Agenda

Advisory Committee on Rules of Civil Procedure

February 27, 2019

4:00 to 6:00 p.m.

Scott M. Matheson Courthouse

450 South State Street

Judicial Council Room

Administrative Office of the Courts, Suite N31

Welcome and approval of minutes.	Tab 1	Jonathan Hafen, Chair
Follow up on Rule 24: Report from Attorney General's Office on "timely."	Tab 2	Nancy Sylvester
Rule 4. Standards for electronic acceptance of service.	Tab 3	Justin Toth (subcommittee chair), Judge Laura Scott, Lauren DiFrancesco, and Susan Vogel
Rule 26. General provisions governing disclosure and discovery (multiple requests for rule amendments): Continue prior discussion at paragraph (a)(4)(A).	Tab 4	Rod Andreason (subcommittee chair), Tim Pack, Trystan Smith, Leslie Slaugh
New Rule 7A. Motion for order to show cause.	Tab 5	Lauren DiFrancesco (subcommittee chair), Jim Hunnicutt, Judge Holmberg, Susan Vogel
Other business: Committee notes schedule; rule amendment schedule through May; October meeting.		Jonathan Hafen

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

2019 Meeting Schedule:

March 27, 2019

April 24, 2019

May 22, 2019

June 26, 2019

September 25, 2019

October 30, 2019 (Change to October 16?)

November 20, 2019

Tab 1

UTAH SUPREME COURT ADVISORY COMMITTEE ON RULES OF CIVIL PROCEDURE

Meeting Minutes – January 23, 2019

PRESENT: Chair Jonathan Hafen, Heather Sneddon, Lauren DiFrancesco, Paul Stancil, Larissa Lee, Susan Vogel, Judge Clay Stucki, Leslie Slaugh, Timothy Pack, Justin Toth, Katy Strand (Recorder), Lincoln Davies, Michael Petrogeorge, Bryan Pattison (phone), Judge Laura Scott, Dawn Hautamaki (phone), Judge Andrew Stone, Trevor Lee, Judge James Blanch, Judge Kent Holmberg (phone)

EXCUSED: Trystan Smith, James Hunnicutt, Rod Andreason, Judge Amber Mettler

STAFF: Nancy Sylvester

GUESTS: Katie Gregory

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(1) WELCOME AND APPROVAL OF MINUTES.

Jonathan Hafen welcomed the committee and guest. He asked for approval of the minutes. Susan Vogel asked to correct several issues. She then moved to approve the corrected minutes. Leslie Slaugh seconded. The motion passed unanimously.

(2) CIVIL RULE 58B AND JUVENILE RULE 58.

Nancy Sylvester explained that the legislature passed a law allowing for juvenile courts to enter orders for restitution, but did not provide for how to enforce them. The proposed rules would allow the courts to send the orders to the district courts. Katie Gregory reported that this bill went into effect last July, but that there is no procedure to collect on these orders. There was a concern about confidentiality for the juvenile, but as of January 1, the Code of Judicial Administration allows these filings to be private records. Lauren DiFrancesco questioned if the name of the juvenile would be a part of the record, as this will not be sealed. Dawn Hautamaki reported that when these are filed they are done in the name of the victim. She does know that it is a special type of judgment, but that the juvenile restitution case type will be protected. Judge Clay Stucki stated that the victim would probably want the name in the judgment, as the ability to search it in financial situations would be needed for collection. Judge Andrew Stone questioned what the purpose of a judgment was, other than to publicize the debt. Ms. Hautamaki noted that the victim does not have a say in if this judgment is filed. Judge Stucki questioned if the judgment could stand alone, so that no information other than the debt would be included.

Leslie Slaugh reported that this is exactly what an abstract does: it lists only the amount, the debtor, and the creditor. Ms. Hautamaki agreed that this was correct. Mr. Hafen noted that this question exceeded the scope of the committee's concern, but seemed to be related to the issue. Heather

Sneddon said she wondered whether the victim should have the choice to have the abstract sent to the district court. Mr. Slaugh responded that the statute does not require it to be registered with the district court, so the victim could choose to collect or not.

Mr. Hafen responded that the only amendment the committee was considering was at lines 4 to 5. Mr. Slaugh questioned if the civil rules should require something to let the juvenile court know the judgment had been satisfied. Mr. Hafen proposed adding "and the juvenile court" so that both courts would be notified. Ms. Gregory proposed the rule be voted on, but not submitted to the Court until the juvenile committee approved it. Judge Stucki moved to adopt the amended rule below, Ms. Sneddon seconded. The motion passed unanimously.

Rule 58B. Satisfaction of judgment.

(a) Satisfaction by acknowledgment. Within 28 days after full satisfaction of the judgment, the owner or the owner's attorney must file an acknowledgment of satisfaction in the court in which the judgment was entered. <u>If the judgment was entered in juvenile court and abstracted to the district court, the satisfaction of judgment must be filed in the district court and the juvenile court.</u> If the owner is not the original judgment creditor, the owner or owner's attorney must also file proof of ownership. If the satisfaction is for part of the judgment or for fewer than all of the judgment debtors, it must state the amount paid or name the debtors who are released.

(b) Satisfaction by order of court. The court in which the judgment was first entered may, upon motion and satisfactory proof, enter an order declaring the judgment satisfied.

(c) Effect of satisfaction. Satisfaction of a judgment, whether by acknowledgement or order, discharges the judgment, and the judgment ceases to be a lien as to the debtors named and to the extent of the amount paid. A writ of execution or a writ of garnishment issued after partial satisfaction must include the partial satisfaction and must direct the officer to collect only the balance of the judgment, or to collect only from the judgment debtors remaining liable.

(d) Filing certificate of satisfaction in other counties. After satisfaction of a judgment, whether by acknowledgement or order, has been entered in the court in which the judgment was first entered, a certificate by the clerk showing the satisfaction may be filed with the clerk of the district court in any other county where the judgment has been entered.

(3) ADVISORY COMMITTEE NOTES PROJECT GROUP A.

Trevor Lee reported that the rules were divided and that the subcommittee determined that a large number of the notes should be removed based upon the Supreme Court's guidance. The committee determined that "historical context" did not include notes on how the rule has been. Mr. Slaugh pointed out that these comments are less helpful as the changes are available on the court's site. Mr. Hafen pointed out that the committee could inform the bar of this website. Ms. Vogel questioned where this information is available. Ms. Sylvester proposed updating the rules website to make more clear that the amendments link included historic rule changes.

Mr. Lee reported on the proposed changes to the notes in rule 1. Mr. Hafen questioned if the goals of the committee should be removed, as the committee does not do anything but recommend rule amendments. It's the court's role to actually make the amendments. Judge Stone proposed that it be removed, as the purpose should not be included. Mr. Hafen questioned if the statement of how the rules applied should be a part of the rule, as it was substantive. He proposed taking out the word "committee" but leaving in the remainder. Mr. Slaugh questioned if this was necessary, as any proceeding would have it apply, as nothing says they don't apply. Timothy Pack proposed deleting line 1. Ms. Hautamaki proposed removing the entire last paragraph. Ms. Sylvester asked whether all the pre-November 2011 rules should be removed. Judge Stone reported that cases from that time frame are still being litigated, so the rules should remain readily available. Ms. Sylvester said the last paragraph should remain then. Judge Stone moved to approve the amended/removed note, Ms. DiFrancesco seconded. Motion passed. The note reads as follows:

> A primary purpose of the 2011 amendments is to give effect to the long-standing but often overlooked directive in Rule 1 that the Rules of Civil Procedure should be construed and applied to achieve "the just, speedy and inexpensive determination of every action." The amendments serve this purpose by limiting parties to discovery that is proportional to the stakes of the litigation, curbing excessive expert discovery, and requiring the early disclosure of documents, witnesses and evidence that a party intends to offer in its case-in-chief. The purpose is to restore balance to the goals of Rule 1, so that a just resolution is not achieved at the expense of speedy and inexpensive resolutions, and greater access to the justice system can be afforded to all members of society.
>
> Due to the significant changes in the discovery rules, the Supreme Court order adopting the 2011 amendments makes them effective only as to cases filed on or after the effective date, November 1, 2011, unless otherwise agreed to by the parties or ordered by the court.

Ms. DiFrancesco proposed removing the entire note to rule 3. She said all of the historical notes were too old, the change referenced was pre-1993, and self-evident at this point. Mr. Lee agreed and added that even if the amendments were recent, he did not believe the note should be included. Ms. DiFrancesco moved to delete this note. Larissa Lee seconded. Motion passed.

Ms. Vogel reported that Rule 4 was a difficult rule for pro se litigants. Her proposal included the items she found people were confused about, particularly the fact that they cannot serve papers themselves, how to do service by mail, the concerns about electronic acceptance of service, and how international service is more complicated than pro se litigants know. She suggested letting people know that embassies may be helpful and also that alternative service requires that the litigant provide the proposed alternative, not the judge.

Mr. Hafen questioned whether Ms. Vogel's notes were more of a guide than an example. Ms. Sylvester proposed linking to the courts' self-help resource pages. Mr. Slaugh expressed concern that explaining that the judge would not propose an alternative service would be an interpretation of the rule, and not appropriate for a note. Judge James Blanch said what Ms. Vogel had proposed might work better as a guide for the Self-Help Center. Mr. Hafen agreed and said he believed that such a guide would be even more helpful than a committee note. Ms. Vogel thought it would be nice to at least link to the self-help webpage. Mr. Hafen proposed that this note be tabled, that the subcommittee look at adding a link to the webpage and scaling down the note. Judge Blanch also questioned focusing solely on the pro se litigant, as the rules apply equally to all. Judge Laura Scott asked what the Supreme Court meant by including examples. She wondered if the committee could ask for additional guidance. Mr. Hafen agreed that the question needed to be discussed.

Mr. Pack questioned whether any of the notes for Rule 4 were necessary. Mr. Hafen said he believed that if the changes were not substantial and recent, the notes should be removed. Ms. DiFrancesco agreed, and noted that if the year was included with a note, it would be more helpful. Paul Stancil said he thought explaining the changes to the rules was an artifact of the past and not necessary anymore. So he supported eliminating these notes. Mr. Pack said that if the rule is clear there should be no notes. Lincoln Davies agreed with Mr. Pack; unless there is need for explanation (as in the situation where the federal rules are very different), notes are not helpful, and if there is a note, the date should be included. The committee generally agreed with this philosophy.

Larissa Lee introduced the notes to Rule 5. She said most of the notes are dated or inapplicable. Mr. Slaugh proposed removing the juvenile court portion out of the rule and having a separate rule in the juvenile rules. Until such a rule is adopted, Ms. Lee proposed leaving the note. She also proposed keeping in the notes regarding the case. Mr. Slaugh believed that cases interpreting rules should not be included, but if they amend the rule they should. Mr. Hafen proposed leaving in the 2015 note, and no additional notes. Judge Stucki moved to approve the note below. Mr. Slaugh seconded. The motion passed unanimously.

URCP 5.

Advisory Committee Notes

2015 amendments

Since the Rules of Juvenile Procedure do not have a rule on serving papers, this rule applies in juvenile court proceedings under Rule 1, Rule 81(a), and Rule of Juvenile Procedure 2.

> Under paragraph (b)(3)(A), electronically filing a document has the effect of serving the document on lawyers who have an e-filing account. (Lawyers representing parties in the district court are required to have an account and electronically file documents. Code of Judicial Administration Rule 4-503.) The 2015 amendment excepts from this provision documents electronically filed in juvenile court.
>
> Although electronic filing in the juvenile court presents to the parties the documents that have been filed, the juvenile court e-filing application (CARE), unlike that in the district court, does not deliver an email alerting the party to that fact. The Board of Juvenile Court Judges and the Advisory Committee on the Rules of Juvenile Procedure believe this difference renders electronic filing alone insufficient notice of a document having been filed. So in the juvenile court, a party electronically filing a document must serve that document by one of the other permitted methods.

Ms. Vogel proposed giving an example regarding service by mail. Mr. Slaugh said he thought that this would modify the rule. He proposed amending paragraph (d) to copy the federal rule. Judge Stucki proposed replacing the word "was" with the word "is." Mr. Slaugh questioned whether this would still allow for the presumption that it was served. Ms. Vogel proposed it state "on whom it is served that day." Judge Blanch agreed with bringing the rule in line with the federal rule, and perhaps the court form could be changed. Ms. Vogel proposed changing the tense, and changing the forms. Ms. Sneddon supported filing the certificate of service after the filing. Judge Blanch supported changing the forms rather than changing the rule. Michael Petrogeorge agreed. Judge Scott proposed removing what was required in the rule. Mr. Hafen tabled this discussion for the next meeting.

Mr. Lee introduced the notes to Rule 7. He proposed removing all the notes. He said he would consider exempting the discussion of the Supreme Court case, but believed it was unnecessary as the rule is clear enough. Ms. Sylvester noted that the committee has referenced the language about judges issuing orders in many forms. Ms. Sneddon said she would like the Court to provide more insight. Mr. Hafen noted that the redline the Court reviewed would itself invite feedback. Mr. Slaugh said he believed the note should exist, but be dated. Judge Stucki said he thought that would be inconsistent. Mr. Slaugh argued that historical notes are valuable, but could have a sunset period. This discussion was tabled until after the Court has provided additional guidance.

Ms. Hautamaki proposed deleting the notes on Rule 77, as the notes are old and not relevant. Ms. Lee so moved and Mr. Stucki seconded. The motion passed unanimously.

(4) RULE 109 REVISITED: RECOMMENDATION FROM CLERKS OF COURT RE CLARIFYING LANGUAGE IN (d).

Ms. Sylvester reported that she spoke with the Clerks of the Court, who asked for clarifying language regarding who serves the injunction referenced in Rule 109. They would like it to be clear that the court is not doing it. Mr. Slaugh said he did not believe it is important how it is served, only that it is served. The proposed change required that a particular person serve it, and that is too

limiting. Ms. Vogel added that a protective order may not allow the petitioner to provide it to the respondent. Ms. Hautamaki stated that the concern was that the court was not responsible for this service. Mr. Hafen does not believe the current rule mandates that the court do anything. Judge Stone argued that there might be times when the court does need to serve it. Judge Kent Holmberg argued that there are many rules like this where the court is not required to serve things. The committee declined to change this rule.

(5) RULE 24: REPORT FROM ATTORNEY GENERAL'S OFFICE ON "TIMELY"

Ms. Sylvester reported that the Attorneys General's office responded to the committee questions on what was timely. Mr. Slaugh proposed changing the language to reference papers, not pleadings. He also proposed adding the language below as well as the language proposed by the Attorney General's office. Mr. Hafen proposed this be tabled to the next meeting.

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 Government Officer or Agency. On timely motion, the court may permit a federal or state governmental officer or agency to intervene if a party's claim or defense is based on:

(A) a statute or executive order administered by the officer or agency; 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 Pleading 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.

(d) Constitutionality of Utah statutes and ordinances.

(d)(1) **Challenges to Utah statutes.** If a party challenges the constitutionality of a Utah statute in an action in which the Attorney General has not appeared, the party raising the question of constitutionality must notify the Attorney General of such fact as described in paragraphs (d)(1)(A), (d)(1)(B), and (d)(1)(C).

(d)(1)(A) **Form and Content**. The notice must (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 the constitutionality of the statute.

(d)(1)(B) **Timing**. The party must serve the notice on the Attorney General on or before the date the party files the paper challenging the constitutionality of the statute.

(d)(1)(C) **Service**. The party must serve the notice on the Attorney General by email or, if circumstances prevent service by email, by mail at the addresses below, and 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, Suite 230

P.O. Box 142320

Salt Lake City, Utah 84114-2320

(d)(1)(D) **Attorney General's response to notice.**

(d)(1)(D)(i) Within 14 days after the deadline for the parties to file all papers in response to the constitutional challenge, the Attorney General must file a notice of intent to respond unless the Attorney General determines that a response is unnecessary. The Attorney General may seek up to an additional 7 days' extension of time to file a notice of intent to respond.

(d)(1)(D)(ii) If the Attorney General files a notice of intent to respond within the time permitted by this rule, the court will allow the Attorney General to file a response to the constitutional challenge and participate at oral argument when it is heard.

(d)(1)(D)(iii) Unless the parties stipulate to or the court grants additional time, the Attorney General's response to the constitutional challenge will be filed within 14 days after filing the notice of intent to respond.

(d)(1)(D)(iv) The Attorney General's right to respond to a constitutional challenge under Rule 25A of the Utah Rules of Appellate Procedure is unaffected by the Attorney General's decision not to respond under this rule.

(d)(2) **Challenges to county or municipal ordinances**. If a party challenges the constitutionality of a county or municipal ordinance in an action in which the district attorney, county attorney, or municipal attorney has not appeared, the party raising the question of constitutionality must notify the district attorney, county attorney, or municipal attorney of such fact. The procedures for the party challenging the constitutionality of a county or municipal ordinance will be as provided in paragraphs (d)(1)(A), (d)(1)(B), and (d)(1)(C), except that service must be on the individual county or municipality. The procedures for the district attorney's, county attorney's, or municipal attorney's response will be as provided in paragraph (d)(1)(D).

(d)(3) **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 under paragraphs (d)(1) or (d)(2), the court may postpone the hearing until the party serves the notice. It is the party's responsibility to find and use the correct email address for the relevant district attorney, county attorney, or municipal attorney, or if circumstances prevent service by email, it is the party's responsibility to find and use the correct mailing address.

(6) ADJOURNMENT

The remaining matters were deferred, and the committee adjourned at 5:49 pm. The next meeting will be held February 27, 2019 at 4:00 pm.

Tab 2

Administrative Office of the Courts

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

Hon. Mary T. Noonan
Interim State Court Administrator
Raymond H. Wahl
Deputy Court Administrator

MEMORANDUM

To: Civil Rules Committee
From: Nancy Sylvester
Date: February 21, 2019
Re: Civil Rule 24

At our November meeting, the committee approved bringing Rule 24 in line with its federal counterpart, but raised some questions about the meaning of the term "timely" with respect to when the Attorney General's Office intervenes. I raised that question with the Attorney General's office and its attorneys shared a draft with the committee, which I revised to bring in line with the rest of the rule. The Attorney General's office has since reviewed and approved for their purposes the revised draft, which is attached.

Rule 24. Intervention.

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

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

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

(b) **Permissive intervention.** ~~Upon~~.

(1) In General. On timely ~~application~~ motion, the court may permit anyone ~~may be permitted~~ to intervene ~~in an action: (1) when a statute confers~~who:

(A) is given a conditional right to intervene by a statute; or ~~(2) when an applicant's~~

(B) has a claim or defense ~~and~~that shares with the main action ~~have~~ a common question of law or fact ~~in common. When a party to an action bases~~.

(2) By a Government Officer or Agency. On timely motion, the court may permit a federal or state governmental officer or agency to intervene if a party's claim or defense ~~upon any~~is based on:

(A) a statute or executive order administered by ~~a governmental~~the officer or agency; or ~~upon~~

(B) any regulation, order, requirement, or agreement issued or made ~~pursuant to~~under the statute or executive order~~, the officer or agency upon timely application may be permitted to intervene in the action.~~ .

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

(c) ~~**Procedure.**~~ **Notice and Pleading Required.** A ~~person desiring~~motion to intervene ~~shall serve a motion to intervene upon~~ must be served on the parties as provided in ~~Rule~~ Rule 5. The ~~motions shall~~motion must state the grounds ~~therefor~~ for intervention and ~~shall be accompanied by a pleading setting forth~~~~that~~ sets out the claim or defense for which intervention is sought.

(d) Constitutionality of Utah statutes and ordinances.

(d)(1) **Challenges to Utah statutes.** If a party challenges the constitutionality of a Utah statute in an action in which the Attorney General has not appeared, the party raising the question of constitutionality ~~shall~~ must notify the Attorney General of such fact as described in paragraphs (d)(1)(A), (d)(1)(B), and (d)(1)(C). ~~The court shall permit the state to be heard upon timely application.~~

(d)(1)(A) **Form and Content**. The notice must (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 the constitutionality of the statute.

38 (d)(1)(B) **Timing**. The party must serve the notice on the Attorney General on or before the date
39 the party files the paper challenging the constitutionality of the statute.
40 (d)(1)(C) **Service**. The party must serve the notice on the Attorney General by email or, if
41 circumstances prevent service by email, by mail at the addresses below, and file proof of service with
42 the court.
43 Email: notices@agutah.gov
44 Mail:
45 Office of the Utah Attorney General
46 Attn: Utah Solicitor General
47 350 North State Street, Suite 230
48 P.O. Box 142320
49 Salt Lake City, Utah 84114-2320
50 (d)(1)(D) **Attorney General's response to notice.**
51 (d)(1)(D)(i) Within 14 days after the deadline for the parties to file all papers in response to
52 the constitutional challenge, the Attorney General must file a notice of intent to respond unless
53 the Attorney General determines that a response is unnecessary. The Attorney General may
54 seek up to an additional 7 days' extension of time to file a notice of intent to respond.
55 (d)(1)(D)(ii) If the Attorney General files a notice of intent to respond within the time permitted
56 by this rule, the court will allow the Attorney General to file a response to the constitutional
57 challenge and participate at oral argument when it is heard.
58 (d)(1)(D)(iii) Unless the parties stipulate to or the court grants additional time, the Attorney
59 General's response to the constitutional challenge will be filed within 14 days after filing the notice
60 of intent to respond.
61 (d)(1)(D)(iv) The Attorney General's right to respond to a constitutional challenge under Rule
62 25A of the Utah Rules of Appellate Procedure is unaffected by the Attorney General's decision
63 not to respond under this rule.
64 (d)(2) **Challenges to county or municipal ordinances**. If a party challenges the constitutionality of a
65 county or municipal ordinance in an action in which the district attorney, county attorney, or municipal
66 attorney has not appeared, the party raising the question of constitutionality ~~shall~~ must notify the district
67 attorney, county attorney, or municipal attorney of such fact. The procedures for the party challenging the
68 constitutionality of a county or municipal ordinance will be consistent with paragraphs (d)(1)(A), (d)(1)(B),
69 and (d)(1)(C), except that service must be on the individual county or municipality. ~~The court shall permit~~
70 ~~the county or municipality to be heard upon timely application.~~The procedures for the district attorney's,
71 county attorney's, or municipal attorney's response will be consistent with paragraph (d)(1)(D).
72 (d)(3) **Failure to provide notice.** Failure of a party to provide notice as required by this rule is not a
73 waiver of any constitutional challenge otherwise timely asserted. If a party does not serve a notice as
74 required under paragraphs (d)(1) or (d)(2), the court may postpone the hearing until the party serves the

75 notice. It is the party's responsibility to find and use the correct email address for the relevant district
76 attorney, county attorney, or municipal attorney, or if circumstances prevent service by email, it is the
77 party's responsibility to find and use the correct mailing address.
78

Tab 3

Administrative Office of the Courts

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

Hon. Mary T. Noonan
Interim State Court Administrator
Raymond H. Wahl
Deputy Court Administrator

MEMORANDUM

To: Civil Rules Committee
From: Nancy Sylvester
Date: February 21, 2019
Re: Rules 4 and Acceptance of Service

Justin Toth provided the following on behalf of the Rule 4 subcommittee:

> Here are the proposed revisions from our subcommittee. I also want to share with you Susan Vogel and Judge Scott's observations and comments on this proposed language.
>
> In our draft amendments, the two primary concerns were that (1) whatever is presented must comply with the ESIGN and Utah Electronic Transactions Act, and (2) we minimize "improper" behavior by process servers as much as possible. During the November 28 Meeting, Judge Blanch also pointed out that he felt strongly that parties have a duty to cooperate in litigation and avoid costs and expenses in service of process (which is, in fact, also codified at URCP 4(d)(3)(A)). So, in an attempt to balance that duty with the desire to mitigate improper behavior by process servers, we have proposed two revisions:
>
> a. 4(d)(3)(B)(i) – Requires compliance with ESIGN and UETA. Susan Vogel would also like to spell out in detail what aspects of the statutes we want process servers to comply with. Justin Toth is concerned that it would be cumbersome and would potentially unwittingly limit the obligations to comply. The burden should be on the process server to assure proper compliance.
> b. 4(d)(3)(B)(ii) – Sets forth a general "prohibition against deception" by process servers by requiring compliance with Utah Code § 76-8-101, et. seq. and, more specifically, requiring them to avoid stating or implying that the process is a document that "originates" with judicial officer or court. Susan Vogel would like more specific language saying "A process server shall not use coercion or deception to induce someone to accept service of documents. A

> communication seeking an acceptance of service must comply with Utah Code 76-8- 501 et. seq., and shall not state or imply that the communication originates with a judicial officer or court of the State of Utah." Judge Scott (and Justin Toth) are concerned that the addition of the first sentence "creates more problems than it solves. A defendant may raise coercion or deception in an argument that service was not proper without adding this language."

Those are the reports and comments from the Rule 4 subcommittee.

Rule 4. Process.

(a) Signing of summons. The summons must be signed and issued by the plaintiff or the plaintiff's attorney. Separate summonses may be signed and issued.

(b) Time of service. Unless the summons and complaint are accepted, a copy of the summons and complaint in an action commenced under Rule 3(a)(1) must be served no later than 120 days after the complaint is filed, unless the court orders a different period under Rule 6. If the summons and complaint are not timely served, the action against the unserved defendant may be dismissed without prejudice on motion of any party or on the court's own initiative.

(c) Contents of summons.

(c)(1) The summons must:

(c)(1)(A) contain the name and address of the court, the names of the parties to the action, and the county in which it is brought;

(c)(1)(B) be directed to the defendant;

(c)(1)(C) state the name, address and telephone number of the plaintiff's attorney, if any, and otherwise the plaintiff's address and telephone number;

(c)(1)(D) state the time within which the defendant is required to answer the complaint in writing;

(c)(1)(E) notify the defendant that in case of failure to answer in writing, judgment by default will be entered against the defendant; and

(c)(1)(F) state either that the complaint is on file with the court or that the complaint will be filed with the court within 10 days after service.

(c)(2) If the action is commenced under Rule 3(a)(2), the summons must also:

(c)(2)(A) state that the defendant need not answer if the complaint is not filed within 10 days after service; and

(c)(2)(B) state the telephone number of the clerk of the court where the defendant may call at least 14 days after service to determine if the complaint has been filed.

(c)(3) If service is by publication, the summons must also briefly state the subject matter and the sum of money or other relief demanded, and that the complaint is on file with the court.

(d) Methods of service. The summons and complaint may be served in any state or judicial district of the United States. Unless service is accepted, service of the summons and complaint must be by one of the following methods:

(d)(1) Personal service. The summons and complaint may be served by any person 18 years of age or older at the time of service and not a party to the action or a party's attorney. If the person to be served refuses to accept a copy of the summons and complaint, service is sufficient if the person serving them states the name of the process and offers to deliver them. Personal service must be made as follows:

(d)(1)(A) Upon any individual other than one covered by paragraphs (d)(1)(B), (d)(1)(C) or (d)(1)(D), by delivering a copy of the summons and complaint to the individual personally, or by leaving them at the individual's dwelling house or usual place of abode with a person of suitable

age and discretion who resides there, or by delivering them to an agent authorized by appointment or by law to receive process;

(d)(1)(B) Upon a minor under 14 years old by delivering a copy of the summons and complaint to the minor and also to the minor's father, mother, or guardian or, if none can be found within the state, then to any person having the care and control of the minor, or with whom the minor resides, or by whom the minor is employed;

(d)(1)(C) Upon an individual judicially declared to be incapacitated, of unsound mind, or incapable of conducting the individual's own affairs, by delivering a copy of the summons and complaint to the individual and to the guardian or conservator of the individual if one has been appointed; the individual's legal representative if one has been appointed, and, in the absence of a guardian, conservator, or legal representative, to the person, if any, who has care, custody, or control of the individual;

(d)(1)(D) Upon an individual incarcerated or committed at a facility operated by the state or any of its political subdivisions, by delivering a copy of the summons and complaint to the person who has the care, custody, or control of the individual, or to that person's designee or to the guardian or conservator of the individual if one has been appointed. The person to whom the summons and complaint are delivered must promptly deliver them to the individual;

(d)(1)(E) Upon a corporation not otherwise provided for in this rule, a limited liability company, a partnership, or an unincorporated association subject to suit under a common name, by delivering a copy of the summons and complaint to an officer, a managing or general agent, or other agent authorized by appointment or law to receive process and by also mailing a copy of the summons and complaint to the defendant, if the agent is one authorized by statute to receive process and the statute so requires. If no officer or agent can be found within the state, and the defendant has, or advertises or holds itself out as having, a place of business within the state or elsewhere, or does business within this state or elsewhere, then upon the person in charge of the place of business;

(d)(1)(F) Upon an incorporated city or town, by delivering a copy of the summons and complaint as required by statute, or in the absence of a controlling statute, to the recorder;

(d)(1)(G) Upon a county, by delivering a copy of the summons and complaint as required by statute, or in the absence of a controlling statute, to the county clerk;

(d)(1)(H) Upon a school district or board of education, by delivering a copy of the summons and complaint as required by statute, or in the absence of a controlling statute, to the superintendent or administrator of the board;

(d)(1)(I) Upon an irrigation or drainage district, by delivering a copy of the summons and complaint as required by statute, or in the absence of a controlling statute, to the president or secretary of its board;

(d)(1)(J) Upon the state of Utah or its department or agency by delivering a copy of the summons and complaint to the attorney general and any other person or agency required by statute to be served; and

79 (d)(1)(K) Upon a public board, commission or body by delivering a copy of the summons and
80 complaint as required by statute, or in the absence of a controlling statute, to any member of its
81 governing board, or to its executive employee or secretary.
82 **(d)(2) Service by mail or commercial courier service.**
83 (d)(2)(A) The summons and complaint may be served upon an individual other than one
84 covered by paragraphs (d)(1)(B) or (d)(1)(C) by mail or commercial courier service in any state or
85 judicial district of the United States provided the defendant signs a document indicating receipt.
86 (d)(2)(B) The summons and complaint may be served upon an entity covered by paragraphs
87 (d)(1)(E) through (d)(1)(I) by mail or commercial courier service in any state or judicial district of
88 the United States provided defendant's agent authorized by appointment or by law to receive
89 service of process signs a document indicating receipt.
90 (d)(2)(C) Service by mail or commercial courier service shall be complete on the date the
91 receipt is signed as provided by this rule.
92 **(d)(3) Acceptance of service.**
93 **(d)(3)(A) Duty to avoid expenses.** All parties have a duty to avoid unnecessary expenses of
94 serving the summons and complaint.
95 **(d)(3)(B) Acceptance of service by party.** Unless the person to be served is a
96 minor under 14 years old or an individual judicially declared to be incapacitated, of unsound mind,
97 or incapable of conducting the individual's own affairs, a party may accept service of a summons
98 and complaint by signing a document that acknowledges receipt of the summons and complaint.
99 **(d)(3)(B)(i) Content of proof of acceptance.** The proof of acceptance must demonstrate
100 on its face that the acceptance of service complies with the federal ESIGN Act and Utah
101 Electronic Transactions Act.
102 **(d)(3)(B)(ii) Duty to avoid deception.** A request to accept service must comply with Title
103 76, Chapter 8 of the Utah Code and shall not state or imply that the request to accept service
104 originates with a judicial officer or court of the State of Utah.
105 **(d)(3)(C) Acceptance of service by attorney for party.** An attorney may accept service of a
106 summons and complaint on behalf of the attorney's client by signing a document that acknowledges
107 receipt of the summons and complaint.
108 **(d)(3)(D) Effect of acceptance, proof of acceptance.** A person who accepts service of the
109 summons and complaint retains all defenses and objections, except for adequacy of service. Service
110 is effective on the date of the acceptance. Filing the acceptance of service with the court constitutes
111 proof of service under Rule 4(e).
112 **(d)(4) Service in a foreign country.** Service in a foreign country must be made as follows:
113 (d)(4)(A) by any internationally agreed means reasonably calculated to give notice, such as
114 those means authorized by the Hague Convention on the Service Abroad of Judicial and
115 Extrajudicial Documents;

(d)(4)(B) if there is no internationally agreed means of service or the applicable international agreement allows other means of service, provided that service is reasonably calculated to give notice:

(d)(4)(B)(i) in the manner prescribed by the law of the foreign country for service in that country in an action in any of its courts of general jurisdiction;

(d)(4)(B)(ii) as directed by the foreign authority in response to a letter of request issued by the court; or

(d)(4)(B)(iii) unless prohibited by the law of the foreign country, by delivering a copy of the summons and complaint to the individual personally or by any form of mail requiring a signed receipt, addressed and dispatched by the clerk of the court to the party to be served; or

(d)(4)(C) by other means not prohibited by international agreement as may be directed by the court.

(d)(5) Other service.

(d)(5)(A) If the identity or whereabouts of the person to be served are unknown and cannot be ascertained through reasonable diligence, if service upon all of the individual parties is impracticable under the circumstances, or if there is good cause to believe that the person to be served is avoiding service, the party seeking service may file a motion to allow service by some other means. An affidavit or declaration supporting the motion must set forth the efforts made to identify, locate, and serve the party, or the circumstances that make it impracticable to serve all of the individual parties.

(d)(5)(B) If the motion is granted, the court will order service of the complaint and summons by means reasonably calculated, under all the circumstances, to apprise the named parties of the action. The court's order must specify the content of the process to be served and the event upon which service is complete. Unless service is by publication, a copy of the court's order must be served with the process specified by the court.

(d)(5)(C) If the summons is required to be published, the court, upon the request of the party applying for service by other means, must designate a newspaper of general circulation in the county in which publication is required.

(e) Proof of service.

(e)(1)The person effecting service must file proof of service stating the date, place, and manner of service, including a copy of the summons. If service is made by a person other than by an attorney, sheriff, constable, United States Marshal, or by the sheriff's, constable's or marshal's deputy, the proof of service must be by affidavit or unsworn declaration as described in Title 78B, Chapter 18a, Uniform Unsworn Declarations Act.

(e)(2) Proof of service in a foreign country must be made as prescribed in these rules for service within this state, or by the law of the foreign country, or by order of the court.

(e)(3) When service is made pursuant to paragraph(d)(4)(C), proof of service must include a receipt signed by the addressee or other evidence of delivery to the addressee satisfactory to the court.

155 (e)(4) Failure to file proof of service does not affect the validity of the service. The court may allow
156 proof of service to be amended.
157 **Advisory Committee Notes**
158
159
160
161
162

Tab 4

KIRTON | McCONKIE

Rod N. Andreason
randreason@kmclaw.com
801.321.4853

MEMORANDUM

TO: Nancy Sylvester

FROM: Rod Andreason, Chair, URCP 26 Subcommittee

DATE: October 19, 2018

SUBJECT: URCP 26 Subcommittee Report and Proposed Changes

On June 27, 2018, at the regular monthly meeting of the Utah Supreme Court Advisory Committee on the Utah Rules of Civil Procedure, Chairman Jon Hafen formed a subcommittee consisting of Committee members Rod Andreason (chair), Leslie Slaugh, Trystan Smith, and Tim Pack to discuss and draft proposed changes to URCP 26. After soliciting input regarding potential problems with the Rule and meeting twice to discuss them, the subcommittee has decided to propose the following changes to the Rule, for the following reasons:

1. Add at the end of (a)(1), insert: "Rule 34 governs the form of producing all documents, data compilations, electronically stored information, tangible things, and evidentiary material pursuant to this Rule."

   Reason: Ensure compliance with URCP 34 in initial disclosure document production.

2. Revise (a)(2)(A) to: "by <u>a</u> plaintiff within 14 days after filing of the first answer to <u>that plaintiff's</u> complaint; and"

   Reason: There may be multiple plaintiffs, some of which may join the case at a later date.

3. Revise (a)(2)(B) to: "by a defendant within 42 days after filing of <u>that defendant's</u> first answer to the complaint."

   Reason: There may be multiple defendants; some of them may seek to file a motion to dismiss or similar motion after appearance that is not an answer, and such should not have to provide initial disclosures before such motion is resolved.

4. Revise (a)(4)(A) title to: "Disclosure of <u>retained</u> expert testimony."

   Reason: Clarity; this paragraph only pertains to this type of expert witness.

5. Revise (a)(4)(C)(i) to: "The party who bears the burden of proof on the issue for which expert testimony is offered shall serve on the other parties the information required by

paragraph (a)(4)(A) within 14 days after the close of fact discovery. Within seven days thereafter, the party opposing the expert may serve notice electing either a deposition of the expert pursuant to paragraph (a)(4)(B) and Rule 30, or a written report pursuant to paragraph (a)(4)(B). The deposition shall occur, or the report shall be served on the other parties, within 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 shall be permitted."

Reason: Practitioners reportedly need more time for these actions.

6. Revise (a)(4)(C)(ii) to "The party who does not bear the burden of proof on the issue for which expert testimony is offered shall serve on the other parties the information required by paragraph (a)(4)(A) within 14 days after the later of (A) the date on which the disclosure under paragraph (a)(4)(C)(i) is due, or (B) receipt of the written report or the taking of the expert's deposition pursuant to paragraph (a)(4)(C)(i). Within seven days thereafter, the party opposing the expert may serve notice electing either a deposition of the expert pursuant to paragraph (a)(4)(B) and Rule 30, or a written report pursuant to paragraph (a)(4)(B). The deposition shall occur, or the report shall be served on the other parties, within 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 shall be permitted."

   Reason: Practitioners reportedly need more time for these actions. Also, when the party bearing the burden fails to disclose an expert, the party who does not bear the burden currently has no triggering event for providing its expert disclosure.

7. Revise (a)(4)(C)(iii) to "(a)(4)(C)(iii) If the party who bears the burden of proof on an issue wants to designate rebuttal expert witnesses, it shall serve on the other parties the information required by paragraph (a)(4)(A) within 14 days after the later of (A) the date on which the election under paragraph (a)(4)(C)(ii) is due or (B) receipt of the written report or the taking of the expert's deposition pursuant to paragraph (a)(4)(C)(ii). Within seven days thereafter, the party opposing the expert may serve notice electing either a deposition of the expert pursuant to paragraph (a)(4)(B) and Rule 30, or a written report pursuant to paragraph (a)(4)(B). The deposition shall occur, or the report shall be served on the other parties, within 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 shall be permitted."

   Reason: Practitioners reportedly need more time for these actions.

8. Revise (a)(4)(E) to: "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 (a)(4)(B). A deposition of such a witness may not exceed four hours. No further discovery of such a witness is permitted."

   Reason: Prohibit excessive discovery and expense in seeking testimony information from non-retained experts.

9. Revise (a)(5)(B) to "Disclosure required by paragraph (a)(5)(A) shall 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) shall also be filed. At least 14 days before trial, a party shall serve and file any counter designations of deposition testimony and any objections and grounds for the objections to the use of any deposition, witness, or exhibit. Other than objections under Rules 402 and 403 of the Utah Rules of Evidence, objections not listed are waived unless excused by the court for good cause."

   Reasons: Judges reportedly want to see these items, although not all of the proposed trial exhibits (we would like judges' input and confirmation on this). Also, this section needs parallel reference to objections to witnesses as well as other disclosures. Although many objections to witnesses, as well as exhibits, must be considered within the scope of their offering at trial, this funnels down the scope of such potential objections. (If this is too demanding as to witnesses, it is likely too demanding for exhibits as well, requiring both to be removed).

10. Revise (c)(6)(A) to: "before the close of standard discovery and after reaching the limits of standard discovery imposed by these rules, a stipulated statement that extraordinary discovery is necessary and proportional under paragraph (b)(2) and, for each party represented by an attorney, a statement that the attorney consulted with the client about the request for extraordinary discovery."

Reason: The current requirement has been universally ignored and may be too onerous and expensive relative to its desired goal: ensuring that parties know that extraordinary discovery will result in additional expense.

11. Revise (d)(3) to “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.

    Reason: Language.

A redline of Rule 26 with these proposed changes is attached.

Rule 26. General provisions governing disclosure and discovery.

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

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

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

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

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

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

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

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

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

Rule 34 governs the form of producing all documents, data compilations, electronically stored information, tangible things, and evidentiary material pursuant to this Rule.

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

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

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

(a)(3) Exemptions.

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

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

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

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

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

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

(a)(4) Expert testimony.

(a)(4)(A) Disclosure of retained expert testimony. A party shall, without waiting for a discovery request, serve on the other parties the following information regarding any person who

Comment [RNA1]: Reason: ensure compliance with URCP 34 in initial disclosure document production.

Comment [RNA2]: Reason: There may be multiple plaintiffs, some of who may join the case at a later date.

Comment [RNA3]: Reason: There may be multiple defendants; some of them may seek to file a motion to dismiss or similar motion after appearance that is not an answer, and such should not have to provide initial disclosures before such motion is resolved.

Comment [RNA4]: Reason: Clarity; this paragraph only pertains to this type of expert witness.

may be used at trial to present evidence under Rule 702 of the Utah Rules of Evidence and who is retained or specially employed to provide expert testimony in the case or whose duties as an employee of the party regularly involve giving expert testimony: (i) the expert's name and qualifications, including a list of all publications authored within the preceding 10 years, and a list of any other cases in which the expert has testified as an expert at trial or by deposition within the preceding four years, (ii) a brief summary of the opinions to which the witness is expected to testify, (iii) ~~all~~ the facts and 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.

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

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

(a)(4)(C)(i) The party who bears the burden of proof on the issue for which expert testimony is offered shall serve on the other parties the information required by paragraph (a)(4)(A) within ~~seven~~ 14 days after the close of fact discovery. Within seven days thereafter, the party opposing the expert may serve notice electing either a deposition of the expert pursuant to paragraph (a)(4)(B) and Rule 30, or a written report pursuant to paragraph (a)(4)(B). The deposition shall occur, or the report shall be served on the other parties, within ~~28~~ 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 shall be permitted.

(a)(4)(C)(ii) The party who does not bear the burden of proof on the issue for which expert testimony is offered shall serve on the other parties the information required by paragraph (a)(4)(A) within 14 ~~seven~~ days after the later of (A) the date on which the ~~election~~ disclosure under paragraph (a)(4)(C)(i) is due, or (B) receipt of the written report or the taking of the expert's deposition pursuant to paragraph (a)(4)(C)(i). Within seven days thereafter, the party opposing the expert may serve notice electing either a deposition of the expert pursuant to paragraph (a)(4)(B) and Rule 30, or a written report pursuant to paragraph (a)(4)(B). The deposition shall occur, or the report shall be served on the other parties, within ~~28~~ 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 shall be permitted.

(a)(4)(C)(iii) If the party who bears the burden of proof on an issue wants to designate rebuttal expert witnesses, it shall serve on the other parties the information required by paragraph (a)(4)(A) within 14 ~~seven~~ days after the later of (A) the date on which the election under paragraph (a)(4)(C)(ii) is due~~,~~ or (B) receipt of the written report or the taking of the expert's deposition pursuant to paragraph (a)(4)(C)(ii). Within seven days thereafter, the party opposing the expert may serve notice electing either a deposition of the expert pursuant to paragraph (a)(4)(B) and Rule 30, or a written report pursuant to paragraph (a)(4)(B). The deposition shall occur, or the report shall be served on the other parties, within ~~28~~ 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 shall be permitted.

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

Comment [RNA5]: Reason: Practitioners reportedly need more time.

Comment [RNA6]: Reason: Practitioners reportedly need more time.

Comment [RNA7]: Reason: Practitioners reportedly need more time.

Comment [RNA8]: Reason: When the party bearing the burden fails to disclose an expert, the party who does not bear the burden currently has no triggering event for providing its expert disclosure.

Comment [RNA9]: Reason: Practitioners reportedly need more time.

Comment [RNA10]: Reason: Practitioners reportedly need more time.

Comment [RNA11]: Reason: Practitioners reportedly need more time.

(a)(4)(E) Summary of non-retained expert testimony. If a party intends to present evidence at trial under Rule 702 of the Utah Rules of Evidence from any person other than an expert witness who is retained or specially employed to provide testimony in the case or a person whose duties as an employee of the party regularly involve giving expert testimony, that party must serve on the other parties a written summary of the facts and opinions to which the witness is expected to testify in accordance with the deadlines set forth in paragraph (a)(4)(C). Such a witness cannot be required to provide a report pursuant to (a)(4)(B). A deposition of such a witness may not exceed four hours. No further discovery of such a witness is permitted.

(a)(5) Pretrial disclosures.

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

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

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

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

(a)(5)(B) Disclosure required by paragraph (a)(5)(A) shall 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) shall also be filed. At least 14 days before trial, a party shall serve and file any counter designations of deposition testimony~~,~~ and any objections and grounds for the objections to the use of any deposition, witness, ~~and~~ or ~~to the admissibility of~~ exhibits~~s~~. Other than objections under Rules 402 and 403 of the Utah Rules of Evidence, objections not listed are waived unless excused by the court for good cause.

Comment [RNA12]: Reason: Judges reportedly want to see these items, although not all of the proposed trial exhibits (need judges' input/confirmation).

Comment [RNA13]: Reason: Need parallel reference to objections to witnesses as well as other disclosures. Although many objections to witnesses, as well as exhibits, must be considered within the scope of their offering at trial, this funnels down the scope of such potential objections. (If this is too demanding as to witnesses, it is likely too demanding for exhibits as well, requiring both to be removed).

(b) Discovery scope.

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

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

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

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

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

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

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

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

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

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

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

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

163 **(b)(7) Trial preparation; experts.**

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Tier	Amount of Damages	Total Fact Deposition Hours	Rule 33 Interrogatories including all discrete subparts	Rule 34 Requests for Production	Rule 36 Requests for Admission	Days to Complete Standard Fact Discovery
1	$50,000 or less	3	0	5	5	120

2	More than $50,000 and less than $300,000 or non-monetary relief	15	10	10	10	180
3	$300,00 or more	30	20	20	20	210

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

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

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

Comment [RNA14]: Reason: The current requirement has been universally ignored and may be too onerous and expensive relative to its desired goal: ensuring that parties know that extraordinary discovery will result in additional expense.

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

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

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

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

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

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

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

(f) Filing. Except as required by these rules or ordered by the court, a party shall not file with the court a disclosure, a request for discovery, or a response to a request for discovery, but shall file only the

257 certificate of service stating that the disclosure, request for discovery, or response has been served on
258 the other parties and the date of service.

259 **Advisory Committee Notes**

260 **Legislative Note**

261

262

Tab 5

Administrative Office of the Courts

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

Hon. Mary T. Noonan
Interim State Court Administrator
Raymond H. Wahl
Deputy Court Administrator

MEMORANDUM

To: Civil Rules Committee
From: Nancy Sylvester
Date: February 25, 2019
Re: New Rule 7A. Motion to enforce order and for sanctions

The Forms Committee proposed a change to the procedure for enforcing court orders by doing everything through regular motion practice. A subcommittee consisting of Lauren DiFrancesco (chair), Jim Hunnicutt, Susan Vogel, Judge Holmberg, and Leslie Slaugh has adopted the Forms Committee's recommendation regarding motion practice and proposes calling this process a motion to enforce order and for sanctions, rather than order to show cause. The subcommittee will provide more details about the changes they've proposed. But one noteworthy aspect of the proposal is that it includes the option for a two-step process; namely, recognizing the court's discretion to convene a telephone conference before the hearing to resolve any preliminary issues, but not requiring the conference.

Rule 7A. Motion to enforce order and for sanctions.

(a) Motion. To enforce a court order or to obtain a sanctions order for violation of an order, a party must file a motion to enforce order and for sanctions (if requested), pursuant to the procedures of this rule and Rule 7. The timeframes set forth in this rule rather than those set forth in Rule 7 govern motions to enforce orders and for sanctions. If the motion is to be heard by a commissioner, the motion must also follow the procedures of Rule 101. For purpose of this rule, an order includes a judgment.

(b) Affidavit. The motion must state the title and date of entry of the order that the moving party seeks to enforce. The motion must be verified, or must be accompanied by at least one supporting affidavit that is based on personal knowledge and shows that the affiant is competent to testify on the matters set forth. The verified motion or affidavit must set forth facts that would be admissible in evidence and that would support a finding that the party has violated the order.

(c) Proposed order. The motion must be accompanied by a proposed order to attend hearing, which must:

(c)(1) state the title and date of entry of the order that the moving party seeks to enforce;

(c)(2) state the relief sought by the moving party;

(c)(3) state whether the moving party has requested that the nonmoving party be held in contempt and, if that request has been made, state that the penalties for contempt may include, but are not limited to, a fine of up to $1000 and confinement in jail for up to 30 days;

(c)(4) order the nonmoving party to appear personally or through counsel at a specific date, time and place to explain whether the nonmoving party has violated the order; and

(c)(5) state that no written response is required but is permitted if filed at least 14 days before the hearing, unless the court sets a different time, and that any written response must follow the requirements of Rule 7, and Rule 101 if the hearing will be before a commissioner.

(d) Service of the order. If the court grants the motion and issues an order to attend hearing, the moving party must have the order, the motion, and all supporting affidavits personally served on the nonmoving party in a manner provided in Rule 4 at least 28 days before the hearing. For good cause the court may order that service be made on the nonmoving party's counsel of record in a manner provided in Rule 5. The court may order less than 28 days' notice of the hearing if:

(d)(1) the motion requests an earlier date; and

(d)(2) it clearly appears from specific facts shown by affidavit that immediate and irreparable injury, loss, or damage will result to the moving party if the hearing is not held sooner.

(e) Reply. A reply is not required, but if filed, must be filed at least 7 days before the hearing, unless the court sets a different time.

(f) Hearing. At the hearing the court may receive evidence, hear argument, and rule upon the motion, or may request additional briefing or hearings. The moving party bears the burden of proof on all claims made in the motion. At the court's discretion, the court may convene a telephone conference before the

37 hearing to preliminarily address any issues related to the motion, including whether the court would like to
38 order a briefing schedule other than as set forth in this rule.
39 **(g) Limitations.** This rule does not apply to an order to show cause that is issued by the court on its
40 own initiative. A motion to enforce order and for sanctions presented to a court commissioner must also
41 follow Rule 101, including all time limits set forth in Rule 101. This rule applies only in civil actions, and
42 does not apply in criminal cases.
43 **(h) Orders to show cause**. The process set forth in this rule replaces and supersedes the prior order
44 to show cause procedure. An order to attend hearing serves as an order to show cause as that term is
45 used in statute.