Utah Supreme Court
Advisory Committee on the Utah Rules of Civil Procedure
Meeting Agenda

Rod Andreason, Chair

Location: Matheson Courthouse or WebEx Webinar: Link

Date: September 23, 2026

Time: 4:00 – 6:00 p.m.

Welcome and approval of minutes	Tab 1	Rod Andreason
Rules back from public comment – Rules 5, 29, 30, 37, 64, 64E, 74, 105, 110 (*Discussion; consider submitting to the Court for final approval if no additional amendments*)	Tab 2	Rod Andreason
Rule 65C – amendments clarifying and updating post-conviction relief procedures (*Discussion; further action or consider submitting to the Court for approval for public comment*)	Tab 3	Keri Sargent
New Rule 88 - Affidavits vs Declarations (*Discussion; consider submitting to the Court for approval for public comment*)	Tab 4	Ash McMurray & Joshua Jewkes
Rule 103 Child Protective Orders – Supreme Court requested modification to the equipment language to be coordinated with URJP Rule 37A (*Discussion; consider submitting to the Court for approval for public comment*)	Tab 5	Justin Toth & Sonia Sweeney
Rule 73 - Supreme Court invited a recommendation on the best approach to implement their holding from *Western Mortgage & Realty Co. v. Walker*, 2026 UT 30, ¶	Tab 6	Rod Andreason

50 n.22. into the rules framework to avoid future misunderstanding. (*Discussion; consider forming subcommittee*)		
Rules 26.1 and 37 – Court of Appeals invited the Committee to clarify whether sanctions imposed under Rule 26.1(f) must follow the procedures set forth in Rule 37(b). *Bonham v. Bonham*, 2026 UT App 141, ¶ 45 n.7. (*Discussion; consider forming subcommittee*)	Tab 7	Rod Andreason
Rules 26 and 31 – amendments to (a) eliminate depositions upon written questions unless permitted by the court; and/or (b) impose limits on the number of such depositions and/or the number of written questions that can be posed; and (c) impose a limit on the number of subpoenas that a party may issue (similar to the limitations on requests for admissions, etc.). (*Discussion; consider forming subcommittee*)	Tab 8	Judge Laura Scott
Next Meeting		Rod Andreason

Reminder: Check style guide for conformity before rules are sent to the Supreme Court.

URCP Committee Website: Link

2026 Meeting Schedule:

Jan 28 • Feb 25 • Mar 18 • April 22 • May 27 • Sep 23 • Oct 28 • Nov 18 • Dec 16

Tab 1

UTAH SUPREME COURT ADVISORY COMMITTEE
ON RULES OF CIVIL PROCEDURE

Summary Minutes – May 27, 2026
via Webex

THIS MEETING WAS CONDUCTED ELECTRONICALLY VIA WEBEX

Committee members	Present	Excused	Guests/Staff Present
Rod N. Andreason, Chair	X		Sonia Sweeney, Staff
Justin T. Toth, Vice Chair	X		Keri Sargent
Ash McMurray	X		Tracy Bullock
Michael Stahler	X		Justice Paige Petersen
Loni Page	X		
Joshua Jewkes	X		
Meagan Rudd	X		
Laurel Hanks	X		
Tonya Wright	X		
Judge Rita Cornish	X		
Judge Catherine Conklin		X	
Jonas Anderson		X	
Heather Lester	X		
J. Brett Chambers	X		
Judge Blaine Rawson	X		
Judge Ronald Russell	X		
Judge Patrick Corum		X	
Rachel Sykes	X		
Michael Young	X		
Tyler Lindley		X	
Commissioner Marian Ito	X		
Judge Laura Scott, *Emeritus*	X		
James Hunnicutt, *Emeritus*	X		

(1) Introductions

The meeting began at 4:01 p.m. after a quorum formed. Mr. Rod Andreason welcomed the Committee Members and guest, Justice Paige Petersen.

(2) Thanks From the Supreme Court

Justice Petersen thanked the committee for their extensive volunteer work in keeping the rules updated and responsive. Mr. Michael Stahler inquired how the court was handling the unprecedented transition to a seven-member court and the loss of Justice Hagen. Justice Petersen noted it has been a difficult time, but the court is adapting well and expects the Governor to announce new nominees soon. Judge Rita Cornish asked if Justice Jill Pohlman would remain the primary liaison for the rules committees. Justice Petersen confirmed that Justice Pohlman will retain this assignment due to her unparalleled expertise with the rules.

(3) Approval of Minutes

Mr. Andreason acknowledged the proposed edit to the April 22, 2026 meeting minutes by Mr. Jim Hunnicutt that had been circulated via email. Judge Cornish moved to approve the minutes subject to Mr. Hunnicutt's proposed revision. Mr. Justin Toth seconded the motion. The motion to approve the minutes passed unanimously.

(4) New Rule 88 - Affidavits vs Declarations

Mr. Ash McMurray presented the proposed New Rule 88, outlining recent feedback from Justice Pohlman regarding the definition of the term “acknowledged,” and whether the word "acknowledgement" also needed to be defined. Mr. McMurray presented three options: leaving the word "acknowledgment" undefined, incorporating the statutory definition directly into the rule, or referencing the Utah Code statute. Judge Ronald Russell argued against adding plain language definitions like “verified” to the term, noting that “acknowledged” refers specifically to a notarial act which differs from verification in case law. He advocated for directly referencing the definition of "acknowledgment" in Utah Code section 46-1-2 to avoid ambiguity. The committee debated the style guide's preference against statutory references but ultimately agreed the statutory reference was necessary for legal clarity. Additionally, Mr. McMurray addressed a question about whether a sworn declaration needs to be acknowledged, clarifying that it does not; it only needs to be given under oath. He proposed revising the rule's definitions to reflect this distinction.

Judge Cornish moved to amend the definition of “acknowledged” to reference the statutory definition of “acknowledgment,” accepting a friendly amendment from Judge Russell to change the word “verified” to “notarized.” Judge Russell seconded the motion. The motion passed unanimously. Mr. McMurray and Mr. Joshua Jewkes discussed other potential edits, including that the definition of "sworn declaration" be amended to include justices, justice court judges, and commissioners. Mr. McMurray and Mr. Jewkes agreed to submit the edits to Justice Pohlman for a subsequent pre-conference review. Following that review, the rule will return to the committee for further review before requesting it be forwarded to the Supreme Court to request it go out for public comment.

(4) New URE 107 – Review of Potential Conforming Amendments to URCP

Ms. Sonia Sweeney introduced Mr. Jace Willard, Staff for the Utah Rules of Evidence Committee, to discuss proposed Utah Rule of Evidence (URE) 107, which regulates "illustrative aids," which have been historically referred to as "demonstrative exhibits." The Advisory Committee on the Rules of Evidence requested feedback on whether any URCP rules required conforming amendments to match this new terminology, specifically asking about URCP rules 26, 47, and 51. Judge Cornish voiced concern with the URE adopting the phrase "illustrative aid," explaining that the civil bar has relied on the term "demonstrative exhibit" for decades and changing it would trigger widespread confusion and unnecessary litigation. Mr. Toth and Judge Blaine Rawson acknowledged that demonstrative exhibits are frequently confused with substantive evidence, leading to trial disputes. Despite understanding the URE Committee's intent to clarify this distinction, the URCP committee expressed a strong preference for retaining the term "demonstrative exhibit" or adopting "demonstrative aid," rather than introducing a completely new term. Mr. Stahler also pointed out that the proposed URE 107 advisory note inaccurately characterized URCP Rule 51. Mr. Willard will convey the URCP committee's preference to retain the term "demonstrative exhibit" to the URE committee, and for correcting the reference to Rule 51 in the proposed advisory note.

(5) Rule 74(e) – Substitution of Counsel: Evaluating the necessity of prior counsel's consent (Discussion)

Mr. Andreason presented a proposed amendment to Rule 74(e) regarding the substitution of counsel. He explained that requiring the former counsel's signature on a notice of substitution is unnecessary and often detrimental to the client, as former counsel may be uncooperative or difficult to locate. The committee agreed that while former counsel must receive notice of the substitution, their permission and signature should not be a prerequisite for a client to secure new representation. Mr. Stahler moved to strike the language requiring former counsel's signature and to forward the rule to the Supreme Court for public comment. Mr. Toth seconded the motion. The motion passed unanimously.

(6) Rules back from Public Comment – 73, 86

The committee reviewed Rules 73 and 86 following their respective public comment periods. Rule 86 received no public comments. Rule 73 received a single comment arguing that the seven-day response period to object to proposed attorney fees should be extended to 14 days. Mr. Andreason noted that this specific deadline was not part of the recent rule amendments sent out for comment. Mr. Stahler observed that the commenter likely misread Rule 73(a), which establishes a 14-day limit for the initial claim, and incorrectly assumed all subsequent deadlines in the rule should match it. The committee concluded the comment was not well-taken and declined to alter the existing seven-day response period for proposed orders. Judge Cornish made a motion to forward Rule 73, without change, to the Supreme Court for final approval. Mr. Toth seconded the motion and it passed unanimously. Mr. Stahler moved to forward Rule 86 to the Supreme Court for final approval. Mr. Toth seconded the motion and it passed unanimously.

(7) Rule 30(f) - Consider whether to recommend deleting deposition-handling language requiring the officer to seal and transmit the record with specific labeling

Ms. Rachel Sykes proposed amending Rule 30(f) to remove outmoded language requiring deposition officers to securely seal physical transcripts and mark them with specific labeling ("Do not open"). She argued this practice creates unnecessary costs and serves no modern practical purpose. Judge Cornish and Judge Laura Scott agreed, noting that in modern practice, official electronic transcripts are readily available, and the dramatic unsealing of physical depositions at trial is now mostly used for theatrical purposes rather than preserving evidentiary integrity. Judge Cornish moved to strike the deposition-handling language from Rule 30(f) and to forward the rule to the Supreme Court for public comment. Mr. Toth seconded the motion. The motion passed unanimously.

(8) Rule 5 - Amendments Regarding Serving Parties in Default

Judge Cornish reviewed the drafted revisions to Rule 5, which govern service requirements for parties in default. The committee examined the restructured language which mandates that if a party is seeking a default judgment and knows the non-moving party is represented by an attorney, they must serve notice to that attorney even if no formal appearance has been entered. The Committee made minor punctuation edits. Judge Cornish moved to approve the proposed changes to Rule 5 and forward the rule to the Supreme Court for public comment. Mr. Stahler seconded the motion and it passed unanimously.

(9) Future Meetings

Mr. Andreason solicited input from committee members about their desire to hold other meetings in a virtual format. Based on consensus of the members, in-person meetings with a hybrid option will be held quarterly, starting with the September 2026 meeting.

Mr. Andreason also acknowledged that Ms. Loni Page will no longer be on the Committee. Committee Members expressed their gratitude for Ms. Page's service. Ms. Tracy Bullock, Fourth District Clerk of Court, will be the replacement for Ms. Page.

(10) June Meeting

Mr. Andreason solicited input from committee members about the June 2026 meeting. Based on consensus of the members, the June meeting will be canceled.

(11) Adjournment

The meeting was adjourned at 5:44 p.m. The next meeting will be September 23, 2026, at 4:00 p.m. as an in-person meeting with a hybrid option.

Tab 2

UTAH COURT RULES – PUBLISHED FOR COMMENT

The Supreme Court and Judicial Council invite comments about amending these rules. To view the proposed amendment, click on the rule number.

To submit a comment or view the comments of others, click on "Continue Reading." To submit a comment, scroll down to the "Leave a Reply" section, and type your comment in the "Comment" field. Type your name and email address in the designated fields and click "Post Comment."

Comments cannot be acknowledged, but all will be considered. Comments are saved to a buffer for review before publication.

HOME LINKS

Posted: July 23, 2026

Utah Courts

Rules of Civil Procedure – Comment Period Closed September 8, 2026

URCP005. Service and filing of pleadings and other documents. AMEND. The amendments require a party seeking default judgment to serve notice on a non-moving party's attorney if known, even if no formal appearance has been entered. Additionally, they expand service requirements on defaulting parties to mandate serving the proposed default judgment along with all accompanying and supporting documents.

URCP029.Stipulations regarding disclosure and discovery procedure. AMEND. This amendment corrects a typographical error by updating a cross-reference from Rule 26(b)(2) to Rule 26(b)(3) regarding proportionality standards.

URCP030. Depositions upon oral questions. AMEND. The amendments to paragraph (f) remove outmoded requirements for deposition officers to physically seal and label transcripts with specific markings, streamlining delivery requirements to reflect modern practice and eliminate unnecessary costs.

URCP037. Statement of discovery issues; Sanctions; Failure to admit, to attend deposition or to preserve evidence. AMEND.

Search... SEARCH

To view all comments submitted during a particular comment period, click on the comment deadline date. To view all comments to an amendment, click on the rule number.

CATEGORIES

- -Alternate Dispute Resolution
- -Code of Judicial Administration
- -Code of Judicial Conduct
- -Fourth District Court Local Rules
- -Licensed Paralegal Practitioners Rules of Professional Conduct
- -Rules Governing Licensed Paralegal Practitioner
- -Rules Governing the State Bar

The amendments align paragraph (a)(2) with Rule 7(q) by adding a 1,500-word limit option for statements of discovery issues, and update a cross-reference in paragraph (a)(7) from Rule 26(b)(2) to Rule 26(b)(3) regarding proportionality standards.

URCP064. Writs in general. AMEND. The amendments to paragraph (d)(2) align the rule with S.B. 156 by explicitly permitting writs to direct an officer to establish a periodic payment schedule with a defendant in lieu of seizing and selling property, or to communicate with the defendant regarding payment of the writ.

URCP064E. Writ of execution. AMEND. The amendment to paragraph (a) aligns the rule with S.B. 156 by clarifying that a writ of execution is available to enforce a judgment or order for the payment of money whether the payment is in an amount sufficient to satisfy the final judgment or subject to a periodic payment schedule.

URCP074. Withdrawal of counsel. AMEND. The amendment to paragraph (e) removes the requirement for former counsel's signature on a notice of substitution of counsel, ensuring that obtaining former counsel's signature or permission is not a prerequisite for a client to secure new representation.

URCP0105. Shortening 30 day waiting period in divorce actions. AMEND. The amendments replace references to a "motion for a hearing" with a "request to enter a decree of divorce" to reflect the modern practice of submitting stipulated proposed findings rather than holding actual hearings, alongside minor plain-language and stylistic updates.

URCP110. Judicial interview of a minor child. NEW. This new rule applies to district court proceedings in which the court is permitted to interview a minor child, and explicitly excludes juvenile court matters, child testimony, and non-judicial interviews. Adapted generally from the Uniform Judicial Interview of Children Act (UJICA), the rule covers interview criteria, required judicial training, recording requirements, guardian ad litem attendance, and post-interview access to records.

This entry was posted in **-Rules of Civil Procedure**, **URCP005**, **URCP029**, **URCP030**, **URCP037**, **URCP064**, **URCP064E**,

- -Rules of Appellate Procedure
- -Rules of Civil Procedure
- -Rules of Criminal Procedure
- -Rules of Evidence
- -Rules of Juvenile Procedure
- -Rules of Professional Conduct
- -Rules of Professional Practice
- -Rules of Small Claims Procedure
- ADR0104
- ADR101
- ADR103
- Appendix A
- Appendix B
- Appendix F
- CJA 1-101
- CJA Appendix F
- CJA01-0201
- CJA01-0204
- CJA01-0205
- CJA01-0205
- CJA01-0302
- CJA01-0303
- CJA01-0304
- CJA01-0305
- CJA010-01-0404
- CJA010-1-020
- CJA014-0701
- CJA014-0704
- CJA014-0705
- CJA014-0719
- CJA02-0101
- CJA02-0102
- CJA02-0103
- CJA02-0104
- CJA02-0106.01
- CJA02-0106.02
- CJA02-0106.03
- CJA02-0106.04
- CJA02-0106.05
- CJA02-0204
- CJA02-0206
- CJA02-0208
- CJA02-0208
- CJA02-0211
- CJA02-0212
- CJA03-0101
- CJA03-0102
- CJA03-0103
- CJA03-0103
- CJA03-0104

URCP074, URCP105, URCP110.

« Rules of Juvenile Procedure – Comment Period Closed September 8, 2026

Rules of Appellate Procedure – Comment Period Closed September 8, 2026 »

UTAH COURTS

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7 thoughts on "Rules of Civil Procedure – Comment Period Closed September 8, 2026"

Leslie Slaugh
July 23, 2026 at 11:58 am

Proposed Rule 5 modifies the requirement to serve a notice of default judgment but preserves an uncertainty that has existed regarding that service: if an attorney appears in an action and the court later enters a judgment, must the Rule 58A notice of entry of judgment be served only on the attorney as required by Rule 5(b)(1), or should service also be made on the party?

I recommend that Rule 5(b)(1) be modified to require that any Rule 58A notice of judgment be served on both the attorney and the party. Too often, especially with default judgments, the judgment is entered as a result of a mistake or neglect by the attorney. The client should be notified directly of any judgment so that the attorney cannot hide the mistake.

Liz Kazandzhy
July 23, 2026 at 9:33 pm

I believe Rule 110 is an important addition to the Utah Rules of Civil Procedure. It gives children a more direct voice with judicial decision-makers, rather than having that voice potentially diluted or distorted by the many adults involved in the process, including parents, attorneys, therapists, and guardians ad litem. Meeting directly with a child—when warranted—can also remind judges and commissioners of the human realities of the proceedings, putting a name and a face to the case before them.

That said, I have serious reservations about paragraph (c)(5) and its implications in cases involving abuse.

CONFIDENTIALITY CAN BE VETOED BY AN ABUSIVE PARENT

As currently written, paragraph (c)(5) provides that:

– the default arrangement is that both parents may obtain access to the recording of the child's interview; and
– to opt out of that access, both parents must stipulate to such.

This effectively gives an abusive parent the ability to veto the confidentiality of the child's disclosures. And considering that the child will be told "whether the interview record will be provided to the parties" under paragraph (c)(6)(E), if the child is told an abusive parent may later access the recording, the child will be less likely to speak freely about their experiences. For an abused child, the interview may feel much the same as if their abuser were standing in the corner of the room. (For purposes of this comment, I use the term "abuse" broadly to include related factors identified in Utah Code § 81-9-204(4), such as coercive control and psychological maltreatment.)

A better approach would be one in which the default arrangement is that *neither* parent may obtain access to the recording unless they *both* stipulate to that access. This would allow a protective parent to protect the confidentiality of the interview rather than allowing an abusive parent to compel access to it.

CONFIDENTIALITY AND DUE PROCESS CAN COEXIST

This approach remains consistent with paragraph (d)(2), which requires the disclosure of contested factual allegations and preserves the parties' opportunity to respond—an appropriate and necessary safeguard.

In fact, paragraph (d)(2) already points toward how to strike the right balance. The interview itself could remain confidential by default, while children are clearly informed that certain categories of information may nevertheless be disclosed. Therapists routinely explain confidentiality in a similar way—for example, by telling a child that most of what they say will stay between them, but there are a few situations where it may need to be shared to help keep the child safe. Children understand those boundaries, and that understanding often makes honest disclosure possible because they know exactly what will—and will not—remain confidential.

A similar approach here would better protect abused children while preserving the due process rights of parents to respond to factual allegations that could affect the outcome of the case.

Eric Stephenson
July 29, 2026 at 2:54 pm

Comments on Proposed Amendments to Rules 64 and 64E

The amendments proposed would codify the abusive practice of constables misusing writs of execution to pressure debtors for installment payments instead of performing the court directed and supervised seizure and sale process. As a consumer protection litigation attorney with more than 23 years of experience, I therefore oppose the proposed changes to Rules 64 and 64E.

Rules 64 and 64E exist to ensure that judgments are enforced through an official, impartial judicial process subject to court supervision, not through a private collection arrangement controlled by the person who benefits from obtaining payment. Under that process, the debtor receives notice of exemptions, an opportunity to object and be heard, and the constable must report an inventory of any seizures and proceeds of property sales to the court. The proposed amendments subvert those safeguards and convert the execution process into ongoing debt collection administered by constables without judicial oversight. This Court should reject those amendments or at least clarify their scope as suggested below.

This concern is not hypothetical. Utah's execution process has already been the subject of repeated litigation challenging the way writs of execution have been misused by constables to obtain installment payments from judgment debtors. In that litigation, constables testified under oath that their payment collection process exists to avoid executing writs of execution. To that end, those constables sent letters to debtors threatening to seize and sell their property at a specified date, time, and location with no intention of ever carrying out those sales. Rather than taking action stop these abuses of the judicial process, the Legislature has now authorized constables to administer periodic payment arrangements. The proposed amendments to Rules 64 and 64E would now incorporate that practice into the Rules of Civil Procedure without addressing the abuse that gave rise to the litigation.

The Rules of Civil Procedure govern how a writ is obtained, served, and returned. They do not define the scope of a constable's official duties and they cannot expand or diminish the protections available to debtors under federal or state consumer protection laws. That distinction should be made clear in the Rules themselves. Without such language, the amendments invite the argument that any collection activity undertaken by a constable is authorized by this Court and therefore beyond the reach of the FDCPA and Utah's consumer protection statutes. Rejecting the proposed changes or incorporating a simple savings clause would prevent that misunderstanding and would clarify that allowing constables to collect debt does not authorize them to violate state or federal consumer protection statutes. I propose language along the following lines:

"Nothing in these rules may be construed to make the acceptance or administration of periodic payments part of the judicial execution process or an official duty of a constable, or as affecting the applicability of any federal or state law governing debt collection activity."

The power of the State exists to enforce lawful judgments, not to facilitate private collection arrangements. A writ of execution is a command from the court to seize and sell a debtor's property under strict judicial procedures and oversight. The court's orders are not, and should not be reduced to, a discretionary process the constable can wholly disregard, which is precisely what some constables have testified their payment collection process is designed to accomplish. When the execution process is used to pressure payment rather than enforce the court's order, judicial oversight and neutrality are replaced by a private collection arrangement where the constable's financial interest is aligned with obtaining payment rather than simply carrying out the court's command.

Courts entrust constables with significant authority because they are expected to exercise that authority as neutral officers of the court, not as interested participants who leverage the credibility of their office for a financial stake in the outcome. When a constable's compensation depends upon administering long-term payment arrangements, the constable acquires a financial interest that differs materially from the traditional role of neutrally executing a writ and returning it to the court. The authority of public office should not be used as a means of generating private income. Indeed, while constables are now allowed to collect periodic payments, Utah Code § 76-8-110 paradoxically prohibits police officers from collecting debts for compensation or from holding a financial interest in a debt collection agency.

The Court should reject the proposed amendments. They would transform the execution process from a neutral judicial procedure into an ongoing debt collection system administered by constables for their own financial benefit, while removing the judicial oversight and protections the Rules were designed to provide. If the Court nevertheless adopts any portion of the proposal, the Rules should expressly state that making payment arrangements does not replace the judicial procedures governing execution of a writ, expand the official duties of a constable, or create any exception to applicable federal or state laws governing debt collection.

Chad Rasmussen
July 29, 2026 at 3:15 pm

- CJA11-0107
- CJA11-0201
- CJA11-0202
- CJA11-0203
- CJA11-0301
- CJA11-0302
- CJA11-0303
- CJA11-0401
- CJA11-0501
- CJA11-0503
- CJA11-0510
- CJA11-0511
- CJA11-0513
- CJA11-0520
- CJA11-0521
- CJA11-0591
- CJA14-0515
- CJA14-0721
- CJA_Appx_F
- CJA_Appx_I
- CJA_Appx_J
- CJC Terminology
- CJC01
- CJC02
- CJC02.11
- CJC02.12
- CJC02.3
- CJC03
- CJC03.7
- CJC04
- CJC04.1
- CJC05
- CJCApplicability
- CR1008
- CR1101
- CR430
- CR432
- Fourth District Local Rule 10-1-407
- LPP1.00
- LPP1.01
- LPP1.010
- LPP1.011
- LPP1.012
- LPP1.013
- LPP1.014
- LPP1.015
- LPP1.016
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- LPP1.07
- LPP1.08

The addition of a requirement in Rule 5(a)(2)(B)(ii) to serve under Rule 4 is unnecessary and unduly burdensome on the plaintiff/judgment creditor because it requires more work/effort than even to renew a judgment under Rule 58C. If a motion under Rule 58C is not required to be served under Rule 4, why would a motion to modify or augment the judgment be required to be served under Rule 4. Once a party has been summoned to appear, it should not be incumbent upon the plaintiff/judgment creditor to effectively summon the defendant/judgment debtor anew, and if a defendant/judgment debtor fails to keep the court and the plaintiff/judgment creditor apprised of his/her contact information, it should not fall upon the plaintiff/judgment creditor to effectively do that job. Furthermore, it will only increase costs of litigation and, ultimately, increase the amounts the defendant/judgment debtor will have to pay. This does not seem like a prudent or reasonable requirement to impose upon plaintiffs/judgment creditors; otherwise the same logic can be applied to virtually anything that is filed with the court, including motions for summary judgment, or even simply motions for an award of attorney's fees.

Thus, I suggest that the language to be added regarding motions to modify or augment default judgments not be adopted.

Chip Shaner
July 30, 2026 at 12:23 pm

The proposed Rule 5 changes require that in the case of an application for a default judgment that an unrepresented party be served with the default judgment papers via first- class mail and does not give an avenue for service upon these individuals via email. As a high-volume creditor's rights filer, these comments are offered from that perspective.

Forcing creditors to first-class mail these default judgment papers imposes an additional cost without an identified corresponding benefit. Most creditors would welcome additional contact from their defendants, but at this stage the defendants have largely already decided to not actively participate in the process. While the cost of one mailing may seem insignificant, multiplied across hundreds or thousands over the course of the year adds up.

Rule amendments should only impose additional requirements where there is a demonstrated corresponding benefit to the litigants or the process as a whole. Reaching out to known attorneys as proposed in this rule update appears to fulfill both prongs as when the defendant has an attorney the defendant is engaged in the process and receives a direct benefit from the representation. By contrast, there does not appear to be a comparable benefit to first-class mailing default judgment

- LPP1.09
- LPP15-0701
- LPP15-0702
- LPP15-0703
- LPP15-0704
- LPP15-0705
- LPP15-0706
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- LPP15.01001
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- LPP15.01119
- LPP15.01120
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- LPP15.0517

papers to parties who have not participated in the litigation process despite prior notice.

Furthermore, in today's world email is as likely to reach and be read by a defendant as first-class mail. Creditors generally have the defendant's email address either as a result of a prior business relationship or as otherwise used by the defendant to communicate with the creditor regarding the defendant's account. Email is routine and, in many instances, may be more likely to be reviewed promptly than traditional mail.

It is my suggestion that in debt collection cases that there be an option for the serving party to email the default judgment papers to the last known email address on file with the creditor instead of having to send the default judgment papers via first-class mail. Additionally, I would suggest that the portion of the rule dealing with serving attorney's licensed out of state be modified to allow for service to either the attorney's preferred email address or the email address on file with the attorney licensing entity in the state where the attorney is licensed.

Below is a suggested edit.

(B) Email. If the party serving or being served a document does not have an
electronic filing account:
i) In the case of a debt collection case and the email address has been provided as part of the transaction related to the matter, emailing it to the most recent email address on file with the creditor, the most recent email address provided to the court as provided in Rule 10 or Rule 76 or;
ii) In all other cases where the person being served has provided to the court an email address as provided in Rule 10 or Rule 76 email it to that address; or
iii) if service is to an attorney licensed in Utah, to the email address on the attorney's most recent filing or on file with the Utah State Bar; or
iv) if service is to an attorney not licensed in Utah, to the email address on the attorney's most recent filing, the preferred email address of the attorney provided to the serving party, or the email address on file with the attorney licensing entity in the state where the attorney is licensed.

Rachel Sykes
August 13, 2026 at 1:10 pm

I write in support of the proposed amendments to Rule 37. A word limit instead of a page limit is more practical. A word limit would discourage attorneys from tinkering with margins, font size, etc. in their SODIs in an attempt to force it into 4 pages.

Eric K. Johnson
August 15, 2026 at 2:16 pm

Summary of my comments on propose URCP 110:

1. Proposed paragraph (b)(2) applies to judicial interviews substantially the same restrictive threshold the Legislature imposed on compelled child testimony.
2. Concerns about litigation abuse and judicial workload justify reasonable controls, not a presumption against interviews.
3. Paragraph (b)(3) relies too heavily on speculation before the interview has occurred.
4. Citing "Best interest" does not substitute for an actual reason.
5. Possible coaching is not ordinarily a reason to avoid direct judicial inquiry.
6. Any specialized judicial training should be sound, practical, and publicly reviewable.
7. Parties and GALs may propose questions. The judicial officer should conduct the interview without an unnecessary audience.
8. Recording the interview is essential.
9. Rule 110 should not purchase protection from possible retaliation at the price of reliable factfinding.
10. Paragraph (c)(5): one party should not control another party's access or response rights.
11. Paragraph (c)(6): tell the child the truth about confidentiality and retaliation.
12. Paragraph (d)(2): replace "potentially dispositive" with materiality and provide meaningful access to the record.
13. Protect the interview record from misuse, not from legitimate adjudicative access.

I support adoption of a rule that facilitates, rather than discourages, judges and commissioners conducting appropriate interviews of children in child custody and parent-time disputes.

Proposed Rule 110 gets several important things right. It distinguishes a judicial interview from child testimony and from an interview conducted by a nonjudicial person. It permits parties and an attorney guardian ad litem to propose questions while leaving the actual questioning to the judge or commissioner. It requires the interview to be recorded. It requires the judicial officer to explain the interview process directly to the child in age-appropriate terms. And it recognizes that information obtained in the interview can create rights of disclosure and response.

Those provisions are worthwhile.

But the proposed rule's central premise is backwards.

Paragraphs (b)(2) and (b)(3) treat a judicial interview as something approaching an extraordinary last resort. Before talking directly with the child, the court would have to determine that "extenuating circumstances necessitate the interview," that "there is no other reasonable method to obtain

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information from the child," and that the interview itself is in the child's best interest. The rule then adds a series of predictive considerations that make it easier still to decline the interview before the court knows what the interview would reveal.

That is the wrong presumption.

A child may be among the most percipient witnesses to the family circumstances bearing on custody and parent-time and is the only firsthand source of the child's own wishes and concerns. When applicable law permits the court to inquire directly and the requested interview concerns a material issue, the starting point should ordinarily be to hear from the child unless a concrete, evidence-supported reason establishes why the court should not.

That does not mean every request requires an unlimited interview. Courts should reject immaterial requests, prevent unnecessary repetitive interviews, control their scope and duration, and protect a child from a substantial and particularized risk of serious harm that cannot reasonably be mitigated.

Those are legitimate limitations. A general presumption against firsthand information is not.

1. Proposed paragraph (b)(2) applies to judicial interviews substantially the same restrictive threshold the Legislature imposed on compelled child testimony.

This is my principal objection. Utah Code § 81-9-204(5)(a) provides that a minor child may not be required by either party to testify unless the trier of fact determines that extenuating circumstances necessitate hearing the child's testimony and there is no other reasonable method of presenting it.

The Legislature then addresses something different. Section 81-9-204(5)(b) separately authorizes the court to inquire into and consider the child's desires regarding future custody and parent-time schedules. Section 81-9-204(5)(c) separately provides for the court to conduct such an interview in camera. Its reference to whether an interview is the "only method" addresses when prior consent of the parties is unnecessary; it does not impose "only method" as a universal prerequisite to conducting every judicial interview.

Proposed Rule 110 itself recognizes the distinction. Paragraph (a)(2) expressly provides that the rule does not apply to "testimony by a child."

Yet paragraph (b)(2) then provides that a judicial interview may occur only if, among other things, "extenuating circumstances necessitate the interview" and "there is no other reasonable method to obtain information from the child"—substantially the same restrictive concepts the Legislature expressly applied to compelling a child to testify.

Those are different procedures. The statute treats them differently. The rule should too.

More fundamentally, why should "extenuating circumstances" be necessary before a judge or commissioner may speak directly with a child about matters the court is legally permitted to inquire into?

Why should second-hand communication be preferred over first-hand communication?

Having a GAL, evaluator, therapist, parent, or other intermediary speak with the child and later report what the child said is not equivalent to hearing directly from the child. It filters the information. The precise question is unknown. The precise answer is unknown. Context is lost. Natural follow-up questions cannot be asked by the factfinder when they occur. The intermediary's understanding, memory, characterization, and opinions necessarily stand between the original source and the court.

A third-party account can sometimes be useful, but is neither needed nor warranted. And it is not the original source. The better presumption runs in the opposite direction:

When a proper request for a judicial interview concerns a material matter the law permits the court to inquire into, the interview should presumptively occur unless a concrete, compelling, evidence-supported reason establishes that it should not.

I recommend replacing paragraph (b)(2) with language substantially along these lines:

(2) Upon a request under paragraph (b)(1) that identifies with reasonable particularity the subject matter of the requested interview, the court shall conduct the judicial interview unless the court finds, based upon specific facts and not merely generalized concerns or speculation, that:

(A) the proposed subject of the interview is outside the scope of matters the court is legally permitted to inquire into or is immaterial to a disputed custody or parent-time issue;

(B) the child plainly lacks the ability to communicate meaningfully concerning the subject of the proposed interview;

(C) conducting the interview would create a substantial and particularized risk of serious harm to the child that cannot reasonably be mitigated by the manner in which the interview is conducted; or

(D) the requested interview would be unreasonably cumulative because the court has recently interviewed the child concerning substantially the same matters and no material change warrants another interview.

The court may reasonably limit the scope and duration of the interview. The court shall state on the record the specific basis for denying a requested judicial interview.

The precise wording can be refined. The important principles are not complicated: relevance, lawful scope, meaningful ability to communicate, protection from proved and serious non-mitigable harm, and protection against unnecessary repetition.

What should disappear is the presumption that direct judicial inquiry requires "extenuating circumstances."

2. Concerns about litigation abuse and judicial workload justify reasonable controls, not a presumption against interviews.

One predictable objection to a presumption favoring appropriate interviews is that high-conflict litigants will demand them constantly, either to involve children unnecessarily in litigation or simply to burden the court.

That possibility should be addressed directly.

It does not justify proposed paragraph (b)(2).

Every procedural device is capable of misuse. The answer is to prohibit and control misuse, not to make legitimate use extraordinarily difficult.

The proposed language above does that. A party requesting an interview should identify its subject with reasonable particularity. The subject must be material and within the lawful scope of judicial inquiry. Repetitive interviews may be denied as unreasonably cumulative. The court may limit the interview's duration and subject matter. And when misuse occurs through a filing, existing Rule 11 already prohibits papers presented for an improper purpose such as harassment, unnecessary delay, or needless increase in litigation cost.

Those are sensible anti-abuse mechanisms. An "extenuating circumstances" barrier is not. It protects against abuse by impairing proper use.

Judicial workload is likewise a legitimate administrative concern, but it does not justify preferring inferior information.

A presumption favoring an appropriate interview does not mean every interview must consume hours. A judge can identify the material subjects to be discussed and conduct a focused interview of reasonable duration.

And direct, recorded communication has an efficiency advantage of its own: it creates one identifiable source for what the child actually told the court instead of inviting collateral disputes over what different parents, GALs, evaluators, therapists, or other intermediaries claim the child said.

I do not contend that every judicial interview will save time. Some will not. The narrower principle, however, is enough: Judicial economy should be achieved by controlling relevance, scope, duration, and unnecessary repetition—not by creating a substantive presumption against obtaining material information from the original source.

3. Paragraph (b)(3) relies too heavily on speculation before the interview has occurred.

Proposed paragraph (b)(3) asks the court to predict whether the interview is "likely" to assist the court, its "likely benefit" to the child, the "potential harm" to the child, and whether some other process can elicit the child's views.

Some of these considerations may matter in a particular case. The problem is making speculative predictions grounds for declining the interview before the judicial officer knows what direct communication with the child will reveal.

– Likelihood the interview will assist the court. How can the court reliably know what it will learn without conducting the interview?

An interview that ultimately proves unhelpful was not therefore unreasonable to conduct. Factfinders regularly receive information that ultimately receives little or no weight. We ordinarily do not insist upon proof of the information's ultimate value before the factfinder may receive it.

– Age, maturity, and ability to communicate. There will be obvious cases in which a child plainly lacks the ability to communicate meaningfully. The rule should accommodate them. But maturity and communicative ability are often best assessed by communicating with the child. They should not become reasons for refusing an interview based merely on assumptions about what the court expects to encounter.

– "Likely benefit" to the child. A judicial interview is a fact-gathering procedure. Its legitimacy should not depend upon proving that the act of interviewing itself confers an independent benefit on the child. The relevant benefit is that the court deciding the child's custody and parent-time does so with better information.

– Potential harm. Actual, particularized risks deserve serious consideration. Generalized possibilities do not.
Virtually any involvement in litigation may cause anxiety, embarrassment, discomfort, or displeasure. A standard based simply on "potential harm," without requiring evidence concerning probability, seriousness, and reasonable mitigation, permits speculation to substitute for analysis.

If competent information establishes that interviewing a particular child would create a substantial and particularized risk of serious harm that cannot reasonably be mitigated, that is a legitimate basis to decline or modify the interview.

The rule should require that showing rather than presume it.

– Other processes for obtaining the child's views. For a child capable of communicating directly with the factfinder, no intermediary supplies the same thing as direct communication. Another process may sometimes be useful or necessary. Its availability should not itself establish that direct communication is dispensable.

– Whether the child wants to communicate. The child's willingness or reluctance to communicate deserves consideration, particularly in deciding how an interview should be conducted. It should not automatically determine whether the court receives otherwise material information. A reluctant child may have important reasons for the reluctance. Indeed, fear of upsetting or angering a parent may itself be information the court should know.

– Recognition or enforcement elsewhere. Paragraph (b)(3)(F), concerning whether the interview is likely to facilitate recognition or enforcement in another state or foreign court, appears remote from the central question of whether the judicial officer should hear directly from the child. Unless some specific legal requirement makes this factor necessary, I recommend deleting it.

4. "Best interest" should not substitute for an actual reason.

I recommend deleting proposed paragraph (b)(2)(C)'s requirement that conducting the interview itself be found to be "in the child's best interest."

The best-interest standard properly governs the ultimate custody and parent-time determination. But saying, "I do not find interviewing the child to be in the child's best interest," does not explain why the interview should not occur.

If the problem is serious psychological harm, identify the harm and the evidence establishing it.

If the child cannot communicate meaningfully, identify why.

If the proposed subject is immaterial or outside the court's lawful inquiry, identify it.

If another interview would be needlessly repetitive, identify the prior interview and explain why nothing material has changed.

Those are reasons that can be evaluated and reviewed.

"In the child's best interest," standing alone, is merely a conclusion. Rule 110 should require the reasoning.

5. Possible coaching is not ordinarily a reason to avoid direct judicial inquiry.

Another concern is that a child may have been coached. That concern is real too. But avoiding direct communication with the child does not solve it.

No judicial officer can infallibly determine from demeanor whether a child has been coached, and the rule should not rest on any assumption that judges possess that ability. But direct inquiry gives the factfinder something an intermediary's summary does not: the opportunity to ask follow-up questions.

If a child uses unusual or adult terminology, the judicial officer can ask what the child understands the words to mean. If the child states a conclusion, the judicial officer can ask what

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happened that led the child to it. If the child describes something the child did not personally observe, the judicial officer can ask how the child learned it. If the child's preference rests on particular experiences or concerns, the judicial officer can explore those reasons within the lawful scope of the interview.

The point is not that direct questioning magically detects coaching. The point is that a concern about coaching generally supports careful direct inquiry, not deliberate reliance on another adult's interpretation of the child's statements.

6. Any specialized judicial training should be sound, practical, and publicly reviewable.

Proposed paragraph (b)(4) would require a judge or commissioner conducting an interview first to complete whatever child-interview training the Judicial Council requires.

I question whether specialized training should operate as a prerequisite to a judicial officer conducting an interview at all. Judges and commissioners routinely question people of differing ages, abilities, educational levels, communication styles, and emotional states.

If specialized child-interview training is nevertheless required, it should be grounded in reliable evidence, focused on neutral and non-leading questioning rather than promotion of a disputed psychological theory, reasonably limited in time and cost, and readily available to every judicial officer who may need it.

The training materials should also be publicly available for review. If judicial officers are being taught a particular methodology for questioning children whose statements may materially influence custody and parent-time decisions, the public and the bar should be able to know what that methodology is.

Training should improve judicial interviews. It should not become another practical impediment to conducting them.

7. Parties and GALs may propose questions. The judicial officer should conduct the interview without an unnecessary audience.

I support proposed paragraph (c)(1), which permits a party and an attorney guardian ad litem to propose questions but leaves the court to determine what questions actually will be asked.

That is an appropriate role for a GAL.

I strongly support paragraph (c)(2)'s requirement that the interview be recorded.

I oppose paragraph (c)(3)'s provision that the attorney guardian ad litem will be permitted to attend the interview in person. Proposed paragraph (c)(4), by contrast, generally excludes the parties and their attorneys. Why should the GAL be treated differently? The GAL is not needed to conduct the interview.

The GAL is not the factfinder. The GAL can propose questions beforehand. And the interview is recorded.

Physical attendance therefore adds an adult whose presence is unnecessary to the basic function being performed and whose presence can affect what the child says or does not say.

A child may know what result the GAL favors. The child may seek the GAL's approval or fear the GAL's disapproval. The child may have previously told the GAL something different and hesitate to clarify, qualify, or change it while that same lawyer listens.

None of this requires bad conduct by the GAL. The influence need not be intentional to exist.

The cleanest procedure is the simplest one.

I recommend replacing paragraphs (c)(3) and (c)(4) with:

Except upon a finding of good cause based on particularized circumstances, no person other than the child and the judge or commissioner conducting the interview may attend, observe, or listen to the judicial interview in real time.

When siblings are involved, the rule should not prohibit the judicial officer from interviewing them separately, together, or both when reasonably useful.

But the default should be the judicial officer and the child.

8. Recording the interview is essential.

Paragraph (c)(2) provides: "The court will record the interview."

That requirement should remain without qualification.

Without a record, there is no reliable way to determine precisely what questions were asked, what answers were given, what the child did or did not say, whether important qualifications or follow-up questions occurred, whether the interview was competently conducted, or whether the court later characterized the interview accurately.

The record is also essential when meaningful review becomes necessary.

If the value of a judicial interview is direct communication between the original source and the factfinder, preserving that direct communication accurately should be nonnegotiable.

9. Rule 110 should not purchase protection from possible retaliation at the price of reliable factfinding.

A serious concern remains: a child who knows that a parent may eventually learn what the child tells the court may be less candid. In some cases, the child may fear anger, pressure, punishment, manipulation, or retaliation. That is a real risk. But secrecy creates serious risks too.

A child may know things about each parent's home, behavior, relationships, interactions, parenting, and the child's own experiences that nobody else knows firsthand. The child is also the only firsthand source of the child's own genuine wishes and concerns.

Thus, the choice is not between disclosure with risk and confidentiality without risk. Both choices carry risk.

Obtaining the child's information directly and allowing meaningful access to material information may expose the child to anger, pressure, or retaliation.

Withholding, filtering, or concealing that information risks inaccurate findings, erroneous custody and parent-time decisions, reliance on second-hand characterizations, and adjudication based upon information an affected party cannot meaningfully answer.

When those risks genuinely conflict, the more principled choice for an adjudicative system is the one that preserves accurate factfinding and procedural fairness. The law should not purchase protection from possible retaliation at the price of deliberate ignorance of material information. The proper response to retaliation is to address retaliation.

If there is a demonstrated reason to fear that a parent will threaten, punish, intimidate, manipulate, pressure, or retaliate against the child for speaking honestly with the court, the court should take appropriate measures to prevent that conduct. If retaliation occurs, it should be addressed directly. And a parent's demonstrated willingness to retaliate against a child for communicating honestly with the court may itself be relevant to the very custody and parent-time determination before the court.

Privacy from the public may be appropriate. Secret adjudicative information is something different.

A judicial interview is not therapy. A therapist treats a patient. A judicial officer obtains information for use in deciding legal rights and obligations. Therapeutic confidentiality is therefore not the proper model for communications that may materially influence a custody or parent-time decision.

10. Paragraph (c)(5): one party should not control another party's access or response rights.

Proposed paragraph (c)(5) permits the parties jointly to waive access to the interview record, notice of the child's communications, and the right to respond. It further provides that an approved stipulation ordinarily precludes later access, including on appeal.

I do not object to permitting a competent party knowingly to waive that party's own access and response rights.

But the rule should make clear that one party cannot waive, block, or condition another party's rights.

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Nor should paragraph (c)(5) be reversed so that confidentiality becomes the default unless both parties consent to disclosure. That merely moves the veto. Either parent could then prevent the other from learning material information heard by the decision-maker simply by refusing to agree to access.

The cleaner principle is individual waiver: Each party may control that party's own waiver. One party's choice should not extinguish another party's access or response rights.

11. Paragraph (c)(6): tell the child the truth about confidentiality and retaliation.

I generally support paragraph (c)(6), which requires the judicial officer to explain the interview process directly to the child before questioning begins.

It is true that telling a child the interview may later be disclosed to the parties can affect what the child is willing to say. That does not justify misleading the child or creating an expectation of secrecy that the adjudicative process cannot fairly honor. The court should explain the situation truthfully, in age-appropriate language, substantially along these lines:

This interview is private from the public, but it is part of a court case. What you tell me may affect decisions I make. Because I have to be fair to the people whose rights I am deciding, what you tell me may have to be shared with the parties and their lawyers. You should tell me the truth even if you think someone may not like what you say. If you are worried that anyone may threaten you, pressure you, punish you, or retaliate against you because of what you tell me, you should tell me that too.

That warning does not eliminate risk. Nothing can. But it is honest, and it treats fear of retaliation as information the court should know rather than as a reason to avoid learning what the child has to say.

12. Paragraph (d)(2): replace "potentially dispositive" with materiality and provide meaningful access to the record.

Proposed paragraph (d)(2) recognizes an important principle: when a child makes a contested factual allegation that may determine the outcome, the parties must receive disclosure and an opportunity to respond before the court makes its final decision. The principle is sound. The threshold is too narrow.

The proposed rule uses "potentially dispositive." Child custody and parent-time determinations are rarely based on one isolated fact that independently decides the case. They ordinarily depend on the cumulative effect of facts, perceptions, relationships, experiences, concerns, preferences, and credibility assessments. A communication need not be independently dispositive to affect the result materially. Nor are a child's "views" always cleanly separable from factual assertions.

Consider:

• "I don't want to stay with Dad because he scares me."
• "Mom told me not to tell Dad what happens at her house."
• "I want more time with Mom because Dad is never home."
• "I don't like going to Mom's because of how her boyfriend treats me."

Each statement contains some combination of preference, perception, explanation, and factual assertion. The court should not be permitted materially to rely on such information while withholding it simply because no isolated statement qualifies as "potentially dispositive." The better threshold is materiality.

I recommend language substantially along these lines:

Except to the extent a party has knowingly waived that party's own access and response rights, before making a decision based in whole or in material part upon a communication made by the child during the judicial interview concerning a contested matter, the court shall disclose the communication and sufficient surrounding context to permit a meaningful opportunity to respond with evidence and legal argument. If the communication cannot fairly be understood, evaluated, or answered without access to the interview record, the court shall provide such access.

Meaningful access should ordinarily include enough of the actual record to understand what the court heard and relied upon, not merely the court's characterization of it.

Context matters. The wording of the question matters. The wording of the answer matters. Follow-up questions, clarifications, qualifications, contradictions, and hesitations may matter. The judicial interview is valuable precisely because it removes intermediaries between the child and the decision-maker. Rule 110 should not then unnecessarily create a new intermediary by reducing the interview to the judge's later summary for the parties.

13. Protect the interview record from misuse, not from legitimate adjudicative access.

Meaningful party access does not require making the recording public or permitting unrestricted distribution.

Rule 110 can protect the child directly. It can restrict public access. It can prohibit publication or posting. It can prohibit dissemination to nonparties except as authorized by the court. It can prohibit use of the recording to harass, shame, interrogate, threaten, or intimidate the child. It can impose additional narrowly tailored protections when concrete circumstances justify them. Those restrictions target the potential misconduct itself.

What the rule should not do is use ignorance of what the child said as the method of preventing misuse. Proposed paragraph (d)(3) appropriately restricts disclosure of the interview contents and record to nonparties during the proceeding and after its conclusion. The rule should, however, clarify the duration and exceptions to that restriction, including whether

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and under what protections the interviewed child may later obtain the child's own interview record and when the record may be accessed if genuinely necessary in a later judicial proceeding concerning the child.

Utah Courts Home Page

Tab 3

Administrative Office of the Courts

Interim Chief Justice Jill Pohlman
Utah Supreme Court
Chair, Utah Judicial Council

September 10, 2026

Ronald B. Gordon, Jr.
State Court Administrator
Neira Siaperas
Deputy State Court Administrator

MEMORANDUM

TO: Utah Rules of Civil Procedure Committee

FROM: Keri Sargent, Deputy District Court Administrator

RE: URCP Rule 65C Changes and Workgroup Report

In October 2025, the Utah Rules of Civil Procedure (URCP) Committee received requests to modify Rule 65C from the Utah Attorney General's Office, the Indigent Appellate Defense Division (IADD), and the Utah Association of Criminal Defense Lawyers (UACDL).

The Committee also aimed to address *Bevan v. State* (2018 UT App 237), in which the Court of Appeals held that under the Postconviction Remedies Act (PCRA), district courts must give petitioners notice and an opportunity to be heard before dismissing a post-conviction petition or claim on procedural bar grounds. A workgroup met from October 2025 through July of this year to develop proposed changes, resulting in the attached redline version of the rule to be presented to the Committee in September.

The proposed amendments include changes intended to address the notice-and-opportunity -to-be-heard requirement identified in *Bevan*. Judges retain the authority under Rule 65C(h) in the redline version to summarily dismiss claims that appear "frivolous on their face" without requiring a response from the State or reciting findings of fact. The redline version also removes "previously adjudicated claims" from the summary dismissal criteria in Rule 65C(h)(1).Under the revised rule, a claim is "frivolous on its face" only if it fails as a matter of law, has no arguable basis in fact, or challenges an already-expired sentence.

The workgroup expressed differing views regarding the effect of that change on procedural bars. One view is that, because procedural bars are removed from Rule 65C(h)'s summary-dismissal procedure, dismissal on those grounds should proceed through motion practice under Rule 65C(k), thereby providing the petitioner notice and an opportunity to respond. Another view is that the amendment does not make Rule

65C(k) the exclusive procedure for considering procedural bars and does not displace the PCRA provision authorizing a court to raise a procedural or time bar on its own motion, provided the parties are given notice and an opportunity to be heard. Rule 65C(k), as proposed, addresses the respondent's answer or other response and the time for responding to a motion to dismiss or for summary judgment, but does not expressly state that a motion by the State is the exclusive means of raising a procedural bar.

The Committee may wish to consider whether the proposed rule adequately reflects its intended procedure for court-raised procedural bars or whether additional language is necessary to clarify when and how those bars may be considered.

The Utah Attorney General's requests made by Mark Field are listed below. The Attorney General's Office also supported addressing the notice-and-opportunity-to-be-heard issue identified in *Bevan. v State.*

- Requirements for newly discovered evidence.
    - Paragraph(d)(6) requires petitioners to state the reasons why newly discovered evidence could not have been uncovered in time for the claim to be addressed in the "trial court, at trial, [or] on the appeal".
- Page and word limits for memoranda.
    - Paragraph (f)(2)–(3) incorporates a 25-page / 9,000-word cap for memorandums of law, along with the requested procedure to petition for an overlength memorandum upon a showing of good cause.
- Record creation and service of the underlying criminal matter.
    - Paragraphs (i) and (j)(2) mandate that the clerk create an electronic record under Utah Rule of Appellate Procedure 11 if one does not exist and serve it directly upon appointed counsel.
- Ability to reply to a motion for summary judgment.
    - Paragraph (k) adds language granting the respondent 30 days to file a reply memorandum supporting its motion if the petitioner files an opposition.
- Restricts discovery if an evidentiary hearing is set.
    - Paragraph (n) permits discovery under Rules 26 through 37 upon motion of a party and a determination by the court that there is good cause to believe discovery is necessary to provide evidence likely to be admissible at an evidentiary hearing.

The IADD, Ann Marie Taliaferro, and UACDL asked for comprehensive changes to Rule 65C. As the workgroup met and started to resolve each request, they discussed the holistic nature of the changes being requested.

The Attorney General mostly opposed their requests. But each change proposed was not discussed point by point.

The decision was made to focus on proposed changes intended to address the notice-and-opportunity-to-be-heard issue identified in *Bevan v State*. The changes requested by the AG were also considered, as they were more manageable for the workgroup to address. Ms. Taliaferro, IADD, as represented by Ben Miller and then Debra Nelson, and UACDL as represented by David Ferguson, could then present their comprehensive changes to the Committee.

Both IADD and UACDL submitted proposed amendments to URCP Rule 65C aimed at protecting post-conviction access for petitioners. However, their approach and scope differ significantly: IADD submitted targeted procedural fixes focused on practical challenges faced by appointed counsel and pro se petitioners, whereas UACDL proposed a sweeping structural revision to align Rule 65C with broader constitutional standards and pre-PCRA case law.

Their shared requests included removing the “plain and concise” pleading requirements, as that could create confusion with the requirement to include all of the facts. Both groups sought to relax the strict rule prohibiting case law citations in initial filings. IADD requested changing the rule to state that a petitioner "need not" set forth citations, noting that pro se petitions were being rejected merely for mentioning case law. UACDL similarly proposed allowing supporting memorandums without requiring unnecessary extra physical copies. Both groups insisted that courts must provide petitioners notice and an opportunity to be heard before dismissing claims on procedural grounds, consistent with the requirement identified in *Bevan v State.*

Areas where the two organizations differed were as follows:

- Their approach to summary dismissals. UACDL wanted a complete elimination of summary dismissals, and IADD recognized it as a mechanism to balance finality.
- IADD requested that appointed counsel be allowed to "freely amend" petitions, with new claims automatically "relating back" to the original filing date, modeled after federal habeas standards. UACDL focused more on broader statutory exceptions.
- UACDL was interested in changing the statute of limitations or expanding tolling rules, while IADD did not propose such amendments.
- UACDL wanted to expand the substantive grounds for relief to include "fundamental unfairness," "other unusual circumstances," a "changed science writ" (for bogus or outdated scientific evidence), and broad relief for coercion under a preponderance standard.
- UACDL requested striking restrictive discovery rules (which required showing evidence was likely admissible at an evidentiary hearing) and replacing them with standard civil discovery under Rules 26–37 "to the extent permitted by rule". No such proposal came from IADD.

As private defense counsel, Ms. Taliaferro provided a unique viewpoint to the workgroup. Although she did not present a redline proposal, her primary focus was addressing the heightened hurdles within the rule for incarcerated or self-represented petitioners, and she generally shares the concerns raised by both UACDL and IADD.

The summary above outlines the primary requests submitted by Ms. Taliaferro, IADD, and UACDL. Each has been invited to attend the upcoming meeting to engage in further discussion and to provide their own memos to the Committee if they choose. Their proposed redline versions are also attached for your review.

I recommend that the Committee's next steps be to evaluate and determine the appropriate response to the broad, sweeping revisions requested by IADD, UACDL, and Ms. Taliaferro. Additionally, I encourage the Committee to review the consensus modifications developed by the workgroup, as reflected in the proposed Rule 65C redline.

I look forward to discussing these matters with you.

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Rule 65C. Postc~~-c~~onviction relief.

(a) Scope. This rule governs proceedings in all petitions for post-conviction relief filed under the Post-Conviction Remedies Act, Utah Code Title 78B, Chapter 9. The Act sets forth the manner and extent to which a person may challenge the legality of a criminal conviction and sentence after the conviction and sentence have been affirmed in a direct appeal under Article I, Section 12 of the Utah Constitution, or the time to file such an appeal has expired.

(b) Procedural defenses and merits review. Except as provided in paragraph (h), if the court comments on the merits of a postc~~-c~~onviction claim, it ~~shall~~ will first clearly and expressly determine whether that claim is independently precluded under ~~Section~~ Utah Code 78B-9-106.

(c) Commencement and venue. The proceeding ~~shall~~ will be commenced by filing a petition with the clerk of the district court in the county in which the judgment of conviction was entered. The petition should be filed on forms provided by the court. The court may order a change of venue on its own motion if the petition is filed in the wrong county. The court may order a change of venue on motion of a party for the convenience of the parties or witnesses.

(d) Contents of the petition. The petition ~~shall~~ must set forth all claims that the petitioner has in relation to the legality of the conviction or sentence. The petition ~~shall~~ must state:

(1) whether the petitioner is incarcerated and, if so, the place of incarceration;

(2) the name of the court in which the petitioner was convicted and sentenced and the dates of proceedings in which the conviction was entered, together with the court's case number for those proceedings, if known by the petitioner;

(3) in plain and concise terms, all of the facts that form the basis of the petitioner's claim to relief;

(4) whether the judgment of conviction, the sentence, or the commitment for violation of probation has been reviewed on appeal, and, if so, the number and title of the appellate proceeding, the issues raised on appeal, and the results of the appeal;

(5) whether the legality of the conviction or sentence has been adjudicated in any prior postc~~-c~~onviction or other civil proceeding, and, if so, the case number and title of those proceedings, the issues raised in the petition, and the results of the prior proceeding; and

(6) if the petitioner claims entitlement to relief due to newly discovered evidence, the reasons why the evidence could not have been discovered in time for the claim to be

addressed in the trial court, at trial, on the appeal, or any previous postc~~-c~~onviction petition.

(e) Attachments to the petition. If available to the petitioner, the petitioner ~~shall~~ must attach to the petition:

(1) affidavits, copies of records and other evidence in support of the allegations;

(2) a copy of or a citation to any opinion issued by an appellate court regarding the direct appeal of the petitioner's case;

(3) a copy of the pleadings filed by the petitioner in any prior postc~~-c~~onviction or other civil proceeding that adjudicated the legality of the conviction or sentence; and

(4) a copy of all relevant orders and memoranda of the court.

(f) Memorandum of ~~authorities~~law.

(1)The petitioner shall not set forth argument or citations or discuss authorities in the petition and need only to set out fact as necessary pursuant to paragraph (d). If a separate memorandum of law is submitted, the trial court will review any facts or ground for relief in the memorandum as if they were submitted in the petition itself.~~, but these may be set out in a separate memorandum, two copies of which shall be filed with the petition.~~

(2) Length of the memorandum. If a memorandum of law is filed, it must be limited to 25 pages or 9000 words.

(3) The court may permit a party to fille an overlength memorandum of law upon a showing of good cause. An overlength memorandum must include a table of contents and a table of authorities with page references.

(g) Assignment. On the filing of the petition, the clerk ~~shall~~ will promptly assign and deliver it to the judge who sentenced the petitioner. If the judge who sentenced the petitioner is not available, the clerk ~~shall~~ will assign the case in the normal course.

(h)Summary dismissal of claims.

(1) The assigned judge ~~shall~~ must review the petition along with any attachments~~,~~ and any filed memorandum of law. ~~, if it is apparent to the court that~~ If any claim ~~has been adjudicated in a prior proceeding, or if any claim in the petition~~ appears frivolous on its face, the court ~~shall forthwith~~will issue an order dismissing the claim, stating ~~either that the claim has been adjudicated or~~ that the claim is frivolous on its face. The order ~~shall~~ will be sent by mail to the petitioner. Proceedings on the claim ~~shall~~ will terminate with the entry of the order of dismissal. The order of dismissal need not recite findings of fact or conclusions

of law. If all the claims have been dismissed under summary dismissal, the court will advise the petitioner they have the right to appeal within thirty (30) days.

(2) A claim is frivolous on its face when, based solely on the allegations and facts contained in the ~~pleadings~~petition, memorandum of law, and attachments, it appears that:

(A) the facts alleged do not support a claim for relief as a matter of law;

(B) the claim has no arguable basis in fact; or

(C) the claim challenges the sentence only and the sentence has expired prior to the filing of the petition.

(3) If a claim is not frivolous on its face but is deficient due to a pleading error or failure to comply with the requirements of this rule, the court ~~shall~~ will return a copy of the petition with leave to amend within 21 days. The court may grant one additional 21-day period to amend for good cause shown.

(4) The court ~~shall~~ must not review for summary dismissal the initial postc~~-c~~onviction petition in a case where the petitioner is sentenced to death.

(i) Service of petitions. If, on review of the petition, the court concludes that all or part of the petition should not be summarily dismissed, the court ~~shall~~ will designate the portions of the petition that are not dismissed and direct the clerk to serve upon the respondent a copy of the petition, attachments, memorandum, and an electronic court record of the underlying criminal case being challenged, including all non-public documents. If an electronic appellate record of the underlying case has not already been created, the clerk will create the record consistent with Utah Rule of Appellate Procedure 11~~.~~

(1) If the petition is a challenge to a felony conviction or sentence, the respondent is the state of Utah represented by the Attorney General. Service on the Attorney General ~~shall~~ must be by mail at the following address:

Utah Attorney General's Office

Criminal Appeals

Postc~~-C~~onviction Section

160 East 300 South, 6th Floor

P.O. Box 140854

Salt Lake City, UT 84114-0854

(2) In all other cases, the respondent is the governmental entity that prosecuted the petitioner.

(j) Appointment of pro bono counsel.

(1) If any portion of the petition is not summarily dismissed, the court may, upon the request of an indigent petitioner, appoint counsel consistent with the provisions of Utah Code 78B-8-109. ~~on a pro bono basis to represent the petitioner in the post-conviction court or on post-conviction appeal. In determining whether to appoint counsel the court shall consider whether the petition or the appeal contains factual allegations that will require an evidentiary hearing and whether the petition involves complicated issues of law or fact that require the assistance of counsel for proper adjudication.~~

(2) If counsel is appointed, the court clerk will serve upon appointed counsel a copy of the electronic record of the underlying case consistent with the provisions of Utah Rule of Appellate Procedure 11.

(k) Answer or other response. Within sixty (60)~~30 days~~ after service of a copy of the petition upon the respondent, or within such other period of time as the court may allow, the respondent ~~shall~~ must answer or otherwise respond to all the claims in the petition that have not been previously dismissed. ~~otherwise respond to the portions of the petition that have not been dismissed and shall~~ The respondent must serve the answer or other response upon the petitioner in accordance with Rule 5~~(b)~~. Within sixty (60)~~30~~ days (plus time allowed for service by mail) after service of any motion ~~to dismiss or for summary judgment,~~ the petitioner may respond by memorandum to the motion. Within thirty (30) days, the respondent may file a reply memorandum supporting the motion if the petitioner files an opposition. No further pleadings or amendments will be permitted unless ordered by the court.

(l) Hearings. After pleadings are closed, the court ~~shall~~ will promptly set the proceeding for a hearing or otherwise dispose of the case. The court may also order a prehearing conference, but the conference shall not be set so as to delay unreasonably the hearing on the merits of the petition. At the prehearing conference, the court may:

(1) consider the formation and simplification of issues;

(2) require the parties to identify witnesses and documents; and

(3) require the parties to establish the admissibility of evidence expected to be presented at the evidentiary hearing.

(m) Presence of the petitioner at hearings. The petitioner ~~shall~~ must be present at the prehearing conference if the petitioner is not represented by counsel. The prehearing conference may be conducted by means of telephone or video conferencing. The petitioner ~~shall~~ must be present before the court at hearings on dispositive issues but need not otherwise be present in court during the proceeding. The court may conduct any hearing at the correctional facility where the petitioner is confined.

(n) Discovery; records.

(1) If the court sets the proceeding for an evidentiary hearing, discovery under Rule 26 through 37 will be allowed by the court upon motion of a party and a determination that there is good cause to believe that discovery is necessary to provide a party with evidence that is likely to be admissible at an evidentiary hearing.

~~Discovery under Rules 26 through 37 shall be allowed by the court upon motion of a party and a determination that there is good cause to believe that discovery is necessary to provide a party with evidence that is likely to be admissible at an evidentiary hearing.~~

(2) The court may order either the petitioner or the respondent to obtain any relevant transcript or court records.

(3) All records in the criminal case under review, including the records in an appeal of that conviction, are deemed part of the trial court record in the petition for postc~~-c~~onviction relief. A record from the criminal case retains the security classification that it had in the criminal case.

(o) Orders; stay.

(1) If the court vacates the original conviction or sentence, it shall enter findings of fact and conclusions of law and an appropriate order. If the petitioner is serving a sentence for a felony conviction, the order shall be stayed for five~~7~~ days. Within the stay period, the respondent shall give written notice to the court and the petitioner that the respondent will pursue a new trial, or sentencing proceedings,~~pursue a new sentence,~~ appeal the order, or take no action. Thereafter the stay of the order is governed by these rules and by the Rules of Appellate Procedure.

(2) If the respondent fails to provide notice or gives notice at any time during the stay period that it intends to take no action, the court shall lift the stay and deliver the order to the custodian of the petitioner. ~~that no action will be taken, the stay shall expire and the court shall deliver forthwith to the custodian of the petitioner the order to release the petitioner.~~

(3) If the respondent gives notice that it intends to retry or resentence the petitioner~~ will be retried or resentenced~~, the trial court may enter any supplementary orders as to arraignment, trial, sentencing, custody, bail, discharge, or other matters that may be necessary.~~ and proper.~~

(p) Costs. The court may assign the costs of the proceeding, as allowed under Rule 54(d), to any party as it deems appropriate. If the petitioner is indigent, the court may direct the costs to be paid by the governmental entity that prosecuted the petitioner. If the petitioner is in the custody of the Department of Corrections, Utah Code Title 78A, Chapter 2, Part 3 governs the manner and procedure by which the trial court shall determine the amount, if any, to charge for fees and costs.

(q) Appeal. Any final judgment or order entered upon the petition may be appealed to and reviewed by the Court of Appeals or the Supreme Court of Utah in accord with the statutes governing appeals to those courts.

434 P.3d 516
Court of Appeals of Utah.

John Dean BEVAN, Appellant,
v.
STATE of Utah, Appellee.

No. 20180786-CA
|
Filed December 20, 2018

Synopsis
Background: The Third District Court, Tooele Department, No. 180300743, Matthew Bates, J., dismissed defendant's petition for postconviction relief. Defendant appealed.

Holdings: The Court of Appeals held that:

[1] trial court's failure to provide notice that it was dismissing defendant's petition as procedurally barred constituted manifest error, and

[2] statute requiring notice to the parties when a court raises procedural bar that a claim has been previously adjudicated superseded rule that summarily dismisses a claim based on that same procedural bar.

Reversed, order vacated, and remanded.

Procedural Posture(s): Appellate Review; Post-Conviction Review.

West Headnotes (3)

[1] **Criminal Law** Post-conviction relief
Criminal Law Proceedings
Trial court's lack of compliance with Post-Conviction Remedies Act (PCRA) constituted manifest error, where trial court, in dismissing defendant's claims for postconviction relief as procedurally barred due to having been previously adjudicated, failed to provide notice to the parties that it was considering that procedural bar as required under PCRA. Utah Code Ann. § 78B-9-106(2)(b); Utah R. App. P. 10(e).

1 Case that cites this headnote

[2] **Courts** Operation and Effect of Rules
To supersede a rule of civil procedure in regard to a special statutory proceeding, a statute must clearly counter and thus override the rule.

[3] **Criminal Law** Process or notice
Criminal Law Necessity for Hearing
Provision of Post-Conviction Remedies Act (PCRA) requiring notice to the parties when a court raises the procedural bar that a claim for relief has been previously adjudicated was clearly counter to the summary dismissal for the same procedural bar permitted in the rule of civil procedure governing post-conviction relief, and therefore statute superseded rule, and the trial court was required to give parties notice and an opportunity to be heard. Utah Code Ann. § 78B-9-106(2)(b); Utah R. Civ. P. 65C(h)(1).

1 Case that cites this headnote

Third District Court, Tooele Department, The Honorable Matthew Bates, No. 180300743

Attorneys and Law Firms

Scott David Goodwin, Attorney for Appellant

Sean D. Reyes and Thomas Brunker, Salt Lake City, Attorneys for Appellee

Before Judges Michele M. Christiansen Forster, David N. Mortensen, and Ryan M. Harris.

Opinion

PER CURIAM:

¶1 John Dean Bevan appeals the trial court's order dismissing his petition for postconviction relief under rule 65C(h)(1) of the Utah Rules of Civil Procedure, which allows for summary dismissal of claims under certain circumstances. This matter is before the court on its own motion for summary reversal due to manifest error. *See* Utah R. App. P. 10(e).

[1] ¶2 The trial court summarily dismissed Bevan's claims as procedurally barred because it determined that the claims had previously been adjudicated. Under rule 65C(h)(1), if the trial court finds that a claim had been adjudicated in a prior proceeding, the court "shall forthwith issue an order dismissing the claim." Utah R. Civ. P. 65C(h)(1). However, the trial court did not provide notice to the parties that it was considering the procedural bar as required under the Post-Conviction Remedies Act (PCRA). *See* Utah Code Ann. § 78B-9-106(2)(b) (LexisNexis 2012).

¶3 The PCRA lists procedural and time bars in Utah Code section 78B-9-106. Among other things, relief is precluded if the ground for relief has been raised in prior proceedings, whether at trial, on appeal, or in a prior ***517** petition for relief. *Id.* § 78B-9-106(1). In 2008, the statute was amended to allow courts to consider sua sponte whether grounds for relief may be precluded. *See* Post-Conviction Remedies Act Revisions, ch. 288, § 106(2)(b), 2008 Utah Laws 1845, 1846. Now the statute provides that "[a]ny court may raise a procedural or time bar on its own motion, provided that it gives the parties notice and an opportunity to be heard." Utah Code Ann. § 78B-9-106(2)(b).

[2] **[3]** ¶4 Utah Rule of Civil Procedure 65C was promulgated specifically to implement procedures for seeking relief under the PCRA. Utah R. Civ. P. 65C(a). Although the rule provides the procedures, the PCRA "sets forth the manner and extent to which a person may challenge the legality of a criminal conviction and sentence after the conviction and sentence have been affirmed" or the time to appeal has expired. *Id.* The rules of civil procedure "apply to all special statutory proceedings, except insofar as such rules are by their nature clearly inapplicable." *Id.* R. 81(a). To supercede a rule of civil procedure in regard to a special statutory proceeding, a statute must "clearly counter and thus override" the rule. *Maxfield v. Herbert*, 2012 UT 44, ¶ 17, 284 P.3d 647. Here, the statute requiring notice when a court raises the procedural bar that a claim for relief has been previously adjudicated is clearly counter to the summary dismissal permitted in rule 65C for the same procedural bar.[1] Accordingly, the statute supercedes this provision of the rule, and the trial court must give the parties notice and an opportunity to be heard.

¶5 In this case, the record establishes that the trial court dismissed Bevan's petition as procedurally barred without providing the required notice and opportunity to be heard. The lack of compliance with the provisions of section 78B-9-106(2)(b) constitutes manifest error requiring reversal. *See* Utah R. App. P. 10(e). Therefore, the trial court's order is vacated and this matter is remanded to the trial court for further proceedings in compliance with section 78B-9-106(2)(b).

All Citations

434 P.3d 516, 880 Utah Adv. Rep. 13, 2018 UT App 237

Footnotes

1 Notably, if a trial court finds that the petition is frivolous on its face the petition may be dismissed without notice. Utah R. Civ. P. 65C(h)(1). Frivolousness is not a procedural bar requiring notice listed in section 78B-9-106. *See* Utah Code Ann. § 78B-9-106(1) (LexisNexis 2012).

ANN MARIE TALIAFERRO

PROPOSED REDLINE EDITS
URCP RULE 65C

Rule 65C. Post-Conviction Relief

(a) Scope. This rule governs proceedings in all petitions for post-conviction relief filed under the Post-Conviction Remedies Act, Utah Code Title 78B, Chapter 9. The Act sets forth the manner in which~~an d extent to which~~ a person may challenge the legality of a criminal conviction and sentence after the conviction and sentence have been affirmed in a direct appeal under Article I, Section 12 of the Utah Constitution, or the time to file such an appeal has expired.

~~**(b) Procedural Defenses and Merits Review.** Except as provided in paragraph (h), if the court comments on the merits of a post-conviction claim, it shall first clearly and expressly determine whether that claim is independently precluded under Section 78B-9-106~~propose to delete. Why needed?.

(c) Commencement and Venue. The proceeding shall be commenced by filing a petition with the clerk of the district court in the county in which the judgment of conviction was entered. The petition ~~should~~ may be filed on forms provided by the court. The court may order a change of venue on its own motion if the petition is filed in the wrong county. The court may order a change of venue on motion of a party for the convenience of the parties or witnesses.

(d) Contents of the Petition. The petition shall set forth all claims that the petitioner has in relation to the legality of the conviction or sentence. The petition shall state:
(1) whether the petitioner is incarcerated and, if so, the place of incarceration;
(2) the name of the court in which the petitioner was convicted and sentenced and the dates of proceedings in which the conviction was entered, together with the court's case number for those proceedings, if known by the petitioner;
(3) in plain and concise terms, all of the facts that form the basis of the petitioner's claim to relief;
(4) whether the judgment of conviction, the sentence, or the commitment for violation of probation has been reviewed on appeal, and, if so, the number and title of the appellate proceeding, the issues raised on appeal, and the results of the appeal;
(5) whether the legality of the conviction or sentence has been adjudicated in any prior post-conviction or other civil proceeding, and, if so, the case number and title of those proceedings, the issues raised in the prior ~~petition~~proceeding, and the results of the prior proceeding; and
(6) if the petitioner claims entitlement to relief due to newly discovered material evidence as defined by Utah Code 78B-9-104(e), the reasons why the evidence could not have been discovered by the time of trial or sentencing or in time to include the evidence in any previously filed post-trial motion or postconviction proceeding~~in time for the claim to be addressed in the trial, the appeal, or any previous post-conviction petition.~~

(e) Attachments to the Petition. If available to the petitioner, the petitioner shall attach to the petition:

(1) affidavits, copies of records and other evidence in support of the allegations;
(2) a copy of or a citation to any opinion issued by an appellate court regarding the direct appeal of the petitioner's case;
(3) a copy of the pleadings filed by the petitioner in any prior post-conviction or other civil proceeding that adjudicated the legality of the conviction or sentence; and
(4) a copy of all relevant orders and memoranda of the court.

(f) Memorandum of Authorities. The petitioner shall not set forth argument or citations or discuss authorities in the petition, but these may be set out in a separate memorandum, two copies of which shall be filed with the petition.

(g) Assignment. On the filing of the petition, the clerk shall promptly assign and deliver it to the judge who sentenced the petitioner. If the judge who sentenced the petitioner is not available, the clerk shall assign the case in the normal course.

(h) Summary Dismissal of Claims.

(1) The assigned judge shall review the petition, and, if it is apparent to the court that ~~any claim has been adjudicated in a prior proceeding, or if~~ any claim in the petition appears frivolous on its face, the court shall forthwith issue an order dismissing the claim, stating ~~either that the claim has been adjudicated or~~ that the claim is frivolous on its face. The order shall be sent by mail to the petitioner. Proceedings on the specific claim shall terminate with the entry of the order of dismissal. The order of dismissal need not recite findings of fact or conclusions of law. If the court dismisses all claims in the petition as frivolous, the court shall inform the petitioner of the right to appeal and the time frame for doing so to the court with appellate jurisdiction.
(2) A claim is frivolous on its face when, based solely on the allegations contained in the pleadings and attachments, it appears that:
(A) the facts alleged do not support a claim for relief as a matter of law;
(B) the claim has no arguable basis in fact; or
(C) the claim challenges the sentence only and the sentence has expired prior to the filing of the petition.
(3) If a claim is not frivolous on its face but is deficient due to a pleading error or failure to comply with the requirements of this rule, the court shall return a copy of the petition with leave to amend ~~within 21 days. The court may grant one additional 21-day period to amend for good cause shown~~in a time period set by the court.
(4) The court shall not review for summary dismissal the initial post-conviction petition in a case where the petitioner is sentenced to death.

(i) Service of Petitions. If, on review of the petition, the court concludes that all or part of the petition should not be summarily dismissed, the court shall designate the portions of the petition that are not dismissed and direct the clerk to serve upon the respondent a copy of the petition and any ~~,~~ attachments, memorandum, and an electronic court record of the underlying criminal case being challenged, including all non-public documents. If an electronic appellate record of the underlying case has not already been created, the clerk will create the record.
(1) If the petition is a challenge to a felony conviction or sentence, the respondent is the state of Utah represented by the Attorney General. Service on the Attorney General shall be by mail at the following address:
Utah Attorney General's Office
Criminal Appeals

Post-Conviction Section
160 East 300 South, 6th Floor
P.O. Box 140854
Salt Lake City, UT 84114-0854
(2) In all other cases, the respondent is the governmental entity that prosecuted the petitioner.

(j) Appointment of Pro Bono Counsel. If any portion of the petition is not summarily dismissed, the court may, upon the request of an indigent petitioner, appoint counsel on a pro bono basis or from the Indigent Appellate Defense Division to represent the petitioner in the post-conviction court or on post-conviction appeal. In determining whether to appoint counsel the court may consider: (1) whether the petitioner is incarcerated; (2) the likelihood that an evidentiary hearing will be necessary; (3) the likelihood that an investigation will be necessary; (4) the complexity of the factual and legal issues; and (5) any other factor relevant to the particular case.

HAVING DISCUSSION HERE ABOUT COURT'S FINDING PRO BONO COUNSEL.~~shall consider whether the petition or the appeal contains factual allegations that will require an evidentiary hearing and whether the petition involves complicated issues of law or fact that require the assistance of counsel for proper adjudication.~~

(k) Answer~~ or Other Response~~. Within 30 days after service of a copy of the petition upon the respondent, or within such other period of time as the court may allow, the respondent shall answer ~~or otherwise respond to~~ the portions of the petition that have not been dismissed and shall serve the answer or other response upon the petitioner in accordance with Rule 5(b).~~ Within 30 days (plus time allowed for service by mail) after service of any motion to dismiss or for summary judgment, the petitioner may respond by memorandum to the motion.~~ The Answer shall include notice that any of the petitioner's claims are precluded under Utah Code 78B-9-106 or barred by the limitation period established in 78B-9-107. No further pleadings or amendments will be permitted unless ~~ordered~~ allowed by the court.

(*l*) Hearings and Motion Practice. After pleadings are closed, the court shall promptly set the proceeding for an initial scheduling~~ hearing or otherwise dispose of the case. The court may also order a prehearing conference, but the conference shall not be set so as to delay unreasonably the hearing on the merits of the petition~~ hearing. At the initial scheduling ~~pre~~hearing~~ conference~~, the court may:

(1) consider the formation and simplification of issues;

(2) inquire as to either party's intent to file dispositive motions, motions regarding the admissibility of evidence expected to be presented at an evidentiary hearing, or other motions, and set motion deadlines as needed;

(3) inquire as to the need by either party for further discovery;

(4) ~~(2)~~ require the parties to preliminarily identify anticipated witnesses and documents.~~;~~

~~and~~

~~(3) require the parties to establish the admissibility of evidence expected to be presented at the evidentiary hearing.~~

(m) Presence of the Petitioner at Hearings. The petitioner shall be present at ~~the prehearing conference~~all hearings if the petitioner is not represented by counsel. Hearings ~~The prehearing conference~~ may be conducted by means of telephone or video conferencing. The petitioner shall be present ~~before the court~~ at hearings on dispositive issues ~~but need not otherwise be present in court during the proceeding~~. The court may conduct any hearing at the correctional facility where the petitioner is confined.

(n) Discovery; Records.

(1) Discovery under Rules 26 through 37 shall be allowed by the court upon motion of a party and a determination that there is good cause to believe that discovery is necessary to provide a party with evidence that is likely to be admissible at an evidentiary hearing.

(2) The court may order either the petitioner or the respondent to obtain any relevant transcript or court records.

(3) All records in the criminal case under review, including the records in an appeal of that conviction, are deemed part of the trial court record in the petition for post-conviction relief. A record from the criminal case retains the security classification that it had in the criminal case.

(*o*) Orders; Stay.

(1) If the court vacates the original conviction or sentence, it shall enter findings of fact and conclusions of law and an appropriate order. If the petitioner is serving a sentence for a felony conviction, the order shall be stayed for 7 days. Within the stay period, the respondent shall give written notice to the court and the petitioner that the respondent will pursue a new trial, pursue a new sentence, appeal the order, or take no action. Thereafter the stay of the order is governed by these rules and by the Rules of Appellate Procedure.

(2) If the respondent fails to provide notice or gives notice that no action will be taken, the stay shall expire and the court shall deliver forthwith to the custodian of the petitioner the order to release the petitioner.

(3) If the respondent gives notice that the petitioner will be retried or resentenced, the trial court may enter any supplementary orders as to arraignment, trial, sentencing, custody, bail, discharge, or other matters that may be necessary and proper.

(p) Costs. The court may assign the costs of the proceeding, as allowed under Rule 54(d), to any party as it deems appropriate. If the petitioner is indigent, the court may direct the costs to be paid by the governmental entity that prosecuted the petitioner. If the petitioner is in the custody of the Department of Corrections, Utah Code Title 78A, Chapter 2, Part 3 governs the manner and procedure by which the trial court shall determine the amount, if any, to charge for fees and costs.

(q) Appeal. Any final judgment ~~or order entered upon the petition~~ may be appealed to and reviewed by the Court of Appeals or the Supreme Court of Utah in accord with the statutes governing appeals to those courts.

Utah R. Civ. P. 65C

ATTORNEY GENERAL

MARK FIELDS

PROPOSED REDLINE EDITS

URCP RULE 65C

Rule 65 C. Post-conviction relief

(a) Scope. This rule governs proceedings in all petitions for post-conviction relief filed under the Post-Conviction Remedies Act, Utah Code Title 78B, Chapter 9. The Act sets forth the manner and extent to which a person may challenge the legality of a criminal conviction and sentence after the conviction and sentence have been affirmed in a direct appeal under Article I, Section 12 of the Utah Constitution, or the time to file such an appeal has expired.

(b) Procedural defenses and merits review. Except as provided in paragraph (h), if the court comments on the merits of a post-conviction claim, it shall first clearly and expressly determine whether that claim is independently precluded under Section78B-9-106.

(c) Commencement and venue. The proceeding shall be commenced by filing a petition with the clerk of the district court in the county in which the judgment of conviction was entered. The petition should be filed on forms provided by the court. The court may order a change of venue on its own motion if the petition is filed in the wrong county. The court may order a change of venue on motion of a party for the convenience of the parties or witnesses.

(d) Contents of the petition. The petition shall set forth all claims that the petitioner has in relation to the legality of the conviction or sentence. The petition shall state:

(1) whether the petitioner is incarcerated and, if so, the place of incarceration;

(2) the name of the court in which the petitioner was convicted and sentenced and the dates of proceedings in which the conviction was entered, together with the court's case number for those proceedings, if known by the petitioner;

(3) in plain and concise terms, all of the facts that form the basis of the petitioner's claim to relief;

(4) whether the judgment of conviction, the sentence, or the commitment for violation of probation has been reviewed on appeal, and, if so, the number and title of the appellate proceeding, the issues raised on appeal, and the results of the appeal;

(5) whether the legality of the conviction or sentence has been adjudicated in any prior post-conviction or other civil proceeding, and, if so, the case number and title of those proceedings, the issues raised in the petition, and the results of the prior proceeding; and

(6) if the petitioner claims entitlement to relief due to newly discovered evidence, the reasons why the evidence could not have been discovered in time for the claim to be addressed in the trial, a posttrial motion, the appeal, or any previous post-conviction petition.

(e) Attachments to the petition. If available to the petitioner, the petitioner shall attach to the petition:

(1) affidavits, copies of records and other evidence in support of the allegations;

(2) a copy of or a citation to any opinion issued by an appellate court regarding the direct appeal of the petitioner's case;

(3) a copy of the pleadings filed by the petitioner in any prior post-conviction or other civil proceeding that adjudicated the legality of the conviction or sentence; and

(4) a copy of all relevant orders and memoranda of the court.

(f) Memorandum of authorities.

(1) The petitioner shall not set forth argument or citations or discuss authorities in the petition, but these may be set out in a separate memorandum, two copies of which shall be filed with the petition.

(2) Length of the memorandum. The memorandum of authorities must comply with the page limit or the corresponding word limit set forth in Utah Rule of Civil Procedure 7(q) for motions and opposition memoranda filed under rules 12(b), 12(c), and 56. The memorandum of authorities shall be limited to 25 pages or 9,000 words.

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

(g) Assignment. On the filing of the petition, the clerk shall promptly assign and deliver it to the judge who sentenced the petitioner. If the judge who sentenced the petitioner is not available, the clerk shall assign the case in the normal course.

(h) Summary dismissal of claims.

(1) The assigned judge shall review the petition, and, if it is apparent to the court that ~~any claim has been adjudicated in a prior proceeding, or if~~ any claim in the petition appears frivolous on its face, the court shall forthwith issue an order dismissing the claim, stating ~~either that the claim has been adjudicated or~~ that the claim is frivolous on its face. The order shall be sent by mail to the petitioner. Proceedings on the claim shall terminate with the entry of the order of dismissal. The order of dismissal need not recite findings of fact or conclusions of law.

(2) A claim is frivolous on its face when, based solely on the allegations contained in the pleadings and attachments, it appears that:

(A) the facts alleged do not support a claim for relief as a matter of law;

(B) the claim has no arguable basis in fact; or

(C) the claim challenges the sentence only and the sentence has expired prior to the filing of the petition.

(3) If a claim is not frivolous on its face but is deficient due to a pleading error or failure to comply with the requirements of this rule, the court shall return a copy of the petition with leave to amend within 21 days. The court may grant one additional 21-day period to amend for good cause shown.

(4) The court shall not review for summary dismissal the initial post-conviction petition in a case where the petitioner is sentenced to death.

(i) Service of petitions. If, on review of the petition, the court concludes that all or part of the petition should not be summarily dismissed, the court shall designate the portions of the petition that are not dismissed and direct the clerk to serve upon the respondent a copy of the petition, attachments, memorandum, and an electronic court record of the underlying criminal case being challenged, including all non-public documents. If an electronic appellate record of the underlying case has not already been created, the clerk will create the record consistent with Utah Rule of Appellate Procedure 11.

(1) If the petition is a challenge to a felony conviction or sentence, the respondent is the state of Utah represented by the Attorney General. Service on the Attorney General shall be by mail at the following address:

Utah Attorney General's Office
Criminal Appeals
Post-Conviction Section
160 East 300 South, 6th Floor
P.O. Box 140854
Salt Lake City, UT 84114-0854

(2) In all other cases, the respondent is the governmental entity that prosecuted the petitioner.

(j) Appointment of pro bono counsel.

(1) If any portion of the petition is not summarily dismissed, the court may, upon the request of an indigent petitioner, appoint counsel on a pro bono basis to represent the petitioner in the post-conviction court or on post-conviction appeal. In determining whether to appoint counsel the court shall consider whether the petition or the appeal contains factual allegations that will require an evidentiary hearing and whether the petition involves complicated issues of law or fact that require the assistance of counsel for proper adjudication.

(2) If pro bono counsel is appointed, the clerk shall serve upon appointed counsel a copy of the petition, attachments, memorandum, and an electronic record of the underlying criminal case being challenged, including all non-public documents. If an electronic appellate record of the underlying case has not already been created, the clerk will create the record consistent with Utah Rule of Appellate Procedure 11.

(k) Answer or other response. Within 30 days after service of a copy of the petition upon the respondent, or within such other period of time as the court may allow, the respondent shall answer or otherwise respond to the portions of the petition that have not been dismissed and shall serve the answer or other response upon the petitioner in accordance with Rule 5(b). Within 30 days (plus time allowed for service by mail) after service of any motion to dismiss or for summary judgment, the petitioner may respond by memorandum to the motion. The respondent may file a reply in support of the motion. No further pleadings or amendments will be permitted unless ordered by the court.

(l) Hearings. After pleadings are closed, the court shall promptly set the proceeding for a hearing or otherwise dispose of the case. The court may also order a prehearing conference, but the conference shall not be set so as to delay unreasonably the hearing on the merits of the petition. At the prehearing conference, the court may:

(1) consider the formation and simplification of issues;

(2) require the parties to identify witnesses and documents; and

(3) require the parties to establish the admissibility of evidence expected to be presented at the evidentiary hearing.

(m) Presence of the petitioner at hearings. The petitioner shall be present at the prehearing conference if the petitioner is not represented by counsel. The prehearing conference may be conducted by means of telephone or video conferencing. The petitioner shall be present before the court at hearings on dispositive issues but need not otherwise be present in court during the proceeding. The court may conduct any hearing at the correctional facility where the petitioner is confined.

(n) Discovery; records.

(1) If the court sets the proceeding for an evidentiary hearing, ~~D~~discovery under Rules 26 through 37 shall be allowed by the court upon motion of a party and a determination that there is good cause to believe that discovery is necessary to provide a party with evidence that is likely to be admissible at an evidentiary hearing.

(2) The court may order either the petitioner or the respondent to obtain any relevant transcript or court records.

(3) All records in the criminal case under review, including the records in an appeal of that conviction, are deemed part of the trial court record in the petition for post-conviction relief. A record from the criminal case retains the security classification that it had in the criminal case.

(o) Orders; stay.

(1) If the court vacates the original conviction or sentence, it shall enter findings of fact and conclusions of law and an appropriate order. If the petitioner is serving a sentence for a felony conviction, the order shall be stayed for 7 days. Within the stay period, the respondent shall give written notice to the court and the petitioner that the respondent will pursue a new trial, pursue a new sentence, appeal the order, or take no action. Thereafter the stay of the order is governed by these rules and by the Rules of Appellate Procedure.

(2) If the respondent fails to provide notice or gives notice that no action will be taken, the stay shall expire and the court shall deliver forthwith to the custodian of the petitioner the order to release the petitioner.

(3) If the respondent gives notice that the petitioner will be retried or resentenced, the trial court may enter any supplementary orders as to arraignment, trial, sentencing, custody, bail, discharge, or other matters that may be necessary and proper.

(p) Costs. The court may assign the costs of the proceeding, as allowed under Rule 54(d), to any party as it deems appropriate. If the petitioner is indigent, the court may direct the costs to be paid by the governmental entity that prosecuted the petitioner. If the petitioner is in the custody of the Department of Corrections, Utah Code Title 78A, Chapter 2, Part 3 governs the manner and procedure by which the trial court shall determine the amount, if any, to charge for fees and costs.

(q) Appeal. Any final judgment or order entered upon the petition may be appealed to and reviewed by the Court of Appeals or the Supreme Court of Utah in accord with the statutes governing appeals to those courts.

UTAH ASSOCIATION OF CRIMINAL DEFENSE LAWYERS ASSOCIATION

DAVID FERGUSON

PROPOSED REDLINE EDITS

URCP RULE 65C

Requested Changes with Notes

(a) Scope. This rule governs proceedings in all petitions for post-conviction relief filed as a collateral proceeding against a conviction or sentence. ~~under the Post-Conviction Remedies Act, Utah Code Title 78B, Chapter 9. The Act~~ This rule sets forth the manner and extent to which a person may challenge the legality of a criminal conviction and sentence after the conviction and sentence have been affirmed in a direct appeal under Article I, Section 12 of the Utah Constitution, or the time to file such an appeal has expired.

(b) ~~**Procedural defenses and merits review.**~~ **Time period on which to file a petition.** Upon receipt of the petition, the court will follow the procedures provided in paragraph (m). A petition must be filed within 4 years of the latest date of the following,[1] unless the interests of justice may excuse a later filing:[2]

(1) the last day for filing an appeal from the entry of the final judgment of conviction, if no appeal is taken;

(2) the entry of the decision of the appellate court that has jurisdiction over the case, if an appeal is taken;

(3) the last day for filing a petition for writ of certiorari in the Utah Supreme Court or the United States Supreme Court, if no petition for writ of certiorari is filed;

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[1] While PCRs historically had no time bar for filing, a general 4-year statute of limitations reflects the standard time for filing claims for civil actions and recognizes the importance of avoiding stale claims. The following list is taken nearly verbatim from Utah Code § 78B-9-107.

[2] The "interests of justice" exception was adopted by the Utah Supreme Court in *Julian v. State*, during a brief period of time when the courts held that the legislature had been unconstitutionally too strict by setting a rigid statute of limitations for PCRs. 966 P.2d 249 (Utah 1998). This was to help ensure that PCRs didn't become too procedural, which later happened in 2008 when the legislature adopted the PCRA statute and reasserted its interest in an inflexible time bar. I have added the "interests of justice" exception back into the rule to reflect the holding in *Julian*.

(4) the entry of the denial of the petition for writ of certiorari or the entry of the decision on the petition for certiorari review, if a petition for writ of certiorari is filed;

(5) the date on which new facts, not previously known, were discovered.[3]

(6) the date on which material facts suppressed by the State are discovered.[4] [5]

(c) **<u>Tolling of the limitation to file.</u>** <u>The time on which a petition may be filed under paragraph (b) is tolled for any period during which the petition is prevented from filing due to the following:</u>[6]

<u>(1) State action in violation of the Utah or United States Constitution;</u>

<u>(2) Physical or mental incapacity;</u>

<u>(3) Force, fraud, or coercion from another individual;</u>[7] <u>or</u>

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[3] This language replaces language from the statute:

> "the date on which petitioner knew or should have known, in the exercise of reasonable diligence, of evidentiary facts on which the petition is based"

The proposed language is broader than what's provided in the statute. It reflects a pre-PCRA statute decision, *Hurst v. Cook*, where the Court held that the discovery of new evidence constitutes a good cause basis for the filing of a successive post-conviction petition. See Tillman v. State, 2005 UT 56, ¶ 22 (describing the *Hurst* factors).

[4] This aligns with the constitutional obligations of prosecutors to present material exculpatory and impeachment facts. The failure to do so tolls the time limitation to filing a PCR as reflected in *Tillman v. State*, 2005 UT 56.

[5] The PCRA statute also allows the tolling of the PCR limitation for victims of human trafficking. This reference could get omitted since the "interests of justice" would likely allow a trafficking victim to file a PCR later. However, I've included some language in a later section that deals with that issue better if the Court wishes to preserve the concept.

[6] Aside from modifications proposed in subparagraph (3) these are all taken directly from the PCRA statute.

[7] The provision in statute that this subparagraph is based on tolls filing due to force, fraud, or coercion for certain sex/property crimes committed while being trafficked. While it may have made political sense to single out victims of human trafficking for added protections under PCRA statute, it makes more sense to recognize these policy concerns as they apply more broadly.

(4) The pendency of the outcome of a petition asserting DNA exoneration or factual innocence.

(d) Limitation on Postconviction DNA testing or factual innocence. There is no time limitation on the filing of a petition under Part 3, Postconviction Testing of DNA, or Part 4, Postconviction Determination of Factual Innocence of the Utah Code.[8]

(e) Grounds for relief. Relief under this Rule may not be granted unless:[9]

(1) the conviction was obtained or the sentence was imposed in violation of the United States Constitution or Utah Constitution;

(2) the conviction was obtained or the sentence was imposed under a statute that is in violation of the United States Constitution or Utah Constitution, or the conduct for which the petitioner was prosecuted is constitutionally protected;

(3) the sentence was imposed or probation was revoked in violation of the controlling statutory provisions;

(4) the petitioner had ineffective assistance of counsel in violation of the United States Constitution or Utah Constitution;

(5) new facts not previously known which would show the denial of a constitutional right or might change the outcome of the trial.[10]

(6) an unlawful destruction or failure to preserve biological evidence for a violent felony offense. Biological evidence that is unlawfully destroyed or unpreserved is presumed to have been favorable for the petitioner when:

(A) the biological evidence was not previously tested; or

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[8] The handling of postconviction DNA testing and factual innocence PCRs should be handled in a new rule, 65D; this paragraph serves as a placeholder.

[9] This list corresponds with Utah Code § 78B-9-104 except where noted below.

[10] The PCRA statute's "newly discovered evidence" is incredibly stringent. The proposed language adopts the "newly discovered evidence" standard from *Hurst v. Cook*, which predates the legislative constrictions on PCRs. *See Tillman v. State*, 2005 UT 56, ¶ 22 (discussing *Hurst*).

(B) if the biological evidence was previously tested, there exists a material change in circumstances, including a scientific or technological advance, that would make it plausible that a test of the biological evidence would produce a favorable test result for the petitioner;

(7) the petitioner can prove entitlement to relief under a rule announced by the United States Supreme Court, the Utah Supreme Court, or the Utah Court of Appeals after conviction and sentence became final on direct appeal, and that:

(A) the rule was dictated by precedent existing at the time the petitioner's conviction or sentence became final; or

(B) the rule decriminalizes the conduct that comprises the elements of the crime for which the petitioner was convicted;

(8) the petitioner was deprived of a fair trial or sentencing by force, fraud, or coercion of another individual;[11]

(9) the existence of fundamental unfairness in a conviction;[12]

(10) new scientific evidence that undermines the conclusions of scientific evidence or testimony that was material to the defendant's conviction;[13] or

(11) other unusual circumstances.[14]

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[11] The PCRA statute's version of this provision introduces it as a mechanism for human trafficking victims to take advantage of. I've broadened it so that the petitioner doesn't have to prove that they were trafficked to show that someone coerced them to act against their interests.

[12] *See Hurst v. Cook*, 777 P.2d 1029, 1035, 1037 n. 10 (Utah 1989) (describing when "fundamental unfairness" applies to granting PCRs).

[13] Other jurisdictions refer to this as a "changed science writ." There is a long history of bogus scientific claims being used as the basis to convict individuals.

[14] *See Hurst v. Cook*, 777 P.2d 1029, 1035 (Utah 1989) (describing when "unusual circumstances" should apply to granting PCRs).

(f) **Burden of proof.** The court may not grant relief from a conviction or sentence unless, in light of the facts proved in the postconviction proceeding, and viewed with the evidence and facts introduced at trial or during sentencing:[15]

(1) the petitioner establishes by a preponderance that there would be a reasonable likelihood of a more favorable outcome;[16] or

(2) if the petitioner challenges the conviction or the sentence on grounds that the prosecutor knowingly failed to correct false testimony at trial or at sentencing, the petitioner establishes by a preponderance a reasonable likelihood that the false testimony could have affected the judgment of the fact finder.

(g) **Successive petitions.** A successive petition, if filed, petition may not be granted unless good cause is shown that the issue in the successive petition addresses:[17]

(1) the denial of a constitutional right pursuant to new law that is, or might be, retroactive;

(2) new facts not previously known which would show the denial of a constitutional right or might change the outcome of the trial;

(3) the existence of fundamental unfairness in a conviction;

(4) the illegality of a sentence;

(5) a claim overlooked in good faith with no intent to delay or abuse the writ; or

(6) other unusual circumstances apply.

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[15] Corresponds with Utah Code § 78B-9-104(2).

[16] The PCRA statute uses a clear and convincing standard of proof when a human trafficker uses force, fraud, or coercion to have the petitioner commit a crime. This is convoluted. Any issue about the petitioner having been coerced into a conviction can be dealt with in the difficulty of presenting that evidence rather than a heightened standard of proof.

[17] This list is taken from Hurst v. Cook, where the Utah Supreme Court identified the circumstances in which it held that the constitution should permit a successive petition. *See Tillman v. State*, 2005 UT 56, ¶ 22 (summarizing the list).

(h) **Commencement and venue.** The proceeding ~~shall~~ must ~~be commenced by~~ begin with the filing of a petition with the clerk of the district court in the county in which the judgment of conviction was entered. ~~The petition should be filed on forms provided by the court.~~[18] The court may order a change of venue on its own motion if the petition is filed in the wrong county. The court may order a change of venue on motion of a party for the convenience of the parties or witnesses.

(i) **Contents of the petition.** The petition ~~shall set forth~~ must present all claims that the petitioner has in relation to the legality of the conviction or sentence. The petition ~~shall~~ must state:

(1) whether the petitioner is incarcerated and, if so, the place of incarceration;

(2) the name of the court in which the petitioner was convicted and sentenced and the dates of proceedings in which the conviction was entered, together with the court's case number for those proceedings, if known by the petitioner;

(3) sufficient facts to place the respondent on fair notice of the claims asserted ~~in plain and concise terms, all of the facts that form the basis of the petitioner's claim to relief;~~[19]

(4) whether the judgment of conviction, the sentence, or the commitment for violation of probation has been reviewed on appeal, and, if so, the number and title of the appellate proceeding, the issues raised on appeal, and the results of the appeal;

(5) whether the legality of the conviction or sentence has been adjudicated in any prior post-conviction or other civil proceeding, and, if so, the case number and title of those proceedings, the issues raised in the petition, and the results of the prior proceeding; and

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[18] Some prisoners use the court forms, but some don't. The forms aren't all that great, and it doesn't seem like this should be required by the rule.

[19] There is some incongruence here between the language in the rule and the ordinary deference that courts should give to *pro se* litigants. The proposed language reduces an unnecessary access to justice hurdle.

(6) if the petitioner claims entitlement to relief due to newly discovered evidence, the reasons why the evidence ~~could not have been~~ were not[20] discovered in time for the claim to be addressed in the trial, the appeal, or any previous post-conviction petition.

(j) **Attachments to the petition.** ~~If available to the petitioner, the petitioner shall attach to the petition:~~ The petitioner may attach to the petition:[21]

(1) affidavits, copies of records and other evidence in support of the allegations;

(2) a copy of or a citation to any opinion issued by an appellate court regarding the direct appeal of the petitioner's case;

(3) a copy of the pleadings filed by the petitioner in any prior postconviction or other civil proceeding that adjudicated the legality of the conviction or sentence; and

(4) a copy of all relevant orders and memoranda of the court.

(k) **Memorandum of authorities.** The petitioner ~~shall not set forth~~ will not present argument or citations or discuss authorities in the petition, but these may be set out in a separate memorandum~~, two copies of which shall be filed with the petition~~.[22]

(l) ~~**Assignment.** On the filing of the petition, the clerk shall will promptly assign and deliver it to the judge who sentenced the petitioner. If the judge who~~

[20] Alleging what facts "were not known" is obviously an important part of an initial pleading. Providing a basis for why the facts "could not have been known" seems more suited for argument and discovery.

[21] The rules on pleadings in the district court in other contexts do not impose this requirement.

[22] This seems archaic. All filings are now uploaded, including mailed submissions. And since the petitioner doesn't need to make two copies of the petition, it doesn't make sense to require them to make two copies of any supporting memorandum (at least not in the digital age of uploading court files).

~~sentenced the petitioner is not available, the clerk shall will assign the case in the normal course.~~[23]

(m) Summary dismissal of claims.[24]

(1) The assigned judge ~~shall~~ will review the petition, and, if it is apparent to the court that ~~any claim has been adjudicated in a prior proceeding, or if any claim in the petition appears frivolous on its face~~ none of the claims are based in a ground for relief under this Rule, the court ~~shall~~ will ~~forthwith~~ issue ~~an order~~ a notice indicating its intent to dismiss~~ing~~ the claim, stating the basis for the decision. The order ~~shall~~ will be sent by mail to the petitioner. If the petitioner makes a written request within 30 days of receipt of the order, the court will schedule a hearing to allow the petitioner an opportunity to be heard on why the petitions should not be dismissed.[25] If no timely request is made, or if the court determines at the conclusion of the hearing that the order is correct, it will convert the notice to a final order. The court may allow the petitioner time to amend the petition to cure any defect in the pleading. ~~Proceedings on the claim~~

[23] This paragraph seems more appropriately placed in the Code of Judicial Administration.

[24] The entire procedure of summary dismissal ought to be eliminated. PCR petitions are supposed to have the same deferential pleading standard that applies to complaints, and like civil complaints, judges are required to construe pro se petitions liberally. *McNair v. State*, 2014 UT App 127. Subparagraph (1) includes language that should be used if the Court wishes to retain the summary dismissal procedure. Subparagraph (2) should be eliminated entirely. At best it creates a confusing pleading standard when Rule 12 otherwise governs pleading standards. Additionally, subparagraph (2)'s definition of a "frivolous" petition is stated more cleanly and clearer in subparagraph (1).

[25] Utah Code § 78B-9-106 requires the court to allow a petitioner to have a hearing before dismissing the case. Since the court is allowed to dismiss any petition, *sua sponte*, the proposed procedures under this paragraph creates a mechanism on how that hearing can be scheduled.

~~shall terminate with the entry of the order of dismissal. The order of dismissal need not recite findings of fact or conclusions of law.~~[26]

~~(2) A claim is frivolous on its face when, may be dismissed under this paragraph when, based solely on the allegations contained in the pleadings and attachments, it appears that:~~

~~(A) the facts alleged do not support a claim for relief as a matter of law;~~

~~(B) the claim has no arguable basis in fact.; or~~

~~(C) the claim challenges the sentence only and the sentence has expired prior to the filing of the petition.~~[27]

~~(3) If a claim is not frivolous on its face but is deficient due to a pleading error or failure to comply with the requirements of this rule, the court shall return a copy of the petition with leave to amend within 21 days. The court may grant one additional 21-day period to amend for good cause shown.~~[28]

(~~4~~3) The court ~~shall~~ will not review for summary dismissal the initial postconviction petition in a case where the petitioner is sentenced to death.

(n) Service of petitions. If, on review of the petition, the court concludes that all or part of the petition should not be summarily dismissed, the court ~~shall~~ will designate the portions of the petition that are not dismissed and direct the clerk to serve upon the respondent a copy of the petition, attachments, memorandum, and an electronic court record of the underlying criminal case being challenged, including all non-public documents. If an electronic appellate

[26] In no other circumstance is a court permitted to dismiss a case without having to give the reason for the dismissal. This subparagraph underscores how clearly the PCRA statute and Rule 65C have been crafted to undermine legal access to the courts for post-conviction petitioners.

[27] While this provision appears to be trying to address mootness, there are situations in which a particular sentence, even once complete, creates ongoing harm. For example, the type of sentence that a judge issues in a domestic violence case either creates a discretionary sentencing protective order, or a nondiscretionary permanent protective order. Issues of mootness should be reserved for a case-by-case review.

[28] Since other parts of this proposed rule allow for extended limitations on filings, this provision is unnecessary.

record of the underlying case has not already been created, the clerk will create the record.

(1) If the petition is a challenge to a felony conviction or sentence, the respondent is the state of Utah represented by the Attorney General. Service on the Attorney General shall be by mail at the following address:

Utah Attorney General's Office
Criminal Appeals
Post-Conviction Section
160 East 300 South, 6th Floor
P.O. Box 140854
Salt Lake City, UT 84114-0854

(2) In all other cases, the respondent is the governmental entity that prosecuted the petitioner.

(o) Appointment of ~~pro bono~~ counsel. If any portion of the petition is not summarily dismissed, the court may, upon the request of an indigent petitioner, appoint counsel on a pro bono basis <u>or from the Indigent Appellate Defense Division</u>, to represent the petitioner in the post-conviction court or on post-conviction appeal. In determining whether to appoint counsel the court will consider: ~~whether the petition or the appeal contains factual allegations that will require an evidentiary hearing and whether the petition involves complicated issues of law or fact that require the assistance of counsel for proper adjudication.~~

(1) whether the petitioner is incarcerated;
(2) the likelihood that an evidentiary hearing will be necessary;
(3) the likelihood that an investigation will be necessary;
(4) the complexity of the factual and legal issues; and
(5) any other factor relevant to the particular case.[29]

[29] These amendments are taken from another a draft that is currently being considered. They come from statute.

(p) Answer or other response. Within 30 days after service of a copy of the petition upon the respondent, or within such other period of time as the court may allow, the respondent ~~shall~~ must answer or otherwise respond to the portions of the petition that have not been dismissed and ~~shall~~ must serve the answer or other response upon the petitioner in accordance with Rule 5(b). ~~Within 30 days (plus time allowed for service by mail) after service of any motion to dismiss or for summary judgment, the petitioner may respond by memorandum to the motion. No further pleadings or amendments will be permitted unless ordered by the court.~~[30]

(q) Hearings. After pleadings, along with any discovery schedule ordered by the court, are closed, the court ~~shall~~ will promptly set the proceeding for a hearing or otherwise dispose of the case. The court may also order a prehearing conference, ~~but the conference shall not be set so as to delay unreasonably the hearing on the merits of the petition.~~[31] At the prehearing conference, the court may:

(1) consider the formation and simplification of issues;

(2) require the parties to identify witnesses and documents; and

(3) require the parties to establish the admissibility of evidence expected to be presented at the evidentiary hearing.

(r) Presence of the petitioner at hearings. The petitioner ~~shall~~ will be present at the prehearing conference if the petitioner is not represented by counsel. The prehearing conference may be conducted by means of telephone or video conferencing. The petitioner ~~shall~~ will be present before the court at hearings on dispositive issues but need not otherwise be present in court during the proceeding if represented by counsel. The court may conduct any hearing at the correctional facility where the petitioner is confined.

[30] I've deleted this sentence because it is already stated in other rules of procedure.

[31] Courts are already expected to promptly hold hearings on pending matters.

(s) Discovery; records.

(1) Discovery under Rules 26 through 37 ~~shall~~ will be allowed by the court to the extent permitted by rule. ~~upon motion of a party and a determination that there is good cause to believe that discovery is necessary to provide a party with evidence that is likely to be admissible at an evidentiary hearing.~~ [32]

(2) The court may order either the petitioner or the respondent to obtain any relevant transcript or court records.

(3) All records in the criminal case under review, including the records in an appeal of that conviction, are deemed part of the trial court record in the petition for post-conviction relief. A record from the criminal case retains the security classification that it had in the criminal case.

(t) Orders; stay.

(1) If the court vacates the original conviction or sentence, it ~~shall~~ will enter findings of fact and conclusions of law and an appropriate order. If the petitioner is serving a sentence for a felony conviction, the order ~~shall~~ will be stayed for 7 days. Within the stay period, the respondent ~~shall~~ must give written notice to the court and the petitioner that the respondent will pursue a new trial, pursue a new sentence, appeal the order, or take no action. Thereafter the stay of the order is governed by these rules and by the Rules of Appellate Procedure. (2) If the respondent fails to provide notice or gives notice that no action will be taken, the stay ~~shall~~ will expire and the court shall will deliver forthwith to the custodian of the petitioner the order to release the petitioner. (3) If the respondent gives notice that the petitioner will be retried or resentenced, the trial court may enter any supplementary orders as to arraignment, trial, sentencing, custody, bail, discharge, or other matters that may be necessary and proper.

[32] The "likely to be admissible" standard seems to reflect the pre-2011 version of Rule 26. Since proportionality has replaced that standard and is clearly reflected in Rule 26-37, this language is both outdated and redundant.

(u) **Costs.** The court may assign the costs of the proceeding, as allowed under Rule 54(d), to any party as it deems appropriate. If the petitioner is indigent, the court may direct the costs to be paid by the governmental entity that prosecuted the petitioner. If the petitioner is in the custody of the Department of Corrections, Utah Code Title 78A, Chapter 2, Part 3 governs the manner and procedure by which the trial court ~~shall~~ will determine the amount, if any, to charge for fees and costs.

(v) **Appeal.** Any final judgment or order entered upon the petition may be appealed to and reviewed by the Court of Appeals or the Supreme Court of Utah in accord with the statutes governing appeals to those courts.

UTAH INDIGENT APPELLATE DEFENSE DIVISION
BEN MILLER / DEBRA NELSON

PROPOSED REDLINE EDITS
URCP RULE 65C

Proposes Amendments to Rule 65C

Submitted by Utah Indigent Appellate Defense Division

Rule 65C. Post-conviction relief.

(a) Scope. This rule governs proceedings in all petitions for post-conviction relief filed under the Post-Conviction Remedies Act, Utah CodeTitle 78B, Chapter 9. The Act sets forth the manner and extent to which a person may challenge the legality of a criminal conviction and sentence after the conviction and sentence have been affirmed in a direct appeal under Article I, Section 12 of the Utah Constitution, or the time to file such an appeal has expired.

(b) Procedural defenses and merits review. Except as provided in paragraph (h), if the court comments on the merits of a post-conviction claim, it shall first clearly and expressly determine whether that claim is independently precluded under Section78B-9-106.

(c) Commencement and venue. The proceeding shall be commenced by filing a petition with the clerk of the district court in the county in which the judgment of conviction was entered. The petition should be filed on forms provided by the court. The court may order a change of venue on its own motion if the petition is filed in the wrong county. The court may order a change of venue on motion of a party for the convenience of the parties or witnesses.

(d) Contents of the petition. The petition shall set forth all claims that the petitioner has in relation to the legality of the conviction or sentence. The petition shall state:

(1) whether the petitioner is incarcerated and, if so, the place of incarceration;

(2) the name of the court in which the petitioner was convicted and sentenced and the dates of proceedings in which the conviction was entered, together with the court's case number for those proceedings, if known by the petitioner;

(3) ~~in plain and concise terms,~~ all of the facts that form the entire basis of each of the petitioner's claim to relief;

(4) whether the judgment of conviction, the sentence, or the commitment for violation of probation has been reviewed on appeal, and, if so, the number and title of the appellate proceeding, the issues raised on appeal, and the results of the appeal;

(5) whether the legality of the conviction or sentence has been adjudicated in any prior post-conviction or other civil proceeding, and, if so, the case number and title of those proceedings, the issues raised in the petition, and the results of the prior proceeding; and

(6) if the petitioner claims entitlement to relief due to newly discovered evidence, the reasons why the evidence could not have been discovered in time for the claim to be addressed in the trial, a posttrial motion, the appeal, or any previous post-conviction petition.

(e) Attachments to the petition. If available to the petitioner, the petitioner shall attach to the petition:

(1) affidavits, copies of records and other evidence in support of the allegations;

(2) a copy of or a citation to any opinion issued by an appellate court regarding the direct appeal of the petitioner's case;

(3) a copy of the pleadings filed by the petitioner in any prior post-conviction or other civil proceeding that adjudicated the legality of the conviction or sentence; and

(4) a copy of all relevant orders and memoranda of the court.

(f) ~~Memorandum of authorities~~Legal argument. The petitioner ~~shall~~ need not set forth argument or citations or discuss authorities in the petition but need only set out facts as necessary pursuant to subsection (d). A separate memorandum of law is not required. If a separate memorandum of law is submitted, a court shall review any facts or grounds for relief in the memorandum as if they were submitted in the petition itself. A court may disregard any legal argument. , ~~but these may be set out in a separate memorandum, two copies of which shall be filed with the petition.~~

(g) Assignment. On the filing of the petition, the clerk shall promptly assign and deliver it to the judge who sentenced the petitioner. If the judge who sentenced the petitioner is not available, the clerk shall assign the case in the normal course.

(h)Summary dismissal of claims.

(1) The assigned judge shall review the petition, and, if it is apparent to the court that any claim has been adjudicated in a prior proceeding, or if any claim in the petition appears frivolous on its face, the court shall forthwith issue an order dismissing the claim, stating either that the claim has been adjudicated or that the claim is frivolous on its face. The order shall be sent by mail to the petitioner. If a court determines any claim is frivolous, it shall provide the petitioner a meaningful opportunity to be heard before issuing a final order dismissing the claim.

Proceedings on the claim shall terminate with the entry of the order of dismissal. The order of dismissal need not recite findings of fact or conclusions of law.

(2) A claim is frivolous on its face when, based solely on the allegations contained in the pleadings and attachments, it appears that:

(A) the facts alleged do not support a claim for relief as a matter of law;

(B) the claim has no arguable basis in fact; or

(C) the claim challenges the sentence only and the sentence has expired prior to the filing of the petition.

(3) If a claim is not frivolous on its face but is deficient due to a pleading error or failure to comply with the requirements of this rule, the court shall return a copy of the petition with leave to amend within 21 days. The court may grant one additional 21-day period to amend for good cause shown.

(4) The court shall not review for summary dismissal the initial post-conviction petition in a case where the petitioner is sentenced to death.

(5) The court shall conduct review pursuant to this subsection after the acceptance of any amended petition unless the parties stipulate that claims in the amended petition can proceed to subsection (j).

(i) Service of petitions. If, on review of the petition, the court concludes that all or part of the petition should not be summarily dismissed, the court shall designate the portions of the petition that are not dismissed and direct the clerk to serve upon the respondent a copy of the petition, attachments, memorandum, and an electronic court record of the underlying criminal case being challenged, including all non-public documents. If an electronic appellate record of the underlying case has not already been created, the clerk will create the record consistent with Utah Rule of Appellate Procedure 11.~~.~~

(1) If the petition is a challenge to a felony conviction or sentence, the respondent is the state of Utah represented by the Attorney General. Service on the Attorney General shall be by mail at the following address:

Utah Attorney General's Office

Criminal Appeals

Post-Conviction Section

160 East 300 South, 6th Floor

P.O. Box 140854

Salt Lake City, UT 84114-0854

(2) In all other cases, the respondent is the governmental entity that prosecuted the petitioner.

(j) Appointment of ~~pro bono~~ counsel. (1) If any portion of the petition is not summarily dismissed, the court may, upon the request of an indigent petitioner, appoint counsel consistent with the provisions of Utah Code § 78B-8-109. (2) If counsel is appointed, , the clerk shall serve upon appointed counsel a copy of the petition, attachments, and an electronic record consistent with the provisions of Utah Rule of Appellate Procedure 11. (3) If counsel is appointed, counsel may freely file one amended petition for postconviction relief and need not file a separate motion for leave to amend; all claims raised in a first amended petition filed with appointed counsel shall relate back to the original petition and need not otherwise comply with the requirements of Utah Rule of Civil Procedure 15(c). Any further amended petition must strictly comply with Rule 15(c).

~~on a pro bono basis to represent the petitioner in the post-conviction court or on post-conviction appeal. In determining whether to appoint counsel the court shall consider whether the petition or the appeal contains factual allegations that will require an evidentiary hearing and whether the petition involves complicated issues of law or fact that require the assistance of counsel for proper adjudication~~.

(k) Answer or other response. Within ~~30~~ 60 days after service of a copy of the petition upon the respondent, or within such other period of time as the court may allow, the respondent shall answer or file a motion to dismiss responding to all claims that have not been previously dismissed. Respondent ~~otherwise respond to the portions of the petition that have not been dismissed and~~ shall serve the answer or ~~other response~~motion to dismiss upon the petitioner in accordance with Rule 5(b). Within ~~30~~ 60 days (plus time allowed for service by mail) after service of any motion to dismiss ~~or for summary judgment~~, the petitioner may respond by memorandum to the motion. Within 30 days, the respondent may file a reply motion if petitioner files an opposition. No further pleadings, ~~or~~ amendments, or motions will be permitted unless ordered by the court.

(l) Hearings. After pleadings are closed, the court shall promptly set the proceeding for a hearing or otherwise dispose of the case. The court may also order a prehearing conference, but the conference shall not be set so as to delay unreasonably the hearing on the merits of the petition. At the prehearing conference, the court may:

(1) consider the formation and simplification of issues;

(2) require the parties to identify witnesses and documents; and

(3) require the parties to establish the admissibility of evidence expected to be presented at the evidentiary hearing.

(m) Presence of the petitioner at hearings. The petitioner shall be present at the prehearing conference if the petitioner is not represented by counsel. The prehearing conference may be conducted by means of telephone or video conferencing. The petitioner shall be present before the court at hearings on dispositive issues but need not otherwise be present in court during the proceeding. The court may conduct any hearing at the correctional facility where the petitioner is confined.

(n) Discovery; records.

(1) Discovery under Rules 26 through 37 shall be allowed by the court upon motion of a party and a determination that there is good cause to believe that discovery is necessary to provide a party with evidence that is likely to be admissible at an evidentiary hearing.

(2) The court may order either the petitioner or the respondent to obtain any relevant transcript or court records.

(3) All records in the criminal case under review, including the records in an appeal of that conviction, are deemed part of the trial court record in the petition for post-conviction relief. A record from the criminal case retains the security classification that it had in the criminal case.

(o) Orders; stay.

(1) If the court vacates the original conviction or sentence, it shall enter findings of fact and conclusions of law and an appropriate order. If the petitioner is serving a sentence for a felony conviction, the order shall be stayed for 7 days. Within the stay period, the respondent shall give written notice to the court and the petitioner that the respondent will pursue a new trial, pursue a new sentence, appeal the order, or take no action. Thereafter the stay of the order is governed by these rules and by the Rules of Appellate Procedure.

(2) If the respondent fails to provide notice or gives notice that no action will be taken, the stay shall expire and the court shall deliver forthwith to the custodian of the petitioner the order to release the petitioner.

(3) If the respondent gives notice that the petitioner will be retried or resentenced, the trial court may enter any supplementary orders as to arraignment, trial, sentencing, custody, bail, discharge, or other matters that may be necessary and proper.

(p) Costs. The court may assign the costs of the proceeding, as allowed under Rule 54(d), to any party as it deems appropriate. If the petitioner is indigent, the court may direct the costs to be paid by the governmental entity that prosecuted the petitioner. If the petitioner is in the custody of the Department of Corrections, Utah Code Title 78A, Chapter 2, Part 3 governs the manner and procedure by which the trial court shall determine the amount, if any, to charge for fees and costs. Filing costs shall be waived for any petitioner who is either indigent; a person who is incarcerated at any jail or prison facility at the time of filing will be presumed indigent.

(q) Appeal. Any final judgment or order entered upon the petition may be appealed to and reviewed by the Court of Appeals or the Supreme Court of Utah in accord with the statutes governing appeals to those courts.

Tab 4

[PROPOSED] Rule 88. Form and validity of signed declarations; verification and acknowledgement of documents.

(a) **Definitions.** As used in these rules:

(1) "Acknowledged" means notarized with an acknowledgement consistent with Utah Code section 46-1-2.

(2) "Declarant" means the person who gives a signed declaration.

(3) "Signed declaration" means a sworn declaration or unsworn declaration.

(4) "Sworn declaration" means a declaration in a signed document given under oath before a justice, judge, commissioner, court clerk, or notary public. A sworn declaration includes an affidavit or jurat.

(5) "Unsworn declaration" means a declaration in a signed document not given under oath but given under penalty of Title 76, Chapter 8, Part 5 Falsification in Official Matters.

(7) "Verified" means including or accompanied by a signed declaration in accordance with paragraph (d).

(b) **Validity of unsworn declaration**. Except as otherwise provided by statute or rule, if a rule requires or permits the use of a sworn declaration, an unsworn declaration meeting the requirements of this rule has the same effect as a sworn declaration.

(c) **Form of unsworn declaration.** An unsworn declaration must include language in substantially the following form:

I declare under criminal penalty under the law of Utah that the foregoing is true and correct.

Signed on the ___ day of ______, _____, at ________________________________.
Date Month Year City or other location, and state or country

____

Printed name

____

Signature

(d) **Verified document.** If a rule requires or permits a document or any portion of a document to be verified, the document must be accompanied by a signed declaration—in the same document or in one or more separate supporting documents—that is based on the declarant's personal knowledge, shows the declarant is competent to testify on the matters set forth in the document, and affirms that the matters set forth in the document are true and correct.

(e) **Filing.** If a person files a signed declaration or verified document, the filer must comply with Rule 5(f).

Effective:

[PROPOSED] Rule 88. Form and validity of signed declarations; verification and acknowledgement of documents.

(a) **Definitions.** ~~Throughout these rules:~~As used in these rules:

(1) ~~The term~~ “A~~a~~cknowledged” means notarized with an acknowledgement ~~verified before a notary public or other individual authorized to take acknowledgements~~consistent with Utah Code section 46-1-2.

(2) ~~The term~~ “~~declarant~~Declarant” means the person who gives a signed declaration.

(3) ~~The term~~ “S~~s~~igned declaration” means a sworn declaration or unsworn declaration.

(4) ~~(A) The term~~ “~~sworn~~ Sworn declaration” means a declaration in a signed document ~~written and signed document~~ given under oath before a justice, judge, commissioner, court clerk, or notary public~~ before any justice, judge, commissioner, any court clerkthe clerk of any court, any justice court judge, or any notary public~~.

~~(B) The term~~A ~~“~~sworn declaration~~”~~ includes an ~~written sworn statement, certificate,~~ affidavit or jurat~~, or other document with an notarized or acknowledged signature~~.

(5) ~~The term~~ “~~unsworn~~ Unsworn declaration” means a declaration in a ~~written and~~ signed document not given under oath but given under penalty of Title 76, Chapter 8, Part 5 Falsification in Official Matters.

~~(6) The term “verificationVerification” means the act of causing a document or facts to be verified.~~

(7) ~~The term~~ “~~verified~~Verified” means including or accompanied by a signed declaration in accordance with paragraph (d)~~ of this rule~~.

(b) **Validity of unsworn declaration**. Except as otherwise ~~specifically~~ provided by statute or rule, if a rule requires or permits the use of a sworn declaration, an unsworn

Commented [AM1]: Derived and adapted from, and intended to be consistent with, the Uniform Unsworn Declarations Act, Utah Code 78B-18a-101, et seq.

Commented [JJMP2]: I suggested this revision and others in this definitional section to match the presentation we use in other URCP rules where we provide definitions (e.g., URCP 64 and 87).

Commented [AM3]: Subcommittee:

Because “notarized” has a different meaning than “acknowledgment,” I think we need both words in the definition:

Utah Code 46-1-2

(1)"Acknowledgment" means a notarial act in which a notary certifies that a signer, whose identity is personally ...

Commented [AM4]: Language derived and adapted from Utah Code § 75A-2-119

Commented [JJMP5]: Do we need to define acknowledgement?

Commented [AM6R5]: After discussion, the committee recommends pointing to the Utah Code where the term ...

Commented [AM7]: This language is now more consistent with the Uniform Unsworn Declarations Act’s ...

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Commented [AM8]: Language derived and adapted from Utah Code 78B-18a-102(4).

Commented [AM9]: In my opinion, “certificate” is an ambiguous term that might sometimes refer to a ...

Commented [JJMP10]: Three thoughts: ...

Commented [AM11R10]: After reviewing the definition of “acknowledgment” in Utah Code 46-1-2, the consensus ...

Commented [JP12R10]: I like these changes. Should we combine (A) & (B)? So it would read, ...

Commented [AM13R10]: I like this suggestion and have made changes consistent with the second option.

Commented [SS14]: Ash edits = ...

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Commented [AM15]: Language derived and adapted from Utah Code 78B-18a-201(5).

Commented [AM16]: The term “verification” appears to appear only in headings. The rules themselves appear to u ...

Commented [JP17]: A new suggested deletion. I don’t feel strongly about it, but I don’t think “of this rule” is ...

Commented [AM18]: Language derived and adapted from Utah Code 78B-18a-104.

declaration meeting the requirements of this rule has the same effect as a sworn declaration.

(c) **Form of unsworn declaration.** An unsworn declaration must include language in substantially the following form:

I declare under criminal penalty under the law of Utah that the foregoing is true and correct.

Signed on the ___ day of ______, _____, at ________________________________.
Date Month Year City or other location, and state or country

____
Printed name

____
Signature

(d) **Verified document~~s~~.** If a rule requires or permits a document or any portion ~~thereof~~ of a document to be verified, the document must be ~~verified~~accompanied by a signed declaration~~,~~ — in the same document or in one or more separate supporting documents~~,~~ — that is based on the declarant's personal knowledge, ~~and~~ shows ~~that~~ the declarant is competent to testify on the matters set forth in the ~~declaration or~~ document, and affirms that the matters set forth in the document are true and correct.

(e) **Filing.** If a person files a signed declaration or verified document ~~is filed~~, the~~n~~ filer ~~the filing party~~ must comply with Rule 5(f).

Effective:

Commented [AM19]: Language derived and adapted from Utah Code 78B-18a-106.

Commented [AM20]: Suggested plain language change.

Commented [JP21R20]: Great suggestion.

Commented [AM22]: Changed to em dashes to conform to the Style Guide

Commented [AM23]: Language derived and adapted from current Rules 7A(b), 7B(b), and 56(c)(4)

Commented [JJMP24]: I don't think we need "declaration" as the declaration is attesting to what it is in the document.

Commented [AM25]: This phrase may be redundant in light of the required form of an unsworn declaration, but it and the other changes are intended to address some of the comments by committee members noting that the use of "verified" in the definition seemed somewhat circular.

Commented [AM26]: Language derived and adapted from current Rule 11.

Commented [JJMP27]: I suggested these revisions b/c someone other than a party might file. Also, although we try to avoid identifying the subparts, I do wonder if it's helpful here to direct there reader to (f) in particular. I started to read through Rule 5 trying to figure out how someone would comply before finally seeing (f).

Tab 5

Rule 103. Child protective orders.

Effective: ~~*November 1, 2026*~~

(a) **Scope.** This rule applies when a juvenile court transfers a petition for a child protective order to the district court pursuant to statute.

(b) **Definition.** As used in this rule, “child” means an individual who is under 18 years old.

(c) **Hearing.** If the juvenile court issued an ex parte child protective order before transferring the petition, the district court will hold a hearing within 21 days of that protective order’s issuance.

(d) **Child’s Testimony**. No party may compel a child to testify unless the court finds that extenuating circumstances exist that would necessitate the testimony of the child be heard and there is no other reasonable method to present the child’s testimony. A child’s testimony may be presented in one or more of the following ways:

(1) **Recorded Statements.** A child’s oral statement may be recorded and, upon motion and for good cause shown, a child’s recorded statement is admissible as evidence in any court proceeding regarding the child protective order if the following conditions are met:

(A) no attorney for any party is in the child’s presence when the statement is recorded;

(B) the recording is visual and aural and is recorded on film or videotape or by other electronic means;

(C) ~~the recording equipment is capable of making an accurate recording, the operator of the equipment is competent, and~~ the recording is accurate and has not been altered;

(D) each voice in the recording is identified;

(E) the person conducting the interview of the child in the recording is present at the proceeding and is available to testify and be cross-examined by either party if requested by a party or the court;

(F) the parties and the parties' attorneys are provided an opportunity to view the recording before it is shown to the court;

(G) the court views the recording and determines that it is sufficiently reliable and trustworthy and that the interest of justice will best be served by admission of the statement into evidence; and

(H) the child is available to testify and to be cross-examined at trial, either in person or as provided in paragraph (d)(2) or (d)(3), or the court determines that the child is unavailable as a witness to testify at trial under the Utah Rules of Evidence. For purposes of this paragraph, "unavailable" includes a determination, based on medical or psychological evidence or expert testimony, that the child would suffer serious emotional or mental strain if required to testify at trial.

(2) **Recorded Testimony.** The court may order that a child's testimony be taken outside the courtroom and be recorded. That testimony is admissible as evidence, for viewing in any court proceeding regarding the allegations relating to the protective order, if the provisions of this paragraph and paragraph (d)(3) are observed:

(A) the recording is both visual and aural and recorded on film or videotape or by other electronic means;

(B) ~~the recording equipment is capable of making an accurate recording, the operator is competent, and~~ the recording is accurate and is not altered;

(C) each voice on the recording is identified; and

(D) each party is given an opportunity to view the recording before it is shown in the courtroom.

(3) **Live Testimony.** The court may order that a child's testimony may be taken in a room other than the courtroom if the following conditions are observed:

(A) Only the judge, domestic commissioner, attorneys for each party, persons necessary to operate equipment, and a counselor or therapist whose presence contributes to the child's welfare and emotional well-being may be with the child during the testimony. The parties may also be present during the child's testimony unless a party consents to be hidden from the child's view, or the court determines that the child will suffer serious emotional or mental strain if required to testify in the party's presence, or that the child's testimony will be unreliable if required to testify in the party's presence. If the court makes that determination, or if the party consents:

(i) the party may not be present during the child's testimony;

(ii) the court will ensure that the child cannot hear or see the party;

(iii) the court will advise the child prior to testifying that the party is present at the trial and may listen to the child's testimony;

(iv) the party must be permitted to observe and hear the child's testimony, and the court will ensure that the party has a means of two-way telephonic communication with counsel during the child's testimony; and

(v) normal court procedures must be approximated as nearly as possible.

(B) Only the judge, domestic commissioner, and attorneys may question the child unless the court otherwise orders; and

(C) As much as possible, persons operating equipment must be confined to an adjacent room or behind a screen or mirror so the child cannot see or hear them.

(4) **Combining recorded and live testimony prohibited.** If the court orders that the testimony of a child be taken under paragraph (d)(2), the child may not be required to testify in court at any proceeding where the recorded testimony is used.

UTAH COURT RULES – PUBLISHED FOR COMMENT

The Supreme Court and Judicial Council invite comments about amending these rules. To view the proposed amendment, click on the rule number.

To submit a comment or view the comments of others, click on "Continue Reading." To submit a comment, scroll down to the "Leave a Reply" section, and type your comment in the "Comment" field. Type your name and email address in the designated fields and click "Post Comment."

Comments cannot be acknowledged, but all will be considered. Comments are saved to a buffer for review before publication.

Posted: August 27, 2026

Utah Courts

Rules of Juvenile Procedure – Comment Period Closes October 13, 2026

URJP012. Admission to shelter care. Amend/replace. The proposed revision completely repurposes Rule 12, previously titled "Admission to shelter care," a process governed by statute. The proposed new title, "Warrants and subpoenas in child welfare or other related non-delinquency proceedings" and the new paragraph (a) provide the scope of the new Rule 12, which now articulates updated procedures for warrants and subpoenas in child welfare and related non-delinquency proceedings. While Rule 7 currently includes some of the provisions found in the newly designed Rule 12, Rule 7 is presently under review by the Committee for revision as a stand-alone rule applying only to delinquency and criminal matters. The proposed iteration of Rule 12 would establish a 72-hour filing deadline for filing returns of service and permits ex parte motions to vacate a warrant or subpoena prior to execution. Additionally, the proposal mandates that all related warrant and subpoena documents be sealed for 20 days post-issuance, subject to modification by the court for good cause.

URJP037A. Visual recording of statement or testimony of child in abuse, neglect, dependency, substantiation, child protective

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- -Licensed Paralegal Practitioners Rules of Professional Conduct
- -Rules Governing Licensed Paralegal Practitioner
- -Rules Governing the State Bar

order, or other related non-delinquency proceedings; conditions of admissibility. Amend. The proposed amendments to Rule 37A streamline subparagraphs (a)(3) and (c)(2) by eliminating redundant requirements regarding equipment capability and operator competence, focusing instead strictly on the accuracy and unaltered state of the recording. This change aligns the rule with the more concise verbiage already found in Rule 29A of the Utah Rules of Juvenile Procedure, the analog of Rule 37A used in delinquency proceedings. Additionally, subparagraph (a)(5) is amended to clarify that the interviewer's presence and availability for cross-examination at the proceeding is required only "if requested by a party or the court."

CONTINUE READING

Posted: August 27, 2026

Utah Courts

Code of Judicial Administration – Comment Period Closes October 13, 2026

CJA04-405.Juror and Wtiness Fees and Expenses (AMEND)
The proposed amendments remove the requirement that a court order is necessary to provide juror refreshments and make non-substantive formatting changes.

CONTINUE READING

Posted: August 4, 2026

Utah Courts

Supreme Court Rules of Professional Practice – Comment Period Closes September 18, 2026

SCRP01-501. **Lawyer disciplinary and disability proceedings: purpose, authority, scope, and structure. Amend.**
SCRP01-502. **Definitions. Amend**
SCRP01-503. **Oversight Committee for the Office of Professional Conduct. Amend**

- -Rules of Appellate Procedure
- -Rules of Civil Procedure
- -Rules of Criminal Procedure
- -Rules of Evidence
- -Rules of Juvenile Procedure
- -Rules of Professional Conduct
- -Rules of Professional Practice
- -Rules of Small Claims Procedure
- ADR0104
- ADR101
- ADR103
- Appendix A
- Appendix B
- Appendix F
- CJA 1-101
- CJA Appendix F
- CJA01-0201
- CJA01-0204
- CJA01-0205
- CJA01-0205
- CJA01-0302
- CJA01-0303
- CJA01-0304
- CJA01-0305
- CJA010-01-0404
- CJA010-1-020
- CJA014-0701
- CJA014-0704
- CJA014-0705
- CJA014-0719
- CJA02-0101
- CJA02-0102
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- CJA02-0208
- CJA02-0208
- CJA02-0211
- CJA02-0212
- CJA03-0101
- CJA03-0102
- CJA03-0103
- CJA03-0103
- CJA03-0104

Rule 37A. Visual recording of statement or testimony of child in abuse, neglect, dependency, substantiation, child protective order, or other related non-delinquency proceedings; conditions of admissibility.

(a) In any abuse, neglect, dependency, substantiation, child protective order, or other related non-delinquency proceeding, the oral statement of a child may be recorded, and upon motion and for good cause shown is admissible as evidence in any court proceeding regarding the petition if all of the following conditions are met:

(1) no attorney for any party is in the child's presence when the statement is recorded;

(2) the recording is visual and aural and is recorded on film, videotape, or other electronic means;

(3) ~~the recording equipment is capable of making an accurate recording; the operator of the equipment is competent; and~~ the recording is accurate and has not been altered;

(4) each voice in the recording is identified;

(5) the person conducting the interview of the child in the recording is present at the proceeding and is available to testify and be cross-examined by either party if requested by a party or the court;

(6) the parties and the parties' attorneys are provided an opportunity to view the recording before it is shown to the court;

(7) the court views the recording and determines that it is sufficiently reliable and trustworthy and that the interest of justice will best be served by admission of the statement into evidence; and

(8) the child is available to testify and to be cross-examined at trial, either in person or as provided by paragraph (b) or (c), or the court determines that the child is unavailable as a witness to testify at trial under the Utah Rules of Evidence. For purposes of this paragraph "unavailable" includes a determination, based on medical

or psychological evidence or expert testimony, that the child would suffer serious emotional or mental strain if required to testify at trial.

(b) In any abuse, neglect, dependency, substantiation, child protective order, or other related non-delinquency proceeding, the court may order that the testimony of any child may be taken in a room other than the courtroom. All of the following conditions must be observed:

(1) Only the judge, attorneys for each party, persons necessary to operate equipment, and a counselor or therapist whose presence contributes to the welfare and emotional well-being of the child may be with the child during the testimony. The parties may also be present during the child's testimony unless a party consents to be hidden from the child's view, or the court determines that the child will suffer serious emotional or mental strain if required to testify in the party's presence, or that the child's testimony will be unreliable if required to testify in the party's presence. If the court makes that determination, or if the party consents:

(A) the party may not be present during the child's testimony;

(B) the court will ensure that the child cannot hear or see the party;

(C) the court will advise the child prior to testifying that the party is present at the trial and may listen to the child's testimony;

(D) the party must be permitted to observe and hear the child's testimony, and the court will ensure that the party has a means of two-way telephonic communication with counsel during the child's testimony; and

(E) normal court procedures must be approximated as nearly as possible;

(2) Only the judge and attorneys may question the child unless otherwise approved by the judge; and

(3) As much as possible, persons operating equipment must be confined to an adjacent room or behind a screen or mirror so the child cannot see or hear them.

(c) In any abuse, neglect, dependency, substantiation, child protective order, or other related non-delinquency proceeding, the court may order that the testimony of any child be taken outside the courtroom and be recorded. That testimony is admissible as evidence, for viewing in any court proceeding regarding the allegations if the provisions of paragraph (b) are observed, in addition to the following provisions:

(1) the recording is both visual and aural and recorded on film, videotape, or other electronic means;

(2) ~~the recording equipment is capable of making an accurate recording; the operator is competent; and~~ the recording is accurate and is not altered;

(3) each voice on the recording is identified; and

(4) each party is given an opportunity to view the recording before it is shown in the courtroom.

(d) If the court orders that the testimony of a child be taken under paragraph (b) or (c), the child may not be required to testify in court at any proceeding where the recorded testimony is used.

Effective date:

Tab 6

2026 WL 2437185

NOTICE: THIS OPINION HAS NOT BEEN RELEASED FOR PUBLICATION IN THE PERMANENT LAW REPORTS. UNTIL RELEASED, IT IS SUBJECT TO REVISION OR WITHDRAWAL.

Supreme Court of Utah.

WESTERN MORTGAGE & REALTY COMPANY, Tim Tippett, and Estate of Frank S. Tiegs, Appellants,
v.
Keith T. WALKER and Lorin Walker, Appellees.

No. 20250396
|
Heard April 1, 2026
|
Filed August 20, 2026*

Synopsis

Background: Joint venturer in a failed real estate development project brought quiet title action against co-venturers, and co-venturers counterclaimed for fraud, breach of contract, breach of fiduciary duty, and aiding and abetting breach of fiduciary duty. After a bench trial, the Fifth District Court, Washington County, Andrew Stone, J., awarded co-venturers damages for breaches of contract and fiduciary duty and awarded co-venturers undisclosed contingent attorney fees as consequential damages pursuant to post-trial motion. Joint venturer appealed and co-venturers requested attorney fees on appeal.

Holdings: The Supreme Court, Nielsen, J., held that:

[1] award of undisclosed contingent fees as damages involved a legal question subject to review for correctness;

[2] stipulation as to appellate rights did not bar joint venturer's arguments about undisclosed contingent fees as damages;

[3] co-venturers failed to make requisite pretrial disclosure of contingent fees as damages;

[4] co-venturers failed to make requisite proof at trial of foreseeability of contingent fees as damages;

[5] lack of pretrial disclosure of contingent fees as damages was not for good cause; and

[6] lack of pretrial disclosure of contingent fees as damages was not harmless.

Reversed with instructions.

Procedural Posture(s): On Appeal; Motion for Attorney's Fees.

West Headnotes (48)

[1] Appeal and Error

Trial court's determination that rule of civil procedure providing a post-trial mechanism to claim attorney fees trumped any pretrial failure by co-venturers to disclose their hybrid contingency-hourly agreement to joint venturer as part of damages calculation was a legal question subject to review for correctness, on joint venturer's appeal of award of undisclosed contingent attorney fees to co-venturers as consequential damages for joint venturer's breach of fiduciary duty, in action arising from a failed real estate development project; trial court's decision to award undisclosed contingent fees was based on its interpretation of interplay between two rules of civil procedure. Utah R. Civ. P. 26(a)(1)(C), 26(d), 73.

More cases on this issue

[2] Appeal and Error

Meaning of and interplay between rules of civil procedure requiring pretrial disclosure of computation of claimed damages and post-trial requests for attorney fees is a question of law that the Supreme Court reviews for correctness. Utah R. Civ. P. 26, 73.

[3] Appeal and Error

Signed stipulation as to appellate rights containing directive that award of attorney fees to co-venturers was to be administered pursuant to rule providing post-trial mechanism to claim fees did not bar joint venturer's appellate arguments about lack of pretrial disclosure and foreseeability of co-venturers' contingent attorney fee arrangement as part of calculation of consequential damages for joint venturer's breach of fiduciary duty relating to a failed real estate development project; joint venturer was not challenging use of rule to precisely quantify the damages award based on fees but rather trial court's decision, made four months after stipulation, that rule trumped another rule's pretrial disclosure requirements when fees were sought as damages and that foreseeability of those damages could be proven after trial. Utah R. Civ. P. 26(a)(1)(C), 26(d), 73.

[4] **Damages**

Reference by courts and commentators to general damages for breach of contract as direct damages and consequential damages as special damages is a distinction of phraseology, not substance.

[5] **Damages**

"Consequential damages," or "special damages," for breach of contract are a type of expectation damages reasonably within the contemplation of, or reasonably foreseeable by, the parties at the time the contract was made.

[6] **Damages**

"Consequential damages" for breach of contract are the natural, but not the necessary, result of an injury, and thus are not implied by law and are peculiar to the case at hand.

[7] **Damages**

"General expectation damages" for breach of contract are implied in law because they are the probable and necessary result of the injury.

[8] **Damages**

"General expectation damages" for breach of contract are damages which everybody knows are likely to result from the harm described.

[9] **Pretrial Procedure**

If a party does not know the full amount of consequential damages for breach of contract, the party must disclose what it has and must supplement those disclosures as more information is acquired through discovery. Utah R. Civ. P. 26(a)(1)(C), 26(d).

[10] **Damages**

Consequential damages for breach of contract must ordinarily be pleaded in order to be recovered. Utah R. Civ. P. 9(h).

[11] **Damages**

Unlike general damages for breach of contract, which everybody knows are likely to result from the harm described, and may be recovered under a general allegation of damages, consequential damages for breach of contract are peculiar to an individual's case, and must be specially pleaded to let his adversary know what will be involved. Utah R. Civ. P. 9(h).

[12] **Pretrial Procedure**

Rule of civil procedure governing pretrial disclosure of computation of claimed damages requires early disclosure of damages information because, among other things, it enables both the opposing party and the court to determine the proportionality of other discovery requests. Utah R. Civ. P. 26(b)(3)(A)-(C).

[13] **Appeal and Error**

Joint venturer preserved for appeal the issue of proof of consequential damages as part of a party's case-in-chief, on joint venturer's appeal of award of undisclosed contingent attorney fees to co-venturers as consequential damages for joint venturer's breach of fiduciary duty, in action arising from a failed real estate development project, where joint venturer argued the issue below.

[14] Appeal and Error

Joint venturer did not impermissibly cite authority not raised below with respect to issue of proof of consequential damages as part of a party's case-in-chief, on joint venturer's appeal of award of undisclosed contingent attorney fees to co-venturers as consequential damages for joint venturer's breach of fiduciary duty, in action arising from a failed real estate development project; joint venturer merely offered additional authority on appeal for the position it argued below.

More cases on this issue

[15] Damages

After pleading and disclosure, a party seeking to recover consequential damages for breach of contract must prove three things: (1) that consequential damages were caused by the contract breach; (2) that consequential damages ought to be allowed because they were foreseeable at the time the parties contracted; and (3) the amount of consequential damages within a reasonable certainty. Utah R. Civ. P. 9(h), 26.

[16] Damages

Same test for proof of consequential damages arising from a breach of contract applies to proof of consequential damages arising from a tort such as breach of fiduciary duty.

[17] Damages

Elements of proof of consequential damages for breach of contract are part of the seeking party's case-in-chief, which is ordinarily presented at trial.

[18] Damages

Parties may agree, or the court may order, that the issue of consequential damages for breach of contract be determined in a post-trial proceeding. Utah R. Civ. P. 73.

[19] Damages

Parties' agreement, or a court order, that the issue of consequential damages for breach of contract be determined in a post-trial proceeding does not excuse the non-breaching party from making timely disclosures of claimed damages; the breaching party cannot be left to guess at what damages are being sought and how they are to be calculated, even if damages are handled in a post-trial proceeding. Utah R. Civ. P. 26(a)(1)(C), 26(d), 73.

[20] Damages

To prove causation, the party seeking consequential damages for breach of contract must show "proximate cause," which is that cause which, in natural and continuous sequence produces the injury and without which the result would not have occurred.

[21] Damages

Proximate cause, as part of proof of causation for consequential damages for breach of contract, is generally determined by an examination of the facts, and questions of fact are to be decided by the jury, or by the judge in a bench trial.

[22] Damages

Evidence of proximate cause, as part of proof of causation for consequential damages for breach of contract, must do more than merely raise a conjecture, for where proximate cause is left to conjecture, the plaintiff must fail as a matter of law.

[23] **Damages**

To prove foreseeability, as part of proof of causation for consequential damages for breach of contract, the non-breaching party must show that the consequential damages were reasonably within the contemplation of, or reasonably foreseeable by, the parties at the time the contract was made.

[24] **Damages**

When a tort claim arises out of a contractual relationship, the time the contract was made is the appropriate time to measure the reasonable foreseeability of consequential damages.

[25] **Damages**

Whether particular damages for breach of contract are foreseeable will always hinge upon the nature and language of the contract and the reasonable expectations of the parties.

[26] **Damages**

To prove the amount of consequential damages for breach of contract with reasonable certainty, a party must present sufficient evidence to enable the trier of fact to make a reasonable approximation.

[27] **Damages**

While the evidence of amount of consequential damages for breach of contract must not be so indefinite as to allow the factfinder to speculate as to amount, some degree of uncertainty is tolerable.

[28] **Damages**

When consequential damages for breach of contract are attorney fees, evidence of amount of damages may include time sheets, billing contracts, and testimony.

[29] **Damages**

General rules for claiming consequential damages apply to all claims for consequential damages, including attorney fees when sought as damages of that type.

[30] **Costs, Fees, and Sanctions**

In general, Utah follows the "American Rule," under which a prevailing party may not recover attorney fees from the opposing side unless provided for in statute or contract.

[31] **Damages**

Attorney fees pursuant to exception to American Rule for a breach of a fiduciary duty must be sought as consequential damages, and thus must be foreseeable.

[32] **Damages**

Foreseeability requirement for contingent attorney fees as consequential damages has two parts: (1) it must have been foreseeable at the time of contracting that a breach would cause the non-breaching party to incur attorney fees as damages, and (2) if a contingency fee forms part of the damages calculation, the specific contingency arrangement must also have been foreseeable at that time.

[33] **Damages**

Foreseeability of contingent attorney fees as consequential damages must normally be proved at trial as an element of a party's case-in-chief.

[34] **Damages**

A party seeking contingent attorney fees as consequential damages must meet the usual requirements for consequential damages: specific pleading, disclosure, causation, foreseeability, and amount. Utah R. Civ. P. 9(h), 26(a)(1)(C), 26(d).

[35] **Damages**

Calculation of reasonable attorney fees and expenses as damages may be finalized in a post-trial proceeding, but the computation of these fee damages cannot be disclosed for the first time post-trial if the computation includes a contingency fee or seeks more than the usual "reasonable" attorney fee. Utah R. Civ. P. 26(a)(1)(C), 26(d), 73.

[36] **Joint Ventures**

Co-venturers failed to make the requisite timely disclosure of their contingent attorney fee arrangement as part of calculation of consequential damages for joint venturer's breach of fiduciary duty relating to a failed real estate development project; co-venturers never disclosed their hybrid hourly-contingency agreement with their attorneys in initial pretrial disclosures or supplemental disclosures before fact discovery finished, and it was not until co-venturers' post-trial motion claiming attorney fees that co-venturers disclosed the contingency fee and presented evidence as to its foreseeability. Utah R. Civ. P. 26(a)(1)(C), 26(d), 73.

More cases on this issue

[37] **Joint Ventures**

Co-venturers failed to make the requisite proof at trial of contingent attorney fees as consequential damages for joint venturer's breach of fiduciary duty relating to a failed real estate development project; co-venturers were silent throughout discovery and trial as to foreseeability of a contingency fee or how a contingency fee was to be calculated, it was not until co-venturers' post-trial motion claiming attorney fees that co-venturers disclosed the contingency fee and presented evidence as to its foreseeability, and joint venturer never agreed to litigate foreseeability post-trial. Utah R. Civ. P. 26(a)(1)(C), 26(d), 73.

More cases on this issue

[38] **Pretrial Procedure**

Disclosure of consequential damages for breach of contract must be made during initial disclosures or as early as possible through supplemental disclosures, before fact discovery finishes. Utah R. Civ. P. 26(a)(1)(C), 26(d).

[39] **Costs, Fees, and Sanctions**

Attorney fees do not constitute a "practice area" under portion of rule of civil procedure governing disclosure and discovery which states that the rule does not apply when it is "changed or supplemented by a rule governing disclosure and discovery in a practice area," and thus another rule of civil procedure providing a post-trial mechanism to claim attorney fees does not trump the disclosure/discovery rule with respect to issue of attorney fees that are claimed as consequential damages. Utah R. Civ. P. 26(a), 73.

[40] **Joint Ventures**

Co-venturers lacked good cause for non-compliance with rule of civil procedure requiring pretrial disclosure of their contingent attorney fee arrangement as part of calculation of consequential damages for joint venturer's breach of fiduciary duty relating to a failed real estate development project, even though another rule of civil procedure provided a post-trial mechanism to claim attorney fees; co-venturers were not seeking fees in the sense of post-trial rule but rather were seeking consequential damages that happened to be owed to an attorney, plain language of disclosure rule required disclosure of the "computation of any damages claimed," and post-trial rule did not alter that requirement when the claimed damages happened to be attorney fees. Utah R. Civ. P. 26(a)(1)(C), 26(d), 73.

More cases on this issue

[41] **Damages**

Rule of civil procedure providing a post-trial mechanism to claim attorney fees does not require a party to claim fees after trial when attorney fees are sought as consequential damages. Utah R. Civ. P. 73.

[42] Costs, Fees, and Sanctions

Rule of civil procedure providing a post-trial mechanism to claim attorney fees is about claiming attorney fees awarded under statute or contract. Utah R. Civ. P. 73.

[43] Costs, Fees, and Sanctions

Rule of civil procedure providing a post-trial mechanism to claim attorney fees can play a role in calculating the precise amount of fees. Utah R. Civ. P. 73.

[44] Joint Ventures

Trial court's approval of plan to proceed with issue of attorney fees for co-venturers pursuant to a post-trial mechanism for claiming attorney fees, without objection from joint venturer, did not provide good cause for co-venturers' non-compliance with rule of civil procedure requiring pretrial disclosure of their contingent attorney fee arrangement as part of calculation of consequential damages for joint venturer's breach of fiduciary duty relating to a failed real estate development project; court and joint venturer had no way of knowing at time of approval of the post-trial plan that co-venturers were waiting to disclose a damages computation that included a contingency fee. Utah R. Civ. P. 26(a)(1)(C), 26(d), 73.

More cases on this issue

[45] Appeal and Error

Co-venturers' failure to make the requisite pretrial disclosure of their contingent attorney fee arrangement as part of calculation of consequential damages for joint venturer's breach of fiduciary duty relating to a failed real estate development project was not harmless, even if joint venturer could have requested additional discovery or time after co-venturers revealed the contingent fee arrangement in their post-trial motion claiming fees; damage had already been done since trial was over, judgment had been entered, opportunity to make an early settlement had passed, and parties had stipulated not to appeal most of trial court's rulings, including the ruling that attorney fees were available for breach of fiduciary duty. Utah R. Civ. P. 26(a)(1)(C), 26(d), 73.

More cases on this issue

[46] Pretrial Procedure

Rule of civil procedure requiring pretrial disclosure of computation of claimed damages places the burden of disclosure on the party seeking damages. Utah R. Civ. P. 26(a)(1)(C), 26(d).

[47] Pretrial Procedure

A party's duty, under rule, to make pretrial disclosure of computation of claimed damages is especially salient when the damages calculation includes a contingent attorney fee as consequential damages, the specific terms of which must be proven foreseeable to avoid unfair surprise. Utah R. Civ. P. 26(a)(1)(C), 26(d).

[48] Costs, Fees, and Sanctions

Co-venturers were not entitled to appellate attorney fees on joint venturer's appeal of trial court's award of undisclosed contingent attorney fees as consequential damages to co-venturers for joint venturer's breach of fiduciary duty relating to a failed real estate development project, where Supreme Court reversed the award of contingency fees. Utah R. Civ. P. 26(a)(1)(C), 26(d).

More cases on this issue

Fifth District Court, Washington County, The Honorable Andrew H. Stone, No. 210500036

Attorneys and Law Firms

Troy L. Booher, LaShel Shaw, Zaven A. Sargsian, Jack L. Darrington, Salt Lake City, for appellants

Erik A. Olson, Jason R. Hull, Salt Lake City, M. Eric Olmstead, St. George, for appellees

Justice Nielsen authored the opinion of the Court, in which Justice Petersen, Associate Chief Justice Pohlman, Justice Jorgensen, and Justice Dent joined.

Justice Nielsen, opinion of the Court:

INTRODUCTION

***1** ¶1 Western Mortgage & Realty Company sued Keith and Lorin Walker to quiet title to 2,300 acres of land near Sand Hollow Reservoir in Washington County. The Walkers had planned to develop a community of 10,000 homes on that land but faced foreclosure in the wake of the 2008 financial crisis. To stabilize the project, the Walkers and Western entered into a contract under which Western was to clear title to the land and transfer the title to an entity that the parties would jointly control. Western was supposed to form the entity but never did.

¶2 Western filed suit to obtain sole ownership of the land, and the Walkers counterclaimed that Western had breached the contract and its fiduciary duties to the Walkers by refusing to form the promised entity. After a bench trial, the district court concluded that Western had breached the contract and its fiduciary duties. The court awarded the Walkers significant monetary damages, established a constructive trust over the entire project, granted the Walkers a 41% interest in the trust, and awarded attorney fees as consequential damages for Western's breach of fiduciary duty. The court instructed the Walkers to submit their post-trial motion for fees under rule 73 of the Utah Rules of Civil Procedure. The parties signed a stipulation agreeing not to appeal any of these rulings.

¶3 The surprise came when in their rule 73 motion the Walkers revealed they had a hybrid contingency-hourly agreement with their attorneys. They had not disclosed this arrangement as a damage calculation under rule 26. But they argued in their rule 73 motion that any failure to disclose was for good cause or harmless and that the contingency agreement was foreseeable. Over Western's objections that it was inappropriate to disclose consequential damage calculations for the first time in a rule 73 motion, the district court ruled that all motions for attorney fees must be decided under rule 73, that the contingency agreement was foreseeable, and that the Walkers' failure to disclose the arrangement under rule 26 was for good cause or harmless.

¶4 We reverse. When a party seeks attorney fees under the fiduciary duty exception to the American Rule, those fees are consequential damages. And as with any claim for consequential damages, the party seeking them must comply with the procedures our rules lay out to receive them.

¶5 The Walkers disclosed their intention to seek attorney fees as consequential damages and the district court ruled that they could claim those fees, but the Walkers did not disclose their contingency fee or prove its foreseeability or amount at trial. The failure to disclose was not for good cause or harmless because it hampered Western's ability to understand and defend against the Walkers' claims. The Walkers thus cannot obtain the contingency fee as consequential damages because of these failures.

BACKGROUND

¶6 Keith and Lorin Walker planned to develop a property near Sand Hollow Reservoir in Washington County, but the 2008 mortgage crisis intervened. To save the project from foreclosure and mounting debts, the Walkers entered into an agreement with Western and its owner, Frank Tiegs. They signed an agreement which contemplated a joint venture to take over the project in the form of a shared legal entity to hold title to the land. That agreement did not contain an attorney fee provision. After the parties failed to move forward under the agreement, Western sued the Walkers to quiet title to the land. The Walkers counter-claimed for fraud, breach of contract, breach of fiduciary duty, and aiding and abetting breach of fiduciary duty against Tiegs and another Western executive, Tim Tippett. Relevant here, in a supplemental Utah Rule of Civil Procedure 26 disclosure the Walkers stated they would seek "amounts paid" to legal counsel and litigation experts as damages. *See* Utah R. Civ. P. 26(a)(1)(C), (d)(5) (requiring that disclosures include "a computation of any damages claimed" and requiring supplemental disclosure for incomplete or incorrect information).[1]

***2** ¶7 The case proceeded to a bench trial. The district court rejected the Walkers' fraud claims but granted judgment in their favor on their breach of contract and breach of fiduciary duty claims, ordering Western to pay the Walkers over $1 million and maintain the rest of the property in a constructive trust. The court also awarded attorney fees as consequential damages for Western's breach of fiduciary duty and for Tiegs' and Tippett's aiding and abetting that breach. The court instructed the Walkers to submit their declaration of attorney fees in a post-trial rule 73 motion. *See* Utah R. Civ. P. 73 (providing post-trial mechanism to claim attorney fees).

¶8 After the court's ruling but before the Walkers submitted their declaration of attorney fees, the parties signed a stipulation on appellate rights. They waived the right to challenge any of the court's decisions made prior to the stipulation but not "any future rulings or orders by the Court" including "any ruling or order related to the awarding to the Walkers of attorney fees."

¶9 The Walkers then filed their rule 73 motion. Through this post-trial motion, Western learned for the first time that the Walkers were seeking a contingency fee based on a hybrid hourly-contingency agreement.[2] In their pretrial rule 26 disclosures the Walkers had disclosed only an intent to seek "amounts paid" to legal counsel and litigation experts. In their post-trial rule 73 motion the Walkers acknowledged that the contingency fee could only be awarded as consequential damages to the extent that it was "reasonably foreseeable," but argued that it was foreseeable. Their counsel, Erik Olson, declared that "any litigant involved in high-stakes commercial litigation in Utah ... should reasonably foresee that a plaintiff asserting claims may engage counsel on a contingency fee." The Walkers also included a declaration by expert Richard Hoffman, opining on how the court might distribute the proceeds of the constructive trust to account for the contingency fee. The Walkers had not previously disclosed that they intended to rely on either Olson or Hoffman to prove consequential damages.

¶10 Western opposed the fee motion, arguing that the calculation for consequential damages must be disclosed before trial and the foreseeability of those damages must be proven at trial. Western also disputed foreseeability, pointing out that the Walkers testified at trial that they each had a net worth of around $4 million and submitting a declaration from attorney George Pratt who testified that commercial litigation matters like the one here "are almost always taken on an hourly basis." Tippett also submitted a declaration stating that no one at Western knew the Walkers had retained their counsel on a contingency fee basis.

¶11 In reply, the Walkers provided another declaration from Olson, asserting that it would be "highly unusual" to present confidential attorney-client relationship information at trial. He also explained that his firm "has low overhead" and sought to rebut Pratt's testimony that the contingency arrangement was unforeseeable. The Walkers also argued that even if rule 26 disclosure applied to attorney fees as damages, the failure to disclose was for good cause or harmless.

¶12 The district court granted the Walkers' motion. The court framed the dispute in "two main points, one procedural and one substantive." Procedurally, the court noted "an apparent conflict" between rule 73, governing fee applications, and rule 26, governing damage disclosures, "when the fees are sought as consequential damages." It ruled that the mandatory language of rule 73(a) ("Attorney fees *must* be claimed by filing a motion ....")[3] as well as the exemption language in rule 26(a) ("This rule applies unless changed or supplemented by a rule governing disclosure and discovery in a practice area.")[4] allow parties to seek attorney fees by motion after judgment, even when those fees are claimed as undisclosed consequential damages. The court worried that "requiring disclosure [of billing arrangements] would necessarily place the party claiming fees in a disadvantaged position" because it "would potentially disclose much in the way of tactics, strategy and other work product." The court also found good cause and harmlessness for the Walkers' failure to disclose their contingency fee because the Walkers made clear from the start that they were expecting fee amounts to be calculated pursuant to rule 73, and because Western could have requested additional discovery after learning of the contingency fee but did not do so.

***3** ¶13 Substantively, the court found that the contingency fee was foreseeable. It relied on the facts and opinions from Olson's declaration and noted that attorneys are permitted to testify about "the nature and value of legal services rendered in the case." (Quoting Utah R. Prof. Conduct 3.7(a)(2)).

¶14 The court awarded about $900 thousand for hourly fees and litigation expenses, which included a 15% markup to account for the contingency fee. It also increased the Walkers' monetary judgment from about $1.4 to $1.7 million and their interest in the constructive trust from 41% to 48.235%, again to account for the contingency fee. The court later augmented the fee award for additional hourly fees and expenses.

¶15 Western appeals.

STANDARD OF REVIEW

[1] ¶16 The parties dispute the applicable standard of review. The Walkers argue that we should apply an abuse-of-discretion standard to the district court's fee award because the rules are unclear about how to address attorney fees as consequential damages. They cite cases standing for the broad proposition that a district court has discretion to manage its docket, *see Morton v. Cont'l Baking Co.*, 938 P.2d 271, 275 (Utah 1997) ("A trial judge is given a great deal of latitude in determining the most fair and efficient manner to conduct court business."), and that a court has discretion under Utah Rule of Civil Procedure 26(d)(4) to excuse any failure to disclose, *see Keystone Ins. Agency v. Inside Ins., LLC*, 2019 UT 20, ¶ 12, 445 P.3d 434 ("We review a district court's decision on sanctions under rule 26(d)(4) ... for an abuse of discretion.").

¶17 On the other hand, Western argues that we should review for correctness, noting that "legal questions that pertain to [an] attorney fees issue" are "reviewed for correctness." *Brady v. Park*, 2019 UT 16, ¶ 32, 445 P.3d 395. They claim that the district court's determination that rule 73 trumped any failure to disclose under rule 26 is a legal question that is not granted discretion. *See Keystone*, 2019 UT 20, ¶ 12, 445 P.3d 434 ("We review a district court's interpretation of our rules of civil procedure, precedent, and common law for correctness.").

[2] ¶18 We agree with Western. The district court's decision to award an undisclosed contingency fee was based on its interpretation of how rule 73 should be read together with rule 26. The meaning of and interplay between these two rules is a question of law we review for correctness. *See Jones v. Mackey Price Thompson & Ostler*, 2020 UT 25, ¶ 86, 469 P.3d 879; *see also USA Power, LLC v. PacifiCorp*, 2016 UT 20, ¶ 90, 372 P.3d 629 ("A trial court's conclusion as to what constitutes a reasonable attorney fee award is reviewed for an abuse of discretion" but only if the court "has employed the proper standard." (cleaned up)).

ANALYSIS

¶19 Western appeals the district court's rulings that a contingent fee sought as damages may be disclosed for the first time in a post-trial rule 73 motion, that any failure to disclose in this case was for good cause or harmless, and that the contingency fee was foreseeable. The Walkers argue that the district court's rulings were correct or should be granted deference, and that Western waived its appellate arguments by signing a stipulation.

¶20 We reverse the district court. First, we hold that Western did not waive its arguments by signing the stipulation, which does not apply to the court's rulings about the contingency fee. Second, we review the principles underlying claims for consequential damages and explain that consequential damages must be disclosed under rule 26, presented as foreseeable at trial through evidence or testimony, and (if awarded) calculated and finalized by the finder of fact, including through post-judgment proceedings as appropriate. This remains true where the claimed consequential damages happen to be attorney fees. Finally, we apply these principles and hold that the contingency fee was not awardable here.

I. Western Has Not Waived Its Right to Challenge the District Court's Rulings

***4** **[3]** ¶21 We first address the Walkers' position that Western has waived several of its arguments by signing a stipulation as to appellate rights.

¶22 The stipulation states that each party "waives any right to appeal from any of the Court's decisions contained in the Findings of Fact and Conclusions of Law dated November 1, 2024, the proposed judgment filed herewith, and any order or other ruling of the Court entered prior to the date of this stipulation." Importantly, the stipulation "does not preclude any party from appealing any future rulings or orders by the Court ... including without limitation any ruling or order related to the awarding to the Walkers of attorney fees, expert fees, expenses, and litigation costs." The parties signed this stipulation after the court had made its trial rulings and a proposed judgment had been filed but before the Walkers had submitted their rule 73 motion for fees.

¶23 Because the stipulation covers the court's ruling that the Walkers shall "submit their declaration of attorney fees and other litigation expenses following entry of judgment" "pursuant to the provisions of rule 73," the Walkers argue that Western "waive[d] the right to appeal from the trial court's directive that the fee award to the Walkers be administered post-trial under rule 73." Western responds that its appellate arguments are not barred by the stipulation because it "is not challenging the use of rule 73 to precisely quantify a consequential damages award based on fees" but rather the court's decision (made four months after the stipulation) that rule 73 trumps rule 26's disclosure requirements when fees are sought as damages and that the foreseeability of those damages may be proven after trial.

¶24 We agree with Western. The stipulation does not cover Western's arguments about the disclosure and foreseeability of contingency fees as consequential damages. And the stipulation expressly carved out "any future rulings or orders by the Court," including "any ruling or order related to the awarding to the Walkers of attorney fees." At the very least, the court's ruling on foreseeability and disclosure of the contingency fee was a future ruling "related to" the awarding of attorney fees. We thus hold that the stipulation does not bar any of Western's claims on appeal.[5]

II. Consequential Damages—Including Fees Sought as Damages—Must Be Disclosed Under Rule 26, Must Be Foreseeable, and Must Be Proven at Trial

¶25 We next review consequential damages principles and what a party must do to obtain these damages, including adequate disclosure and proof at trial of causation, foreseeability, and amount within a reasonable certainty. We then explain that a party seeking attorney fees and litigation expenses as consequential damages must meet these same requirements, with an additional foreseeability requirement for contingency fees.

A. Consequential or Special Damages Are a Type of Expectation Damage that Flow Naturally, but Not Necessarily, from an Injury

***5 [4] [5] [6] [7] [8]** ¶26 Consequential or special damages are "[l]osses that do not flow directly and immediately from an injurious act but that result indirectly from the act." *Damages: Consequential Damages*, Black's Law Dictionary (12th ed. 2024).[6] They are a type of expectation damage "reasonably within the contemplation of, or reasonably foreseeable by, the parties at the time the contract was made." *Trans-W. Petroleum, Inc. v. U.S. Gypsum Co.*, 2016 UT 27, ¶¶ 15, 17, 379 P.3d 1200 (cleaned up). Because they are "the natural, but not the necessary, result of an injury," consequential damages are "not implied by law" and are "peculiar to the case at hand." *Id.* ¶ 17 (cleaned up). In contrast, general expectation damages are "implied in law" because they are "the probable and necessary result of the injury." *Id.* ¶ 16 (cleaned up). "They are damages which everybody knows are likely to result from the harm described." *Cohn v. J.C. Penney Co.*, 537 P.2d 306, 307 (Utah 1975).[7]

¶27 While general damages are measured by "the market value of the very thing promised, at the time of performance," *Trans-W.*, 2016 UT 27, ¶ 16, 379 P.3d 1200 (quoting Dobbs, Law of Remedies § 12.1(1) (2d ed. 1993)), consequential damages are measured "by the gains [the promised] performance could produce ... or the loss that is produced by the absence of such performance," *id.* ¶ 17 (quoting Dobbs, Law of Remedies § 12.1(1) (2d ed. 1993) (alterations in original)).

B. Consequential Damages Must be Disclosed Under Rule 26, and the Causation, Foreseeability, and Amount of Those Damages Must Be Proved at Trial

1. Consequential Damages Must be Disclosed or They Are Not Recoverable

[9] [10] [11] ¶28 To recover consequential damages, the party claiming them must disclose the fact of those damages, their amount, and all discoverable material on which that amount is based. Utah R. Civ. P. 26(a)(1)(C) (requiring that initial disclosures include "a computation of any damages claimed and a copy of all discoverable documents or evidentiary material on which such computation is based"); *see also Keystone Ins. Agency v. Inside Ins.*, 2019 UT 20, ¶ 17, 445 P.3d 434 (explaining that both "the fact of damages and the method for calculating the amount of damages must be apparent in initial disclosures" (cleaned up)); *Build, Inc. v. Utah Dep't of Transp.*, 2018 UT 34, ¶¶ 43–55, 428 P.3d 995 (affirming dismissal of consequential damages claim because plaintiff "never disclosed an amount of consequential damages or a basis for calculating it"). If a party does not know the full consequential damages amount, it must disclose what it has and must supplement those disclosures "as more information [is] acquired through discovery." *Keystone*, 2019 UT 20, ¶ 17 n.5, 445 P.3d 434; *see also* Utah R. Civ. P. 26(d).[8]

***6 [12]** ¶29 Rule 26 requires early disclosure of damages information because, among other things, it enables both the opposing party and the court to determine the proportionality of other discovery requests. Utah R. Civ. P. 26(b)(3)(A)–(C) (listing proportionality factors, including "the amount in controversy," "the burden or expense" of production, and "the overall case management"); *see also id.* R. 26 advisory committee's note to 2011 amendment ("Early disclosure of damages information is important. Among other things, it is a critical factor in determining proportionality.").[9] And rule 26 imposes a stiff penalty for failure to disclose: "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." *Id.* R. 26(d)(4). This hefty price reflects both the toll that a failure to disclose can have on the opposing party and the desire to avoid avoidable surprise in litigation. *See id.* R. 26 advisory committee's note to 2011 amendment (explaining that penalties for lack of disclosure ensures that the disclosure requirement is "meaningful" and "discourage[s] sandbagging"). And we have not been hesitant to exact it. *See Keystone*, 2019 UT 20, ¶¶ 16–21, 27, 445 P.3d 434 (affirming exclusion of damages evidence for failure to disclose); *Build*, 2018 UT 34, ¶¶ 43–55, 428 P.3d 995 (affirming dismissal of consequential damages claim for lack of disclosure); *Bodell Constr. Co. v. Robbins*, 2009 UT 52, ¶¶ 34–39, 215 P.3d 933 (similar).

2. A Party Seeking Consequential Damages Must Prove Causation, Foreseeability, and the Amount Within a Reasonable Certainty as Part of Its Case-in-Chief[10]

[13] **[14]** **[15]** **[16]** ¶30 After pleading and disclosure, a party seeking to recover consequential damages must then prove them. The seeking party must prove three things: "(1) that consequential damages were caused by the contract breach; (2) that consequential damages ought to be allowed because they were foreseeable at the time the parties contracted; and (3) the amount of consequential damages within a reasonable certainty." *Mahmood v. Ross*, 1999 UT 104, ¶ 20, 990 P.2d 933. While framed in contractual terms, we apply this same test to consequential damages that arise from a tort such as breach of fiduciary duty. *See Campbell v. State Farm Mut. Auto. Ins.*, 2001 UT 89, ¶ 121, 65 P.3d 1134 ("Although the foreseeability of damages test is generally limited to the contractual realm, we note that its use to determine damages in the context of tortious third-party, bad faith claims is justified since such claims arise only because of the contractual relationship of the parties." (cleaned up)), *rev'd on other grounds*, 538 U.S. 408, 123 S.Ct. 1513, 155 L.Ed.2d 585 (2003); *see also below* ¶ 33.

[17] **[18]** **[19]** ¶31 These elements are part of the seeking party's case-in-chief, which is ordinarily presented at trial. *See Canyon Country Store v. Bracey*, 781 P.2d 414, 419–20 (Utah 1989) (explaining that issue of attorney fees as consequential damages "was part of Canyon Country's case-in-chief" and was properly "submitted to the jury as an element of damages"); *Meadowbrook, LLC v. Flower*, 959 P.2d 115, 117–19 & n.9 (Utah 1998) (holding that "prevailing party" attorney fees—those awarded by contract or statute—may be sought through post-trial motion, but clarifying that this rule does not apply to fees that are "an item of consequential damages," because "evidence of such fees must be presented to the jury according to established trial procedure").[11] Failure to prove any of these elements at the appropriate moment dooms the consequential damages claim. *See, e.g.*, *Gables at Sterling Village Homeowners Ass'n v. Castlewood-Sterling Village I, LLC*, 2018 UT 04, ¶¶ 72–77, 417 P.3d 95 (explaining that a party's post-trial claim for fees as consequential damages failed because the party failed to "prove that he was entitled to the fees" during trial).

***7** **[20]** **[21]** **[22]** ¶32 To prove causation, the party seeking consequential damages must show proximate cause—"that cause which, in natural and continuous sequence ... produces the injury and without which the result would not have occurred." *Harline v. Barker*, 912 P.2d 433, 439 (Utah 1996) (cleaned up). "Proximate cause is generally determined by an examination of the facts, and questions of fact are to be decided by the jury," or by the judge in a bench trial. *Mahmood*, 1999 UT 104, ¶ 22, 990 P.2d 933. The "evidence must do more than merely raise a conjecture," for "where the proximate cause of the injury is left to conjecture, the plaintiff must fail as a matter of law." *Id.* (cleaned up); *see id.* ¶¶ 23–29 (reversing jury award of consequential damages where there was insufficient evidence linking the breach to the alleged damages).

[23] **[24]** **[25]** ¶33 To prove foreseeability, a party must show that the consequential damages were "reasonably within the contemplation of, or reasonably foreseeable by, the parties at the time the contract was made." *Beck v. Farmers Ins. Exch.*, 701 P.2d 795, 801–02 (Utah 1985); *Billings v. Union Bankers Ins.*, 918 P.2d 461, 466 (Utah 1996) (same). When, as here, a tort claim arises out of a contractual relationship, "the time the contract was made" is the appropriate time to measure the reasonable foreseeability of damages. *See Campbell*, 2001 UT 89, ¶¶ 120–21, 65 P.3d 1134 (cleaned up); *Norman v. Arnold*, 2002 UT 81, ¶ 35, 57 P.3d 997 (noting that "a claim for breach of fiduciary duty is an independent tort that, on occasion, arises from a contractual duty"). "Whether particular damages may be considered foreseeable will always hinge upon the nature and language of the ... contract and the reasonable expectations of the parties." *Machan v. UNUM Life Ins.*, 2005 UT 37, ¶ 17, 116 P.3d 342 (cleaned up). There is an additional foreseeability requirement unique to contingency fee cases that we discuss below. *See below* ¶ 37.

[26] **[27]** **[28]** ¶34 To prove the amount of consequential damages with reasonable certainty, a party must present "sufficient evidence to enable the trier of fact to make a reasonable approximation." *Cook Assocs., Inc. v. Warnick*, 664 P.2d 1161, 1166 (Utah 1983). While the evidence "must not be so indefinite as to allow the factfinder to speculate as to [damage amounts], some degree of uncertainty is tolerable." *Diversified Striping Sys. Inc. v. Kraus*, 2022 UT App 91, ¶ 55, 516 P.3d 306 (cleaned up). "It is, after all, the wrongdoer, rather than the injured party, who should bear the burden of some uncertainty in the amount of damages." *Atkin Wright & Miles v. Mountain States Tel. & Tel. Co.*, 709 P.2d 330, 336 (Utah 1985). When the consequential damages are attorney fees, evidence may include timesheets, billing contracts, and testimony.

C. The Rules for Claiming Consequential Damages Apply to Claims for Attorney Fees as Consequential Damages

[29] ¶35 These general rules for consequential damages apply to all claims for consequential damages, including attorney fees when sought as damages of that type.

[30] **[31]** ¶36 In general, Utah follows the so-called American Rule: a prevailing party may not recover attorney fees from the opposing side unless provided for in statute or contract. *See Turtle Mgmt., Inc. v. Haggis Mgmt., Inc.*, 645 P.2d 667, 671 (Utah 1982). We have recognized a limited number of exceptions to the American Rule, and some of these require a party to seek fees as consequential or special damages.[12] At issue here is a fiduciary-duty exception based on our statement in *Campbell* that "breach of a fiduciary obligation is a well-established exception to the American rule." 2001 UT 89, ¶ 122, 65 P.3d 1134. Though we make no holding today on whether attorney fees may be awarded as damages for every breach of fiduciary duty,[13] we re-affirm *Campbell*'s holding that any such fees must be sought as damages, and thus must be foreseeable. *Id.* ¶¶ 120 –25.

***8** **[32]** **[33]** ¶37 As we explained in *USA Power, LLC v. PacifiCorp*, the foreseeability requirement for contingent attorney fees as damages has two parts: First, as for all claims for consequential damages, it must have been foreseeable at the time of contracting (here, when the fiduciary duty arose) that a breach would cause the non-breaching party to incur attorney fees as damages. 2016 UT 20, ¶ 94, 372 P.3d 629.[14] Second, if a contingency fee forms part of the damages calculation, the specific contingency arrangement must also have been foreseeable at that time. *Id.*[15] As with other consequential damage elements, the foreseeability of contingency fees as damages must normally be proved at trial as an element of a party's case-in-chief. *See above* ¶ 31.[16]

[34] ¶38 In sum on this point, attorney fees sought under a *Campbell*-style exception to the American Rule must be sought as consequential damages and must meet the usual requirements for consequential damages—specific pleading, disclosure, causation, foreseeability, and amount. If a contingency fee forms part of the damages calculation, it must have not only been foreseeable that a breach would cause the non-breaching party to incur attorney fees, but also that the specific contingency arrangement was foreseeable. *USA Power*, 2016 UT 20, ¶ 94, 372 P.3d 629.[17]

III. The Walkers Cannot Recover Their Contingency Fee as Consequential Damages Because They Failed to Disclose It or Prove Its Foreseeability at Trial; the Failure to Disclose Was Not for Good Cause or Harmless

¶39 With these principles in mind, we now turn to the district court's award of the Walkers' contingency fee as consequential damages for Western's breach of fiduciary duty. The Walkers would be entitled to that fee as consequential damages if they properly disclosed it under rule 26 and then proved (1) that the fee damages were caused by Western's breach of fiduciary duty, (2) that the specific fee arrangement was foreseeable at the time the fiduciary duty arose (here, when the parties entered into their agreement), and (3) that the fee amount is accurate within reasonable certainty. *See Trans-W. Petroleum v. United States Gypsum Co.*, 2016 UT 27, ¶ 19, 379 P.3d 1200; *USA Power, LLC v. PacifiCorp*, 2016 UT 20, ¶ 94, 372 P.3d 629.

***9** **[35]** ¶40 We conclude that while the Walkers proved causation of their contingency fee damages during trial, they failed to disclose them as required under rule 26 and did not prove either foreseeability or amount at trial.[18]

A. The Walkers Have Lost the Opportunity to Recover Their Contingency Fee as Damages by Failing to Disclose It as Part of Their Damages Amount and Prove Its Foreseeability at Trial

[36] ¶41 From the beginning of this dispute through trial, the Walkers never disclosed that a contingency fee formed part of their consequential damages attorney fee computation. They first disclosed their claim for fees and legal expenses as damages in an amended initial disclosure, stating they intended to seek "amounts paid to legal counsel" and "amounts paid to litigation experts"—that is, expenses they actually incurred, not a contingency kicker to be paid by the opposing party. They did not disclose any method for calculating these damages, other than that they expected the factfinder to "determine their entitlement to these damages" and the court to "determine the amount in accordance with rule 73." A few months later, the district court awarded them fees and expenses for a supplemental deposition, but the Walkers again declined to provide information for calculating their fees, stating they would wait until after trial.

[37] ¶42 Nor did the Walkers provide this information during trial. In accordance with their expert disclosures, their damages expert testified at trial that the "proceeds from revenues generated by the constructive trust property should continue to be split 59-41 between the parties." But this contradicted his post-trial testimony that the Walkers should receive 48.235% of the constructive trust property to account for the contingency fee. The Walkers never disclosed that they would provide testimony or evidence as to the foreseeability of a contingency fee or how a contingency fee should be calculated. They were silent throughout discovery and trial as to these damage computations.

[38] ¶43 It was not until their post-trial rule 73 motion that the Walkers disclosed the contingency fee and presented evidence as to its foreseeability. This was too late. As explained above, damage disclosures must be made during initial disclosures or as early as possible through supplemental disclosures, before fact discovery finishes. *See above* ¶¶ 28–29; *see also* *Bodell Constr. Co. v. Robbins*, 2009 UT 52, ¶ 35, 215 P.3d 933. Western did not have an opportunity to challenge the foreseeability of the contingency fee in discovery and at trial because of this lack of disclosure.

***10** ¶44 The Walkers' failure to disclose and provide testimony and evidence at trial left their contingent fee without proof of foreseeability. Without that proof, the fee was not awardable under *Campbell*'s rule. *See* *Campbell v. State Farm Mut. Auto. Ins.,* 2001 UT 89, ¶¶ 120–25, 65 P.3d 1134, *rev'd on other grounds*, 538 U.S. 408, 123 S.Ct. 1513, 155 L.Ed.2d 585 (2003); *USA Power*, 2016 UT 20, ¶ 94, 372 P.3d 629. As explained above, in *Campbell* the foreseeability of the contingency fee was litigated during trial. *See above* ¶ 37 nn.15, 16. While the parties may consent to try these issues at a later time, the default without consent is trial.[19]

¶45 Had the Walkers disclosed the contingency fee and presented evidence of its foreseeability at trial the district court may have reached the same conclusion and awarded the contingency fee as damages. But that isn't what happened. The district court did not rule on the foreseeability of the contingency fee in its trial order because the Walkers failed to disclose it or prove its foreseeability at trial. The Walkers lost the opportunity to obtain their contingency fee.

B. Rule 26 Applies to Attorney Fees Awarded as Damages, and the Walkers' Failure to Disclose Was Not for Good Cause and Was Not Harmless

¶46 The district court didn't think that rule 26 applied, or that if it did, then the failure to disclose was for good cause or harmless. We disagree.

[39] ¶47 The district court concluded that rule 26 did not apply where attorney fees were at issue—regardless of the basis for recovery—because the rule said it did not apply where it was "changed or supplemented by a rule governing disclosure and discovery in a practice area." (Quoting Utah R. Civ. P. 26(a)). In its view, rule 73 governed the "practice area" of attorney fees. This misunderstands both the plain meaning of "practice area" and the structure of rule 26.

¶48 A "practice area," in legal circles, means the kind of cases that an attorney does—at a high level of generality, things like divorce, criminal, bankruptcy, etc. *See, e.g.*, *In re Hughes & Coleman*, 60 S.W.3d 540, 543 (Ky. 2001) (discussing various "practice areas" in attorney advertising, such as "international," "corporate," "litigation," "bankruptcy," and personal injury); *Carter v. Ann Arbor City Att'y*, 271 Mich.App. 425, 722 N.W.2d 243, 252 (Mich. Ct. App. 2006) ("Defendant was seeking to hire two attorneys to practice in specific areas of the law: labor law and zoning and planning law—not a general lawyer with experience in a multitude of practice areas."). The structure of rule 26 reflects this understanding, having specialized discovery rules for domestic relations, personal injury, unlawful detainer, and probate. Utah R. Civ. P. 26.1–26.4. Attorney fees are not confined to a particular practice area and do not constitute a "practice area" in and of themselves under rule 26.[20]

***11** ¶49 The district court alternatively ruled that even if rule 26 were applicable to claims of attorney fees as consequential damages, the Walkers' failure to disclose their contingency arrangement was for good cause or was harmless. Again, we disagree.

[40] **[41]** **[42]** **[43]** ¶50 The district court determined there was good cause for the Walkers' failure to disclose because rule 73 permitted—or as the district court saw it, *required*—a party to claim fees after trial. That may be true when fees are sought under a statute or contract and result from the litigation rather than the original wrongdoing.[21] But not so with fees as consequential damages. Indeed, the Walkers were not seeking fees in the rule 73 sense, but rather were seeking consequential damages that happened to be owed to an attorney. The plain language of rule 26 requires disclosure of the "computation of any damages claimed." Utah R. Civ. P. 26(a)(1)(C). Rule 73 does not alter this requirement when the claimed damages happen to be attorney fees.[22] *Cf. Bodell Constr.*, 2009 UT 52, ¶ 38, 215 P.3d 933 (rejecting claim that good cause existed for delayed disclosure of damage computation because the party "complied with generally accepted litigation practices" (cleaned up)); *see also USA Power*, 2016 UT 20, ¶ 95, 372 P.3d 629 (holding that a contingency fee award is available "only when the award is sought as damages and the contingency fee arrangement was foreseeable"(cleaned up)).

[44] ¶51 The district court also found good cause for the nondisclosure because it approved of the plan to proceed under rule 73 with no objection from Western. But when the Walkers made this request, the court—like Western—had no way of knowing that the Walkers were waiting to disclose a damages computation that included a contingency fee. The Walkers cannot claim good cause when they didn't disclose the required information and then rely on an unopposed ruling based on that withheld information.

***12** **[45]** **[46]** **[47]** ¶52 The district court concluded that the failure to disclose was harmless because Western could have requested additional discovery or time after the contingency fee was finally revealed. But rule 26 places the burden of disclosure on the party seeking damages, and any action Western might have taken "does not free [the Walkers] from [their] obligation to disclose a computation of damages." *Keystone Ins. Agency v. Inside Ins.*, 2019 UT 20, ¶ 20, 445 P.3d 434; *see also RJW Media Inc. v. Heath*, 2017 UT App 34, ¶ 29, 392 P.3d 956 ("An insufficient disclosure by one party does not shift the burden and risk to resolve the insufficient disclosure to the other party[.]"); *Black Diamond Fin. LLC v. Big Cottonwood Pine Tree Water Co.*, 2020 UT App 90, ¶ 25, 470 P.3d 445 (rejecting plaintiff's argument that because defendant "could have asked [plaintiff's witness] further questions about ... alleged damages at the deposition and conducted discovery relating to possible computations that might relate to those damages," plaintiff's failure to disclose the damages calculation until expert discovery was harmless). The duty to disclose is especially salient when the damage calculation includes a contingency fee, the specific terms of which must be proven foreseeable to avoid unfair surprise. *USA Power*, 2016 UT 20, ¶¶ 93–95, 372 P.3d 629 (noting that "it is this foreseeability requirement that justifies an award based solely on a contingency fee").

¶53 Even if Western had asked and the court had reopened discovery at that point, the damage had already been done. Trial was over. Judgment had been entered. The opportunity to make an early settlement had passed. And the parties had stipulated not to appeal most of the court's rulings, including the ruling that attorney fees were available for breach of fiduciary duty. It was too late to disclose a contingency fee and argue about its foreseeability—that is, to disclose and prove a new computation for consequential damages. The Walkers' failure to disclose their contingency fee was not for good cause and was not harmless.

CONCLUSION

[48] ¶54 When a party seeks attorney fees as damages, it must comply with the usual disclosure and burden of proof requirements for damages. This includes disclosure of a contingency fee if it is part of the damages calculation and proof at trial of causation, foreseeability, and amount. By failing to initially disclose or litigate the contingency portion at trial, the Walkers lost the chance to claim it. And contrary to the district court's determinations, this failure was not for good cause or harmless. We instruct the district court to modify the Walkers' damages award accordingly.[23]

Before this case was decided, Chief Justice Durrant recused himself and Justice Hagen stepped down from the court.

Justice Jorgensen and Justice Dent, having reviewed the briefs and listened to the oral argument recording, substituted for Chief Justice Durrant and Justice Hagen and participated fully in this decision.

All Citations

--- P.3d ----, 2026 WL 2437185, 2026 UT 30

Footnotes

* As of January 31, 2026, "The Supreme Court consists of seven justices." Utah Code § 78A-3-101(1). Pursuant to Utah Supreme Court Standing Order No. 18, this court sat and rendered judgment in this matter as a division of five justices.

1 While the 2025 version of the Utah Rules of Civil Procedure applies and there have been some subsequent changes to the rules, none of the changes impact our analysis. Thus, unless otherwise noted, we cite the current version of the rules throughout this opinion for both convenience and clarity.

2 The Walkers' agreement with their attorneys included hourly rates discounted by 50% as well as a contingent fee on any recovery. The contingent fee was 15% if the value of the recovery was over $120 million or 10% if the value of the recovery was less than $120 million, and it included an additional 5% if post-trial litigation became necessary.

3 *See* Utah R. Civ. P. 73(a) (2025) (emphasis added). Rule 73(a)'s language was amended in May 2026 to "Attorney fees *may* be claimed by filing a motion," Utah R. Civ. P. 73(a) (2026) (emphasis added).

4 *See* Utah R. Civ. P. 26(a).

5 Western alternatively argues that the stipulation should be set aside as unknowing and involuntary. The Walkers respond that Western should have asked the trial court to set aside the stipulation and cannot now argue that the stipulation should be set aside. Because we agree with Western that the stipulation does not bar its appellate arguments, it necessarily did not have to move to set that stipulation aside. An obstacle is an obstacle only if it is in your way.

6 Courts and commentators "often refer to general damages as direct damages and consequential damages as special damages," but this is a distinction "of phraseology, not substance." *Trans-W. Petroleum v. U.S. Gypsum Co.*, 2016 UT 27, ¶ 15 n.12, 379 P.3d 1200 (cleaned up).

7 An illustration from *Cohn* shows the difference between general and consequential damages in the tort context:

> Plaintiff sues defendant for blowing up his dam in the river and claims damages in the amount of $5,000. His proof shows the cost of repairs to the dam to be $1,000. He offers evidence to the effect that he had a water mill which had to be shut down for two months during the rebuilding of the dam and that he lost profits in the amount of $4,000 as a result thereof. The rebuilding of the dam is an item of general damages, but the loss of profits due to inoperation of the mill is an item of special [or consequential] damage because it is peculiar to his case. Another man might have his dam blown up and might not even own a mill, or it might not be operative. Still another man might have special damages because he could not irrigate his farm as a result of the destruction of the dam which he owned and the lowering of the water below the bottom of his l[a]teral ditch. Each dam owner would need to set forth his particular special damages because such special damages do not of necessity follow as a result of the tort.

Cohn v. J.C. Penney Co., 537 P.2d 306, 307 (Utah 1975).

8 We also note that consequential damages "must ordinarily be pleaded in order to be recovered." *Trans-W.*, 2016 UT 27, ¶ 15, 379 P.3d 1200 (cleaned up); *see also* Utah R. Civ. P. 9(h) ("If an item of special damage is claimed, it must be specifically stated."). This rule exists because, unlike general damages "which everybody knows are likely to result from the harm described," and "may be recovered under a general allegation of damage," consequential damages are "peculiar to [an individual's] case," and "must be specially pleaded" to "let his adversary know what will be involved." *Cohn*, 537 P.2d at 307–08 (cleaned up).

Though there may be some question as to whether the Walkers pleaded their consequential damages with the requisite level of specificity, we do not discuss the pleading requirement further here because the parties did not raise the issue.

9 To the extent that fee arrangements implicate attorney-client privilege, the party can raise those concerns, and the court can deal with them under Utah Rule of Civil Procedure 26(b)(9).

10 The Walkers argue that this issue is unpreserved and complain that Western cites to authority it didn't raise below. But we agree with Western that this issue was preserved, and that Western is merely offering additional authority on appeal for the position it argued below, which our cases permit. *See* *Torian v. Craig*, 2012 UT 63, ¶ 20, 289 P.3d 479.

11 Of course, the parties may agree—or the court may order—that the issue of consequential damages be determined in a post-trial proceeding. *See* *Billings v. Union Bankers Ins.*, 918 P.2d 461, 464 (Utah 1996) (explaining that the parties agreed to litigate the issue of an attorney contingency fee as consequential damages in a post-trial proceeding); *cf.* *Canyon Country Store v. Bracey*, 781 P.2d 414, 419–20 (Utah 1989) (noting that the trial court rejected plaintiffs' request that fees as consequential damages "be determined in a separate hearing after trial" because the defendants "objected"). But this type of agreement or order does not excuse a party from making timely damage disclosures. The defendant cannot be left "to guess at what damages [plaintiff is] seeking and how they [are] to be calculated," *Keystone Ins. Agency v. Inside Ins.*, 2019 UT 20, ¶ 18, 445 P.3d 434, even if damages are handled in a post-trial proceeding, *see* *Billings*, 918 P.2d at 464; Brief of Appellee and Cross-Appellant at 41, *Billings v. Union Bankers Ins.*, 918 P.2d 461 (Utah 1996) (No. 940098) (Mar. 10, 1995) (indicating that defendant was aware of plaintiff's contingency fee *before* it agreed to litigate fees as damages post-trial; the contingency fee was a matter of public record).

12 Cases permitting fees to be sought as consequential damages include claims for slander of title, *Neff v. Neff*, 2011 UT 6, ¶¶ 77–86, 247 P.3d 380; the third-party litigation exception (also known as the collateral litigation exception, wrong-of-another-doctrine, or tort-of-another doctrine), *Pac. Coast Title Ins. v. Hartford Acc. & Indem. Co.*, 7 Utah 2d 377, 325 P.2d 906, 907–08 (Utah 1958), *Collier v. Heinz*, 827 P.2d 982, 983–84 (Utah Ct. App. 1992); certain employment contracts, *Heslop v. Bank of Utah*, 839 P.2d 828, 840–41 (Utah 1992); and bad faith breach of insurance contracts, *Billings*, 918 P.2d at 468, *Campbell v. State Farm Mut. Auto. Ins.*, 2001 UT 89, ¶¶ 118–25 & nn.20, 21, 65 P.3d 1134, *rev'd on other grounds*, 538 U.S. 408, 123 S.Ct. 1513, 155 L.Ed.2d 585 (2003); *see also* *Saleh v. Farmers Ins. Exch.*, 2006 UT 20, ¶ 25 n.4, 133 P.3d 428. Many of these exceptions to the American Rule came about by the court exercising its "inherent equitable power" to award reasonable fees when appropriate in the interest of justice and equity. *See* *Stewart v. Utah Pub. Serv. Comm'n*, 885 P.2d 759, 782 (Utah 1994), *superseded on other grounds by* Utah Code § 78B-5-825.5, *as recognized in* *Laws v. Grayeyes*, 2021 UT 59, ¶¶ 50, 54, 498 P.3d 410.

13 We have not had occasion to reach this question. *See* *Gregory & Swapp, PLLC v. Kranendonk*, 2018 UT 36, ¶ 48, 424 P.3d 897 (declining to address the "important question" of whether *Campbell* "meant to operate as an endorsement of attorney fee awards in all breach of fiduciary duty cases" after determining that there was insufficient evidence to support a breach of fiduciary duty claim); *USA Power, LLC v. PacifiCorp*, 2016 UT 20, ¶ 95 nn.142, 147, 372 P.3d 629 (acknowledging court of appeals cases awarding attorney fees for breach of fiduciary duty based on *Campbell* but "express[ing] no opinion" on "the types of cases that permit parties to seek attorney fees as damages"). We decline to resolve this question here because the parties stipulated to not challenge the district court's ruling that fees were available for breach of fiduciary duty. But in an appropriate case we will examine how far the fiduciary duty exception should extend.

14 This requirement is merely a restatement of the general foreseeability requirement for consequential damages, set forth above in ¶ 33. *See also* *Billings*, 918 P.2d at 468 (holding that "as consequential damages, attorney fees are recoverable only if they were reasonably within the contemplation of, or reasonably foreseeable by, the parties at the time the contract was made" (cleaned up)).

15 In the two cases where we upheld as foreseeable a contingency fee awarded as consequential damages—*Campbell* and *Billings*—both foreseeability requirements were satisfied. *See* *USA Power*, 2016 UT 20, ¶ 94, 372 P.3d 629; *id.* nn.135, 136, 137. We also upheld the award of a contingency fee as consequential damages in *Canyon Country Store*, 781 P.2d at 419–20. But we did not discuss foreseeability there because that question was not before the court. *See* *id.*

16 In *Campbell*, for example, the plaintiffs put on evidence at trial through several witnesses that contingency fee arrangements like the one at issue there "have been around for decades, are well-known, and are in fact the most likely

form of attorney fee arrangement" in that type of lawsuit. 2001 UT 89, ¶ 125, 65 P.3d 1134. The defendant in *Campbell* also admitted that contingency fees were "common" in its industry. *Id.*

17 Western also argues that the Walkers offered improper and undisclosed expert testimony by having their attorney submit a declaration about the foreseeability of the contingency fee. But given our reversal on other bases, we need not address this argument.

18 We clarify that the calculation of reasonable attorney fees and expenses as damages may be finalized in a post-trial proceeding, most likely in a rule 73 proceeding. After all, the totals for these fees cannot be finalized until the trial ends —when the billing stops—and may even include so-called fees-on-fees. *See Aston v. Chronicle-Progress LLC*, 2026 UT 7, ¶ 28, 587 P.3d 981 (discussing fees-on-fees). But the computation of these fee damages cannot be disclosed for the first time post-trial if the computation includes a contingency fee or seeks more than the usual "reasonable" attorney fee. *See above* ¶¶ 28–29, 31, 37–38; *see also USA Power*, 2016 UT 20, ¶ 94 n.138, 372 P.3d 629 (noting that if fee damages do *not* include a contingency fee, "[t]here is no need to conduct a separate analysis of whether the amount of the award was foreseeable unless the party being awarded fees seeks more than the usual 'reasonable' attorney fee").

19 As discussed above, ¶ 31 n.11, the parties may knowingly agree to litigate foreseeability post-trial. But here Western never agreed to litigate foreseeability post-trial; it had no way of knowing that the foreseeability of a contingency fee was at issue because the Walkers had not disclosed they were seeking a contingency fee.

20 Of course, an attorney's particular practice may be quite specialized within a given practice area—perhaps even regarding attorney fees. But to our knowledge, there is no such thing as an attorney-fee attorney. And even if there were, it would not control the meaning of "practice area" in rule 26 because the structure of rules 26.1 through 26.4 make the proper level of generality clear.

21 Black's Law Dictionary defines "consequential damages" as "[l]osses that do not flow directly and immediately *from an injurious act*, but that result indirectly *from the act*." *Damages: Consequential Damages*, Black's Law Dictionary (12th ed. 2024) (emphases added). That is, consequential damages are a consequent of the alleged wrongdoing. Where a statute or contract provides for attorney fees to a prevailing party, those damages are a consequent *of the litigation* rather than of the alleged wrongdoing.

22 Granted, the language of rule 73—especially the mandatory "[a]ttorney fees *must* be claimed" language from the 2025 version of the rule—can lead to confusion about what is required when fees are sought as damages. *See* Utah R. Civ. P. 73(a) (2025) (emphasis added). But we have long looked to substance rather than labels. *See, e.g.*, *Gillmor v. Wright*, 850 P.2d 431, 433 (Utah 1993) ("On appeal, we disregard the labels attached to findings and conclusions and look to the substance."). Here, the label of "attorney fees" under rule 73 would seem to apply to all claims for attorney fees, but the substance of the rules demonstrates that rule 73 is about claiming only a subset of attorney fees—those awarded under a statute or contract. *See Gables at Sterling Vill. Homeowner's Ass'n. v. Castlewood-Sterling Vill. I, LLC*, 2018 UT 04, ¶ 76, 417 P.3d 95 ("A post-trial motion is not the appropriate vehicle to litigate a claim for fees not based upon a statute or prevailing party attorney fees clause."). It is not about claiming attorney fees sought as damages. Of course, as the parties point out, rule 73 also can play a role in calculating the precise amount of fees. We invite our rules committee to recommend the best approach in implementing our holding into the rules framework to avoid future misunderstanding.

23 We do not reverse the awarding of hourly fees and other expenses because Western has not challenged these fees on appeal, but the district court will need to recalculate the amounts of these fees without the contingency fee kicker.

The Walkers also ask for their fees on appeal. But because we reverse the district court's award of the contingency fee, we do not award them any fees on appeal.

End of Document

Tab 7

2026 WL 2679017

Court of Appeals of Utah.

Emily Curtis BONHAM, Appellee,
v.
Brandon Reynolds BONHAM, Appellant.

No. 20240597-CA
|
Filed September 11, 2026

Third District Court, Salt Lake Department, The Honorable Richard D. McKelvie, The Honorable Coral Sanchez, No. 194905447

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Judge Gregory K. Orme authored this Opinion, in which Judges Michele M. Christiansen Forster and John D. Luthy concurred.

Opinion

ORME, Judge:

***1** ¶1 Brandon Reynolds Bonham appeals from the district court's decree of divorce dissolving his marriage to Emily Curtis Bonham. Brandon[1] argues that the decree contained multiple errors—some introduced by Emily in her proposed findings of fact—in valuations and divisions of property and awards of attorney fees. We affirm in part, reverse in part, and remand the matter for further proceedings consistent with this opinion.

BACKGROUND[2]

Petition for Divorce

¶2 Emily and Brandon married in July 1998 and separated in July 2019 after Brandon admitted to an extramarital affair that resulted in the birth of a child. Emily petitioned for divorce, citing irreconcilable differences and the affair. The parties had four children together, three of whom were minors at the time of Emily's petition. They shared a large marital estate, including a home and a business, RMT Equipment (RMT).

¶3 Brandon moved for the entry of temporary orders on custody and financial issues. In a declaration in support of his motion, he stated that his father, Brent Bonham, was "purchasing a property in February 2020" that Brandon planned "on renting from him, with a plan to purchase the property from him after the divorce has been finalized." Brent[3] did purchase a house (the Haven Oaks house) around that time for Brandon to live in, and less than a year later —long before the divorce was finalized—Brandon bought it from Brent.

¶4 The court entered a stipulated temporary order awarding Emily possession of the marital home and ordering Brandon to continue to operate RMT, while listing Emily as a general employee and paying her a salary of $2,000 per month. The court also ordered Brandon to pay Emily $4,000 per month as "family support," which was "intended ... to cover child support and spousal support." The court also ordered him to pay Emily's expenses for "fuel and maintenance on her automobile ... in the same manner and to a similar degree as she has used it in the past." Additionally, the court directed Brandon to pay Emily's and the children's health insurance costs. Each party was also "awarded their personal effects and personal items." And the temporary order required the parties to "share equally the costs of the extracurricular activities the children are already participating in."

¶5 Prior to trial, the parties stipulated that Brandon would pay $25,000 toward Emily's attorney fees. Emily's parents covered the fees she incurred beyond this amount as well as what the court later found amounted to $55,000 of her living expenses while the divorce was pending.

Pretrial Disclosures

***2** ¶6 Before trial, the parties submitted financial disclosures. In his first disclosure, filed in December 2019, Brandon did not list the Haven Oaks house as he had not yet purchased it from Brent. But on May 13, 2022, he submitted a second financial disclosure, in which he did list the Haven Oaks house as his real property. He stated that he had purchased the house in November 2020. This second financial disclosure also listed two substantial debts: $700,000 RMT owed to Zions Bank in Brent's name and $500,000 Brandon still owed to Brent for the purchase of RMT. In his third and final financial disclosure, Brandon listed a new house (the Rolling Brook house) as his real property, which he purchased in August 2022 using the equity from the sale of the Haven Oaks house.

¶7 As relevant here, Emily filed her second financial disclosure on the same day as Brandon's second disclosure. As part of her income, she listed the $4,000 in “family support” and the $2,000 salary paid by RMT. But she claimed that, after taxes, she actually received “two deposits of $898 per month” from RMT. Emily also listed the Haven Oaks house as her real property, though she indicated that Brandon's name was on the title. Her estimated value of the Haven Oaks house was “[b]ased on 2021 CMA and mortgage statement.”

Trial

¶8 At a four-day bench trial held in August and September 2022, the parties presented extensive evidence regarding the marital estate. We summarize that evidence below, insofar as it is relevant to our analysis.

Findings of Fact and Divorce Decree

¶9 At the close of the trial, the district court ordered each of the parties to submit proposed findings of fact and conclusions of law in lieu of closing arguments. Of note, in his proposed findings, Brandon pointed out, with our emphasis, that he “testified he would be willing to purchase *Emily's interest* in RMT for $1,500,000,” though he stated just a few lines later that he should be awarded the business at a “fair market value of $1,500,000.”

¶10 The court largely adopted Emily's proposed findings. The court ordered Brandon to pay Emily $1,926 per month in child support—an amount calculated to provide for the parties’ one child who remained a minor. The court also awarded Emily alimony. Regarding Emily's need for alimony, although the court found that she “could potentially earn gross income between $1,950 and $3,089 per month,” the court also found that because she “was and still is a full-time homemaker and caretaker for the parties’ minor child, who requires special attention due to lingering medical issues,” and because she was also “pursuing educational opportunities,” she was “not voluntarily unemployed.” The court thus concluded that she should not be imputed any income. And the court found that her monthly need was $9,107.

¶11 In addressing Brandon's ability to pay alimony, the court found that he “had the ability to earn $23,133.80 per month.” The court assumed a 20% tax rate on this income, reasoning that “Emily's suggested rate of 10%” was “low,” while “Brandon's estimate of 25%” did “not account for the fact that some of the income included in the calculation ... (i.e., the personal expenses paid by the company)” was taxed under the business. And the court stated that Brandon's claimed monthly expenses of “$14,137.69 (not counting expenses paid by his business) ... appear to be inflated.” The court noted that Brandon's claimed expenses “appear to include significant expenses for” his girlfriend and her four children, two of whom are also Brandon's.

¶12 The court next listed several reductions that should be made to the claimed expenses. For instance, the court found that Brandon's claimed childcare expense of $1,275 for the four other children “should be eliminated entirely.” But the court did not deduct the various reductions it listed or provide a specific number for what Brandon's reasonable monthly expenses should be. The court found that “Brandon's expenses are inflated by at least $4,000 per month” because he included as an expense the family support payments he made pursuant to the court's temporary order. The court also determined that “Brandon inflated the expenses ... for his mortgage, HOA fee, electricity, natural gas, water, sewer, garbage, paid television, and internet.” But the court did not say by how much. The court next held that “Brandon should not be permitted to claim marital money to spend on the children he had with [his girlfriend] as an expense where such reduces his ability to pay alimony.” For example, the court noted that Brandon's claimed “$950 per month on food and household supplies” was inflated “[t]o the extent that [he] has claimed expenses associated with taking” his girlfriend and her children “out to dinner.” But the court did not say by how much. The court further stated that any expenses associated with clothing for the girlfriend's children “should be eliminated entirely.” And the court stated that Brandon's expenses for pet care and repairing the Haven Oaks house should be “reduced significantly.” But again, the court did not state by how much.

***3** ¶13 Despite not providing a specific figure for Brandon's reasonable monthly expenses, the court did determine that subtracting the $1,926 in child support from Emily's monthly needs left her with $7,181 in monthly expenses. The court ordered Brandon to pay this amount in alimony to Emily for 21 years, corresponding to the length of the parties' marriage.

¶14 Next, the court addressed arrearages on the child support and alimony awards. The court found that pursuant to its temporary order, Brandon had paid Emily $228,000 in child support and alimony during the pendency of the divorce. This was based on the $4,000 per month in "family support" and the $2,000 monthly payment to her as a listed general employee of RMT. The court found that Emily received only about $1,500 per month from RMT after taxes. Overall, the court found that, accounting for the new amounts for child support and alimony, and accounting for the amount that Emily actually received, Brandon owed her $127,959 for past unpaid child support and alimony.

¶15 The court then awarded Emily the marital home and ordered that its equity be divided equally between Brandon and Emily. Addressing the Haven Oaks house, the court found that Brandon had "used marital money to upgrade and repair the home" and had purchased it from his father in November 2020 but did not disclose the purchase to Emily until April 2022. Brandon later sold the Haven Oaks house and purchased the Rolling Brook house using the Haven Oaks equity. Although Brandon claimed that Brent gifted him money to help with the purchase of the Rolling Brook house, the court concluded that the equity in the house should nevertheless be divided equally between the parties "as a sanction for Brandon's failure to appropriately disclose his interest in the Haven Oaks home until more than 17 months after he had purchased it."

¶16 The court awarded RMT to Brandon. The court determined that "the best evidence of the value of the business, which is supported in great part by [Emily's expert's] testimony, is Brandon's evaluation as the owner." Pointing to Brandon's willingness to purchase Emily's interest in RMT for $1.5 million, the court found that "Brandon's own testimony and proposed findings suggest a value of" $3 million. The court reduced that valuation by the $500,000 debt Brandon owed Brent from the purchase of the business, making the total valuation $2.5 million. But the court declined to deduct from the valuation the alleged $700,000 debt RMT owed Zions Bank because "no documentation was provided verifying this debt and no payments were demonstrated." Alternatively, the court gave Brandon the option of selling RMT and equally dividing the proceeds with Emily.

¶17 The court addressed other marital assets, including a piano, which the court valued at $15,000, and Brandon's mountain bikes, which the court valued at $10,000. And in a spreadsheet attached to its findings, the court accounted for other marital assets, including 3 1/3 water shares, the total value of which the court found to be $10,000. The spreadsheet also listed Brandon's membership in a professional organization, YPO, as having a $2,000 value.

¶18 The court noted that the "parties were subject to the injunction set forth in Rule 109 of the Utah Rules of Civil Procedure," which prevented them from disposing of any marital property without the consent of the other party. And the court noted that its temporary order indicated that "the parties may not dissipate or liquidate any marital assets." But the court found that "Brandon intentionally violated the Rule 109 injunction and the Court's temporary orders on multiple occasions." The court found that "Brandon spent thousands of dollars on expensive toys, lavish gifts, vacations and other purchases during the litigation" and disclosed them only "after Emily independently discovered the purchases." And the court found that he "has not provided a full accounting of marital funds used to purchase the items."

***4** ¶19 The court found that Brandon dissipated "at least $367,599 from the marital estate and that he likely dissipated much more." The court listed as dissipation a host of Brandon's expenditures during the pendency of the divorce, including, as relevant here, an Airstream trailer, a BMW for one of the parties' daughters, jewelry for each of the parties' daughters, improvements to the Haven Oaks house, and paying off Emily's Yukon.[4]

¶20 Thus, the court held Brandon "in contempt of court pursuant to Utah Code § 78B-6-3 et seq." The court determined that sanctions were also appropriate under rule 26.1(f) of the Utah Rules of Civil Procedure because Brandon failed to disclose these dissipated assets. Accordingly, the court ruled that

> rather than paying Emily one-half of the amount ..., Brandon should pay Emily 75% of the determined value ... as a sanction for intentionally violating the Rule 109 injunction on multiple occasions, for intentionally violating the Court's temporary orders on multiple occasions, and

for failing to disclose information sufficient to accurately assess the marital estate or identify purchases that he made with marital funds.

¶21 Finally, the court determined that Emily was entitled to an award of attorney fees. The court found that except for the $25,000 Brandon stipulated to pay prior to trial, Emily's parents had covered her legal fees for her. But the court found that Brandon had paid his attorney fees out of the marital estate and that Emily should have that same opportunity. In calculating the amount of her attorney fees award, the court again noted that Emily should not be imputed any income because she was caring for the parties' remaining minor child, "who requires special attention due to lingering medical issues," and because she was pursuing further education. Thus, the court found that "Emily lacked the financial resources necessary to pay her basic living expenses during the litigation" and she lacked the "resources necessary to pay the additional expense directly associated with litigation."

¶22 In contrast, the court pointed out that Brandon had paid his attorney fees through RMT, "with marital funds using marital resources," and thus, "Emily has in fact paid for one-half of Brandon's costs and fees." The court reasoned, "Emily should be permitted to pay her expert witness costs and attorney fees with marital funds using marital resources." The court also found that "Brandon in fact has the ability to pay Emily's fees and costs" as he would "have significant excess income each month even after he pays his child support and alimony obligations." Therefore, the court concluded that "Emily should be allowed to pay her fees from the marital estate," minus the $25,000 she had already received for fees.

¶23 The court then issued a decree of divorce memorializing its findings and conclusions.

Motions to Amend

¶24 Emily filed a motion urging the court to amend its findings of fact. As relevant here, she argued that the award for the child support arrearage accounted for only one child, though for at least part of the pendency of the divorce, more than one of the parties' children were minors. As a result, she argued that the child support arrearage award and the total equalization payment would need to be increased.

¶25 Brandon filed his own motion asking the court to alter or amend its findings and the decree in several respects. First, he addressed the sanctions the court imposed. He argued that he had properly disclosed his purchase of the Haven Oaks house and so the sanction awarding Emily equity in the Rolling Brook house was improper. And he argued that he had disclosed much of what the court characterized as his dissipation—including the purchase of the Airstream trailer, a dirt bike, paying off Emily's Yukon, and providing for his girlfriend and other children—making inappropriate the sanction of awarding 75% of the total dissipation to Emily. Brandon also argued that the court had set the wrong date from which retroactive alimony was to run. And he argued the court had not properly addressed his ability to pay alimony.

***5** ¶26 Brandon further complained about the total arrearage the court had awarded to Emily. He argued that the line item for extracurricular activities for the parties' remaining minor child should be reduced and that the court failed to account for the amounts he had paid for those extracurriculars, Emily's health insurance, and her auto maintenance and fuel. And Brandon argued that the court had incorrectly found that Emily received only $1,500 of the $2,000 ordered to be paid from RMT because she had testified at trial that she received approximately $1,800 per month. Finally, he argued that "it would be error and double counting to require" him to repay what Emily's parents paid for her living expenses when the court had "specifically calculated the arrears to reflect what Brandon legally owed Emily."

¶27 Brandon also argued that the court "correctly accepted [his] valuation of RMT but utilized the incorrect number when it did so." He urged that he had "repeatedly testified at trial that RMT had a value of $1.5 million" and "never once indicated the value was $3 million." He argued that the court's findings introduced the $3 million valuation and that it should amend that finding to align with his consistent trial testimony.

¶28 Brandon also argued that he did not owe Emily any money for attorney fees because Emily's fees had been paid by her parents, who testified at trial that they intended it to be a gift to her. And he argued that the court had incorrectly calculated the amount he dissipated.

¶29 Brandon's motion to amend also addressed the court's $10,000 valuation of the water shares awarded to Emily, asserting that the shares were worth $10,000 each rather than in total. He asked the court to amend its findings to reflect this. He also argued that the court improperly "singled out" the piano, the mountain bikes, and his YPO membership in assigning them separate values. He argued that these items had already been awarded to him and should not be valued, but that even if they were, the court's valuations were not supported by the evidence. And he asserted that the YPO membership should have been allocated to him as an expense rather than an asset.

¶30 In responding to Brandon's motion to amend, Emily conceded that several of his claimed errors had merit. She agreed that the court should not have required Brandon to both pay the arrearage and reimburse Emily's parents for the $55,000 they paid for her living expenses during the pendency of the divorce. She agreed that her after-tax income from RMT had been miscalculated and that Brandon should receive credit for paying for her auto fuel during this period. And she recognized that, based on Brandon's testimony, the water shares should be valued at $10,000 each rather than $10,000 total, and she did "not object to the court making this edit."

¶31 But the court did not address any of these conceded errors in its order on the parties' motions to amend. The court agreed with Emily on several fronts. As relevant here, the court agreed that the child support arrearage should be increased to address the periods of time during the divorce when more than one of the parties' children were minors. The court found that only one of Brandon's claimed errors merited consideration: the retroactive start date for alimony. The court thus issued a supplemental divorce decree that clarified the date from which alimony should retroactively run. The court also corrected the amount of the support arrearage, finding that because Emily should have received a "child support and spousal support amount of $366,815," and because she had received only $209,000 during the pendency of the divorce, Brandon owed her $157,815 rather than the initial award of $127,959. The court adjusted the total equalization payment accordingly.

Post-Trial Attorney Fees[5]

***6** ¶32 As noted, the court awarded Emily attorney fees in the decree, reasoning that it was equitable to do so where Brandon had paid his legal fees from the marital estate. The court also later awarded her attorney fees for litigating Brandon's post-trial motion to amend.[6]

¶33 The court stated that the post-trial award of fees was proper under rule 102 of the Utah Rules of Civil Procedure, which allows the court to grant attorney fees "to enable the moving party to prosecute or defend the action" where it finds, among other things, that "the moving party lacks the financial resources to pay the costs and fees," "the nonmoving party has the financial resources to pay the costs and fees," "the costs and fees are necessary for the proper prosecution or defense of the action," and "the amount of the costs and fees is reasonable." Utah R. Civ. P. 102(a)–(b). In addressing these factors, the court stated that "as was true during the pendency of the divorce," Emily "currently cannot afford to pay the attorney fees" because she "continues to be a stay-at-home, full-time caretaker for the parties' child, who requires special attention due to medical issues" and because she was "pursuing her educational opportunities and was unemployed." The court also noted that Emily's alimony award "was calculated to only meet her monthly needs" and that "her share of the marital estate was not done in one lump sum" but would be distributed "over a ten-year period." In contrast, the court found that Brandon "has the entirety of his share of the marital estate at his disposal" and "continues to have the business." And the court noted that Brandon had "not indicated that his financial condition has significantly changed" since the previous finding about his ability to pay attorney fees.

¶34 The court also found that the fees Emily incurred were necessary to allow her to defend against Brandon's post-trial motion. And the court found that the affidavits filed by Emily's counsel had "descriptive information associated with the entries," that the fees were "appropriate given [her attorneys'] level of experience," and that her counsels' representation had resulted in "a favorable result on behalf of" Emily "given that the court fully denied" Brandon's "motion except one point" conceded by Emily. The court stated that "in looking closely at his motion to alter or amend the judgment," Brandon had "raised about two dozen separate issues and was unsuccessful in all but one, the length of alimony." Thus, the court was "not persuaded that the only reason he filed his motion was to address some errors that were introduced by" Emily. The court later entered a judgment memorializing the post-trial award of fees to Emily.

¶35 Brandon appeals.

ISSUES AND STANDARDS OF REVIEW

¶36 Brandon first argues that the district court erred in not correcting several conceded calculation errors in its amended findings of fact and amended divorce decree. Because the parties agree on the propriety of a remand to remedy these errors, we grant the remand to allow the court to address these errors in the first instance.

¶37 Next, Brandon argues the court improperly sanctioned him by awarding Emily equity in the Rolling Brook house and 75% of the total value of the assets the court found he dissipated. We review the award of equity as a sanction based on rule 26.1(f) of the Utah Rules of Civil Procedure for correctness. *See Bailey v. Bailey*, 2024 UT App 51, ¶ 21, 548 P.3d 519 ("A district court's interpretation of the Utah Rules of Civil Procedure is reviewed for correctness. For this reason, a court's decision regarding the adequacy of the party's disclosures is reviewed for correctness.") (quotation simplified). And we review the court's dissipation determinations for an abuse of discretion, though "we cannot affirm its determination when the trial court abuses its discretion by failing to enter specific, detailed findings supporting its financial determinations." *Rayner v. Rayner*, 2013 UT App 269, ¶ 4, 316 P.3d 455 (quotation simplified).

***7** ¶38 Brandon challenges the court's valuation of RMT and various other assets as well as the court's awards of alimony and the support arrearage on several fronts. We afford the district court "considerable discretion" in its "valuation of the marital property, the manner in which it distributed that property, and its alimony determination." *Rothwell v. Rothwell*, 2023 UT App 50, ¶ 33, 531 P.3d 225 (quotation simplified), *cert. denied*, 537 P.3d 1011 (Utah 2023). The court exceeds the sound exercise of its discretion "only if no reasonable person would take the view adopted by the district court, that is, if a misunderstanding or misapplication of the law resulted in substantial and prejudicial error, if the court's factual findings are clearly erroneous, or if the award is so seriously inequitable as to manifest a clear abuse of discretion." *Id.* (quotation simplified).

¶39 Lastly, Brandon challenges the court's awards of initial and post-trial attorney fees to Emily. "In divorce cases, both the decision to award attorney fees and the amount of such fees are within the trial court's sound discretion." *Miner v. Miner*, 2021 UT App 77, ¶ 108, 496 P.3d 242 (quotation simplified).

ANALYSIS

I. Conceded Calculation Errors

¶40 Brandon argues that the district court failed to correct what amounted to "over $100,000" in calculation errors, which he partially faults Emily for introducing in her proposed findings. In particular, he argues that the court (1) erred in requiring him to both pay the arrearage and reimburse Emily's parents for $55,000 of expenses they paid on her behalf during the pendency of the divorce, (2) miscalculated the amount of after-tax pay Emily received from RMT by $11,400, (3) failed to credit Brandon for $15,200 he paid for Emily's auto fuel, and (4) undervalued the water shares Emily received by $23,000. Brandon faults the court for failing to correct these issues without explanation despite Emily's post-trial concessions of error. He argues we should remand for the district court to do so now.

¶41 On appeal, Emily acknowledges that the "district court rejected [her] concessions but did not explain why." And she "agrees the lack of factual findings" on these issues "is inadequate for appellate review and suggests this court remand." Given the parties' agreement, we remand to allow the district court to address these issues, making adequate findings in doing so. *See Krajeski v. Krajeski*, 2025 UT App 19, ¶ 30, 565 P.3d 544 ("There must be adequate factual findings to reveal how the court reached its conclusions and to establish that the court's judgment or decree follows logically from, and is supported by, the evidence.") (quotation simplified), *cert. denied*, 574 P.3d 519 (Utah 2025).

II. Sanctions

¶42 The district court sanctioned Brandon by awarding Emily half of the equity in the Rolling Brook house and 75% of the value of assets it found he dissipated. We reverse both sanctions and remand for the district court to make further findings regarding both the Rolling Brook house and Brandon's dissipation.

A. Equity in the Rolling Brook House

¶43 Based on Brent's and Brandon's testimony at trial, the district court found that Brent purchased the Haven Oaks house for Brandon in January 2020 and that Brandon purchased it from Brent in November 2020 but "did not disclose the fact that he had purchased the home to Emily until April of 2022." The court also found that Brandon later sold the Haven Oaks house and used the equity to purchase the Rolling Brook house. Although Brandon asserted that a portion of the funds used to purchase the Rolling Brook house were a gift from Brent, the court stated that it "need not determine" the particulars of Brent's gift or whether the Rolling Brook house "was Brandon's separate property" because it was "appropriate to award" equity in the Rolling Brook house to Emily "as a sanction for Brandon's failure to appropriately disclose his interest in the Haven Oaks house until more than 17 months after he had purchased it."

***8** ¶44 The court relied on rule 26.1 of the Utah Rules of Civil Procedure, which requires each party to "serve on all other parties a fully completed Financial Declaration," along with "[d]ocuments verifying the value of all real estate in which the party has an interest." Utah R. Civ. P. 26.1(c), (c)(5). And rule 26.1(f), which the court directly cited, provides that "[f]ailure to fully disclose all assets and income in the Financial Declaration ... 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."

¶45 Brandon argues that rule 26.1(f) does not provide a basis for awarding Emily equity in the Rolling Brook house. He points out that "an award of non-disclosed assets to the other party ... or other sanctions deemed appropriate by the court"—the only potential bases for this sanction—are not actually listed as sanctions available under rule 37 of the Utah Rules of Civil Procedure, as the language of rule 26.1(f) suggests. *See id.* R. 37(b). And he argues that even if the sanction imposed here was somehow drawn from rule 37, sanctions under that rule are available only "upon motion" based on a "violation of a specific court order"—neither of which were present here. *Bailey v. Bailey*, 2024 UT App 51, ¶ 27, 548 P.3d 519 (quotation simplified). *See id.* ("Rule 37 ... is not self-executing: a party wishing to take advantage of its more expansive sanctions menu must first obtain a discovery order from the court."); Utah R. Civ. P. 37(b) ("[T]he court, upon motion, may impose appropriate sanctions for the failure to follow its orders[.]"). We take Brandon's point.[7] But we need not answer the question posed by the rules because even assuming that awarding equity in the Rolling Brook house to Emily was a sanction available to the court under rule 26.1(f), it was improperly imposed here, where Brandon technically complied with the disclosure requirements of the rule.

¶46 When Brandon filed his first financial disclosure, he was not yet the owner of the Haven Oaks house and so did not disclose it. But by the time he filed his second financial disclosure, he was the owner of the house and he disclosed as much. To the extent that the court imposed this sanction out of concern for this disclosure's tardiness, Emily was not harmed. Brandon filed his second disclosure on May 13, 2022, several months before trial. Emily's second financial disclosure—filed on the same day as Brandon's—included the Haven Oaks house. She argues she "could not have known that Brandon shifted from 'renter' to 'owner' without him saying so," but logically speaking, she had to have had prior knowledge of Brandon's interest in the Haven Oaks house to include it in her own disclosure. And the record indicates that she did. In his request for a temporary order, Brandon stated his intent to purchase the Haven Oaks house, albeit after the divorce was finalized. Emily's listing of Brandon as the owner of the Haven Oaks house and valuing it "[b]ased on 2021 CMA and mortgage statement" shows that she anticipated Brandon following through with his plan.

***9** ¶47 Because Brandon disclosed his ownership of the Haven Oaks house, there was no basis to award Emily equity in the Rolling Brook house—which Brandon purchased during the divorce using, in part, his equity in the Haven Oaks house—as a sanction. We thus reverse and remand this issue for the district court to determine in the first instance whether the Rolling Brook house is Brandon's separate property and to adjust its property distribution accordingly. *See Stonehocker v. Stonehocker*, 2008 UT App 11, ¶ 15, 176 P.3d 476 (stating that in making a property distribution, the district court must first "identify the property in dispute and determine whether each item is marital or separate property").

B. Dissipation

¶48 The district court found that Brandon dissipated at least $367,599 from the marital estate, but it ordered that

> rather than paying Emily one-half of the amount ..., Brandon should pay Emily 75% of the determined value ... as a sanction for intentionally violating the Rule 109 injunction on multiple occasions, for intentionally violating the Court's temporary orders on multiple occasions, and for failing to disclose information sufficient to accurately assess the marital estate or identify purchases that he made with marital funds.

Brandon asserts that several of the purchases he made during the pendency of the divorce—including the Airstream trailer, the BMW, jewelry for the parties' daughters, improvements to the Haven Oaks house, and cars for him and his girlfriend—did not amount to dissipation in the first place. And he argues that using the dissipation award to impose this sanction was inappropriate.

¶49 In assessing whether dissipation occurred, courts should consider several factors:

> (1) how the money was spent, including whether funds were used to pay legitimate marital expenses or individual expenses; (2) the parties' historical practices; (3) the magnitude of any depletion; (4) the timing of the challenged actions in relation to the separation and divorce; and (5) any obstructive efforts that hinder the valuation of the assets.

Hillam v. Hillam, 2024 UT App 102, ¶ 46, 554 P.3d 1137 (quotation simplified). This is "a case-specific inquiry that's best determined by the district court in the first instance." *Id.* ¶ 64. And "its use must be supported by sufficiently detailed findings of fact that explain the ... court's basis for such deviation" from the general rules regarding division of marital property. *Rayner v. Rayner*, 2013 UT App 269, ¶ 21, 316 P.3d 455 (quotation simplified).

¶50 Here, the district court's findings do not show that the court considered the above dissipation factors, other than Brandon's "obstructive efforts that hinder[ed] the valuation of the assets." *Hillam*, 2024 UT App 102, ¶ 46, 554 P.3d 1137 (quotation simplified). And even in doing that, the court considered the obstructive efforts only as to certain expenditures. The court's findings also do not "disclose the steps by which the ultimate conclusion" regarding the value of the various expenditures was reached. *Krajeski v. Krajeski*, 2025 UT App 19, ¶ 30, 565 P.3d 544 (quotation simplified), *cert. denied*, 574 P.3d 519 (Utah 2025). For instance, the court found that Brandon dissipated $60,000 in buying the Airstream trailer. Elsewhere in its findings, the court concluded that, based on Brandon's testimony, "he made $25,000 in profits from the sale of" the trailer. The court found that Emily should "be awarded $12,000 representing her interest in the Airstream" and stated that this "amount is incorporated into the $60,000 amount" of dissipated funds. But the court did not later discuss how it reached the $60,000 figure. Similarly, the court listed the cost of installing a cement pad and garage doors for the Haven Oaks house as $11,500 and $7,000 respectively. The court stated that these figures came from "Exhibit 37," which we take to mean Emily's trial exhibit. But in looking at that trial exhibit, there are different figures listed for the cement pad and garage door. The court did not explain why it chose these particular figures.

***10** ¶51 To be sure, "unstated findings can be implied if it is reasonable to assume that the trial court actually considered the controverted evidence and necessarily made a finding to resolve the controversy, but simply failed to record the factual determination it made." *Cox v. Cox*, 2023 UT App 62, ¶ 33, 532 P.3d 128 (quotation simplified). But "we will not imply any missing finding where there is a matrix of possible factual findings and we cannot ascertain the trial court's actual findings." *Id.* (quotation simplified). And "it is not our responsibility to comb the record" to do so. *Prisbrey v. Prisbrey*, 2026 UT App 39, ¶ 23, 588 P.3d 329.

¶52 This lack of detail requires a remand for the court to reconsider its dissipation determination, making adequate findings in doing so. *See Rayner*, 2013 UT App 269, ¶ 23, 316 P.3d 455. But because the issue will arise again on remand, we address the propriety of the sanction the court chose: awarding Emily 75% of the total dissipation amount. *See Young H2ORE v. J&M Transmission LLC*, 2024 UT App 10, ¶ 48, 543 P.3d 1264 (offering "guidance" on "issues ... certain to arise again on remand").

¶53 "Where one party has dissipated an asset, hidden its value or otherwise acted obstructively, the trial court may, in the exercise of its equitable powers ... hold one party accountable to the other for the dissipation of marital assets." *Goggin v. Goggin*, 2013 UT 16, ¶ 49, 299 P.3d 1079 (quotation simplified). "[W]hen the court conducts its equitable distribution of the marital property, the other spouse should receive a credit for his or her share of the assets that were dissipated." *Id.* Because "marital property is ordinarily divided equally between the divorcing spouses," "the amount of that credit ... should ordinarily be half of the dissipated marital funds." *Ball v. Ball*, 2025 UT App 200, ¶ 16, 584 P.3d 330 (quotation simplified). *See Goggin*, 2013 UT 16, ¶ 47, 299 P.3d 1079 ("Generally, each party is presumed to be entitled to all of his or her separate property and *fifty percent* of the marital property.") (emphasis added; quotation otherwise simplified). Thus, we conclude that awarding Emily 75% of the dissipation total as a sanction was improper—no matter the rule on which the award was premised.

¶54 On remand, after determining what dissipation occurred, the court should award Emily half of the total.[8]

III. Property Valuations

A. RMT

¶55 Brandon argues that the court "purported to accept" his $1.5 million valuation of RMT but mistakenly "used the wrong number"—$2.5 million—in its findings and decree. And he argues that this valuation should have accounted for the $700,000 debt RMT owed to Zions Bank through Brent. We disagree on both fronts.

¶56 The district court did not wholesale "accept[ ] Brandon's valuation and reject[ ] Emily's," as Brandon argues. Because the court found that Brandon's expert's testimony about the value of the business was "unhelpful" and "unreliable," it gave the testimony "little weight," as was its prerogative. *See Wadsworth v. Wadsworth*, 2022 UT App 28, ¶ 59, 507 P.3d 385, *cert. denied*, 525 P.3d 1259 (Utah 2022). On the other hand, the court found that Emily's expert's testimony was "helpful" and "credible," though the court noted that "it can't be said that any of the predictions are 100% accurate, and indeed are not held out to be." Accordingly, the court found that "the best evidence of the value of the business, which is supported in great part by [Emily's expert's] testimony, is Brandon's evaluation as the owner."

***11** ¶57 But Brandon's valuation was inconsistent. He testified at trial that RMT was worth $1.5 million. And in his proposed findings he stated that he "should be awarded RMT ... for a fair market value of $1,500,000," though he stated a few lines later in those same proposed findings, with our emphasis, that "he would be willing to purchase *Emily's interest* in RMT for $1,500,000," suggesting a value of $3 million if Emily's share equates to $1.5 million. At oral argument before this court, Brandon's counsel referred to this latter statement as an erroneous "one-off." Yet the district court found that "Brandon's own testimony and proposed findings suggest a value of" $3 million. And this comported with Emily's expert's valuation of $3,444,000. Accounting for the $500,000 debt the court found that RMT owed Brent, the $2.5 million valuation was "within the range of values established by all the testimony." *Id.* ¶ 64 (quotation simplified). *See Knowlton v. Knowlton*, 2023 UT App 16, ¶ 60, 525 P.3d 898 ("Merely failing to accept one party's proposed valuations does not constitute an abuse of discretion.") (quotation simplified), *cert. denied*, 531 P.3d 730 (Utah 2023).

¶58 And it was reasonable for the court to exclude the claimed $700,000 debt from this valuation. The court found that the "unrebutted testimony and evidence at [t]rial" showed that Brandon owed Brent $500,000 for the purchase of RMT. The court pointed out that Brent "testified unequivocally that the $500,000 debt is a legitimate debt which he expects to be repaid" and was the remainder of what Brandon owed him. But the same could not be said for the $700,000 debt. The court found that "no documentation was provided verifying this debt and no payments were demonstrated." Brandon argues that a Zions Bank representative's trial testimony obviated the need for such documentation. But "[b]ecause determinations regarding the weight to be given to the testimony of witnesses ... are within the province of the finder of fact, we will not second guess a court's decisions about evidentiary weight and credibility if there is a reasonable basis in the record to support them." *Barrani v. Barrani*, 2014 UT App 204, ¶ 6, 334 P.3d 994. And here the lack of any kind of documentation of a large debt owed to a bank was certainly a reasonable basis on which not to credit the representative's testimony that such a debt existed.

¶59 Thus, the court did not exceed its discretion in valuing RMT.[9]

B. Brandon's Personal Property

¶60 Brandon also argues the district court abused its discretion in "randomly assigning value" to several pieces of his personal property—including the piano, mountain bikes, and his YPO membership—and allocating them to his share of the marital estate. He argues that the court's temporary orders, which awarded the parties "their personal effects and personal items," had already disposed of this property and thus there "was no basis to single out these items previously divided, nor was there evidentiary support for the assigned values."

¶61 But the court did not improperly "single out" these assets to be valued. *See Goggin v. Goggin*, 2013 UT 16, ¶ 48, 299 P.3d 1079 ("The court is permitted to look at the marital property in its entirety and to apportion it in a manner that best facilitates a clean break between the parties and achieves a result that equitably divides the marital property as a whole.") (quotation simplified). And temporary orders are just that—temporary. *See Miner v. Miner*, 2021 UT App 77, ¶ 101, 496 P.3d 242 ("An arrangement memorialized in a temporary order can of course be changed, in a final decree of divorce, after a court hears all of the evidence during a full trial.").

¶62 There was also evidence to support at least the court's valuations of the piano and the mountain bikes. Brandon testified at trial that the parties bought the piano from his parents for $10,000, while Emily testified that she thought it was worth "40 grand" and that Brandon's parents had helped them pay for it. The court's valuation of $15,000 was thus reasonable—more closely approximating Brandon's estimate than Emily's. As to the mountain bikes, in her proposed findings, Emily asserted that Brandon had two mountain bikes worth $5,000 each. The $10,000 value the court assigned to the bikes was thus reasonable, especially given Brandon's silence on the matter. *See* *Wadsworth v. Wadsworth*, 2022 UT App 28, ¶ 64, 507 P.3d 385 ("Generally, we will uphold a district court's valuation of marital assets as long as the value is within the range of values established by all the testimony[.]") (quotation simplified), *cert. denied*, 525 P.3d 1259 (Utah 2022).

***12** ¶63 But we can discern no evidence in the record regarding the $2,000 value the court assigned to Brandon's YPO membership. And "without findings from which we can ascertain how the ... court categorized and valued the property, we cannot assess the merits of the challenges to its distribution." *Stonehocker v. Stonehocker*, 2008 UT App 11, ¶ 24, 176 P.3d 476. So, while we affirm the court's valuation of the piano and the mountain bikes, we remand to the district court to make specific findings regarding the value of the YPO membership.[10]

IV. Alimony and Support Arrearage

¶64 Brandon argues that the district court abused its discretion in its calculations of both alimony and the support arrearage owed to Emily. For the following reasons, we remand for the court to address both.

A. Alimony

¶65 "The appropriate amount of any alimony award is governed by a multi-factor inquiry, first articulated in *Jones v. Jones*, 700 P.2d 1072 (Utah 1985)." *Miner v. Miner*, 2021 UT App 77, ¶ 16, 496 P.3d 242. "The so-called *Jones* factors ... require a court to examine (i) the financial condition and needs of the recipient spouse; (ii) the recipient's earning capacity or ability to produce income; and (iii) the ability of the payor spouse to provide support." *Id.* (quotation simplified). "In all cases, the trial court must support its alimony determinations with adequate findings on all material issues." *Id.* ¶ 17 (quotation simplified). Brandon argues the court's findings did not adequately address two of the *Jones* factors—Emily's need and his ability to pay.

1. Emily's Need

a. Imputed Income

¶66 Brandon argues that the court should have imputed income to Emily when determining her need for alimony. "Trial courts have broad discretion to select an appropriate method of assessing a spouse's income, including determinations of income imputation." *Godfrey v. Godfrey*, 2024 UT App 156, ¶ 51, 560 P.3d 151 (quotation simplified). Because "we will find that the trial court abused its discretion only if no reasonable person would take the view" the court did, Brandon "bears a heavy burden" here. *Id.* (quotation simplified). And he has not met it. Despite the court's findings that "Emily could potentially earn gross income between $1,950 and $3,089 per month," it nonetheless concluded that because she "was and still is a full-time homemaker and caretaker for the parties' minor child, who requires special medical attention due to lingering medical issues," and because she was also "pursuing educational opportunities," she was "not voluntarily unemployed" and should "not be imputed any income." We perceive no abuse of discretion on this point.

b. Extracurricular Costs

¶67 In the divorce decree, the court ordered the parties to "equally share costs associated with the minor children's extracurricular activities." The court found this cost to be $490 per month. Brandon argues that this expense should be reduced based on the representation by his attorney at trial that the cost of the parties' remaining minor child's soccer was $2,400 per year, which he works out to total just $100 per month for each parent. But as far as we can tell, this representation by counsel was not substantiated by evidence on the record. Nor was there any indication that this was the only extracurricular expense for this child. And Emily testified that the extracurricular expenses were "[d]efinitely a bit higher when ... more children [were] involved," although she conceded that with one minor child, "it won't be as much." All things considered, we see no abuse of discretion in including this extracurricular cost among Emily's needs.

2. Brandon's Ability to Pay

a. Reasonable Monthly Expenses

***13** ¶68 Brandon argues that in calculating his ability to pay alimony, the court failed to make an express finding of what his reasonable monthly expenses were. We agree.

¶69 Brandon claimed that his monthly expenses totaled $14,137.69. The court found that this was "inflated" and should be "reduced." Other than determining that the $1,275 he spent on childcare for the children he shared with his girlfriend "should be eliminated entirely," the court did not specify any other reductions. For instance, while the court found that Brandon "inflated" the cost of "his mortgage, HOA fee, electricity, natural gas, water, sewer, garbage, paid television and internet" and his "claimed expenses associated with taking" his girlfriend and other children "out to dinner," it did not say by how much. The court also stated that Brandon's expenses for pet care and repairing the Haven Oaks house should be "reduced significantly." But again, the court did not explain by how much. And the court did not provide a net number for what Brandon's reasonable monthly expenses should be after these reductions.

¶70 In *Taft v. Taft*, 2016 UT App 135, 379 P.3d 890, the district court found that a wife's "claimed monthly expenses ... were unreasonably inflated," but it "did not determine the expenses that it considered reasonable." *Id.* ¶ 28 (quotation simplified). We concluded that "[t]he lack of detailed findings in this respect makes it impossible for us to determine on review whether the ... alimony award was proper." *Id.* So too here. "Although the trial court entered lengthy findings after patiently enduring" the trial, its failure to make both a numeric global finding about Brandon's reasonable monthly expenses and more detailed findings about exactly what the reductions to those expenses should be leaves us "hampered in our review." *See Stonehocker v. Stonehocker*, 2008 UT App 11, ¶ 18, 176 P.3d 476. On remand, the district court will need to make such findings.[11]

b. Expenses Paid by RMT

¶71 In Brandon's view, the district court should have included the $4,733.77 he testified that RMT paid on his behalf each month toward his personal expenses. We disagree. In the decree, the court stated that "[t]he most difficult part[ ] in calculating Brandon's income is personal expenses RMT pays on his behalf." In trying to determine this, the court found that $2,816.77 of what RMT paid monthly was used "so that Brandon could go on vacations" and that "[t]o the extent that the funds were spent to take [his girlfriend] and their children on vacation, such should be considered income available to Brandon to pay alimony." Thus, it was appropriate for the court to credit this as income and not as an expense.[12]

c. Tax Rate

***14** ¶72 The court assumed "a 20% tax rate" in calculating Brandon's income and ability to pay alimony, reasoning that Emily's "suggested rate of 10%" was "low," while "Brandon's estimate of 25%" did "not account for the fact that some of the income included in the calculation ... (i.e., the personal expenses paid by the company)" was taxed under the business. Brandon points out that the 20% rate does not indicate whether it also encompasses state and federal taxes as well as FICA and Medicare deductions. We agree, and on remand the district court should clarify why it chose the tax rate it applied to Brandon's income.

B. Support Arrearage

¶73 Under the court's temporary orders, in effect during the pendency of the divorce proceedings, Brandon was required to pay Emily $4,000 per month "as family support" and $2,000 per month as salary from RMT. He was also required to pay for "fuel and maintenance" on Emily's car and for her and their children's health insurance. And the parties were ordered to "share equally the costs of the extracurricular activities the children are already participating in."

¶74 Based on Emily's financial disclosure and trial testimony, the court found that Emily received only $1,500 per month from RMT after taxes and, thus, that she received a total of $209,000 from RMT and in "family support" during the pendency of the divorce. But the court determined that based on its child support and alimony findings, she should have received a total of $336,959 during that time. Subtracting the $209,000 from that sum, the court determined that Brandon owed Emily $127,959 in unpaid support. But in its supplemental decree, the court recognized that the parties had more than one minor child during the pendency of the divorce and the child support therefore should have been higher. The court thus increased the amount owed to $157,815.

¶75 Brandon argues on appeal that the total arrearage should be reduced to account for payments he made for Emily's health insurance, for her auto fuel and maintenance, and for his half of their children's extracurriculars during the pendency of the divorce. And he argues that the court should not have increased child support retroactively.

¶76 As noted, Emily conceded error in the court's calculation of her income from RMT and Brandon's payment of her auto fuel costs during the pendency of the divorce. *See supra* ¶ 30. And she agrees with Brandon that the arrearage should exclude the amount he paid for her health insurance. So on remand, the court must alter the total arrearage owed after making the necessary corrections on these points.

¶77 But we are not persuaded that the trial court exceeded its discretion in not reducing the amount of the arrearage based on auto maintenance, extracurricular costs, or the additional child support. Brandon argues he should be credited for having paid $250 per month for Emily's auto maintenance during the pendency of the divorce. But there was no evidence that he did pay that amount. To the contrary, Emily testified at trial that despite the temporary order requiring Brandon to pay "for regular maintenance" of her car, when she had to replace the shocks on the car, she borrowed $6,000 from her parents. There was likewise no evidence that Brandon was paying his share of the extracurricular costs during the course of the divorce proceeding. Indeed, Emily testified that in an email, Brandon told her that he would provide a cell phone, car insurance, and health insurance for the children but had stated, "Other financial support from me needs to be part of a relationship they each have individually with me." She also testified that Brandon had entirely refused to pay extracurricular costs for one of the children while she was still a minor. And we disagree with Brandon's bare assertion that "an increase in the child support amount would have decreased the alimony amount for the relevant period" and thus reduced the overall arrearage owed. The court did not treat child support and alimony interdependently or proportionally such that increasing one would decrease the other.

V. Attorney Fees

***15** ¶78 Brandon challenges the district court's initial and post-trial awards of attorney fees to Emily. While we affirm the court's decision to order the initial fee award, we remand for the district court to reassess the amount. And we reverse the post-trial fee award and remand for the court to make further findings regarding Emily's request for those fees.

A. Initial Fee Award

¶79 The district court initially awarded Emily attorney fees based on its conclusion that "where Brandon has paid his expert witness costs and attorney fees with marital funds using marital resources, Emily has in fact paid for one-half of Brandon's costs and fees" and she "should be permitted to pay her expert witness costs and attorney fees with marital funds using marital resources." The court further determined, "The attorney fees Emily incurred were reasonable in light of the relatively complex nature of the issues and the amount of time necessary to litigate them." Brandon argues that the court erred in making this award without first "making the requisite determinations under [Utah Code] section 81-1-203 or rule 102." *See* Utah Code Ann. § 81-1-203 (LexisNexis 2025); Utah R. Civ. P. 102. And he argues that Emily provided only "wholly redacted" billing statements, leaving the court unable to adequately determine the reasonableness of her requested fees.

¶80 "In Utah, attorney fees are awardable only if authorized by statute or by contract." *Silva v. Silva*, 2018 UT App 210, ¶ 26, 437 P.3d 593 (quotation simplified). But "in the absence of a statutory or contractual authorization, a court has inherent equitable power to award reasonable attorney fees when it deems it appropriate in the interest of justice and equity." *Id.* (quotation simplified). *See Goggin v. Goggin*, 2013 UT 16, ¶ 34, 299 P.3d 1079 ("A court making an equitable award of attorney fees must ascertain whether the equities of a given case justify the use of its inherent and discretionary power to award fees.") (quotation simplified).

¶81 In *Dahl v. Dahl*, 2015 UT 79, 459 P.3d 276, a divorcing wife argued that her husband "was allowed to pay his attorney fees from marital assets, while she was denied the same privilege." *Id.* ¶ 207. Though it concluded that the wife had not preserved the argument, our Supreme Court "agree[d] that such a result would be inequitable." *Id.* Based on this statement in *Dahl*, we see no abuse of discretion in the district court's determination that here it would be inequitable to allow Brandon to pay his attorney fees out of the marital estate while not allowing Emily to do the same. *Cf. Knowlton v. Knowlton*, 2023 UT App 16, ¶ 87, 525 P.3d 898 (affirming the district court's dissipation finding based on the "obvious imbalance" resulting from a husband's "virtually unfettered access to the marital funds during the pendency of the divorce proceedings and his use of those funds to pay his legal expenses without providing" his former wife "a similar benefit") (quotation simplified), *cert. denied*, 531 P.3d 730 (Utah 2023).

¶82 But the amount of those fees must be reasonable. *See Silva*, 2018 UT App 210, ¶ 26, 437 P.3d 593 (recognizing that "a court has inherent equitable power to award *reasonable* attorney fees") (emphasis added; quotation otherwise simplified). And the district court's statement that "[t]he attorney fees Emily incurred were reasonable in light of the relatively complex nature of the issues and the amount of time necessary to litigate them" glosses over this. So while we affirm the court's decision to award attorney fees on an equitable basis, we vacate the amount of the award and remand for the court to reassess it in light of the detailed findings it must make to support its award. *See CWS, LLC v. Montgomery*, 2025 UT App 183, ¶ 49, 583 P.3d 373 ("Utah appellate courts have consistently encouraged trial courts to make findings to explain the factors which they considered relevant in arriving at an attorney fee award.") (quotation simplified).

B. Post-Trial Fee Award

***16** ¶83 The district court also awarded Emily attorney fees for litigating Brandon's post-trial motion to amend the divorce decree. Brandon argues that this fee award was based on "the same flawed reasoning" that the court relied on in making its initial award and that reasoning no longer applied in the post-trial context. We have just concluded that the reasoning there was not flawed. And while that reasoning—premised on equitably dividing the marital estate—does not apply here, in the post-trial and post-decree context in which the marital estate has already been divided, the district court did not rely solely on equitable considerations in making the post-trial fee award.

¶84 In its order, the court stated that "[a]fter analyzing the factors outlined in rule 102, the award of attorney fees" was "proper." Rule 102 of the Utah Rules of Civil Procedure provides that "either party may move the court for an order requiring the other party to provide costs, attorney fees, and witness fees ... to enable the moving party to prosecute or defend the action." Utah R. Civ. P. 102(a). "Such an award must be based on evidence of the receiving spouse's financial need, the payor spouse's ability to pay, and the reasonableness of the requested fees." *Krajeski v. Krajeski*, 2025 UT App 19, ¶ 53, 565 P.3d 544 (quotation simplified), *cert. denied*, 574 P.3d 519 (Utah 2025). *See* Utah R. Civ. P. 102(b). "When a court decides to award fees, it must make detailed findings of fact supporting its determination." *Miner v. Miner*, 2025 UT App 64, ¶ 30, 571 P.3d 788 (quotation simplified), *cert. denied*, 574 P.3d 526 (Utah 2025).

¶85 The court noted that "as was true during the pendency of the divorce," Emily could not "afford to pay the attorney fees" as she was still a stay-at-home mother, caring for the parties' minor child, "who requires special attention due to medical issues," and pursing her education. The court also stated that the alimony award was calculated only to meet Emily's monthly needs and that she would receive her share of the marital estate over the next 10 years rather than in a lump sum. In contrast, the court found that Brandon "continue[d] to have the financial resources that he had at the time of trial to pay" Emily's fees because he had "the entirety of his share of the marital estate at his disposal" and "continue[d] to have the business." The court also stated that Brandon had "not indicated that his financial condition has significantly changed since" the court previously "found he has the ability to pay."

¶86 The court further found that the fees Emily incurred were necessary to defend against Brandon's motion to amend and that they were reasonable. The court stated that it was "not persuaded that the only reason that [Brandon] filed his motion was to address some errors that were introduced by" Emily because "in looking closely at his motion to alter or amend the judgment," Brandon "raised about two dozen separate issues and was unsuccessful in all but one, the length of alimony."

¶87 While the court clearly articulated the reasonableness of making a post-trial fee award, it did not make adequate findings regarding Emily's need for the fees, Brandon's ability to pay them, or the reasonableness of the fees Emily incurred. And given the adjustments that will need to be made to the parties' income and expenses on remand, the court will also need to make more detailed findings of fact on these points. *See Leppert v. Leppert*, 2009 UT App 10, ¶ 26, 200 P.3d 223.[13] We accordingly reverse the post-trial fee award and remand for the district court to revisit the issue after making the necessary findings of fact.

CONCLUSION

***17** ¶88 Based on the foregoing, we remand to the district court to address several parts of its findings and decree. First, based on the parties' agreement, the court should address errors in its calculation of Emily's living expenses, salary from RMT, and her auto fuel costs during the pendency of the divorce, as well as the value of the water shares she was awarded.

¶89 Next, we reverse the award of equity in the Rolling Brook house to Emily, as Brandon technically complied with his duty to disclose his ownership of the Haven Oaks house. On remand, the district court should categorize the Rolling Brook house as either marital property or Brandon's separate property and adjust its property distribution accordingly.

We also reverse the court's award of 75% of Brandon's total dissipation and remand for the court to make adequate findings regarding what dissipation occurred in the first place, awarding Emily half of that total.

¶90 While we conclude that the court did not exceed its discretion in its valuation of RMT and most of Brandon's personal property, on remand the court is instructed to make specific findings regarding the value it assigned to his YPO membership.

¶91 While we affirm the court's determinations regarding Emily's need for alimony and her ability to produce income, we reverse and remand for the court to address Brandon's ability to pay—in particular, his reasonable monthly expenses and tax rate—in greater detail. And on remand, the court will need to recalculate the support arrearage, incorporating its new findings regarding Emily's income from RMT and the auto fuel and health insurance costs Brandon has already paid.

¶92 Finally, while we affirm the court's decision to make an initial award of attorney fees to Emily, we remand for the district court to determine the reasonable amount for such an award once adequate findings have been made. And we reverse the post-trial attorney fees award and remand to allow the court to make adequate findings on Emily's need, Brandon's ability to pay, and the reasonableness of the fees Emily incurred, especially in light of the adjustments necessitated by this opinion.

All Citations

--- P.3d ----, 2026 WL 2679017, 2026 UT App 141

Footnotes

1 For convenience, we refer to the parties by their first names, with no disrespect intended.

2 On appeal from a bench trial, "we view the evidence in a light most favorable to the trial court's findings, and therefore recite the facts consistent with that standard," presenting "conflicting evidence to the extent necessary to clarify the issues raised on appeal." *Mintz v. Mintz*, 2023 UT App 17, n.3, 525 P.3d 534 (quotation simplified), *cert. denied*, 531 P.3d 730 (Utah 2023).

3 We also refer to Brent by his first name, again with no disrespect intended.

4 Emily concedes that this last expense should not have been included as dissipation. *See infra* note 8.

5 At this point in the proceedings, Judge Richard D. McKelvie, who entered the original and amended divorce decrees retired and was replaced by Judge Coral Sanchez, who entered the post-trial attorney fees award.

6 Emily did not request fees incurred in connection with her own post-trial motion.

7 Much of the parties' briefing was devoted to highlighting the procedural problem with rule 26.1(f) and rule 37 of the Utah Rules of Civil Procedure, namely, whether sanctions imposed under rule 26.1(f) must follow the procedure laid out in rule 37(b), despite rule 26.1(f)'s inclusion of sanctions not listed in the "expansive sanctions menu" under rule 37(b). *Bailey v. Bailey*, 2024 UT App 51, ¶ 27, 548 P.3d 519. *See id.* ¶ 31 n.7 ("[I]t is far from apparent to us that the language of rule 26.1(f) authorizes rule 37 sanctions in the absence of a court order[,] ... especially given the plain language of rule 37(b) and our case law."). Though we leave this procedural problem for another day, we urge the Utah Supreme Court's Advisory Committee on the Rules of Civil Procedure to address and clarify the interplay between these rules.

8 Brandon conceded at trial that he dissipated $61,000. And on appeal, he appears not to challenge an additional $49,556 that the court found he dissipated. Emily also conceded post-trial and on appeal that the $40,000 Brandon paid on her Yukon should not have been included as dissipation. In reassessing its dissipation award, the court should account for these figures.

9 We note that had Brandon been of the view that the court was overvaluing RMT, he could have taken the court up on its alternative suggestion to sell the business and divide "all proceeds equally with Emily." But he did not.

10 Brandon argues that the YPO membership should have been included as one of his expenses, rather than an asset. But because we cannot review how the court categorized the membership without adequate findings, the court may address this argument on remand.

11 In opposing Brandon's motion to amend the findings, Emily conceded that the court's findings and decree did "not include a number for Brandon's ability to pay" and she stated that she did "not oppose the court adding one, after considering, first, the court's findings, and second, Brandon's arguments."

12 In her briefing, Emily notes that Brandon claimed that his expenses paid by RMT included the $2,816.77 for vacations, the $2,000 he paid to Emily as a "general employee" during the pendency of the divorce, and car expenses for his girlfriend that exceeded the marital standard by $245 per month. She asserts that removing these amounts left $1,672 of reasonable expenses.

13 Emily also requests an award of attorney fees incurred on appeal. "Ordinarily, when fees in a divorce have been awarded below to the party who then prevails on appeal, fees will also be awarded to that party on appeal." *Duffin v. Duffin*, 2025 UT App 136, ¶ 40 n.7, 578 P.3d 751 (quotation simplified). But here, with both parties having had a measure of success on appeal, the prevailing party determination is best left to the district court on remand. *See* *Vanderwood v. Woodward*, 2019 UT App 140, ¶ 49, 449 P.3d 983 ("At the conclusion of the proceedings on remand, the district court should reassess the 'prevailing party' issue and award attorney fees as appropriate at that time.").

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Tab 8

Rule 26. General provisions governing disclosure and discovery.

Effective: ~~5/7/2025~~

(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 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; or

(iv) for water rights general adjudication under Utah Code 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 Rule702 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 hours and, 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 medical 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) Information disclosed in legislative audit. If a party is an entity that is subject to an audit by the legislative auditor general under Utah Constitution, Article VI, Section 33, and information that is privileged or prepared in anticipation of litigation or for trial is disclosed to the legislative auditor general or an arbitrator as described in Utah Code section 36-12-15, the disclosure to the legislative auditor general or the arbitrator does not make the information discoverable or prevent the party from claiming that the information is privileged and prepared in anticipation of litigation or for trial.

(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 31 Depositions on written questions Limit # of depositions and/or #**	**Rule 33 Interrogatories including all discrete subparts**	**Rule 34 Requests for Production**	**Rule 36 Requests for Admission**	**Rule 45 Subpoenas**	**Days Complete Standard Fact Discovery**

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			of questions that can be asked?					
1	$50,000 or less	3	0	0	5	5	0	120
2	More than $50,000 and less than $300,000 or non-monetary relief	15	?	10	10	10	5	180
3	$300,000 or more	30	?	20	20	20	10	210
4	Domestic relations actions	4	?	10	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 Rule11. 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 Rule11 or Rule37(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.

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)(3). Disclosure of the identity and subjects of expert opinions and testimony is automatic under Rule 26(a)(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) 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).

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) 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) 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. 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]

The May 7, 2025 effective date is upon approval by a constitutional two-thirds vote of all members elected to each house.

Rule 31. Depositions upon written questions.

Commented [JS1]: The limitations of subparagraph (e) as well as the limit on the number of such depositions will be found in rule 26(c)(5).

Effective: ~~11/1/2011~~

(a) A party may depose a party or witness by written questions. Rules 30 and 45 apply to depositions upon written questions, except insofar as by their nature they are clearly inapplicable.

(b) A party taking a deposition using written questions must~~shall~~ serve on the parties a notice which includes the name or description and address of the deponent, the name or descriptive title of the officer before whom the deposition will be taken, and the questions to be asked.

(c) Within 14 days after the questions are served, a party may serve cross questions. Within 7 days after being served with cross questions, a party may serve redirect questions. Within 7 days after being served with redirect questions, a party may serve re-cross questions.

(d) A copy of the notice and copies of all questions served must~~shall~~ be delivered by the party taking the deposition to the designated officer who must~~shall~~ proceed promptly to ask the questions and prepare a record of the responses.

~~(e) During standard discovery, a deposition by written questioning mustshall not cumulatively exceed 15 questions, including discrete subparts, by the plaintiffs collectively, by the defendants collectively or by third-party defendants collectively.~~