party on any issue for any of the following reasons:

~~(a)~~(1) irregularity in the proceedings of the court, jury or opposing party, or any order of the court, or abuse of discretion by which a party was prevented from having a fair trial;

~~(a)~~(2) misconduct of the jury, which may be proved by the affidavit or declaration of any juror;

~~(a)~~(3) accident or surprise that ordinary prudence could not have guarded against;

(a)(4) newly discovered material evidence that could not, with reasonable diligence, have been discovered and produced at the trial;

~~(a)~~(5) excessive or inadequate damages that appear to have been given under the influence of passion or prejudice;

~~(a)~~(6) insufficiency of the evidence to justify the verdict or other decision; or

~~(a)~~(7) that the verdict or decision is contrary to law or based on an error in law.

(b) **Time for motion.** A motion for a new trial must be filed no later than 28 days after entry of the judgment. When the motion for a new trial is filed under paragraph (a)(1), (2), (3), or (4), it must be supported by affidavits or declarations. If a motion for a new trial is supported by affidavits or declarations, they must be served with the motion.

(c) **Further action after non-jury trial.** After a nonjury trial, the court may, on motion for a new trial, open the judgment if one has been entered, take additional testimony, amend findings of fact and conclusions of law or make new ones, and direct entry of a new judgment.

(d) **New trial on initiative of court or for reasons not in the motion.** No later than 28 days after entry of the judgment the court, on its own, may order a new trial for any

reason that would justify a new trial on motion of a party. After giving the parties notice and an opportunity to be heard, the court may grant a timely motion for a new trial for a reason not stated in the motion. The order granting a new trial must state the reasons for the new trial.

(e) **Motion to alter or amend a judgment.** A motion to alter or amend the judgment must be filed no later than 28 days after entry of the judgment.

Effective 5/12/2020

78B-6-811 Judgment for restitution, damages, and rent -- Immediate enforcement -- Remedies.

(1)
  (a) A court may:
    (i) enter a judgment upon the merits or upon default; and
    (ii) issue an order of restitution regardless of whether a judgment is entered.
  (b) A judgment entered in favor of the plaintiff shall include an order for the restitution of the premises as provided in Section 78B-6-812.
  (c) If the proceeding is for unlawful detainer after neglect or failure to perform any condition or covenant of the lease or agreement under which the property is held, or after default in the payment of rent, the judgment shall also declare the forfeiture of the lease or agreement.
  (d)
    (i) A forfeiture under Subsection (1)(c) does not release a defendant from any obligation for payments on a lease for the remainder of the lease's term.
    (ii) Subsection (1)(d)(i) does not change any obligation on either party to mitigate damages.

(2) The jury or the court, if the proceeding is tried without a jury or upon the defendant's default, shall also assess the damages resulting to the plaintiff from any of the following:
  (a) forcible entry;
  (b) forcible or unlawful detainer;
  (c) waste of the premises during the defendant's tenancy, if waste is alleged in the complaint and proved at trial;
  (d) the amounts due under the contract, if the alleged unlawful detainer is after default in the payment of amounts due under the contract; and
  (e) the abatement of the nuisance by eviction as provided in Sections 78B-6-1107 through 78B-6-1114.

(3) The judgment shall be entered against the defendant for the rent, for three times the amount of the damages assessed under Subsections (2)(a) through (2)(e).

(4)
  (a) If the proceeding is for unlawful detainer, execution upon the judgment shall be issued immediately after the entry of the judgment.
  (b) In all cases, the judgment may be issued and enforced immediately.

(5) In an action under this chapter, the court:
  (a) shall award costs and reasonable attorney fees to the prevailing party;
  (b) may modify a judgment for additional amounts owed if a motion is submitted within 180 days on the earlier of the day on which:
    (i) the order of restitution is enforced; or
    (ii) the defendant vacates the premises; and
  (c) may grant a party additional time for a motion under Subsection (5)(b).

(6)
  (a) If the court issues an order of restitution, the defendant shall provide a current address to the court and the plaintiff within 30 days of the day on which the court issues the order of restitution.
  (b) Failure of a defendant to provide an address under Subsection (6)(a) does not require the plaintiff or the court to bear the burden of seeking out the defendant to provide notice for any subsequent proceeding.

Amended by Chapter 329, 2020 General Session

Tab 9

Rule 6(a)(6)

Request sent to Lauren DiFrancesco by Christopher Ballard.

Email from Christopher Ballard
Ms. DiFrancesco,

I'm Christopher Ballard, chair of the Utah Supreme Court's Advisory Committee on the appellate rules. I understand that you are chair of the civil rules advisory committee. If not, please forgive me for bothering you with this, and, if possible, direct me to the current committee chair.

Several months ago, I received an email from West Publishing noting discrepancies between (1) the way Utah's civil and appellate rules define holidays, and (2) how federal and state law designate the date for observing the new Juneteenth holiday. I'm wondering if your committee has considered taking any action to address these issues. If it has, I think our two committees should coordinate our approach.

Here are the issues:

First, by federal statute (attached), Juneteenth is observed on June 19th, unless that date is a Saturday or Sunday, in which case the holiday is observed on either the preceding Friday or the following Monday. In contrast, by Utah statute (also attached), Juneteenth is always observed on a Monday.

Second, Utah R. Civ. P. 6(a)(6) defines "legal holiday" as "any day designated *by the Governor or Legislature* as a state holiday" while Utah R. App. P. 22 defines "legal holiday" as "days designated as holidays by *the state or federal governments*."

So, it seems that the appellate rules would recognize two different observances of Juneteenth, while the civil rules would recognize only a Monday observance, as defined by state law. Given this, perhaps your committee has decided no action is necessary.

Regardless, I would like to know if your committee has addressed this issue and, if so, what you decided.

Chris

Email from Lauren DiFrancesco
Hey Chris,

My apologies for the delay in getting back with you. I've been in trial for the last several weeks and am still digging out.

So I've looked in to what you've described below, and that's interesting the way the Utah legislature has it always on a Monday like that, especially in contrast to how the federal government is defining it. But certainly the intent of the rules is to have the rules be consistent with the date the courts are closed. And the UT Court's website calls it the third Monday of June, which I imagine is how the legislature's definition shakes out and is just simplified. But I also think it works best when the state and federal court holidays are overlapping, which even the Utah federal courts have done with July 24th. But I don't see how that's possible with federal and state holidays simply being different days. Although both 2022 and 2023 were the 2 years out of the next 7 where the holiday is the same day, where the 19th was on a Sunday and then a Monday.

Happy to discuss, but I have not yet talked to my committee about this. Although at a minimum, a change seems to be in order to add Juneteenth to the list of holidays in URCP 6(a)(6) – beyond that, I'm not sure there's much to do, other than raise with our legislative liaison.

What do you think? I'd love to connect on this before I take it to my committee later this month.

Rule 6. Time.

Effective: 5/1/2021

(a) **Computing time.** The following rules apply in computing any time period specified in these rules, any local rule or court order, or in any statute that does not specify a method of computing time.

(1) When the period is stated in days or a longer unit of time:

(A) exclude the day of the event that triggers the period;

(B) count every day, including intermediate Saturdays, Sundays, and legal holidays; and

(C) include the last day of the period, but if the last day is a Saturday, Sunday, or legal holiday, the period continues to run until the end of the next day that is not a Saturday, Sunday or legal holiday.

(2) When the period is stated in hours:

(A) begin counting immediately on the occurrence of the event that triggers the period;

(B) count every hour, including hours during intermediate Saturdays, Sundays, and legal holidays; and

(C) if the period would end on a Saturday, Sunday, or legal holiday, the period continues to run until the same time on the next day that is not a Saturday, Sunday, or legal holiday.

(3) Unless the court orders otherwise, if the clerk's office is inaccessible:

(A) on the last day for filing under Rule 6(a)(1), then the time for filing is extended to the first accessible day that is not a Saturday, Sunday or legal holiday; or

(B) during the last hour for filing under Rule 6(a)(2), then the time for filing is extended to the same time on the first accessible day that is not a Saturday, Sunday, or legal holiday.

(4) Unless a different time is set by a statute or court order, filing on the last day means:

(A) for electronic filing, before midnight; and

(B) for filing by other means, the filing must be made before the clerk's office is scheduled to close.

(5) The "next day" is determined by continuing to count forward when the period is measured after an event and backward when measured before an event.

(6) "Legal holiday" means the day for observing:

(A) New Year's Day;

(B) Dr. Martin Luther King, Jr. Day;

(C) Washington and Lincoln Day;

(D) Memorial Day;

(E) Independence Day;

(F) Pioneer Day;

(G) Labor Day;

(H) Columbus Day;

(I) Veterans' Day;

(J) Thanksgiving Day;

(K) Christmas; and

(L) any day designated by the Governor or Legislature as a state holiday.

(b) **Extending time.**

(1) When an act may or must be done within a specified time, the court may, for good cause, extend the time:

(A) with or without motion or notice if the court acts, or if a request is made, before the original time or its extension expires; or

(B) on motion made after the time has expired if the party failed to act because of excusable neglect.

(2) A court must not extend the time to act under Rules 50(b) and (d), 52(b), 59(b), (d) and (e), and 60(c).

(c) **Additional time after service by mail.** When a party may or must act within a specified time after service and service is made exclusively by mail under Rule 5(b)(3)(C)(i), 7 days are added after the period would otherwise expire under paragraph (a).

(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.

(e) **Filing or service by inmate.**

(1) For purposes of Rule 45(i) and this paragraph (e), an inmate is a person confined to an institution or committed to a place of legal confinement.

(2) Papers filed or served by an inmate are timely filed or served if they are deposited in the institution's internal mail system on or before the last day for filing or service. Timely filing or service may be shown by a contemporaneously filed notarized statement or written declaration setting forth the date of deposit and stating that first-class postage has been, or is being, prepaid, or that the inmate has complied with any applicable requirements for legal mail set by the institution. Response time will be calculated from the date the papers are received by the court,

or for papers served on parties that do not need to be filed with the court, the postmark date the papers were deposited in U.S. mail.

(3) The provisions of paragraph (e)(2) do not apply to service of process, which is governed by Rule 4.

Tab 10

Rule 60

Judge Holmberg raises the issue addressed the recent Supreme Court Disciplinary Opinion for Terry Spencer, where the last sentence of footnote 8 states:

> Rather than wait for another case to examine whether our rule 60 properly balances finality against the need to ensure that fraud on the court can be effectively addressed, we refer the question to our Advisory Committee on the Rules of Civil Procedure.

IN THE

SUPREME COURT OF THE STATE OF UTAH

In the Matter of the Discipline of TERRY R. SPENCER

TERRY R. SPENCER,
Appellant,

v.

OFFICE OF PROFESSIONAL CONDUCT,
Appellee.

No. 20210458
Heard: March 16, 2022
Filed June 30, 2022

On Direct Appeal

Third District, Salt Lake
The Honorable Richard E. Mrazik
No. 170906087

Attorneys:

Terry R. Spencer, Sandy, *pro se* appellant

Billy L. Walker, Emily A. Lee, Salt Lake City, for appellee

JUSTICE PEARCE authored the opinion of the Court,
in which JUSTICE PETERSEN, JUDGE HARRIS, JUDGE TENNEY,
and JUDGE WALTON joined.

Having recused himself, CHIEF JUSTICE DURRANT does not participate herein; COURT OF APPEALS JUDGE RYAN M. HARRIS sat.

Due to his retirement, JUSTICE HIMONAS did not participate herein; COURT OF APPEALS JUDGE RYAN D. TENNEY sat.

Having recused himself, ASSOCIATE CHIEF JUSTICE LEE does not participate herein; DISTRICT COURT JUDGE JOHN J. WALTON sat.

JUSTICE HAGEN became a member of the Court on May 18, 2022, after oral argument in the matter, and accordingly did not participate.

JUSTICE PEARCE, opinion of the Court:

INTRODUCTION

¶1 The district court suspended Terry R. Spencer from the practice of law for six months and one day for violations of Utah Rules of Professional Conduct 1.5(a), 1.8(e), and 8.4(c). More than one year later, Spencer moved the district court to partially set aside its decision because, he alleged, counsel for the Office of Professional Conduct had committed fraud on the court when she knowingly made false statements, elicited false testimony from a witness, and failed to notify the district court of controlling case law contrary to her position. The district court denied Spencer's motion as untimely, reasoning that Spencer had failed to adequately explain the year-long delay in bringing his motion.

¶2 Spencer claims the district court erred when it found that he had unduly delayed bringing his motion. But Spencer has failed to marshal the evidence that supported the district court's decision, and he has also failed to directly challenge the district court's reasoning. Spencer has thus failed to meet his burden of persuasion on appeal. We affirm.

BACKGROUND

¶3 The Office of Professional Conduct (OPC) filed a complaint against Spencer in district court, alleging twelve violations of the Utah Rules of Professional Conduct (Disciplinary Action).[1] After a three-day trial, the district court determined that Spencer had violated the Rules and entered its Ruling and Order Regarding Sanctions suspending Spencer from the practice of law for six months and one day (Ruling and Order).[2]

¶4 More than one year after the district court's amended Ruling and Order, and more than eight months after Spencer had finished

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[1] The OPC subsequently amended its complaint to include an additional violation based on Spencer's conduct before the court of appeals. The OPC ultimately withdrew this allegation, and the district court did not consider it.

[2] The district court amended its Ruling and Order less than two months later in response to the OPC's rule 59(e) motion to fix two "minor inaccuracies." Those changes are not material to our decision.

serving his suspension, Spencer moved to partially set aside the district court's amended Ruling and Order under Utah Rule of Civil Procedure 60(b)(6).[3] In his motion, Spencer asserted that the attorney representing the OPC (OPC Counsel) had committed fraud on the court—and violated the Utah Rules of Professional Conduct—during the underlying Disciplinary Action in three ways.

¶5 Spencer first argued that OPC Counsel had knowingly made and offered false statements concerning Spencer's connection to a business named The Smart Way Financial, LLC (TSWF). During her examination of Spencer, OPC Counsel asked Spencer if he was an owner of TSWF. Spencer responded, "I don't know." OPC Counsel then stated that she had searched the online Utah Department of Commerce database and "found that [Spencer] w[as], in fact, . . . related to [TSWF]." Following her examination of Spencer, OPC Counsel examined attorney Bradley Carr, whose testimony also tied Spencer to TSWF. Spencer argued that OPC Counsel and Carr's statements were false—and that OPC Counsel knew it—because at the time of the Disciplinary Action, Department of Commerce records "clearly demonstrate[d] that [Spencer] had no interest in, and no relationship to, [TSWF]."

¶6 Spencer also argued that OPC Counsel "appear[ed] to have knowingly elicited false testimony" from Carr on another topic. Before the Disciplinary Action had been filed, Carr, on behalf of one of Spencer's former clients, had filed a lawsuit against Spencer that claimed, among other things, malpractice and fraud (Malpractice Action). In the Disciplinary Action, Carr testified that the fraud claim was based on the propriety of the attorney fees Spencer had charged his then-client. According to Spencer, Carr later contradicted this testimony in the Malpractice Action. And Spencer wanted the district court to determine which of Carr's statements were false so that "[i]f it [was] determined that [Carr] made false on-the-record statement[s] during his testimony in [the Disciplinary Action], then

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[3] Rule 60(b) sets forth specific reasons for which a court may, "[o]n motion and upon just terms, . . . relieve a party or its legal representative from a judgment, order, or proceeding." UTAH R. CIV. P. 60(b). Rule 60(b)(6) is the catch-all provision of rule 60; under it, a court may grant relief for "any other reason that justifies relief." *Id.* R. 60(b)(6).

[OPC Counsel's elicitation of this testimony] may be considered a further 'fraud upon the court.'"

¶7 Finally, Spencer argued that OPC Counsel had failed to inform the district court of controlling case law contrary to her position—namely, *State v. Gordon*, 886 P.2d 112 (Utah Ct. App. 1994). In her closing arguments, OPC Counsel claimed that Spencer had violated a specific Rule of Professional Conduct when he failed to disclose "a very important fact" in a court proceeding. Spencer argued that he wasn't required to make that disclosure under *Gordon* and that by failing to alert the court to that case, OPC Counsel had committed fraud on the court.

¶8 As to the timeliness of his motion, Spencer claimed that he had discovered the alleged fraud after the applicable time period set forth in rule 60. And he argued that a footnote in *State v. Boyden*, 2019 UT 11, 441 P.3d 737, authorizes a court to address fraud on the court under those circumstances.

¶9 The OPC opposed Spencer's motion. The OPC largely argued that Spencer's rule 60(b)(6) motion was meritless. The OPC also argued that Spencer's motion was untimely. As the OPC saw it, *Boyden* was limited to its facts and did not exempt Spencer's motion from the relevant time restriction.

¶10 The district court agreed that Spencer had taken too long to file his motion. The district court noted that rule 60(b)(6) motions must be brought "within a reasonable time." UTAH R. CIV. P. 60(c). And Spencer's rule 60(b)(6) motion, the district court concluded, was untimely for two reasons. As to the first, the district court stated that,

> [Spencer] ha[d] not provided any credible explanation for his delay in bringing this motion, or any credible explanation for why he could not have learned of the bases for his motion before, during, or shortly after the [disciplinary] trial. Indeed, by asserting that [OPC Counsel] misrepresented the information that was available through the Utah Department of Commerce . . ., [Spencer] is implicitly admitting that he was able to determine whether [OPC Counsel]'s representations were correct [at the time the representations were made]. Further, [Spencer] fails to credibly explain why he was unable—before, during, or shortly after the . . . trial—to challenge the veracity of [Carr]'s testimony, or bring the controlling authority in question to the Court's attention.

As to the second reason, the district court found that "the interest in finality [in a ruling and order entered sixteen months prior]—combined with [Spencer]'s lack of diligence—weigh[ed] heavily against the timeliness of [Spencer]'s motion."

STANDARD OF REVIEW

¶11 "[A] district court has broad discretion in ruling on a motion to set aside an order or judgment under rule 60(b), and [t]hus, we review a district court's denial of a 60(b) motion under an abuse of discretion standard." *In re Estate of Willey*, 2016 UT 53, ¶ 5, 391 P.3d 171 (alterations in original) (citation omitted) (internal quotation marks omitted).

ANALYSIS

I. SPENCER HAS FAILED TO MEET HIS BURDEN OF PERSUASION ON APPEAL

¶12 Spencer argues that the district court erred when it denied his rule 60(b)(6) motion as untimely. Spencer's opening brief tracks, almost verbatim, his original rule 60(b)(6) motion. Specifically, Spencer's brief argues that OPC Counsel committed fraud on the court—and violated the Utah Rules of Professional Conduct—when she (1) knowingly made false statements concerning Spencer's connection to TSWF, (2) knowingly elicited false testimony from Carr concerning Spencer's connection to TSWF and the nature of the fraud allegation in the Malpractice Action, and (3) failed to disclose controlling case law contrary to her position at closing arguments. Spencer's brief diverges from his rule 60(b)(6) motion, though not substantively, when it "invites" us, under separate heading, "to utilize [*State v. Boyden*, 2019 UT 11, 441 P.3d 737] to set forth guidelines for cases involving fraud upon the court . . . discovered after the . . . [time periods] provided in Rule 60(b)."

¶13 The OPC argues, among other things, that Spencer has failed to meet his burden of persuasion on appeal because he has failed to marshal the evidence that supported the district court's conclusion. The OPC also claims that Spencer's brief merely "recite[s] the same arguments in his appeal that he made in [his rule 60(b)(6) motion]" and "offers nothing by the way of analysis or evidence to show how the [district] court abused its discretion in denying his [m]otion." We agree with the OPC.

¶14 Rule 24 of the Utah Rules of Appellate Procedure "prescribe[s] standards for the form, organization, and content of a brief on appeal." *State v. Nielsen*, 2014 UT 10, ¶ 33, 326 P.3d 645. As to

content, rule 24 requires an appellant's brief to "explain, with reasoned analysis supported by citations to legal authority and the record, why [it] should prevail on appeal." UTAH R. APP. P. 24(a)(8). An appellant "will almost certainly fail to carry its burden of persuasion on appeal if it fails to marshal and respond to evidence or authority that could sustain the decision under review." *In re Discipline of LaJeunesse*, 2018 UT 6, ¶ 28, 416 P.3d 1122 (citation omitted) (internal quotation marks omitted).

¶15 We addressed the marshaling requirement in *LaJeunesse*. There, the OPC appealed the district court's decision to dismiss its complaint against attorney Richard LaJeunesse. *Id.* ¶¶ 21–22. Although we ultimately affirmed the district court on the merits, *id.* ¶ 48, we recognized that we could have affirmed solely on the OPC's "fail[ure] to carry its burden as the appellant," *id.* ¶ 26. We concluded that the OPC had failed to marshal the evidence because its brief had "fail[ed] to append or recite the findings and conclusions entered by the district court," *id.* ¶ 29, and "ignore[d] crucial elements" of the district court's ruling and analysis, *id.* ¶¶ 30–31. And we said that when "the appellant fails to acknowledge the lower court's decision—or to identify specific grounds for challenging it—we may affirm without reaching the merits of the question presented." *Id.* ¶ 32.

¶16 Spencer's statement of the factual and procedural background of the case, like the OPC's in *LaJeunesse*, "makes only the barest mention of the district court's [decision]." *Id.* ¶ 29. Spencer devotes just a single sentence to the two-page order he now appeals. And that sentence merely informs us that the district court denied his rule 60(b)(6) motion. He simply makes no attempt to address the facts that the district court relied on to conclude that his motion was untimely.

¶17 The argument section of Spencer's brief fares no better. The great bulk of Spencer's argument is dedicated to rehashing the merits of his rule 60(b)(6) motion. Only three sentences are given to the district court's actual decision:

> [T]he Trial Court improperly concluded that [Spencer]'s Rule 60(b)(6) Motion was untimely, as it was not until . . . Carr made statements . . . in the [Malpractice Action] . . . that [Spencer] learned that the testimony provided by [Carr] in the underlying [Disciplinary Action] was false and/or misleading. It was the realization that [Carr] provided false and/or

> misleading testimony in the underlying [Disciplinary Action] that caused [Spencer] to review the documents—available from the Utah Department of Commerce—in the context of [Carr]'s testimony. From these documents, [Spencer] came to understand that [OPC Counsel] had made false statements in the [Disciplinary Action].

¶18 These three sentences ignore "crucial elements of [the district court]'s ruling." *See LaJeunesse*, 2018 UT 6, ¶ 30. Specifically, Spencer's brief does not address the district court's observation that "by asserting that [OPC Counsel] misrepresented the information that was available through the Utah Department of Commerce in [the Disciplinary Action], [Spencer] is implicitly admitting that he was able to determine whether [OPC Counsel]'s representations were correct [at the time they were made]."[4] Nor does it address the district court's assertion that Spencer has "fail[ed] to credibly explain why he was unable—before, during, or shortly after the [Disciplinary Action]—to challenge the veracity of [Carr]'s testimony," particularly when Spencer had access to the complaint Carr filed in the Malpractice Action at the time Carr testified in the Disciplinary Action, or why he was unable to "bring the controlling authority in question to the [district court]'s attention." Spencer cannot meet his burden of demonstrating that the district court erred without addressing these crucial aspects of the district court's ruling.

¶19 Instead of addressing the district court's analysis, Spencer argues that his motion is timely under the logic of a footnote in *State v. Boyden*, 2019 UT 11, ¶ 37 n.8. As Spencer sees it, *Boyden* grants a party leave to file a rule 60(b)(6) motion alleging fraud on the court outside of the time constraints rule 60 establishes. In other words, Spencer reads *Boyden* to provide a way around the time restrictions applicable to a rule 60(b)(6) motion when that motion alleges fraud on the court. But the footnote on which Spencer hangs his hat

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[4] Spencer made this admission explicit at oral argument. There he admitted that "[he] knew [OPC Counsel's statements] were false at the time [of the Disciplinary Action]," and that his decision to file a rule 60(b)(6) motion over a year after those statements were uttered was simply "a judgment call" on his part. Oral Argument at 18:33, 19:09, Spencer v. OPC, 2022 UT 29 (No. 20210458), https://www.utcourts.gov/opinions/streams/index.php?court=sup.

addressed a very specific factual scenario and was not intended to be a de facto rewrite of Utah Rule of Civil Procedure 60.

¶20 In *Boyden*, the State filed a rule 60(b)(3) motion to vacate the conviction of a defendant because the defendant had misrepresented his identity. *Id.* ¶ 8. The district court denied the State's motion, concluding that it lacked jurisdiction, and even if it had it, the Post-Conviction Remedies Act (PCRA) was the State's "sole remedy." *Id.* ¶ 10. In reversing the district court, we concluded that "[t]he State could seek relief under rule 60(b) because neither the PCRA nor any other statute or rule govern[ed]." *Id.* ¶ 24. And the Utah Rules of Civil Procedure—specifically, rule 60(b)—"fill[ed] the gaps." *Id.* ¶ 25.

¶21 We also dropped a footnote where we noted that the State's rule 60(b)(3) motion was timely, and we made clear that we did not reach the question of whether the State could utilize rule 60(b)(3) had it discovered the alleged fraud more than three months after the entry of judgment. *Id.* ¶ 37 n.8. While we left that question unanswered, we made two additional observations. First, we explained that "rule 60 'does not limit the power of a court to entertain an independent action to relieve a party from a judgment, order or proceeding or to set aside a judgment for fraud upon the court.'" *Id.* (quoting UTAH R. CIV. P. 60(d)). We also stated that "courts have inherent authority to set aside judgments obtained through fraud on the court." *Id.*

¶22 Spencer contends this footnote opened the door for a party to raise fraud on the court claims at any time. This was not *Boyden*'s intent. *Boyden* arose in a specific—and unique—context. The State was attempting to correct a serious error in a criminal conviction over the defendant's objection. Yet neither the Rules of Criminal Procedure nor the PCRA gave the State an avenue for relief. Using the Rules of Civil Procedure as a gap-filler, we concluded that the State could use Rule of Civil Procedure 60(b) to correct the error. The State, moreover, had brought its rule 60(b)(3) motion within the applicable ninety-day time limit imposed by rule 60(c). *See* UTAH R. CIV. P. 60(c). But, recognizing that we were using a civil rule to gap-fill the criminal rules, and further recognizing that filing an independent action in a criminal context might raise double jeopardy concerns,[5] we noted that the State would not have been without a

[5] The *Boyden* footnote concluded with a string of citations to various cases in other jurisdictions. Most of these cases deal with the (continued . . .)

remedy had it discovered the fraud on the court after the ninety days had expired. We did not mean to suggest, however, that rule 60(d) could be routinely used to circumvent rule 60(c)'s other timelines. Nor did we intend to suggest that a party for whom an independent action might be a viable path to raise its claims could take advantage of the observation that the State would not be without a remedy when double jeopardy concerns prevent it from filing an independent action. To the extent that others read the footnote the way Spencer does here, we disavow that interpretation and stress that the footnote must be read in the context in which it arose.

¶23 In any event, even if *Boyden* applied here, Spencer would still need to address and attack the district court's conclusion that his motion was not brought within a reasonable time. *See* UTAH R. CIV. P. 60(c) (requiring all rule 60(b) motions "be filed within a reasonable time"). And as we explained above, Spencer has failed to do just that. We affirm.

II. OPC COUNSEL'S ALLEGED VIOLATIONS OF THE UTAH RULES OF PROFESSIONAL CONDUCT ARE NOT PROPERLY BEFORE US

¶24 Spencer also argues that OPC Counsel's conduct in the underlying Disciplinary Action violated a number of the Utah Rules of Professional Conduct. Specifically, Spencer contends that OPC Counsel violated (1) rule 3.3(a)(1) when she knowingly made false statements concerning his connection to TSWF, (2) rule 3.3(b) when she knowingly elicited false testimony concerning his connection to TSWF and the nature of the fraud allegation in the Malpractice Action, and (3) rule 3.3(a)(2) when she failed to disclose controlling case law contrary to her position at closing arguments.

¶25 The OPC argues that Spencer's allegations against OPC Counsel are inappropriately raised before this court. The OPC claims "[t]here is a procedure in place when there are allegations of misconduct against an attorney," and that Spencer stepped outside

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ability of a court to modify or vacate a sentence impacted by a defendant's fraud without courting double jeopardy. *See United States v. Bishop*, 774 F.2d 771, 774–76 (7th Cir. 1985); *Goene v. State*, 577 So.2d 1306, 1309 (Fla. 1991); *People v. Ryan*, 640 N.Y.S.2d 978, 983 (Sup. Ct. 1996); *State v. Foster*, 484 N.W.2d 113, 116–17 (N.D. 1992).

of that procedure when he appended his allegations against OPC Counsel to his appeal. The OPC is right.

¶26 "In attorney discipline cases, the power to sanction attorneys is vested in this court by the Utah Constitution." *Long v. Ethics & Discipline Comm. of the Utah Sup. Ct.*, 2011 UT 32, ¶ 41, 256 P.3d 206; *see also* UTAH CONST. art. VIII, § 4 ("The Supreme Court by rule shall govern the practice of law, including . . . the conduct and discipline of persons admitted to practice law."). In line with this power, we have created a set of rules governing the process by which "any person may initiate a disciplinary proceeding against any [l]awyer." SUP. CT. R. PRO. PRAC. 11-530(a); *see id.* R. 11-501 to -591.

¶27 These rules allow a person to initiate a disciplinary proceeding against an attorney for the OPC by filing a complaint with the OPC. *See id.* R. 11-530(a)(1). Our Ethics and Discipline Committee will then assign a screening panel to review the complaint.[6] *Id.* R. 11-542(f). After reviewing the complaint, the screening panel chair will decide if the complaint merits dismissal. *Id.* R. 11-542(f)(1). If the complaint is dismissed, "[t]he Complainant may appeal the screening panel chair's dismissal to the [chair of the Ethics and Discipline Committee]," who will then "conduct a de novo review of the file, and either affirm or reverse the dismissal." *Id.* R. 11-542(f)(3), (4). "If the screening panel chair determines not to dismiss the Complaint, or the Committee chair reverses the dismissal on appeal, the Committee chair must request that the Supreme Court appoint a special counsel to . . . act as counsel for investigation . . . of the Complaint." *Id.* R. 11-542(5). After the investigation is complete, the special counsel will "notify the OPC of the results." *Id.*

¶28 Spencer, it seems, has followed that process to its finish. Indeed, the OPC claims—and Spencer does not dispute—that "Spencer . . . already submit[ted] a complaint relating to [OPC

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[6] The Ethics and Discipline Committee is comprised of attorneys and members of the public. *Ethics & Discipline Committee*, UTAH STATE BAR, https://www.utahbar.org/ethics-discipline-committee (last visited Apr. 14, 2022). Committee members participate in screening panels, which "review, investigate, and hear informal complaints charging unethical and/or unprofessional conduct against attorneys." *Id.*

Counsel]'s conduct to the OPC and through a special prosecutor, those allegations were dismissed."

¶29 Our Rules do not permit Spencer to use the appeal of his rule 60(b) motion as a vehicle to re-litigate his allegations against OPC Counsel. Our Rules specify the process a complainant must follow to lodge a complaint and to contest that complaint's dismissal. *See id.* R. 11-501 to -591. And while we do not foreclose the ability of a complainant to argue that she should be able to use the Utah Rules of Civil Procedure to augment that process in an appropriate case, *see* UTAH R. CIV. P. 65B, we prohibit a complainant from relying on an appeal of a related motion to subvert it.

III. FRAUD ON THE COURT CLAIMS

¶30 Spencer has not met his burden of persuasion on appeal, and we affirm on that basis. But we believe it prudent to note a misunderstanding underlying the district court's ruling that went unaddressed by the parties. We accordingly raise this issue *sua sponte* to prevent the inadvertent creation of conflict in our rule 60 case law.

¶31 Spencer filed a motion for relief under paragraph (b)(6), a catchall provision offering relief "for . . . any other reason that justifies relief." UTAH R. CIV. P. 60(b)(6). But Spencer's motion was wholly based on his allegation that OPC Counsel had committed fraud on the court. In *In re Estate of Willey*, we held that a party "cannot seek relief under rule 60(b)(6) based on an allegation of fraud on the court."[7] 2016 UT 53, ¶ 8, 391 P.3d 171.

¶32 In *Willey*, a stockholder filed a rule 60(b) motion to set aside two district court orders relating to the stockholder's interests in a

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[7] Rule 60(b) of the Utah Rules of Civil Procedure allows a court, "[o]n motion and upon just terms," to "relieve a party or its legal representative from a judgment, order, or proceeding" for the reasons enumerated in paragraphs (b)(1) through (6). Rule 60(b) motions "must be filed within a reasonable time," and, if based on paragraphs (b)(1) through (3), "not more than 90 days after entry of the judgment or order or, if there is no judgment or order, from the date of the proceeding." UTAH R. CIV. P. 60(c). Due to "these differing times," it is important that "we . . . determine under what paragraphs [a party]'s reasons for relief fall." *In re Estate of Willey*, 2016 UT 53, ¶ 7, 391 P.3d 171.

business. *Id.* ¶ 1. The stockholder claimed relief under paragraphs (b)(4) and (6) of rule 60. *Id.* ¶ 7. While the stockholder made several arguments that rightly invoked paragraph (b)(4), "[t]he only other basis upon which [he] sought relief was fraud on the court." *Id.* ¶ 8. The *Willey* court concluded that the stockholder was unable to seek relief from fraud on the court under paragraph (b)(6). *Id.* We explained that,

> [A] motion seeking relief from a judgment based upon an allegation of fraud on the court necessarily falls under paragraph (b)(3), not paragraph (b)(6).
>
> Under the plain language of rule 60, a party seeking to be relieved from a judgment or order based upon an allegation of fraud on the court must do so under paragraph (b)(3). Motions under paragraph (b)(6), on the other hand, must be based on a reason other than those listed in paragraphs (b)(1) through (5).

Id. ¶ 8–9 (citing UTAH R. CIV. P. 60(b)). In other words, *Willey* instructed courts to classify a rule 60(b) motion—and assess its timeliness—by its content, not its caption. *See id.* ¶ 10 (classifying the stockholder's rule 60(b) motion into the proper subsections, (b)(3) and (4), and "proceed[ing] to determine if [he] timely filed his motion" under those subsections).

¶33 Under *Willey*, therefore, the district court should have classified Spencer's rule 60(b)(6) motion as a rule 60(b)(3) motion and assessed its timeliness accordingly. But this does not change the outcome of the case because even if the district court had properly classified Spencer's rule 60(b) motion, it would have reached the same conclusion—Spencer's motion was untimely.

¶34 All rule 60(b) motions "must be filed within a reasonable time." UTAH R. CIV. P. 60(c). Rule 60(b)(3) motions, moreover, "must be filed . . . not more than 90 days after entry of the judgment or order." *Id.* "The language of the rule is clear; a party must file a rule 60(b) motion within a reasonable time, which is within ninety days after a judgment or order is entered, if the motion is filed under paragraph[] . . . (3)." *Willey*, 2016 UT 53, ¶ 12 (footnote omitted).

¶35 Spencer filed his rule 60(b) motion more than one year after the district court entered its final Ruling and Order. This is well past

the ninety-day limit rule 60(b) imposes. The district court thus correctly denied Spencer's motion as untimely. [8]

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[8] The parties have not questioned *Willey*, and it remains good law. But as we reread *Willey*, we note that we seem to have interpreted our rule 60 without acknowledging the line other courts have drawn between "fraud of an adverse party" and "fraud on the court" when interpreting similarly-worded rules. *See, e.g.*, *United States v. Sierra Pac. Indus., Inc.*, 862 F.3d 1157, 1167–68 (9th Cir. 2017) (emphasizing that "not all fraud is fraud on the court" (citation omitted)); *Torres v. Bella Vista Hosp., Inc.*, 914 F.3d 15, 19 (1st Cir. 2019) (defining fraud on the court as "fraud that seriously affects the integrity of the normal process of adjudication, defile[s] the court itself, and prevents the judicial machinery from performing its usual function" (alteration in original) (citation omitted) (internal quotation marks omitted)); *Fernandez v. Fernandez*, 358 P.3d 562, 566–68 (Alaska 2015) (limiting fraud on the court to fraud that "involve[s] far more than an injury to a single litigant" and "defiles the court itself" (citations omitted)); *see also* 12 JAMES WM MOORE, MOORE'S FEDERAL PRACTICE §§ 60.21[4], 60.43[1] (Matthew Bender 3d ed. 2021) (addressing the difference between fraud by an opposing party and fraud on the court). As a result, our rule may be out of step with how those jurisdictions offer relief from a judgment procured by fraud on the court. *See, e.g.*, *McGee v. Gonyo*, 140 A.3d 162, 165 (Vt. 2016) ("[A] claim of fraud 'upon the court' is 'governed by the catch-all provision of Rule 60(b)(6).'" (citation omitted)); *accord Carter v. Anderson*, 585 F.3d 1007, 1011 (6th Cir. 2009); *Sierra Pac. Indus., Inc.*, 862 F.3d at 1167 (acknowledging a party's ability to seek relief from the rendering court for fraud on the court under federal rule 60(d)(3)). We recognize that our deviation from those decisions may reflect different policy concerns. Or it may merely be an unintended consequence caused by the wording of our rule compared to that of the federal rule. *Compare* UTAH R. CIV. P. 60(d), *with* FED. R. CIV. P. 60(d); *see also United States v. Buck*, 281 F.3d 1336, 1341–42 (10th Cir. 2002) (explaining that there are two "avenues for relief from fraud upon the court" under federal rule 60(d): "[t]he first . . . is an independent action," and "[t]he second . . . is to invoke the inherent power of a court to set aside its judgment if procured by fraud upon the court"). In any event, the parties have not raised these issues, so without proper briefing, we are not in a position to address them. Rather than wait for another case to examine whether our rule 60

(continued . . .)

CONCLUSION

¶36 Spencer claims the district court erred when it denied his rule 60(b) motion as untimely. But Spencer does not adequately address the district court's decision in his brief and thus fails to meet his burden of persuasion on appeal. We affirm the district court.

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properly balances finality against the need to ensure that fraud on the court can be effectively addressed, we refer the question to our Advisory Committee on the Rules of Civil Procedure.

Rule 60. Relief from judgment or order.

Effective: 5/1/2016

(a) **Clerical mistakes.** The court may correct a clerical mistake or a mistake arising from oversight or omission whenever one is found in a judgment, order, or other part of the record. The court may do so on motion or on its own, with or without notice. After a notice of appeal has been filed and while the appeal is pending, the mistake may be corrected only with leave of the appellate court.

(b) **Mistakes; inadvertence; excusable neglect; newly discovered evidence; fraud, etc.** On motion and upon just terms, the court may relieve a party or its legal representative from a judgment, order, or proceeding for the following reasons:

~~(b)~~(1) mistake, inadvertence, surprise, or excusable neglect;

~~(b)~~(2) newly discovered evidence which by due diligence could not have been discovered in time to move for a new trial under Rule 59(b);

~~(b)~~(3) fraud (whether previously called intrinsic or extrinsic), misrepresentation or other misconduct of an opposing party;

~~(b)~~(4) the judgment is void;

~~(b)~~(5) the judgment has been satisfied, released, or discharged, or a prior judgment upon which it is based has been reversed or vacated, or it is no longer equitable that the judgment should have prospective application; or

~~(b)~~(6) any other reason that justifies relief.

(c) **Timing and effect of the motion.** A motion under paragraph (b) must be filed within a reasonable time and for reasons in paragraph (b)(1), (2), or (3), not more than 90 days after entry of the judgment or order or, if there is no judgment or order, from the date of the proceeding. The motion does not affect the finality of a judgment or suspend its operation.

(d) **Other power to grant relief.** This rule does not limit the power of a court to entertain an independent action to relieve a party from a judgment, order or proceeding or to set aside a judgment for fraud upon the court. The procedure for obtaining any relief from a judgment shall be by motion as prescribed in these rules or by an independent action.

Advisory Committee Notes

The 1998 amendment eliminates as grounds for a motion the following: "(4) when, for any cause, the summons in an action has not been personally served upon the defendant as required by Rule 4(e) and the defendant has failed to appear in said action." This basis for a motion is not found in the federal rule. The committee concluded the clause was ambiguous and possibly in conflict with rule permitting service by means other than personal service.

Note adopted [YEAR]

2016 amendments

The deadlines for a motion are as stated in this rule, but if a motion under paragraph (b) is filed within 28 days after the judgment, it will have the same effect on the time to appeal as a motion under Rule 50, 52, or 59. See the 2016 amendments to Rule of Appellate Procedure 4(b).

Note adopted [YEAR]