UTAH SUPREME COURT ADVISORY COMMITTEE
RULES OF BUSINESS AND CHANCERY PROCEDURE

MEETING AGENDA

Evan S. Strassberg, Chair
Gregory L. Watts, Vice Chair

LOCATION: Meeting held in-person at:
Matheson Courthouse — Judicial Council Room (N35)
450 S. State St., Salt Lake City, Utah 84111

DATE: November 30, 2023

TIME: 11:45 to 1:15 p.m.

Welcome and Approval of Minutes	Action	Tab 1	Chair
Summary of process and results to date	Information		Chair
Update on possible 2024 legislative action	Information		Chair
Discussion of Proposed Rule Changes:			
a. ***Rule 13*** *and* ***Rule 18*** *– Jurisdiction / time to jury*	Discussion / Action	Tab 2	Committee
b. ***Rule 16*** *– Mandatory pretrial conferences*	Discussion / Action	Tab 3	Committee
c. ***Rule 26*** *– Proposed modifications to discovery:* *i. Default to allow expert reports and depositions* *ii. Elimination of tiers* *iii. Court must approve extraordinary discovery*	Discussion / Action	Tab 4	Committee
d. ***Rule 24*** *– Intervention of right (even if it destroys business court jurisdiction?)*	Discussion / Action	Tab 5	Committee

e. ***Rule 65A*** *– Proposed clarifications to injunction rule*	Discussion / Action	Tab 6	Committee
Discussion regarding transfer vs. dismissal	Discussion		Committee
Open discussion of any other issues	Discussion		Committee
Next steps / path forward	Discussion		Chair
Adjourn			

COMMITTEE WEB PAGE – https://legacy.utcourts.gov/utc/business-chancery/

UPCOMING MEETING SCHEDULE:
No future meetings are calendared at this time.

TAB 1

Meeting Minutes – July 13, 2023

UTAH SUPREME COURT ADVISORY COMMITTEE
RULES OF BUSINESS AND CHANCERY PROCEDURE

MEETING MINUTES – DRAFT

LOCATION: Meeting held through Webex

DATE: July 13, 2023

TIME: 12:00 to 1:00 p.m.

MEMBERS:	PRESENT	EXCUSED
Evan S. Strassberg, *chair*	•	
Gregory L. Watts, *vice chair*	•	
Beau R. Burbidge	•	
Kade N. Olsen	•	
Jennifer Fraser Parrish	•	
Judge Kara L. Pettit	•	•
Tyson J. Prisbrey	•	
Judge Derek P. Pullan	•	
Lauren A. Shurman	•	

GUESTS:

Nick Stiles

STAFF:

Michael Drechsel

(1) WELCOME AND INTRODUCTIONS:

Chair Strassberg welcomed the committee to the first meeting of the Utah Supreme Court's Advisory Committee on the Rules of Business and Chancery Procedure. Because this was the first meeting, there were no minutes to review. The chair asked each member to make an introduction to the other members of the committee. The chair explained that Judge Pettit was presiding over a jury trial during the meeting, which resulted in her inability to attend.

(2) OVERVIEW OF COMMITTEE ASSIGNMENTS, PROCESS, & WORKING DEADLINES:

Chair Strassberg explained that the committee was tasked with assembling — and submitting to the Supreme Court — a proposed set of rules to govern procedures in the newly created Business and Chancery Court ("the business court"). The court will begin operations in October 2024 and so the advisory committee chair and vice chair are aiming to have a package of proposed rule that could be delivered to the Supreme Court for review by the end of the current year. The chair noted that if legislative changes are needed prior to the business court's opening, those would need to be accomplished in the 2024 general session, which starts in January 2024. Quickly identifying any needed statutory revisions is therefore of critical importance. The chair noted that there would be further discussion on this topic later in the agenda.

(3) HB0216 — DISCUSSION OF STATUTORY ISSUES:

The chair and vice chair had previously reviewed the statutes created by HB0216 (https://le.utah.gov/~2023/bills/static/HB0216.html) and had identified the following statutory issues that might benefit from legislative attention / modification:

- **78A-5a-103(2)** — Supplemental jurisdiction of the business court:
  - What happens if the case involves — for instance — counterclaims that would fall into statutorily excepted case / claim types? There are a number of procedures related to counterclaims, joinder of parties, etc. that are implicated here. Would the entire case have to be removed from the business court? Would only the excepted claims be bifurcated out to the district court?
- **78A-1-103.5** — Single judge and conflicts / disqualifications / recusals:
  - The legislature chose to only fund a single judge for the business court (for fiscal and workload issues). Having a single judge will create significant hurdles for the business court in terms of conflicts and disqualification right from the outset. Where the business court judge has a conflict, will the case always have to be transferred back to the district court? Could there be a certain number of district court judges who could preside over a case in the business court if the single business court judge had a conflict? Would having a temporarily assigned judge serve the purposes of this court and meet the needs of parties litigating in the business court? If a judge is appointed to the bench from a particular firm, how would that judge adjudicate any case involving that firm?
- **78A-5a-104(2)** — Jury trial demand requires that the case be transferred:
  - Because anyone can demand a jury trial — even where they may not be entitled to one due to waiver, etc. — this may result in gamesmanship if there is no provision to bring case back into the business court (i.e., if the case isn't going well for a party, they could strategically make a claim for a jury demand in order to get the case in front of a different judge in the district court). A possible fix could be the following: once a jury demand is made, the business court could be authorized to make a review of the matter to determine whether there is a right to jury (i.e., what if jury was waived by contract and that waiver is enforceable?). If the business court determines the jury demand is ineffectual / unenforceable, the case could remain in

the business court. This isn't possible under the current statutory language. Another possible solution could be that, in order to litigate in the business court, the parties will need to collectively waive the right to demand a jury early in the business court litigation process. Staff explained that Rep. Brammer would likely be willing to make a change to this provision; the real concept being express in this statute is that there be no jury trials in the business court. Staff noted that the specifics for the procedures here were intentionally left out of the statute so that the rules of procedure could be crafted to address these situations. Staff pointed the committee's attention to the language in the statute that says "in accordance with the Utah Rules of Civil Procedure" and explained that the only reason this didn't say "the Utah Rules of Business and Chancery Procedure" is that no such rules existed at the time the statute was created. Staff felt confident Rep. Brammer would be willing to craft language here that would allow the rules of procedure to function well.

Committee members provided comments as the chair presented each of these items (incorporated into the minutes above). The intention is to connect with Rep. Brammer and see if he is willing to address these issues with legislature during the 2024 general legislative session.

(4) DIVISION INTO GROUPS / GROUP ASSIGNMENTS:

Chair Strassberg explained that he and Vice Chair Watts had discussed the path forward and agreed that it made the most sense:

- to look to the existing rules of civil procedure as the starting point for business and chancery rules of procedure; and
- to divide the committee into two subgroups, each led by either the chair or vice chair, to review specifically assigned rules of civil procedure.

Those subgroups were outlined as follows:

- Chair Strassberg's subgroup:
  - Assignment = Rules 7 and 12-21
  - Members = Mr. Burbidge, Ms. Parrish, Mr. Prisbrey, and Judge Pettit
- Vice Chair Watts' subgroup:
  - Assignment = Rules 22-26
  - Members = Ms. Shurman, Mr. Olsen, and Judge Pullan

Judge Pettit was able to join the meeting at the 42-minute mark. The chair provided Judge Pettit with a quick overview of the path forward that the committee had been discussing leading up to her joining the meeting. Judge Pettit stated it sounded like the contemplated approach was similar to the relationship between the rules of civil and rules of criminal procedure, where there is provision (in Rule 81(e) of the Utah Rules of Civil Procedure) that makes clear that the rules of civil procedure where there is no other applicable statute or rule.

Judge Pullan raised a concern that the committee may miss other rules of procedure used by business courts around the country. Judge Pettit agreed with this concern. Judge Pullan suggested that staff should be assigned to review rules from other courts / states to assess

whether there are specialized rules of procedure that could be helpful in Utah. Chair Strassberg asked Mr. Prisbrey if he was comfortable taking on that task, given his experience in crafting the white paper that was used during the exploratory workgroup meetings that occurred during the summer of 2022 and which resulted in creation of HB0216. Mr. Prisbrey accepted the assignment. He explained that the white paper examined New York , Delaware, South Carolina, and Arizona. He would like to expand that to additional states, including Wyoming. Ms. Parrish noted that the federal courts have rules specifically tailored to patent cases and perhaps that is a model that could be used.

Judge Pullan also suggested that the committee may need to take a look at the applicability of Rule 65A in the business court, where certain litigation (i.e., trade secrets, etc.) may necessarily implicate injunctive relief that may be impossible to obtain now that the "serious issues on the merits which should be the subject of further litigation" language has been removed from the rule. Staff shared his sense that Rep. Brammer would be likely be unwilling to walk back the changes that were made to Rule 65A via his House Joint Resolution 002 during the 2023 session. Several committee members explained that if the broader business community desired to have restored to the rules of procedure language similar to what was removed in HJR002 (even if just for certain business court litigation), that should be a topic of conversation that is explored through open dialog with interested legislators.

(6) ADJOURN

The meeting adjourned at approximately 1:00 p.m. The committee did not schedule a next meeting, but agreed to first complete subgroup efforts before calendaring another meeting (likely in six to seven weeks).

TAB 2

Rule 13 and Rule 18 – Jurisdiction / time to jury

Rule 13. Counterclaim and crossclaim.

(a) **Compulsory counterclaim.**

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

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

(B) does not require adding another party over whom the court cannot acquire jurisdiction~~.~~; and

(C) is not one of the enumerated types of claims set forth in Utah Code section 78A-5a-103(2)(a)-(b).

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

(A) when the action was commenced, the claim was the subject of another pending action, or

(B) the opposing party sued on its claim by attachment or other process that did not establish personal jurisdiction over the pleader on that claim, and the pleader does not assert any counterclaim under this rule.

(b) **Permissive counterclaim.** A pleading may state as a counterclaim against an opposing party any claim that is not compulsory and is not one of the enumerated types of claims set forth in Utah Code section 78A-5a-103(2)(a)-(b).

(c) **Relief sought in a counterclaim.** A counterclaim need not diminish or defeat the recovery sought by the opposing party. It may request relief that exceeds in amount or differs in kind from the relief sought by the opposing party.

(d) **Counterclaim maturing or acquired after pleading.** The court may permit a party to file a supplemental pleading asserting a counterclaim that matured or was acquired by the party after serving an earlier pleading, if the claim is not one of the enumerated types of claims set forth in Utah Code section 78A-5a-103(2)(a)-(b).

Commented [MD1]: The Supreme Court's style guide states:

"Do not cite to a specific paragraph (e.g., use 'Utah Code section 75-5-303' not '75-5-303(a)(2)(i)')."

Because using the general statutory reference would result in ambiguity and confusion, the committee may need to obtain special permission from the Court to deviate from the style guide OR consider rewording the proposed language as follows:

"...is not one of the enumerated types of claims over which the business court is excepted from exercising jurisdiction as set forth in Utah Code section 78A-5a-103."

(e) **Crossclaim against coparty.** A pleading may state as a crossclaim any claim by one party against a coparty if the claim arises out of the transaction or occurrence that is the subject matter of the original action or of a counterclaim, or if the claim relates to any property that is the subject matter of the original action; and if the claim is not one of the enumerated types of claims set forth in Utah Code section 78A-5a-103(2)(a)-(b). The crossclaim may include a claim that the coparty is or may be liable to the crossclaimant for all or part of a claim asserted in the action against the crossclaimant.

(f) **Joining additional parties.** Rules 19 and 20 govern the addition of a person as a party to a counterclaim or crossclaim.

(g) **Separate trials; separate judgments.** If the court orders separate trials under Rule 42, it may enter judgment on a counterclaim or crossclaim under Rule 54(b) when it has jurisdiction to do so, even if the opposing party's claims have been dismissed or otherwise resolved.

Effective May/November 1, 20___

Rule 18. Joinder of claims and remedies.

(a) **Joinder of claims.** The plaintiff in his complaint or in a reply setting forth a counterclaim and the defendant in an answer setting forth a counterclaim may join either as independent or as alternate claims as many claims either legal or equitable or both as he may have against an opposing party, so long as each claim is not one of the enumerated types of claims set forth in Utah Code Ann. § 78A-5a-103(2)(a)-(b). There may be a like joinder of claims when there are multiple parties if the requirements of Rules 19, 20, and 22 are satisfied. There may be a like joinder of cross-claims or third-party claims if the requirements of Rules 13 and 14 respectively are satisfied.

(b) **Joinder of remedies; fraudulent conveyances.** Whenever a claim is one heretofore cognizable only after another claim has been prosecuted to a conclusion, the two claims may be joined in a single action; but the court shall grant relief in that action only in accordance with the relative substantive rights of the parties. In particular, a plaintiff may state a claim for money and a claim to have set aside a conveyance fraudulent as to him, without first having obtained a judgment establishing the claim for money.

Effective May/November 1, 20___

TAB 3

Rule 16 – Mandatory pretrial conferences

Rule 16. Pretrial conferences.

(a) **Pretrial conferences.** The chancery court shall~~, in its discretion or upon motion, may~~ direct the attorneys and, when appropriate, the parties to appear for an initial pretrial conference approximately 60 days after the first answer is filed, and in its discretion or upon motion may conduct additional pretrial conferences for such purposes as:

(1) expediting the disposition of the action;

(2) establishing early and continuing control so that the case will not be protracted for lack of management;

(3) discouraging wasteful pretrial activities;

(4) improving the quality of the trial through more thorough preparation;

(5) facilitating mediation or other ADR processes for the settlement of the case;

(6) considering all matters as may aid in the disposition of the case;

(7) establishing the time to join other parties and to amend the pleadings;

(8) establishing the time to file motions;

(9) establishing the time to complete discovery and determining if an accelerated discovery plan, deviating from Rule 26, is warranted;

(10) ~~extending fact discovery;~~

(11) setting the date for pretrial and final pretrial conferences and trial;

(12) provisions providing for the preservation, disclosure or discovery of electronically stored information;

(13) considering any agreements the parties reach for asserting claims of privilege or of protection as trial-preparation material after production; and

(14) considering any other appropriate matters.

(b) **Trial settings.** Unless an order sets the trial date, any party may and the plaintiff shall, at the close of all discovery, certify to the court that discovery is complete, that any

Commented [MD1]: Judge Pettit notes:
I think parties/attorneys are best served if we have a separate set of Rules that are applicable only to chancery court cases. The Rules of Civil Procedure would apply unless a specific Chancery Court rule addressing the issue exists. That is how other jurisdictions handle the rules applicable only to chancery court cases--it is easy for someone who may be interested in filing in chancery court to see the differences in the applicable rules.

Commented [MD2]: Judge Pettit notes:
Other jurisdictions with chancery/business courts require an initial PTC, however, they also do not have mandated timelines in their rules like UT does. It seems like it is not a bad idea to require one though to see if the parties want to shorten the Rule 26 discovery period or limits. There was a Civil Case Management Pilot Program in Utah from 2014 to at least 2017 that required an initial PTC, but I cannot find any reports from the pilot program to know if it was effective in moving cases along more quickly. Defendant's initial disclosures are due 42 days after their answer, so 60 days appears to be the right time to have initial PTC completed if we are requiring one.

required mediation or other ADR processes have been completed or excused and that the case is ready for trial. The court shall schedule the trial as soon as mutually convenient to the court and parties. The court shall notify parties of the trial date and of any final pretrial conference.

(c) **Final pretrial conferences.** The court, in its discretion or upon motion, may direct the attorneys and, when appropriate, the parties to appear for such purposes as settlement and trial management. The conference shall be held as close to the time of trial as reasonable under the circumstances.

(d) **Sanctions.** If a party or a party's attorney fails to obey an order, if a party or a party's attorney fails to attend a conference, if a party or a party's attorney is substantially unprepared to participate in a conference, or if a party or a party's attorney fails to participate in good faith, the court, upon motion or its own initiative, may take any action authorized by Rule 37(b).

Advisory Committee Notes

For the purposes of this rule, "ADR" is as defined in CJA Rule 4-510.01.

Effective May/November 1, 20___

TAB 4

Rule 26 – Proposed modifications to discovery

Rule 26. General provisions governing disclosure and discovery.

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

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

(A) the name and, if known, the physical address, email 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~~ 14 days after ~~the filing of that defendant's first answer to the complaint~~service of the plaintiff's disclosures.

~~(3) **Exemptions.**~~

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

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

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

~~(iii) to enforce an arbitration award;~~

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

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

~~(4)~~(3) **Expert testimony.** *[Note from Evan's Group: This is a substantial rewrite to be consistent with the federal rules.]*

(A) A party must disclose to the other parties the identity of any witness it may use at trial to present evidence under Utah Rule of Evidence 702.~~**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.~~**Witnesses who must provide a written report.** A party must, without waiting for a discovery request, serve on the other parties a written report from any person who may be used at trial to present evidence under Rule 702 of the Utah Rules of Evidence and who is retained or specially employed to provide expert testimony in the case or whose duties as an employee of the party regularly involve giving expert testimony. The report must contain:

(i) a complete statement of all opinions the witness will express and the basis and reasons for them;

(ii) the facts or data considered by the witness in forming them; any exhibits that will be used to summarize or support them;

(iii) the witness's qualifications, including a list of all publications authored in the previous 10 years;

(iv) a list of all other cases in which, during the previous 4 years, the witness testified as an expert at trial or by deposition [and in which a report authored by the witness was disclosed to any other party]; and

(v) a statement of the compensation to be paid for the study and testimony in the case.

(C) Any witness who provides a written report may be deposed by any party against whom the opinion offered by such witness may be used at trial. No such witness may be deposed for more than four hours and the party or parties taking the deposition must pay the expert's reasonable hourly fees for attendance at, but not the fees incurred in preparing for, the deposition.

~~(C)~~(D) **Timing for expert discovery.** A party must make these disclosures at the times and in the sequence that the court orders. Absent a court order, the disclosures must be made as follows:

(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)~~ (a)(3)(B) ~~within 14~~ no later than 28 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)~~ (a)(3)(B) ~~within 14~~ no later than 28 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~~ required in paragraph ~~(a)(4)(C)(i)~~ (a)(3)(B). ~~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~~ in paragraph ~~(a)(4)(A)~~ (a)(3)(B) ~~within 14~~ no later than 28 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~~required in paragraph ~~(a)(4)(C)(ii)~~ (a)(3)(B). ~~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 of the proponent of the expert.

~~(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.**

(i) If a party intends to present evidence at trial under Rule 702 of the Utah Rules of Evidence from any person other than an expert witness who is retained or specially employed to provide testimony in the case or a person whose duties as an employee of the party regularly involve giving expert testimony, that party must serve on the other parties a written summary of the facts and opinions to which the witness is expected to testify in accordance with the deadlines set forth in paragraph ~~(a)(4)(C)~~(a)(3)(D). Such a witness cannot be required to provide a report pursuant to paragraph ~~(a)(4)(B)~~(a)(3)(B). A

deposition of such a witness may not exceed ~~four~~ seven hours and, unless manifest injustice would result, the party taking the deposition must pay the expert's reasonable hourly fees for attendance at, but not in preparation for, the deposition.

(ii) The timing of any disclosure of non-retained expert testimony, whether offered by the party with the burden of proof or in rebuttal, shall be governed by section (a)(3)(D).

(iii) A party may present evidence at trial to rebut a non-retained expert to the same extent, and in the same manner, as the party may rebut a retained expert.

~~(5)~~(4) **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 physical address, email 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) Unless the court orders otherwise, disclosure~~Disclosure~~ required by paragraph ~~(a)(5)(A)~~ (a)(4)(A) must be served on the other parties at least 28 days before trial. Disclosures required by paragraph ~~(a)(5)(A)(i)~~ (a)(4)(A)(i) and ~~(a)(5)(A)(ii)~~ (a)(4)(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)~~(5) **Form of disclosure and discovery production.** Rule 34 governs the form in which all documents, data compilations, electronically stored information, tangible things, and evidentiary material should be produced under this Rule.

(b) **Discovery scope.**

(1) **In general.** Parties may discover any matter, not privileged, which is relevant to the claim or defense of any party if the discovery satisfies the standards of proportionality set forth below.

(2) **Privileged matters.**

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

(i) all information in any form provided during and created specifically as part of a request for an investigation, the investigation, findings, or conclusions of peer review, care review, or quality assurance processes of any organization of health care providers as defined in Utah Code Title 78B, Chapter 3, Part 4, Utah Health Care Malpractice Act, for the purpose of evaluating care provided to reduce morbidity and mortality or to improve the quality of medical care, or for the purpose of peer review of the ethics, competence, or professional conduct of any health care provider; and

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

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

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

(D)

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

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

(E)

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

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

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

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

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

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

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

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

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

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

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

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

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

(6) **Trial preparation materials.** A party may obtain otherwise discoverable documents and tangible things prepared in anticipation of litigation or for trial by or

for another party or by or for that other party's representative (including the party's attorney, consultant, surety, indemnitor, insurer, or agent) only upon a showing that the party seeking discovery has substantial need of the materials and that the party is unable without undue hardship to obtain substantially equivalent materials by other means. In ordering discovery of such materials, the court must protect against disclosure of the mental impressions, conclusions, opinions, or legal theories of an attorney or other representative of a party.

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

(8) **Trial preparation; experts.**

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

(B) Trial-preparation protection for communications between a party's attorney and expert witnesses. Paragraph (b)(6) protects communications between the party's attorney and any witness required to provide disclosures under paragraph (a)(4), regardless of the form of the communications, except to the extent that the communications:

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

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

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

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

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

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

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

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

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

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

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

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

~~(3) **Definition of tiers for standard discovery.** Actions claiming $50,000 or less in damages are permitted standard discovery as described for Tier 1. Actions claiming more than $50,000 and less than $300,000 in damages are permitted standard discovery as described for Tier 2. Actions claiming $300,000 or more in damages are permitted standard discovery as described for Tier 3. Absent an accompanying damage claim for more than $300,000, actions claiming non-monetary relief are permitted standard discovery as described for Tier 2. Domestic relations actions are permitted standard discovery as described for Tier 4.~~

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

(3)

~~(5)~~ **Limits on standard fact discovery.** Standard fact discovery per side (plaintiffs collectively, defendants collectively, and third-party defendants collectively) ~~in each~~

~~tier is~~ shall presumptively be as follows, but may in all cases be modified by the court upon a motion of one or more of the parties. ~~The days to complete standard fact discovery are calculated from the date the first defendant's first disclosure is due and do not include expert discovery under paragraphs (a)(4)(C) and (D).~~

~~Tier~~	~~Amount of Damages~~	~~Total Fact Deposition Hours~~	~~Rule 33 Interrogatories including all discrete subparts~~	~~Rule 34 Requests for Production~~	~~Rule 36 Requests for Admission~~	~~Days to Complete Standard Fact Discovery~~
~~1~~	~~$50,000 or less~~	~~3~~	~~0~~	~~5~~	~~5~~	~~120~~
~~2~~	~~More than $50,000 and less than $300,000 or non-monetary relief~~	~~15~~	~~10~~	~~10~~	~~10~~	~~180~~
~~3~~	~~$300,00 or more~~	~~30~~	~~20~~	~~20~~	~~20~~	~~210~~
~~4~~	~~Domestic relations actions~~	~~4~~	~~10~~	~~10~~	~~10~~	~~90~~

(A) Standard fact discovery shall be completed 210 days after the first defendant's first disclosure is due. Each side shall be entitled to serve:

(i) 20 Rule 33 Interrogatories (including all discrete subparts);

(ii) 25 Rule 24 Requests for Production (including all discrete subparts); and

(iii) 30 Rule 36 Requests for Admission (including all discrete subparts).

(B) Expert Discovery shall be completed not later than 30 days after the last expert witness is disclosed pursuant to section (a)(3).

~~(6)~~(4) **Extraordinary discovery.** To obtain discovery beyond the limits established in paragraph ~~(c)(5)~~ (c)(3), a party must 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), whether or not the request is opposed, establishing a reasonable basis for the relief requested.:

~~(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 *[What should be done with the 2011 advisory committee note and 2012 legislative note in light of the changes made elsewhere in this URBCP Rule 26? At a bare minimum, the rule references would need to be renumbered in certain instances.]*

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]

Effective May/November 1, 20___

TAB 5

Rule 24 – Intervention of right

Rule 24. Intervention.

(a) **Intervention of right.** On timely motion, the court must permit anyone to intervene who:

(1) is given an unconditional right to intervene by a statute; or

(2) claims an interest relating to the property or transaction that is the subject of the action, and is so situated that disposing of the action may as a practical matter impair or impede the movant's ability to protect its interest, unless existing parties adequately represent that interest.

(b) **Permissive intervention.**

(1) In General. On timely motion, the court may permit anyone to intervene who:

(A) is given a conditional right to intervene by a statute; or

(B) has a claim or defense that shares with the main action a common question of law or fact.

(2) By a Governmental Entity. On timely motion, the court may permit a governmental entity to intervene if a party's claim or defense is based on:

(A) a statute or executive order administered by the governmental entity; or

(B) any regulation, order, requirement, or agreement issued or made under the statute or executive order.

(3) Delay or Prejudice. In exercising its discretion, the court must consider whether the intervention will unduly delay or prejudice the adjudication of the original parties' rights.

(c) **Notice and motion required.** A motion to intervene must be served on the parties as provided in Rule 5. The motion must state the grounds for intervention and be accompanied by a pleading that sets out the claim or defense for which intervention is sought.

Commented [MD1]: Lauren Shurman notes:
If Business Court rules will have a corporate disclosure requirement (as in FRCP 7.1), the intervention procedure could require a proposed intervenor to file a corporate disclosure statement. The recusal mechanism for the Business Court is still TBD.

Commented [MD2]: Lauren Shurman notes:
Requirement to file proposed pleading intended to enable judge to determine if Business Court can exercise supplemental jurisdiction over claims and if a jury is demanded. The court may want to consider these factors as relevant to delay and prejudice in deciding whether to grant permissive intervention. Questions for discussion: For intervention of right cases, will intervenor be permitted to demand a jury trial, thereby necessitating a transfer to district court? Will assertion of additional claims for which Business Court cannot exercise supplemental jurisdiction defeat venue, or can the court sever those claims? Similar issues are likely to be discussed in connection with Rules 13 and 15.

(d) **Constitutionality of Utah statutes, ordinances, rules, and other administrative or legislative enactments.**

(1) **Challenges to a statute.** If a party challenges the constitutionality of a statute in an action in which the Attorney General has not appeared, the party raising the question of constitutionality shall notify the Attorney General of such fact by serving the notice on the Attorney General by email or, if circumstances prevent service by email, by mail at the address below. The party shall then file proof of service with the court.

Email: notices@agutah.gov
Mail:
Office of the Utah Attorney General
Attn: Utah Solicitor General
350 North State Street, Suite230
P.O. Box142320
Salt Lake City, Utah84114-2320

(2) **Challenges to an ordinance or other governmental enactment.** If a party challenges the constitutionality of a governmental entity's ordinance, rule, or other administrative or legislative enactment in an action in which the governmental entity has not appeared, the party raising the question of constitutionality shall notify the governmental entity of such fact by serving the person identified in Rule 4(d)(1) of the Utah Rules of Civil Procedure. The party shall then file proof of service with the court.

(3) Notification procedures.

(A) Form and content. The notice shall (i) be in writing, (ii) be titled"Notice of Constitutional Challenge Under URCP 24(d)," (iii) concisely describe the nature of the challenge, and (iv) include, as an attachment, the pleading, motion, or other paper challenging constitutionality as set forth above.

(B) Timing. The party shall serve the notice on the Attorney General or other governmental entity on or before the date the party files the paper challenging constitutionality as set forth above.

(4) **Attorney General's or other governmental entity's response to notice.**

Commented [MD3]: Lauren Shurman notes: Constitutional challenges seem unlikely to arise in the Business Court, though the court may have jurisdiction over constitutional challenges to statutes enumerated in 78A-5a-103, e.g., Utah Antitrust Act, Noncompete Act, UCC. Consider whether the procedure for notifying the Attorney General should be set forth in a separate rule, as in FRCP 5.1.

(A) Within 14 days after the deadline for the parties to file all papers in response to the constitutional challenge, the Attorney General or other governmental entity("responding entity")shall file a notice of intent to respond unless the responding entity determines that a response is unnecessary. The responding entity may seek up to an additional 7 days' extension of time to file a notice of intent to respond.

(B) If the responding entity files a notice of intent to respond within the time permitted by this rule, the court will allow the responding entity to file a response to the constitutional challenge and participate at oral argument when it is heard.

(C) Unless the parties stipulate to or the court grants additional time, the responding entity's response to the constitutional challenge shall be filed within 14 days after filing the notice of intent to respond.

(D) The responding entity's right to respond to a constitutional challenge under Rule 25A of the Utah Rules of Appellate Procedure is unaffected by the responding entity's decision not to respond under this rule.

(5) **Failure to provide notice.** Failure of a party to provide notice as required by this rule is not a waiver of any constitutional challenge otherwise timely asserted. If a party does not serve a notice as required by this rule, the court may postpone the hearing until the party serves the notice.

~~(e) **Indian Child Welfare Act Proceedings.** In proceedings subject to the Indian Child Welfare Act of 1978, 25 U.S.C. sections1901–63:~~

~~(1) The Indian child's tribe is not required to formally intervene in the proceeding unless the tribe seeks affirmative relief from the court.~~

~~(2) If an Indian child's tribe does not formally intervene in the proceeding, official tribal representatives from the Indian child's tribe have the right to participate in any court proceeding. Participating in a court proceeding includes:~~

~~(A) being present at the hearing;~~

~~(B) addressing the court;~~

~~(C) requesting and receiving notice of hearings;~~

~~(D) presenting information to the court and parties that is relevant to the proceeding;~~

~~(E) submitting written reports and recommendations to the court and parties; and~~

~~(F) performing other duties and responsibilities as requested or approved by the court.~~

~~(3) The designated representative must provide the representative's contact information in writing to the court and to the parties.~~

~~(4) As provided in Rule 14-802 of the Supreme Court Rules of Professional Practice, before a nonlawyer may represent a tribe in the proceeding, the tribe must designate the nonlawyer representative by filing a written authorization. If the tribe changes its designated representative or if the representative withdraws, the tribe must file a written substitution of representation or withdrawal.~~

Effective May/November 1, 20___

TAB 6

Rule 65A – Proposed clarifications to injunction rule

Rule 65A. Temporary restraining orders and preliminary injunctions~~Injunctions~~.

(a) **Preliminary injunctions.**

(1) **Notice.** No preliminary injunction shall be issued without notice to the adverse party.

(2) **Consolidation of hearing.** Before or after the commencement of the hearing of an application for a preliminary injunction, the court may order the trial of the action on the merits to be advanced and consolidated with the hearing of the application. Even when this consolidation is not ordered, any evidence received upon an application for a preliminary injunction which would be admissible at the trial on the merits becomes part of the trial record and need not be repeated at the trial. ~~This subdivision (a)(2) shall be so construed and applied as to save to the parties any rights they may have to trial by jury.~~

(b) ~~Temporary~~ Ex parte temporary **restraining** order ~~orders~~.

(1) **Motion without notice.~~Notice.~~** ~~No~~ A temporary restraining order ~~shall~~ may be granted on motion without notice to the adverse party or that party's attorney, ~~unless~~ but only if (A) it clearly appears from specific facts shown by affidavit or by the verified complaint that immediate and irreparable injury, loss, or damage will result to the applicant before the adverse party or that party's attorney can be heard in opposition, and (B) the applicant or the applicant's attorney certifies to the court in writing as to the efforts, if any, that have been made to give notice and the reasons supporting the claim that notice should not be required.

(2) **Effective period of order.~~Form of order.~~** ~~Every temporary restraining order shall be endorsed with the date and hour of issuance and shall be filed forthwith in the clerk's office and entered of record. The order shall define the injury and state why it is irreparable.~~ The court shall fix the period the ex parte order shall remain in effect, which period shall not exceed 14 days. The order shall expire by its terms ~~within such time after entry, not to exceed 14 days, as the court fixes,~~ unless within the time so fixed: (A) the court extends the period for an additional 14 days ~~the order,~~ for good

cause shown~~,~~ ; or (B) ~~is extended for a like period or unless~~ the party against whom the order is directed consents that ~~it~~ the order may be extended for a longer period. The reasons for ~~the extension~~ extending the temporary restraining order shall be ~~entered of record~~stated in the order of extension.

(3) **Procedures after issuance.** A party opposing the ex parte order shall appear and request an expedited scheduling conference. The court shall set the scheduling conference within 48 hours of the request being filed. At the conference, the Court shall (A) set an expedited briefing schedule on any motion to modify or dissolve the order, (B) set expedited deadlines for the filing of memoranda opposing the order and reply memoranda; (C) determine the length of and schedule the preliminary injunction hearing, and (D) define the procedures to be followed at the hearing.

~~(3)~~(4) **Priority of hearing.** If ~~a temporary restraining~~an ex parte order is granted, the ~~motion for a~~ preliminary injunction hearing shall be scheduled ~~for hearing~~ at the earliest possible time and takes precedence over all other ~~civil~~ matters except older matters of the same character. ~~When the motion comes on for hearing, the party who obtained the temporary restraining order shall have the burden to show entitlement to a preliminary injunction; if the party does not do so, the court shall dissolve the temporary restraining order.~~

~~(4) **Dissolution or modification.** On 48 hours' notice to the party who obtained the temporary restraining order without notice, or on such shorter notice to that party as the court may prescribe, the adverse party may appear and move its dissolution or modification. In that event the court shall proceed to hear and determine the motion as expeditiously as the ends of justice require.~~

(c) **Temporary restraining order with notice.**

(1) **Motion with notice.** A party seeking a temporary restraining order with notice shall file a motion and supporting declarations. The motion and declarations shall be served on the opposing party. The opposition memorandum is due 7 days after service. The reply memorandum is due 3 days after the opposition memorandum is

filed. Each party shall with their papers file a proposed order granting or denying the motion. After the motion is briefed, the moving party shall file a request to submit for decision. The Court shall decide the motion on the papers within 7 days of submission. The order granting the motion shall set a scheduling conference within 3 business days of the date the order issues.

(2) **Effective period of order.** The order granting the motion shall remain in effect until the date of the preliminary injunction hearing.

(3) **Procedures after issuance.** At the scheduling conference, the court shall (A) determine the length of and set the preliminary injunction hearing; and (B) define the procedures to be followed at the hearing.

(4) **Priority of hearing.** If the motion is granted, the preliminary injunction hearing shall be scheduled at the earliest possible time and takes precedence over all other matters except older matters of the same character.

(d) **Form of Order or Injunction.** Temporary restraining orders and preliminary injunctions issued under this rule shall (A) be endorsed with the date and hour of issuance, filed forthwith in the clerk's office and entered in the record; (B) define the injury and state why it is irreparable; (C) set forth the reasons for issuance; and (D) be specific in terms and describe in reasonable detail, and not by reference to the complaint or other document, the act or acts sought to be restrained. If a restraining order is granted without notice, the order shall state the reasons justifying the court's decision to proceed without notice.

~~(c)~~(e) **Security.**

(1) **Requirement.** ~~The court shall condition issuance of the order or injunction on the~~ Temporary restraining orders or injunctions issued under this rule shall be conditioned on the moving party giving ~~of~~ security ~~by the applicant,~~ in such sum and form as the court deems proper, unless it appears that none of the parties will incur or suffer costs, attorney fees or damage as the result of any wrongful order or injunction, or unless there exists some other substantial reason for dispensing with

the requirement of security. No such security shall be required of the United States, the State of Utah, or of an officer, agency, or subdivision of either; nor shall it be required when it is prohibited by law.

(2) **Amount not a limitation.** The amount of security shall not establish or limit the amount of costs, including reasonable attorney fees incurred in connection with the restraining order or preliminary injunction, or damages that may be awarded to a party who is found to have been wrongfully restrained or enjoined.

(3) **Jurisdiction over surety.** A surety upon a bond or undertaking under this rule submits to the jurisdiction of the court and irrevocably appoints the clerk of the court as agent upon whom any papers affecting the surety's liability on the bond or undertaking may be served. The surety's liability may be enforced on motion without the necessity of an independent action. The motion and such notice of the motion as the court prescribes may be served on the clerk of the court who shall forthwith mail copies to the persons giving the security if their addresses are known.

~~(d)~~(f) **Persons on whom orders and injunctions are binding.** ~~**Form and scope.** Every restraining order and order granting an injunction shall set forth the reasons for its issuance. It shall be specific in terms and shall describe in reasonable detail, and not by reference to the complaint or other document, the act or acts sought to be restrained. It~~ Temporary restraining orders and injunctions shall be binding only upon the parties to the action, their officers, agents, servants, employees, and attorneys, and upon those persons in active concert or participation with them who receive notice, in person or through counsel, or otherwise, of the order. ~~If a restraining order is granted without notice to the party restrained, it shall state the reasons justifying the court's decision to proceed without notice.~~

~~(e)~~(g) **Grounds.** A restraining order or preliminary injunction may issue only upon a showing by the ~~applicant~~ moving party that:

(1) there is a substantial likelihood that the applicant will prevail on the merits of the underlying claim:

(2) the applicant will suffer irreparable harm unless the order or injunction issues;

(3) the threatened injury to the applicant outweighs whatever damage the proposed order or injunction may cause the party restrained or enjoined; and

(4) the order or injunction, if issued, would not be adverse to the public interest.

~~(f) **Motion for reconsideration.**~~

~~(1) A party enjoined or restrained by a restraining order or a preliminary injunction on February 14, 2023, may move the court to reconsider whether the order or injunction should remain in effect if the order or injunction:~~

~~(A) is in writing;~~

~~(B) is restraining or enjoining the enforcement of a law; and~~

~~(C) explicitly states that the court granted the order or injunction on the ground that the case presented serious issues on the merits which should be the subject of further litigation.~~

~~(2) A motion for reconsideration under this paragraph (f) may be filed at any time before the final determination of the case.~~

~~(3) Upon a motion for reconsideration, the court must determine whether the issuance of the restraining order or preliminary injunction meets the requirements in paragraph (e) regardless of the requirements for the issuance of the order or injunction on the day on which the order or injunction was issued.~~

~~(4) If the court determines that the issuance of the restraining order or preliminary injunction does not meet the requirements of paragraph (e), the court must terminate the order or injunction.~~

~~(g) **Domestic relations cases.** Nothing in this rule shall be construed to limit the equitable powers of the courts in domestic relations cases.~~

Effective May/November 1, 20___