Agenda

Advisory Committee on Rules of Civil Procedure

April 24, 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.	4:00	Tab 1	Jonathan Hafen, Chair
Discussion of Rule 68.	4:05	Tab 2	Representative Brady Brammer
Discussion of Rule 68.	4:20	Tab 3	Representative Ken Ivory
Licensed Paralegal Practitioners and the Civil Rules.	4:35	Tab 4	Steve Johnson, Cathy Dupont, Jim Hunnicutt, Nancy Sylvester
Coordination of iIntervention rules: URCP 24, URAP 25A, URCrP 12 (suggested update to terminology from Appellate Rules Committee).	4:55	Tab 5	Nancy Sylvester
New Rule 7A. Motion for order to show cause.	5:05	Tab 6	Lauren DiFrancesco (subcommittee chair), Jim Hunnicutt, Judge Holmberg, Susan Vogel
Rule 65C: service of petitions.	5:30	Tab 7	Dawn Hautamaki
Rule 100: coordination of district and juvenile minor guardianship cases.	5:45 or time permitting	Tab 8	Shane Bahr, Nancy Sylvester
Other business: Committee notes schedule; rule amendment schedule through May (Rule 73 advisory committee note example).	5:55	Tab 9	Jonathan Hafen, Nancy Sylvester

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

2019 Meeting Schedule:

May 22, 2019

June 26, 2019

September 25, 2019

October 16, 2019

November 20, 2019

Tab 1

UTAH SUPREME COURT ADVISORY COMMITTEE ON RULES OF CIVIL PROCEDURE

Meeting Minutes – March 27, 2019

Committee members & staff	Present	Excused	Appeared by Phone
Jonathan Hafen		**X**	
Rod N. Andreason	**X**		
Judge James T. Blanch	**X**		
Lincoln Davies		**X**	
Lauren DiFrancesco	**X**		
Dawn Hautamaki			**X**
Judge Kent Holmberg	**X**		
James Hunnicutt		**X**	
Larissa Lee			**X**
Trevor Lee	**X**		
Judge Amber M. Mettler	**X**		
Timothy Pack	**X**		
Bryan Pattison			**X**
Michael Petrogeorge		**X**	
Judge Clay Stucki	**X**		
Judge Laura Scott	**X**		
Leslie W. Slaugh	**X**		
Trystan B. Smith	**X**		
Heather M. Sneddon	**X**		
Paul Stancil			**X**
Judge Andrew H. Stone			**X**
Justin T. Toth	**X**		
Susan Vogel	**X**		
Katy Strand, Recording Secretary	**X**		
Nancy Sylvester, Staff	**X**		

GUESTS: Allison Barger, Shane Bahr

(1) WELCOME AND APPROVAL OF MINUTES

Ron Andreason, acting as Chair Pro Tem, welcomed the committee and asked for approval of the minutes. Heather Sneddon moved to approve the corrected minutes. Paul Stancil seconded. The motion passed.

(2) PROBATE RULES: NEW URCP26.4 (CJA 6-506,CJA 4-1001, FORM MEDIATION ORDER)

Allison Barger introduced the work of the Probate Rules Subcommittee and proposed a solution to the existing friction between the Rules of Civil Procedure and the probate code in the form of a new Rule 26.4. She also proposed a state wide mediation requirement, and additional rules to close the gap between the rules and the probate code. The ADR committee recommended the mediation rule, and the board of district court judges approved the effort. The rule being considered today outlines specifics for the objection process and initial disclosures in probate cases. She reported that after a petition is initiated there is a period for interested parties to object. However, this is done without service or the formality of answers. This rule would provide a framework for these objections. She reported that clerks often are taking objections orally, which is problematic for attorneys. Rule 26.4 would further create disclosure requirements that fit the type of case involved. The expected effect of all of this is to limit the costs of probate litigation.

The proposed rule is an entirely new rule. Susan Vogel mentioned that the self-help area of the court website does have an available form proposed objection. Ms. Barger reported that the form is not being used often. Michael Petrogeorge questioned if this rule would apply to ongoing probate cases. Ms. Barger answered that this would apply to new cases. However, there are often several petitions within a probate. Mr. Petrogeorge reported that he worked on cases with additional complaints within the probate case. Ms. Barger answered that a new complaint would be a new matter under the rules of civil procedure. Trystan Smith questioned if a minor settlement would be included under this rule. Ms. Barger stated it would, and that the mediation would be required if it was contested. Mr. Smith pointed out that if it was contested this would often happen only at the final approval stage, at which point these provisions would apply. Ms. Vogel questioned whether the requirements would begin if there was a motion or an objection to the motion. Judge Blanch pointed out that there can be unique issues, such as a termination of a minor guardianship, but that these are not always ruled upon the same way, nor are they always required to go to mediation. Ms. Barger pointed out that the longer rotation for judges in the 3rd District probate calendar may help some of these issues, as the judges will have more time to adjust to probate. Mr. Smith pointed out that the court could waive the mediation under this rule. Ms. Barger acknowledged that point and observed that the ADR rules under the Code of Judicial Administration would still apply. She also pointed out that there would be a pre-mediation conference, which would allow the judge to determine the issues for mediation and would allow parties to choose not to become involved as the case may be. The form order is an outline of the issues to discuss in pre-mediation.

Ms. Vogel proposed that the rule use either petitioner or plaintiff. Ms. Barger replied that this was to clarify that the plaintiff was the earliest petitioner, as the two types of proceedings use different

words. Ms. Vogel also questioned in paragraph (C) whether the phrase of "or otherwise" could be clarified to say or pro se. Mr. Andreason proposed removing everything after "appeared."

Ms. Vogel proposed in paragraph (c)(2)(C) adding the word "then" before "reduced to writing." Mr. Andreason questioned what the differences between paragraphs (b) and (c) were. Ms. Barger and Judge Scott answered that this was to clarify that the oral objections must be in court, not over the phone. Judge Stucki questioned whether the word "also" would clarify that the objection must also be in writing. Judge Scott responded that "then" was more logical as there was a time element to this question. Ms. Vogel proposed clarifying further that it must be filed within "7 days of the hearing at which the oral objection was made." Ms. Sylvester pointed out that this created an extremely long sentence. Mr. Lee proposed making the last clause a separate sentence. Ms. Sneddon said she did not think the long sentence was problematic. Mr. Andreason said he believed that (a) and (b) should be combined with a "first" and then "second." Ms. DiFrancesco mentioned that "mailed" was an odd word, but Judge Scott pointed out that this was normal in probate. Ms. Vogel proposed that (a) include that the oral objection be made in open court at a hearing, then in (b) the hearing would already have been defined. Ms. Barger proposed adding "on the petition," as there may be multiple hearings. Timothy Pack questioned if it mattered which hearing. Ms. Sneddon said she believed that if the hearing could be multiple hearings, it still required that it be the hearing at which the oral objection was made. Judge Stucki questioned whether the requirement of reducing to writing could be placed in (c)(2)(A). Others agreed. Ms. Barger proposed clarifying that the written objection must set forth grounds for the objection.

Judge Holmberg proposed changing "the written objection" to "a written objection." Ms. Vogel agreed. Ms. Sneddon questioned if the term "open court" was sufficiently clear to people who were calling. Ms. Barger proposed changing it to "at a scheduled hearing on the matter." She agreed that "open court" may be ambiguous. Mr. Pack pointed out that it may not matter what hearing it is, as the written objection must occur too. Judge Scott pointed out that subsequent hearings would not be appropriate, even if a written objection still followed.

Mr. Petrogeorge questioned whether the first petitioner on a matter was a plaintiff. If a subsequent petition is filed does the plaintiff remain the same" Judge Scott pointed out that this tied into the fact that the probate action was started by a petition, and the person who filed that ends up being the plaintiff. In other disputes there may be cross claims and additional confusion as to who is the plaintiff at any particular point. Ms. Barger responded that objections are defined in the probate code, but that general litigators may need clarification. Mr. Andreason clarified that objections under (c)(2) were to the petition. Mr. Pack questioned if "the plaintiff" is required, as they could just be a petitioner. Ms. Barger answered that under rule 17 petitioner is not defined. Deadlines are based upon the definition of plaintiff; therefore it is important to have it defined. Mr. Pack pointed out that plaintiff includes the term petitioner. Ms. Barger pointed out that a respondent is typically the person being protected in a guardianship, not the person objecting.

Ms. Vogel questioned under (c)(2)(C) whether the word "stipulated" could be replaced with "agreed upon" for clarity. Further in (c)(3) she proposed replacing the word "redundant." Mr. Andreason

proposed "contained in." Judge Holmberg proposed "included in the petition or disclosures." This issue was also found on line 49.

Mr. Andreason questioned if paragraph (c)(3)(A) created a confusing sentence. Ms. Barger clarified that this was supposed to allow for particular case types to not produce all the same documents (as they all fall under probate, but are not all the same). The rule has been broken up into different types of probate issues, and so this may not be needed. Ms. Sneddon pointed out that if the documents referenced were not relevant they would probably not be in the parties' petition anyway. Mr. Andreason proposed adding a colon, the list of documents, then state that this supersedes Rule 26(a)(2). Ms. Sneddon agreed with this language.

Judge Mettler mentioned that the numbering in the rule was not correct and Ms. Sylvester corrected it.

Judge Mettler moved to submit the rule below for comment. Judge Stucki seconded. The motion passed.

Rule 26.4. Provisions governing disclosure and discovery in contested proceedings under Title 75 of the Utah Code.

(a) **Scope.** This rule applies to all contested actions arising under Title 75 of the Utah Code.

(b) **Definition.** A probate dispute is a contested action arising under Title 75 of the Utah Code.

(c) **Designation of parties, objections, initial disclosures, and discovery.**

(c)(1) **Designation of Parties**. For purposes of Rule 26, the plaintiff in probate proceedings is presumed to be the petitioner in the matter, and the defendant is presumed to be any party filing an objection. Once a probate dispute arises, and based on the facts and circumstances of the case, the court may designate an interested person as plaintiff, defendant, or non-party for purposes of discovery. Only an interested person who has appeared will be treated as a party for purposes of discovery.

(c)(2) **Objection to the petition**.

(c)(2)(A) Any oral objection must be made at a scheduled hearing on the petition and then reduced to writing within 7 days, unless the written objection has been previously filed with the court..

(c)(2)(B) A written objection must set forth the grounds for the objection and any supporting authority, must be filed with the court, and must be mailed to the parties named in the petition and any interested persons as provided in Utah Code § 75-1-201(24).

unless the written objection has been previously filed with the court.(c)(2)(C) If the petitioner and objecting party agree to an extension of time to file the written objection, notice of the agreed upon date must be filed with the court.

(c)(2)(D) In the event no written objection is timely filed, the court will act on the original petition upon the petitioner's filing of a request to submit pursuant to Rule 7 of the Utah Rules of Civil Procedure.

(c)(3) **Initial disclosures in guardianship and conservatorship matters.**

(c)(3)(A) In addition to the disclosures required by Rule 26(a), and unless included in the petition, the following documents must be served by the party in possession or control of the documents within 14 days after a written objection has been filed.

(c)(3)(A)(i) any document purporting to nominate a guardian or conservator, including a will, trust, power of attorney, or advance healthcare directive, copies of which must be served upon all interested persons; and

(c)(3)(A)(ii) a list of less restrictive alternatives to guardianship or conservatorship that the petitioner has explored and ways in which a guardianship or conservatorship of the respondent may be limited.

This paragraph supersedes Rule 26(a)(2).

(c)(3)(B) The initial disclosure documents must be served on the parties named in the probate petition and the objection and anyone who has requested notice under Title 75 of the Utah Code:

(c)(3)(C) If there is a dispute regarding the validity of an original document, the proponent of the original document must make it available for inspection by the contesting party within 14 days of the date of referral to mediation unless the parties agree to a different date.

(c)(3)(D) The court may modify the content and timing of the disclosures required in this rule or in Rule 26(a) for any reason justifying departure from these rules.

(c)(4) **Initial disclosures in all other probate matters.**

(c)(4)(A) In addition to the disclosures required by Rule 26(a), and unless included in the petition, the following documents must be served by the party in possession or control of the documents within 14 days after a written objection has been filed: any other document

purporting to nominate a representative after death, including wills, trusts, and any amendments to those documents, copies of which must be served upon all interested persons. This paragraph supersedes Rule 26(a)(2).

(c)(4)(B) The initial disclosure documents must be served on the parties named in the probate petition and the objection and anyone who has requested notice under Title 75 of the Utah Code.

(c)(4)(C) If there is a dispute regarding the validity of an original document, the proponent of the original document must make it available for inspection by the contesting party within 14 days of the date of referral to mediation unless the parties agree to a different date.

(c)(4)(D) The court may modify the content and timing of the disclosures required in this rule or in Rule 26(a) for any reason justifying departure from these rules.

(c)(5) **Discovery once a probate dispute arises**. Except as provided in this rule or as otherwise ordered by the court, once a probate dispute arises, discovery will proceed pursuant to the Rules of Civil Procedure, including the other provisions of Rule 26.

(d) **Pretrial disclosures, objections.** No later than 14 days prior to an evidentiary hearing or trial, the parties must serve the disclosures required by Rule 26(a)(5)(A).

(3) RULE 73. REVIEW OF COMMENTS

Ms. Sylvester introduced a comment received during the comment period regarding augmenting judgments. Ms. Sylvester pointed out this portion of the rule was not the purpose of the amendments, and that this was a rather substantive change. Judge Clay Stucki stated this was a logical comment. The comment was questioning if the service was necessary for small augmentations (as the service fee will always be more than the $25 augmentation). He proposed adding for scheduled flat fee augmentation amounts the judgment debtor does not need to be served under rule 54(d), which would also need to be amended. He believed it would make sense to make such amendments. Judge Amber Mettler proposed making it clear that this process does not apply to post-judgment collection under rule 73(f)(3). This would require sending rule 54 out for comment, which may be sent out for the LPP amendments.

Judge James Blanch agreed that a defendant in default should not have to be served, but for others using service under rule 5 should be sufficient. This would eliminate the costs and would allow for objections. He pointed out that sometimes augmentations are not automatic. Judge Homberg believed this was a good point. Susan Vogel agreed, and believed that this may encourage debtors to pay. Ms. Sneddon agreed that it was best to serve an augmented judgment, as people should know what is owed. Judge Blanch believed it was only necessary to clarify that persons in default

need not be served. Timothy Pack pointed out that Rule 5 may already take care of this question. The committee agreed that this comment was based upon an incorrect assumption as to what service was required.

Judge Holmberg stated that the comment was about the cost of creating the service notice, not the cost of service. Judge Mettler pointed out that if the cost of doing this was too much it wouldn't be worth the money, and the attorney should not take that action. Judge Blanch agreed. Ms. Sneddon pointed out that the application for the writ was already filed, so the service was not much additional work. Judge Blanch pointed out the committee could look into if $25 was enough of a fee, but should not look into the service question since Rule 5 service controlled.

Judge Kent Holmberg questioned where the word "augment" appeared in the rules. He believed this was just a term of art used by attorneys. Trevor Lee pointed out that the term is used in paragraph (f).

Judge Stucki moved to send the rule as written to the court. Judge Holmberg seconded. The motion passed.

(4) LICENSED PARALEGAL PRACTITIONERS AND THE CIVIL RULES: RULES 4, 5, 10, 11, 26 (RESERVED FOR SUBCOMMITTEE), 53, 56, 58B (COORDINATE WITH OTHER AMENDMENTS), 65A, 73, 74, 75, AND 76. LOOK AT OTHER RULES WHERE "COUNSEL" APPEARS AND DETERMINE IF THERE IS A NEED FOR CHANGE.

Mr. Andreason and Ms. Sylvester introduced this issue. In light of the new licensed paralegal profession, some of the civil rules may need to be updated to accommodate their practice. Ms. Sylvester pointed out that not every required rule may be included in the packet. She asked if additional definitions are required for these rules. Mr. Andreason questioned if this would be odd, as attorney is not defined within the rules. Ms. Sneddon believed that defining legal professional would be valuable as it would make it clear that LLP and attorneys are both included. Judge Stucki proposed adding the definition to Rule 1 to avoid amending the rules in multiple places. Professor Stancil proposed including that the LPP must be "acting in an approved capacity" but that if they used the term counsel, attorney or lawyer would apply to the LPP. This would avoid the risk of expanding the permissible behaviors for the LPPs. Judge Holmberg pointed out that where LPP's are not approved to practice, the term attorney or lawyer should be used. Ms. Sylvester questioned how counsel should be replaced, as it is a nuanced term.

Mr. Andreason pointed out that there is no place where all the rules have a definition section. Judge Holmberg pointed out that sometimes it is nuanced, and perhaps a universal definition would not be appropriate. However, this issue is so unique it may be appropriate. Ms. Sylvester proposed reviewing this and making changes before next month.

Ms. Sylvester also pointed out that there were rule 26 disclosure questions from the Court and proposed assigning Mr. Andreason to evaluate this problem. Judge Blanch questioned what the Court thought should be disclosed that was not already required. Judge Scott asked if the Court was

proposing that the disclosures should be included with the complaint. Mr. Pack questioned what would happen if the required disclosures were not given. Judge Scott answered that she would not allow the documents to be used in court. Judge Blanch questioned whether an LPP should be allowed to file a statement of discovery issues. The Court does not appear to be proposing this, only that the disclosures be required, but they may already be required under the rule. He proposed delineating the consequences for non-disclosure so that no motions would be required. He questioned if these documents should be required with the complaint. Judge Stucki believed that the court was asking for something like 26.5 for debt collection. Judge Blanch does not believe that items being served with the complaint would make sense, but after the answer it would be useful; however, this disclosure is already required. He asked that Ms. Sylvester ask for additional guidance from the court. Ms. DiFrancesco proposed creating a form for that particular situation which could be filed to put the court on notice that documents were missing. Judge Mettler believes the bigger problem is with the LPP rule, as it is not clear that an LPP can file motions. Judge Holmberg requested that someone from the LPP committee explain the limitations of the LPPs.

The committee noticed an issue with USB Rule 14-802. Although the rule defines what the practice of law is, it more specifically enumerates it in a comment. The Court's letter mentioned that LPP's are unable to conduct discovery, but that comes from the comment to the rule, not the rule itself. The rule should probably be amended to more specifically enumerate what attorneys can—and LPP's and other can't—do.

This rule was tabled until next month based upon the questions for Ms. Sylvester to review.

(5) ADJOURNMENT

The remaining matters were deferred, and the committee adjourned at 5:59 pm. The next meeting will be held April 24, 2019 at 4:00 pm.

Tab 2

Rule 68. Settlement offers.

(a) Unless otherwise specified, an offer made under this rule is an offer to resolve all claims in the action between the parties to the date of the offer, including costs, interest and, if attorney fees are permitted by law or contract, attorney fees.

(b) If the adjusted award is not more favorable than the offer, the offeror is not liable for costs, prejudgment interest or attorney fees incurred by the offeree after the offer, and the offeree shall pay the offeror's costs incurred after the offer. The court may suspend the application of this rule to prevent manifest injustice.

(c) An offer made under this rule shall:

(c)(1) be in writing;

(c)(2) expressly refer to this rule;

(c)(3) be made more than 14 days before trial;

(c)(4) remain open for at least 14 days; and

(c)(5) be served on the offeree under Rule 5.

Acceptance of the offer shall be in writing and served on the offeror under Rule 5. Upon acceptance, either party may file the offer and acceptance with a proposed judgment under Rule 58A.

(d) "Adjusted award" means the amount awarded by the finder of fact and, unless excluded by the offer, the offeree's costs and interest incurred before the offer, and, if attorney fees are permitted by law or contract and not excluded by the offer, the offeree's reasonable attorney fees incurred before the offer. If the offeree's attorney fees are subject to a contingency fee agreement, the court shall determine a reasonable attorney fee for the period preceding the offer.

Advisory Committee Notes

Tab 3

West's Nevada Revised Statutes Annotated
Nevada Rules of Court
Rules of Civil Procedure (Refs & Annos)
VIII. Provisional and Final Remedies

Rules of Civil Procedure, Rule **68**

Rule **68**. Offers of Judgment

Currentness

(a) The Offer. At any time more than 21 days before trial, any party may serve an offer in writing to allow judgment to be taken in accordance with its terms and conditions. Unless otherwise specified, an offer made under this rule is an offer to resolve all claims in the action between the parties to the date of the offer, including costs, expenses, interest, and if attorney fees are permitted by law or contract, attorney fees.

(b) Apportioned Conditional Offers. An apportioned offer of judgment to more than one party may be conditioned upon the acceptance by all parties to whom the offer is directed.

(c) Joint Unapportioned Offers.

(1) *Multiple Offerors.* A joint offer may be made by multiple offerors.

(2) *Offers to Multiple Defendants.* An offer made to multiple defendants will invoke the penalties of this rule only if:

(A) there is a single common theory of liability against all the offeree defendants, such as where the liability of some is entirely derivative of the others or where the liability of all is derivative of common acts by another; and

(B) the same entity, person, or group is authorized to decide whether to settle the claims against the offerees.

(3) *Offers to Multiple Plaintiffs.* An offer made to multiple plaintiffs will invoke the penalties of this rule only if:

(A) the damages claimed by all the offeree plaintiffs are solely derivative, such as where the damages claimed by some offerees are entirely derivative of an injury to the others or where the damages claimed by all offerees are derivative of an injury to another; and

(B) the same entity, person, or group is authorized to decide whether to settle the claims of the offerees.

(d) Acceptance of the Offer and Dismissal or Entry of Judgment.

(1) Within 14 days after service of the offer, the offeree may accept the offer by serving written notice that the offer is accepted.

(2) Within 21 days after service of written notice that the offer is accepted, the obligated party may pay the amount of the offer and obtain dismissal of the claims, rather than entry of a judgment.

(3) If the claims are not dismissed, at any time after 21 days after service of written notice that the offer is accepted, either party may file the offer and notice of acceptance together with proof of service. The clerk must then enter judgment accordingly. The court must allow costs in accordance with NRS 18.110 unless the terms of the offer preclude a separate award of costs. Any judgment entered under this section must be expressly designated a compromise settlement.

(e) Failure to Accept Offer. If the offer is not accepted within 14 days after service, it will be considered rejected by the offeree and deemed withdrawn by the offeror. Evidence of the offer is not admissible except in a proceeding to determine costs, expenses, and fees. The fact that an offer is made but not accepted does not preclude a subsequent offer. With offers to multiple offerees, each offeree may serve a separate acceptance of the apportioned offer, but if the offer is not accepted by all offerees, the action will proceed as to all. Any offeree who fails to accept the offer may be subject to the penalties of this rule.

(f) Penalties for Rejection of Offer.

(1) *In General.* If the offeree rejects an offer and fails to obtain a more favorable judgment:

(A) the offeree cannot recover any costs, expenses, or attorney fees and may not recover interest for the period after the service of the offer and before the judgment; and

(B) the offeree must pay the offeror's post-offer costs and expenses, including a reasonable sum to cover any expenses incurred by the offeror for each expert witness whose services were reasonably necessary to prepare for and conduct the trial of the case, applicable interest on the judgment from the time of the offer to the time of entry of the judgment and reasonable attorney fees, if any be allowed, actually incurred by the offeror from the time of the offer. If the offeror's attorney is collecting a contingent fee, the amount of any attorney fees awarded to the party for whom the offer is made must be deducted from that contingent fee.

(2) *Multiple Offers.* The penalties in this rule run from the date of service of the earliest rejected offer for which the offeree failed to obtain a more favorable judgment.

(g) How Costs, Expenses, Interest, and Attorney Fees Are Considered. To invoke the penalties of this rule, the court must determine if the offeree failed to obtain a more favorable judgment. If the offer provided that costs, expenses, interest, and if attorney fees are permitted by law or contract, attorney fees, would be added by the court, the court must compare the amount of the offer with the principal amount of the judgment, without inclusion of costs, expenses, interest, and if attorney fees are permitted by law or contract, attorney fees. If a party made an offer in a set amount that precluded a separate award of costs, expenses, interest, and if attorney fees are permitted by law or contract, attorney fees, the

court must compare the amount of the offer, together with the offeree's pre-offer taxable costs, expenses, interest, and if attorney fees are permitted by law or contract, attorney fees, with the principal amount of the judgment.

(h) Offers After Determination of Liability. When the liability of one party to another has been determined by verdict, order, or judgment, but the amount or extent of the liability remains to be determined by further proceedings, the party adjudged liable may make an offer of judgment, which has the same effect as an offer made before trial if it is served within a reasonable time not less than 14 days before the commencement of hearings to determine the amount or extent of liability.

Credits

Adopted effective October 27, 1998. Amended effective January 1, 2005; March 1, 2019.

Editors' Notes

ADVISORY COMMITTEE NOTES

2019 Amendment

The amendments retain much of former NRCP 68. But as amended Rule 68(f)(2) now provides that, when multiple offers are given, the penalties in Rule 68(f)(1) run from the offer earliest in time that is more favorable than the judgment. The existence of any subsequent offer, whether more or less favorable, does not change the penalty for rejecting the relevant offer. This amendment changes the approach to multiple settlement offers that is prescribed by Albios v. Horizon Communities, Inc., 122 Nev. 409, 132 P.3d 1022 (2006). Experience under Albios suggests that parties are reluctant to make subsequent settlement offers when the penalty for rejecting a favorable offer applies only to the last offer of judgment. The revisions should encourage settlement.

Relevant Additional Resources

Additional Resources listed below contain your search terms.

LAW REVIEW COMMENTARIES

A Proposal to Clarify Rule 68 of the Nevada Rules of Civil Procedure Regarding Offers of Judgment. 7 Nev.L.J. 382 (Spring 2007). Craig Roecks.

NOTES OF DECISIONS

Validity

Statute authorizing court to award attorney fees to prevailing defendant only when plaintiff has not sought more than $10,000, and statute which expressly governs judgment offers and allows recovery of only costs and expert witness fees, not attorney fees, by offerer whose opponent fails to obtain judgment more favorable than offer, are not exclusive, and thus rule permitting award of attorney fees to offeror if judgment finally obtained by offeree is not more favorable than offer is not invalid as being inconsistent with such statutes. Rules Civ.Proc., Rule 68; N.R.S. 17.115, 17.115, subd. 4, 18.010, 18.020. Beattie v. Thomas, 1983, 668 P.2d 268, 99 Nev. 579. Costs 4

Construction and application

Offer of judgment rule and statute are inapplicable to preclude award of costs to offeror after offer of judgment is rejected by offeree and offeror fails to obtain a more favorable judgment; rule and statute bar only the nonaccepting offeree from obtaining costs and attorney fees. Rules Civ.Proc., Rule 68; N.R.S. 17.115. Matthews v. Collman, 1994, 878 P.2d 971, 110 Nev. 940. Costs 42(4); Costs 42(6)

Supreme Court can construe provisions of offer of judgment Rule of Civil Procedure as deemed appropriate; federal court interpretations of similar federal rule are persuasive but not controlling. Fed.Rules Civ.Proc.Rule 68, 28 U.S.C.A.; Rules Civ.Proc., Rule 68. Bowyer v. Taack, 1991, 817 P.2d 1176, 107 Nev. 625. Costs 42(2); Costs 194.50

Class actions are not exempt from provision of Rules Civ.Proc., Rule 68 for award of attorney fees following pretrial offer of judgment if judgment finally obtained by offeree is not more favorable than the offer, despite claimed difficulty inherent in notifying members of large class of a settlement offer within the allotted ten days. Schouweiler v. Yancey Co., 1985, 712 P.2d 786, 101 Nev. 827, rehearing denied. Costs 42(4)

Provision in Rule of Civil Procedure requiring payment of costs and attorney fees of party making offer if judgment finally obtained by offeree is not more favorable than offer encompasses situation in which offeror obtains judgment against offeree as well as situation in which offeree obtains judgment less favorable than offer. Rules Civ.Proc., Rule 68. Beattie v. Thomas, 1983, 668 P.2d 268, 99 Nev. 579. Costs 42(4); Costs 194.50

Where plaintiffs, realizing that defendant was not liable as matter of law, offered to dismiss their complaint with prejudice and to pay costs incurred by defendant, the "offer of judgment" rule did not preclude attorneys' fees in form of damages from being awarded to defendant. NRCP 68. Pearson v. Clucas, 1973, 510 P.2d 629, 89 Nev. 179. Damages 71

Purpose

Purpose of offer of settlement statute and rule is to save time and money for the court system, the parties, and the taxpayers by rewarding a party who makes a reasonable offer and punishing the party who refuses to accept such an offer. N.R.S. 17.115; Rules Civ.Proc., Rule 68. Dillard Dept. Stores, Inc. v. Beckwith, 1999, 989 P.2d 882, 115 Nev. 372, rehearing denied, certiorari denied 120 S.Ct. 2744, 530 U.S. 1276, 147 L.Ed.2d 1008. Costs 42(2)

Purpose of court rule providing that offeree may be required to pay offeror's attorney fees when offeree receives judgment at trial which is not more favorable than offer of judgment is to encourage settlement of lawsuits before trial. Rules Civ.Proc., Rule 68. Allianz Ins. Co. v. Gagnon, 1993, 860 P.2d 720, 109 Nev. 990. Costs 194.50

Purpose of requirement that offer of judgment be made more than ten days prior to trial, in court rule providing that offeree may be required to pay offeror's attorney fees when offeree receives judgment at trial which is not more favorable than offer, is to ensure that offeree have adequate time after service and before trial to consider offer. Rules Civ.Proc., Rule 68. Allianz Ins. Co. v. Gagnon, 1993, 860 P.2d 720, 109 Nev. 990. Costs 194.50

Purpose of Rule of Civil Procedure providing for payment of costs and attorney fees by offeree where judgment finally obtained by offeree is not more favorable than offer is to encourage settlement, not to force plaintiffs unfairly to forego legitimate claims. Rules Civ.Proc., Rule 68. Beattie v. Thomas, 1983, 668 P.2d 268, 99 Nev. 579. Costs 42(4); Costs 194.50

Law governing

Where defendant, in action asserting claims under federal and state law, followed the procedure of Federal Rule of Civil Procedure in making offer of judgment, offer was rejected, and defendant prevailed, and where the law of Nevada, the forum state, permitted a prevailing defendant to recover attorneys' fees incurred after an offer of judgment is rejected by the plaintiff, defendant was entitled to attorney fees incurred in defending against state law claims after offer was rejected, though offer of judgment did not specify the Nevada rule providing for the fee sought, as would have been required if offer had been filed under Nevada rule, and defendant did not file separate offers of judgment under state law. Fed.Rules Civ.Proc.Rule 68, 28 U.S.C.A.; Nev.Rules Civ.Proc., Rule 68. MRO Communications, Inc. v. American Tel. & Tel. Co., 1999, 197 F.3d 1276, certiorari denied 120 S.Ct. 1995, 529 U.S. 1124, 146 L.Ed.2d 820. Costs 194.50

In action which is brought pursuant to district court's diversity jurisdiction, plaintiff who offers to settle action for less than amount of judgment that he ultimately obtains after defendant rejects settlement offer may rely on state law to shift postoffer costs to defendant, but cannot use state law to shift attorney fees; Erie precluded enforcement of state law in diversity cases insofar as it would inject availability of attorney fees and thereby encourage forum shopping. Nev.Rules Civ.Proc., Rule 68. Nicolaus v. West Side Transport, Inc., 1999, 185 F.R.D. 608. Federal Courts 3061

Having expressly stated, in its offer to settle, that settlement offer was made pursuant to Federal Rules of Civil Procedure, plaintiff intervenor was bound by terms of its offer and could not utilize Nevada procedural rule to support its claim for postoffer costs when defendants rejected settlement offer and failed to obtain more favorable judgment. Fed.Rules Civ.Proc.Rule 68, 28 U.S.C.A.; Nev.Rules Civ.Proc., Rule 68. Nicolaus v. West Side Transport, Inc., 1999, 185 F.R.D. 608. Federal Courts 3061

Bifurcated trials

Each phase of bifurcated trial is separate "trial," within meaning of court rule and statute providing that offeree may be required to pay offeror's attorney fees when offeree receives judgment at "trial" which is not more favorable than offer of judgment. N.R.S. 17.115; Rules Civ.Proc., Rules 42(b), 68. Allianz Ins. Co. v. Gagnon, 1993, 860 P.2d 720, 109 Nev. 990. Costs 194.50

Offers of judgment made prior to second "trial" in bifurcated trial were not untimely, and, thus, offers of judgment rendered applicable court rule and statute providing that offeree may be required to pay offeror's attorney fees when offeree receives judgment at trial that is not more favorable than offer of judgment. N.R.S. 17.115; Rules Civ.Proc., Rules 42(b), 68. Allianz Ins. Co. v. Gagnon, 1993, 860 P.2d 720, 109 Nev. 990. Costs 194.50

Time of offer

Under statutes providing that offer of judgment must be made "more than 10 days before the trial begins," the trial date rather than the day the offer of judgment is served is the event triggering the ten-day period, and the ten-day period is calculated by excluding the day of trial and counting backward from the day before trial, with the day the offer is served included in the computation. N.R.S. 17.115; Rules Civ.Proc., Rule 68. Palace Station Hotel & Casino, Inc. v. Jones, 1999, 978 P.2d 323, 115 Nev. 162. Judgment 77

For purposes of rule permitting offer of judgment at any time more than 10 days "before the trial begins," trial begins when actual presentation of evidence commences. Rules Civ.Proc., Rule 68. Schwartz v. Estate of Greenspun, 1994, 881 P.2d 638, 110 Nev. 1042. Judgment 77

Offer of judgment was timely when made more than 10 days before actual presentation of evidence began, even though jury selection commenced within 10 days of offer. N.R.S. 17.115, Rules Civ.Proc., Rules 6(a), 68. Schwartz v. Estate of Greenspun, 1994, 881 P.2d 638, 110 Nev. 1042. Judgment 77

Conditional offer

Although offer of judgment was not expressly conditioned upon acceptance by both plaintiffs, it could only be fairly read as in fact being conditioned upon acceptance by both plaintiffs; accordingly, offer was invalid and defendant was not entitled to attorney fees under rule permitting such an award to a party who makes offer of judgment if offeree does not accept offer and judgment finally obtained by offeree is more favorable than offer. Rules Civ.Proc., Rule 68. Lentz v. I.D.S. Financial Services, Inc., 1995, 890 P.2d 783, 111 Nev. 306, rehearing denied. Costs 194.50

Conditional offer for judgment is not valid under Rule 68, providing for award of attorney fees and costs to offeror if judgment finally obtained by offeree is not more favorable than that offered. Rules Civ.Proc., Rule 68. Stockton Kenworth, Inc. v. Mentzer Detroit Diesel, Inc., 1985, 705 P.2d 145, 101 Nev. 400. Costs 42(2)

Offer for judgment must be unconditional, for Rule 68, providing for award of costs and attorney fees to offeror if final judgment is not more favorable than offer to offeree, to apply. Rules Civ.Proc., Rule 68. Stockton Kenworth, Inc. v. Mentzer Detroit Diesel, Inc., 1985, 705 P.2d 145, 101 Nev. 400. Costs 42(2)

Offer of judgment which would have required seller of tractor-truck seeking possession of it to obtain in some fashion "good title" to vehicle as a condition precedent to receiving payment from garage corporation which had done repairs on vehicle was indefinite and conditional offer; thus, attorney fees and costs would not be awarded to corporation under Rule 68, providing that after offer of judgment has been made, if judgment finally obtained by offeree is not more favorable than the offer, offeree shall pay costs and attorney fees of offeror. Rules Civ.Proc., Rule 68. Stockton Kenworth, Inc. v. Mentzer Detroit Diesel, Inc., 1985, 705 P.2d 145, 101 Nev. 400. Costs 42(2)

Joint unapportioned offers

Joint offer of judgment, which did not indicate whether the $20,000 was being offered to settle subcontractor's contract and quasi-contract claims against contractor or subcontractor's slander claim against individual defendant, and which did not indicate how much would be paid respectively by contractor and individual defendant, was "unapportioned," and therefore, the joint offer could not be used to determine the prevailing party for purposes of attorney fee and costs awards. N.R.S. 17.115; Rules Civ.Proc., Rule 68. Parodi v. Budetti, 1999, 984 P.2d 172, 115 Nev. 236. Costs 42(2); Costs 194.50

A joint, unapportioned offer of judgment is invalid for the purpose of determining a prevailing party eligible for attorney fees and costs. N.R.S. 17.115; Rules Civ.Proc., Rule 68. Parodi v. Budetti, 1999, 984 P.2d 172, 115 Nev. 236. Costs 42(2); Costs 194.50

Individual defendant sued for slander was not at the time of the joint, unapportioned offer of judgment an agent of contractor sued for breach of contract, and thus, the offer of judgment was invalid for the purpose of determining a prevailing party eligible for attorney fees and costs. N.R.S. 17.115; Rules Civ.Proc., Rule 68. Parodi v. Budetti, 1999, 984 P.2d 172, 115 Nev. 236. Costs 42(2); Costs 194.50

Plaintiff's joint offer of judgment of $50,000 to three defendants, which was not apportioned between defendants, was invalid basis for award of attorney fees, under statute and rule providing that offeree who obtains judgment no more favorable than rejected offer of judgment must pay attorney fees and costs of other party. N.R.S. 17.115, subd. 4; Rules Civ.Proc., Rule 68. Yada v. Simpson, 1996, 913 P.2d 1261, 112 Nev. 254. Costs 194.50

Despite fact that defendants were exonerated of any liability at trial, defendants' unapportioned joint offer of judgment was ineffective for purposes of attorney fee award and thus, defendants could not collect attorney fees pursuant to statute and rule providing that, if opposing party does not accept offer of judgment and opposing party then receives judgment at trial which is not more favorable than the offer, district court may award offer of attorney fees incurred from time offer was made. N.R.S. 17.115; Rules Civ.Proc., Rule 68. Smith v. Crown Financial Services of America, 1995, 890 P.2d 769, 111 Nev. 277. Costs 194.50

Unapportioned joint offers of judgment were not valid for purposes of awarding attorney fees to party who made offer of judgment where offeree did not accept offer and judgment finally obtained by offeree was not more favorable that offer; there was no exception from general rule where defendants were completely exonerated from liability. Rules Civ.Proc., Rules 61, 68. Bergmann v. Boyce, 1993, 856 P.2d 560, 109 Nev. 670. Costs 194.50

Multiple plaintiffs who made unapportioned joint offer of judgment to defendant were not entitled to award of costs and attorney fees after judgment exceeding the offer of judgment was obtained in trial on theory defendant was not able to obtain more favorable judgment than that offered. Rules Civ.Proc., Rule 68. Morgan v. Demille, 1990, 799 P.2d 561, 106 Nev. 671. Costs 42(5); Costs 194.50

Offer of judgment which was not apportioned among offerees was invalid as unapportioned joint offer and, therefore, rejection of offer did not bar recovery of costs and attorney fees, even though judgment obtained against offeror was less favorable than offer. Rules Civ.Proc., Rule 68. Ramadanis v. Stupak, 1988, 752 P.2d 767, 104 Nev. 57. Costs 42(4); Costs 194.50

Validity of offer of judgment

Offer of judgment must be unconditional and for definite amount in order to be valid for purposes of rule providing for award of attorney fees and costs to offeror if judgment finally obtained by offeree is not more favorable than that offered. Rules Civ.Proc., Rule 68. Pombo v. Nevada Apartment Ass'n, 1997, 938 P.2d 725, 113 Nev. 559. Costs 42(4); Costs 194.50

Defendants' second offer of judgment, which contained no express conditions, was valid unconditional offer of judgment for purposes of rule providing for award of attorney fees and costs to offeror if judgment finally obtained by offeree was not more favorable than offer, notwithstanding fact that defendants' first offer of judgment made four days earlier had been conditional. Rules Civ.Proc., Rule 68. Pombo v. Nevada Apartment Ass'n, 1997, 938 P.2d 725, 113 Nev. 559. Costs 42(4); Costs 194.50

Lessee's offer of judgment in favor of landlord and equipment lessor was invalid and could not provide basis for awarding attorney fees and costs to lessee, even if same person was acting as agent for landlord and lessor; landlord and lessor sought recovery under separate oral agreements with lessee, and unapportioned joint offer denied landlord and lessor the opportunity to weigh individual changes for more favorable judgment. Rules Civ.Proc., Rule 68. Edwards Industries, Inc. v. DTE/BTE, Inc., 1996, 923 P.2d 569, 112 Nev. 1025. Costs 42(1); Costs 194.50

For purposes of statute and rule authorizing awards of costs, attorney fees, and interest on judgment to offeror whose pretrial offer of judgment is rejected, products liability plaintiff's offer of judgment was not invalid on grounds that it was unapportioned joint offer of judgment to both named defendants; offer was joint in name only in that defense counsel had stipulated that any judgment would be paid by one defendant, and there was no separate liability or basis of liability of second defendant. N.R.S. 17.115; Rules Civ.Proc., Rule 68. Uniroyal Goodrich Tire Co. v. Mercer, 1995, 890 P.2d 785, 111 Nev. 318, rehearing denied. Costs 42(4); Costs 194.50

Valid offer of judgment did not need to recite amount of costs separately from amount of award. Rules Civ.Proc., Rule 68. Fleischer v. August, 1987, 737 P.2d 518, 103 Nev. 242. Judgment 78

Offer of judgment of $50,000, including costs incurred, was valid offer for lump sum of $50,000, which included costs in that amount. Rules Civ.Proc., Rule 68. Fleischer v. August, 1987, 737 P.2d 518, 103 Nev. 242. Judgment 82

Offer for judgment must be for a definite or ascertainable amount, so that parties can be unequivocally aware of what defendant is willing to pay for his peace, for provisions of Rule 68, providing for award of costs and attorney fees to offeror if judgment finally obtained by offeree is not more favorable than offer, to apply. Rules Civ.Proc., Rule 68. Stockton Kenworth, Inc. v. Mentzer Detroit Diesel, Inc., 1985, 705 P.2d 145, 101 Nev. 400. Costs 42(2)

Defendant's pretrial offer of judgment, which was left open for only nine days, rather than statutory ten-day period within which other party was allowed to accept, was fatally defective, and thus, trial court did not err in refusing to award costs and attorney fees to defendant after trial, notwithstanding that defendant's offer of judgment was greater

than amount actually recovered by plaintiff. Rules Civ.Proc., Rule 68. Wickliffe v. Fletcher Jones of Las Vegas, Inc., 1983, 661 P.2d 1295, 99 Nev. 353. Costs 42(4); Costs 194.50

Reasonableness of rejection of offer

Department store's rejection of former area sales manager's "rock-bottom" offer to settle claims of tortious constructive discharge and intentional infliction of emotional distress for total of $187,000 was unreasonable, for purposes of offer of settlement statute and rule, and thus, former manager was entitled to award of attorney fees as prevailing party at trial. N.R.S. 17.115; Rules Civ.Proc., Rule 68. Dillard Dept. Stores, Inc. v. Beckwith, 1999, 989 P.2d 882, 115 Nev. 372, rehearing denied, certiorari denied 120 S.Ct. 2744, 530 U.S. 1276, 147 L.Ed.2d 1008. Costs 194.50

Interest

If individuals fail to secure judgment greater than previously tendered offer of judgment, they cannot seek award of prejudgment interest under either court rule or statutory provision. N.R.S. 17.115; Rules Civ.Proc., Rule 68. Bowyer v. Taack, 1991, 817 P.2d 1176, 107 Nev. 625. Interest 50

Offer of judgment was made pursuant to rule which does not provide for denial of prejudgment interest when final judgment is less favorable than offer and, therefore, did not bar recovery of prejudgment interest. N.R.S. 17.115; Rules Civ.Proc., Rule 68. Ramadanis v. Stupak, 1988, 752 P.2d 767, 104 Nev. 57. Interest 22(1); Interest 49

Where no offer of judgment was made, no deposit made with court, and no formal tender made by owner to sub-subcontractor who brought mechanic's lien foreclosure action, tender of an amount in settlement, which did not make it clear that sub-subcontractor could accept it without impairing its claim for larger amount, did not negate sub-subcontractor's right to attorneys' fees and interest on principal amount due and owing, even if offer was in excess of principal amount of judgment subsequently entered. NRCP 67, 68. Sherman Gardens Co. v. Longley, 1971, 491 P.2d 48, 87 Nev. 558. Interest 50; Mechanics' Liens 310(3)

Costs and attorney fees--In general

Under Nevada Rule of Civil Procedure providing for award of costs to any party that offers to settle, if opposing party rejects settlement offer and fails to obtain more favorable judgment, postoffer attorney fees are recoverable as matter of course, subject only to considerations of good faith and reasonableness of the claims or defenses, the offer of judgment, and the requested attorney fees. Nev.Rules Civ.Proc., Rule 68. Nicolaus v. West Side Transport, Inc., 1999, 185 F.R.D. 608. Costs 194.50

Nevada Rule of Civil Procedure, providing for award of costs to any party that offers to settle, if opposing party rejects this settlement offer and fails to obtain more favorable judgment, permits award of costs to any offering party, whether plaintiff or defendant. Nev.Rules Civ.Proc., Rule 68. Nicolaus v. West Side Transport, Inc., 1999, 185 F.R.D. 608. Costs 42(4)

Defendants were not entitled to attorney fees and costs in partition action despite contention that simple calculation of property values showed that offer was "more favorable" to plaintiff than the judgment; settlement offer would have divided ranch, but judgment awarded plaintiff entire ranch, less an owelty, and therefore judgment obtained by plaintiff was more favorable than the offer. Rules Civ.Proc., Rule 68. Kent v. Kent, 1992, 835 P.2d 8, 108 Nev. 398. Partition 114(1); Partition 114(4)

Under either Rules of Civil Procedure or statute, taxable costs, attorney fees, and prejudgment interest should not be included as part of judgment to determine whether judgment is greater than previously tendered offer of judgment, for

purposes of award of attorney's fees. N.R.S. 17.115, 17.115, subd. 5; Rules Civ.Proc., Rule 68. Bowyer v. Taack, 1991, 817 P.2d 1176, 107 Nev. 625. Costs 194.50

Employer was not entitled to attorney's fees in action brought against it by trustees for various trusts were carpenters on grounds that trustees did not recover more favorable judgment than their offer of judgment under Rules Civ.Proc., Rule 68, where trustees were refused access to general ledger or cash disbursement journal of employer when employer's books were audited, without access to those records no accurate determination could be made of whether employer had fully reported and paid benefits on all hours work by its carpenter employees, and it was not until nine months after Rule 68 offer of judgment was made that documents were produced. Trustees of Carpenters for Southern Nevada Health and Welfare Trust v. Better Bldg. Co., 1985, 710 P.2d 1379, 101 Nev. 742. Labor And Employment 716

Employer was not entitled to expenses and costs of expert utilized for preparation of defense under N.R.S. 17.115 providing for discretionary award of expert witness fees, where employer's offer of judgment was tendered expressly pursuant to Rules Civ.Proc., Rule 68 and refused offer was necessarily subject to terms under which it was made, and employer's expert was never sworn and did not testify at trial. Trustees of Carpenters for Southern Nevada Health and Welfare Trust v. Better Bldg. Co., 1985, 710 P.2d 1379, 101 Nev. 742. Costs 42(2); Costs 187

---- Services prior to offer, costs and attorney fees

Under both attorney fee statute and rule of court for award of attorney fees when obtaining judgment more favorable than offer of judgment that was rejected, trial court cannot award counsel fees for legal services performed prior to date of offer of judgment. N.R.S. 17.115, subd. 4; Rules Civ.Proc., Rule 68. Nurenberger Hercules-Werke GMBH v. Virostek, 1991, 822 P.2d 1100, 107 Nev. 873, rehearing denied. Costs 194.50

---- Judgment for less than offer, costs and attorney fees

Under Nevada law, insured who was awarded less, after trial, than amount for which insurer offered to settle claim was not entitled to attorney fees. N.R.S. 18.010; Nev.Rules Civ.Proc., Rule 68. Bevard v. Farmers Ins. Exchange, 1997, 127 F.3d 1147, certiorari denied 118 S.Ct. 1843, 523 U.S. 1139, 140 L.Ed.2d 1093. Costs 194.50

When there is pretrial offer of judgment that offeree refuses and final judgment results in outcome less favorable to offeree, trial judge may make awards of costs, attorney fees, and interest on judgment to offeror. N.R.S. 17.115; Rules Civ.Proc., Rule 68. Uniroyal Goodrich Tire Co. v. Mercer, 1995, 890 P.2d 785, 111 Nev. 318, rehearing denied. Costs 42(4); Costs 194.50

If offeree declines to accept offer of judgment made pursuant to court rule and statute, and offeree receives judgment at trial which is not more favorable than offer, offeree may be required to pay offeror's attorney fees. N.R.S. 17.115; Rules Civ.Proc., Rule 68. Allianz Ins. Co. v. Gagnon, 1993, 860 P.2d 720, 109 Nev. 990. Costs 194.50

Plaintiff who recovers less than a defendant's offer of judgment is not entitled to recover attorney's fees. N.R.S. 17.115, 17.115, subd. 4, 18.010; Rules Civ.Proc., Rule 68. Bowyer v. Taack, 1991, 817 P.2d 1176, 107 Nev. 625. Costs 194.50

---- Prevailing party after offer rejected, costs and attorney fees

Under Nevada law on award of attorney fees to prevailing defendant after rejection of offer of judgment, the district court needed only to “consider” the four relevant factors, and did not have to make specific findings on any of the factors. Nev.Rules Civ.Proc., Rule 68. MRO Communications, Inc. v. American Tel. & Tel. Co., 1999, 197 F.3d 1276, certiorari denied 120 S.Ct. 1995, 529 U.S. 1124, 146 L.Ed.2d 820. Costs 208

Under Nevada and New Jersey law, a prevailing defendant is entitled to recover attorneys' fees if an offer of judgment is rejected. N.R.S. 17.115, 18.020; Nev.Rules Civ.Proc., Rule 68. MRO Communications, Inc. v. American Tel. & Tel. Co., 1999, 197 F.3d 1276, certiorari denied 120 S.Ct. 1995, 529 U.S. 1124, 146 L.Ed.2d 820. Costs 194.50

Where offeree is precluded under offer of judgment rule from recovering attorney fees and costs because the judgment obtained by offeree is not more favorable than the offer of judgment, offeree is also precluded from recovering statutory attorney fees and costs as a prevailing party. N.R.S. 17.115, subd. 4(b), 18.010, 18.050; Rules Civ.Proc., Rule 68. Palace Station Hotel & Casino, Inc. v. Jones, 1999, 978 P.2d 323, 115 Nev. 162. Costs 42(4); Costs 194.50

Although judgment obtained for years pleaded at time of offers of judgment did not exceed sum of offers served, prevailing plaintiff was properly awarded attorney fees based on total damage award which exceeded offer and included damages which had not yet accrued at time of the offers. Rules Civ.Proc., Rule 68. Clark v. Lubritz, 1997, 944 P.2d 861, 113 Nev. 1089, rehearing denied. Costs 194.50

Statute which allows trial court to award attorney fee to prevailing party under certain circumstances had no application with regard to issue whether defendants, whose offer to allow judgment was refused, should have been awarded attorney fees when judgment obtained against them was for an amount less than that which plaintiff would have obtained if he had accepted the offer. N.R.S. 18.010, subd. 3; NRCP 68. Armstrong v. Riggi, 1976, 549 P.2d 753, 92 Nev. 280. Costs 194.50

---- Discretion of trial court, costs and attorney fees

No one factor under Beattie analysis for attorney fee award is determinative, and trial court has broad discretion to grant request for attorney fees so long as all appropriate factors are considered. Rules Civ.Proc., Rule 68. Yamaha Motor Co., U.S.A. v. Arnoult, 1998, 955 P.2d 661, 114 Nev. 233. Costs 194.10; Costs 194.12

Trial court abused its discretion in awarding attorney fees of $237,100 to plaintiff in products liability case, though jury award of $3.6 million was $1.1 million higher than the offer of judgment rejected by manufacturer, as trial court did not consider, as Beattie factor, whether manufacturer's defenses were litigated in good faith, and trial court, in finding as Beattie factor that rejection of offer was in bad faith, may not have appropriately weighed the fact that manufacturer prevailed on two of its three defenses, and thus, remand was necessary for reweighing under Beattie. Rules Civ.Proc., Rule 68. Yamaha Motor Co., U.S.A. v. Arnoult, 1998, 955 P.2d 661, 114 Nev. 233. Costs 194.28; Costs 194.50

In exercising its discretion to award costs and attorney fees to offeror whose pretrial offer of judgment has been rejected, trial court must evaluate following factors: (1) whether claim was brought in good faith; (2) whether offeror's offer of judgment was brought in good faith; (3) whether offeree's decision to reject offer and proceed to trial was grossly unreasonable or in bad faith; and (4) whether fees sought by offeror are reasonable and justified in amount. N.R.S. 17.115; Rules Civ.Proc., Rule 68. Uniroyal Goodrich Tire Co. v. Mercer, 1995, 890 P.2d 785, 111 Nev. 318, rehearing denied. Costs 42(4); Costs 194.50

Award of attorney fees to offeror when offeree receives judgment at trial which is not more favorable than offer of judgment lies within discretion of district court; however, when district court exercises its discretion in clear disregard of guiding legal principles, such action may constitute abuse of discretion. N.R.S. 17.115; Rules Civ.Proc., Rule 68. Allianz Ins. Co. v. Gagnon, 1993, 860 P.2d 720, 109 Nev. 990. Costs 194.50

Denial of title company's motion for attorney fees in action for alleged breach of duty to defend was not an abuse of discretion where offer to settle was low in light of damages sought and insured was not unreasonable in rejecting offer. Rules Civ.Proc., Rule 68. Bidart v. American Title Ins. Co., 1987, 734 P.2d 732, 103 Nev. 175. Insurance 3585

It is within the discretion of trial judge to allow attorney fees pursuant to Rules Civ.Proc., Rule **68**, based on failure of offeree to obtain a judgment more favorable than pretrial offer of judgment, and in exercising that discretion the trial court must evaluate whether plaintiff's claim was brought in good faith, whether defendant's offer of judgment was brought in good faith both in timing and amount, whether plaintiff's decision to reject the offer and proceed to trial was grossly unreasonable or in bad faith, and whether fees sought by offeror are reasonable and justified in amount. Schouweiler v. Yancey Co., 1985, 712 P.2d 786, 101 Nev. 827, rehearing denied. Costs 42(4)

In exercising discretion regarding allowance of fees and costs under Rule of Civil Procedure providing for payment of costs and attorney fees by offeree when judgment finally obtained by offeree is not more favorable than offer, trial court must evaluate whether plaintiff's claim was brought in good faith, whether defendants' offer of judgment was reasonable and in good faith in both timing and amount, whether plaintiff's decision to reject offer and proceed to trial was grossly unreasonable or in bad faith, and whether fees sought by offeror are reasonable and justified in amount; where court has failed to consider those factors, it is abuse of discretion for court to award full amount of fees requested. Rules Civ.Proc., Rule **68**. Beattie v. Thomas, 1983, 668 P.2d 268, 99 Nev. 579. Costs 42(4); Costs 194.50

While facts of suit would have allowed the court to grant attorney fees, there was no basis for finding that the trial court abused discretion in not allowing attorney fees, in suit wherein plaintiffs unsuccessfully sought to recover damages for alleged tortious interference with prospective economic advantage. **NRCP 68**. Crockett v. Sahara Realty Corp., 1979, 591 P.2d 1135, 95 Nev. 197. Costs 194.30

Offer of judgment rule invests trial court with discretion to allow offeror attorney fees when judgment obtained by offeree is not more favorable than the offer. **NRCP 68**. Armstrong v. Riggi, 1976, 549 P.2d 753, 92 Nev. 280. Costs 194.50

---- Divorce, custody and support proceedings, costs and attorney fees

Rule providing that, in event a defendant has offered judgment more favorable than final award, offeree shall pay costs and attorney fees of party making the offer is inapplicable to divorce proceedings. **NRCP 68**. Leeming v. Leeming, 1971, 490 P.2d 342, 87 Nev. 530. Divorce 1141

Even if rule levying cost of action on party refusing offer of judgment more favorable than final award were applicable to divorce actions, trial court's refusal to invoke rule upon wife's motion for suit money and additional child support was not error, where it could not be said that final award was less favorable than husband's offer of judgment. **NRCP 68**. Leeming v. Leeming, 1971, 490 P.2d 342, 87 Nev. 530. Divorce 1141

---- Reasonableness of amount of award, costs and attorney fees

Amount of offer of judgment is not relevant to a reasonable award of attorney fees under Rules Civ.Proc., Rule **68** based on failure of offeree to obtain judgment more favorable than pretrial offer of judgment. Schouweiler v. Yancey Co., 1985, 712 P.2d 786, 101 Nev. 827, rehearing denied. Costs 42(4)

---- Review, costs and attorney fees

Award of attorney fees to defendant who prevailed at trial after making pretrial offer of judgment was not subject to being disturbed on appeal where it could not be said that the trial court's exercise of discretion was arbitrary or capricious. Rules Civ.Proc., Rule **68**. Schouweiler v. Yancey Co., 1985, 712 P.2d 786, 101 Nev. 827, rehearing denied. Appeal And Error 3718

Where district court in medical malpractice suit found only that settlement offers of doctors had been reasonable and in good faith, but took no evidence and made no findings on other factors required to be considered before awarding costs and attorney fees, cause had to be remanded for redetermination on record of amount of attorney fees to be awarded

under Rule of Civil Procedure providing for payment of costs and attorney fees by offeree when judgment finally obtained by offeree is not more favorable than offer. Rules Civ.Proc., Rule 68. Beattie v. Thomas, 1983, 668 P.2d 268, 99 Nev. 579. Appeal And Error 4742

---- Evidence as to costs, costs and attorney fees

The affidavits and exhibits submitted in support of and opposition to prevailing defendant's motion for attorneys' fees under Nevada law, after plaintiff rejected an offer of judgment, were sufficient for the district court to consider each of the four factors required to be considered under Nevada law and conclude that the $2,009,844.89 in fees sought in action by subscriber to defendant telephone company's transport and billing services was reasonable and justified. Nev.Rules Civ.Proc., Rule 68. MRO Communications, Inc. v. American Tel. & Tel. Co., 1999, 197 F.3d 1276, certiorari denied 120 S.Ct. 1995, 529 U.S. 1124, 146 L.Ed.2d 820. Costs 207

Findings

Language of trial court's award of costs and attorney fees to plaintiff as offeror whose pretrial offer of judgment was rejected indicated that trial court considered appropriate factors. N.R.S. 17.115; Rules Civ.Proc., Rule 68. Uniroyal Goodrich Tire Co. v. Mercer, 1995, 890 P.2d 785, 111 Nev. 318, rehearing denied. Costs 42(4); Costs 194.50

Award of $150,000 in attorney fees made under offer of judgment would be affirmed in protracted litigation where, although district court failed to enter express findings regarding Beattie factors, it reviewed points and authorities on those factors and awarded amount that was substantially less than sum requested. N.R.S. 17.115, Rules Civ.Proc., Rules 6(a), 68. Schwartz v. Estate of Greenspun, 1994, 881 P.2d 638, 110 Nev. 1042. Costs 208

Trial bench is cautioned to provide written support under Beattie factors for awards of attorney fees made pursuant to offers of judgment even where award is less than sum requested. N.R.S. 17.115; Rules Civ.Proc., Rules 6(a), 68. Schwartz v. Estate of Greenspun, 1994, 881 P.2d 638, 110 Nev. 1042. Costs 208

Effect of reversal

Where order granting defendants an involuntary dismissal was reversed for a trial on the merits, such resolution compelled reversal of court's order granting defendants' motion to assess costs and attorney fees because basis for the order, i. e., a judgment finally obtained by plaintiff that was not more favorable than settlement offer made by defendants, no longer existed. Rules of Civil Procedure, Rule 68. Schwabacher and Co. v. Zobrist, 1981, 625 P.2d 82, 97 Nev. 97. Appeal And Error 4698

Remand

Makers of unsecured promissory note were not entitled to award of attorney fees based on holder's refusal of offer of judgment where on remand holder in due course (HDC) would obtain judgment more favorable than pretrial settlement offer made by note makers. Rules Civ.Proc., Rule 68; N.R.S. 17.115. Tipton v. Heeren, 1993, 859 P.2d 465, 109 Nev. 920. Costs 194.50

Harmless and prejudicial error

District court's error in finding that offers of judgment made prior to second “trial” in bifurcated trial were untimely was not harmless, where that error denied offerors the opportunity to recover attorney fees from offeree when judgment at trial was not more favorable than offer. N.R.S. 17.115; Rules Civ.Proc., Rules 61, 68. Allianz Ins. Co. v. Gagnon, 1993, 860 P.2d 720, 109 Nev. 990. Appeal And Error 4485

Civ. Proc. Rules, Rule 68, NV ST RCP Rule 68
Current with amendments received through March 15, 2019.

End of Document

2010 Nevada Code
TITLE 2 CIVIL PRACTICE
Chapter 17 Judgments
NRS 17.115 Offer of judgment.

NRS 17.115 Offer of judgment.

1. At any time more than 10 days before trial, any party may serve upon one or more other parties a written offer to allow judgment to be taken in accordance with the terms and conditions of the offer of judgment.

2. Except as otherwise provided in subsection 7, if, within 10 days after the date of service of an offer of judgment, the party to whom the offer was made serves written notice that the offer is accepted, the party who made the offer or the party who accepted the offer may file the offer, the notice of acceptance and proof of service with the clerk. Upon receipt by the clerk:

(a) The clerk shall enter judgment according to the terms of the offer unless:

(1) A party who is required to pay the amount of the offer requests dismissal of the claim instead of entry of the judgment; and

(2) The party pays the amount of the offer within a reasonable time after the offer is accepted.

(b) Regardless of whether a judgment or dismissal is entered pursuant to paragraph (a), the court shall award costs in accordance with NRS 18.110 to each party who is entitled to be paid under the terms of the offer, unless the terms of the offer preclude a separate award of costs.

Any judgment entered pursuant to this section shall be deemed a compromise settlement.

3. If the offer of judgment is not accepted pursuant to subsection 2 within 10 days after the date of service, the offer shall be deemed rejected by the party to whom it was made and withdrawn by the party who made it. The rejection of an offer does not preclude any party from making another offer pursuant to this section. Evidence of a rejected offer is not admissible in any proceeding other than a proceeding to determine costs and fees.

4. Except as otherwise provided in this section, if a party who rejects an offer of judgment fails to obtain a more favorable judgment, the court:

(a) May not award to the party any costs or attorney's fees;

(b) May not award to the party any interest on the judgment for the period from the date of service of the offer to the date of entry of the judgment;

(c) Shall order the party to pay the taxable costs incurred by the party who made the offer; and

(d) May order the party to pay to the party who made the offer any or all of the following:

(1) A reasonable sum to cover any costs incurred by the party who made the offer for each expert witness whose services were reasonably necessary to prepare for and conduct the trial of the case.

(2) Any applicable interest on the judgment for the period from the date of service of the offer to the date of entry of the judgment.

(3) Reasonable attorney's fees incurred by the party who made the offer for the period from the date of service of the offer to the date of entry of the judgment. If the attorney of the party who made the offer is collecting a contingent fee, the amount of any attorney's fees awarded to the party pursuant to this subparagraph must be deducted from that contingent fee.

5. To determine whether a party who rejected an offer of judgment failed to obtain a more favorable judgment:

(a) If the offer provided that the court would award costs, the court must compare the amount of the offer with the principal amount of the judgment, without inclusion of costs.

(b) If the offer precluded a separate award of costs, the court must compare the amount of the offer with the sum of:

(1) The principal amount of the judgment; and

(2) The amount of taxable costs that the claimant who obtained the judgment incurred before the date of service of the offer.

As used in this subsection, "claimant" means a plaintiff, counterclaimant, cross-claimant or third-party plaintiff.

6. Multiple parties may make a joint offer of judgment pursuant to this section.

7. A party may make to two or more other parties pursuant to this section an apportioned offer of judgment that is conditioned upon acceptance by all the parties to whom the apportioned offer is made. Each party to whom such an offer is made may serve upon the party who made the offer a separate written notice of acceptance of the offer. If any party rejects the apportioned offer:

(a) The action must proceed as to all parties to whom the apportioned offer was made, whether or not the other parties accepted or rejected the offer; and

(b) The sanctions set forth in subsection 4:

(1) Apply to each party who rejected the apportioned offer.

(2) Do not apply to any party who accepted the apportioned offer.

8. If the liability of one party to another party has been determined by verdict, order or judgment, but the amount or extent of the liability of the party remains to be determined by further proceedings, the party found liable may, not later than 10 days before commencement of the proceedings to determine the amount or extent of the liability, serve upon the party to whom he or she is liable a written offer of judgment. An offer of judgment made pursuant to this subsection shall be deemed to have the same effect as an offer of judgment made before trial.

9. The sanctions set forth in subsection 4 do not apply to:

(a) An offer of judgment made to multiple defendants unless the same person is authorized to decide whether to settle the claims against all the defendants to whom the offer is made and:

(1) There is a single common theory of liability against all the defendants to whom the offer is made;

(2) The liability of one or more of the defendants to whom the offer is made is entirely derivative of the liability of the remaining defendants to whom the offer is made; or

(3) The liability of all the defendants to whom the offer is made is entirely derivative of a common act or omission by another person.

(b) An offer of judgment made to multiple plaintiffs unless the same person is authorized to decide whether to settle the claims of all the plaintiffs to whom the offer is made and:

(1) There is a single common theory of liability claimed by all the plaintiffs to whom the offer is made;

(2) The damages claimed by one or more of the plaintiffs to whom the offer is made are entirely derivative of an injury to the remaining plaintiffs to whom the offer is made; or

(3) The damages claimed by all the plaintiffs to whom the offer is made are entirely derivative of an injury to another person.

(Added to NRS by 1971, 1129; A 1979, 829; 1987, 1027; 1999, 1102; 2005, 116)

MANNER OF GIVING AND ENTERING

Tab 4

Supreme Court of Utah

450 South State Street
PO Box 140210
Salt Lake City, Utah 84114-0210

Appellate Clerk's Office
Telephone: (801) 578-3900
Email: supremecourt@utcourts.gov

Catherine J. Dupont
Appellate Court Administrator

Nicole J. Gray
Clerk of Court

November 26, 2018

Jonathan O. Hafen
Chair, Advisory Committee on Utah Rules of Civil Procedure
PARR BROWN GEE & LOVELESS
101 SOUTH 200 EAST SUITE 700
SALT LAKE CITY UTAH 84111

Dear Jonathan:

The rules regulating the practice for Licensed Paralegal Practitioners take effect November 1, 2018. We anticipate having Licensed Paralegal Practitioners practicing by fall of 2019. In anticipation of this new type of legal professional, we are asking our Advisory committees to review rules that may need to be amended to respond to the new legal professional. The LPP Steering Committee identified Rules of Civil Procedure that should be reviewed by your committee. The rules were identified because the rule includes the word "attorney", and the rule relates to one of the three areas of practice for Licensed Paralegal Practitioners: 1) temporary separation, divorce, parentage, cohabitant abuse, civil stalking, and custody and support; 2) forcible entry and detainer and unlawful detainer; and 3) debt collection matters. Your committee may identify other rules that should be amended.

The Court requests that your committee review the Rules of Civil Procedure and propose amendments to the rules that you think are appropriate to incorporate LPPs into the three practice areas and within the limited scope of practice authorized in Rule 14-802. As a starting point, the rules that were identified by the LPP Steering Committee are:

Rule 4	Process
Rule 5	Service and Filling of Pleadings and other papers
Rule 10	Form of Pleading and other paper
Rule 11	Signing of Pleadings, Motions and Affidavits and other papers
Rule 53	Masters
Rule 56	Summary Judgement
Rule 58B	Satisfaction of Judgement

Rule 65A	Injunctions
Rule 74	Withdrawal of Counsel
Rule 75	Limited Appearance (should an LPP always file this document to provide notice to the parties and the court that a LPP is involved in the case for limited legal representation?)
Rule 76	Notice of Contact Information change

We also request that you evaluate Rule 26 regarding required disclosures for debt collection and landlord tenant cases for which an LPP may represent a party. Rule 14-802 does not permit an LPP to conduct discovery. The Court is concerned that if appropriate documentation in debt collection or landlord tenant cases is not filed by the Plaintiff, the LPP will not be able to compel the disclosure of those documents through a discovery request. One solution suggested by the LPP Steering Committee is to amend Rule 26 to specifically require the disclosure of documents in debt collection and landlord tenant cases. The LPP Steering Committee suggested determining which documents are most commonly required and including those documents in Rule 26. We ask that your committee consider this issue.

Sincerely,

Matthew B. Durrant
Chief Justice

Copy: Nancy Sylvester, Staff

Rule 1. General provisions.

Scope of rules. These rules govern the procedure in the courts of the state of Utah in all actions of a civil nature, whether cognizable at law or in equity, and in all statutory proceedings, except as governed by other rules promulgated by this court or statutes enacted by the Legislature and except as stated in Rule 81. They shall be liberally construed and applied to achieve the just, speedy, and inexpensive determination of every action. These rules govern all actions brought after they take effect and all further proceedings in actions then pending. If, in the opinion of the court, applying a rule in an action pending when the rule takes effect would not be feasible or would be unjust, the former procedure applies. Licensed Paralegal Practitioners are included in the terms “attorney” and “counsel” in the practice areas for which they are authorized to practice. Those practice areas are set forth in Rule 14-802 of the Rules Governing the Utah State Bar.

Advisory Committee Notes

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: April 18, 2019
Re: Intervention rules coordination: URCP 24, URAP 25A, and URCrP 12

The Appellate Rules Committee met earlier this month and reviewed the intervention rules. The committee recommended updating the language in all three rules to the more generic "attorney representing the governmental entity" rather than listing out district, county, or municipal attorney. The committee thought the latter terms were not broad enough and were potentially ambiguous. The committee plans to take up the rules again at its May 2 meeting. This committee should discuss whether the new terminology makes sense in the civil rules arena.

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 ~~set~~s out the claim or defense for which intervention is sought.

(d) Constitutionality of Utah statutes and ordinances.

(d)(1) **Challenges to a statute.** 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.

(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 address 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 an ordinance**. If a party challenges the constitutionality of a county or municipal ordinance in an action in which the attorney representing the governmental entity ~~county or municipal attorney~~ has not appeared, the party raising the question of constitutionality ~~shall~~ must notify ~~the county or municipal~~ attorney representing the governmental entity of such fact. The procedures for the party challenging the constitutionality of a county or municipal ordinance will be consistent with paragraphs (d)(1)(A), (d)(1)(B), and (d)(1)(C), except that service must be on the individual governmental entity. ~~The court shall permit the county or municipality to be heard upon timely application.~~The procedures for the response by the attorney representing the governmental entity will be consistent with paragraph (d)(1)(D). It is the party's responsibility to find and use the correct email address for the relevant attorney representing the governmental entity, or if circumstances prevent service by email, it is the party's responsibility to find and use the correct mailing address.

(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.

Rule 25A. Challenging the constitutionality of a statute or ordinance.

(a) **Notice to the Attorney General or ~~the county or municipal attorney~~attorney representing the governmental entity; penalty for failure to give notice.**

(a)(1) When a party challenges the constitutionality of a statute in an appeal or petition for review in which the Attorney General has not appeared, every party must serve its principal brief and any subsequent brief on the Attorney General on or before the date the brief is filed.

(a)(2) When a party challenges the constitutionality of a county or municipal ordinance in an appeal or petition for review in which the responsible county or municipal attorney has not appeared, every party must serve its principal brief and any subsequent brief on the attorney representing the governmental entity~~county or municipal attorney~~ on or before the date the brief is filed, and file proof of service with the court.

(a)(3) If an appellee or cross-appellant is the first party to challenge the constitutionality of a statute or ordinance, the appellant must serve its principal brief on the Attorney General or ~~the county or municipal attorney~~the attorney representing the governmental entity no more than 7 days after receiving the appellee's or the cross-appellant's brief and must serve its reply brief on or before the date it is filed.

(a)(4) Every party must serve its brief on the Attorney General by email or, if circumstances prevent service by email, by mail at the addresses below, ~~or mail at the following address~~ and ~~must~~ 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

~~320 Utah State Capitol~~

P.O. Box 142320

Salt Lake City, Utah 84114-2320

(a)(5) If a party does not serve a brief as required by this rule and supplemental briefing is ordered as a result of that failure, a court may order that party to pay the costs, expenses, and attorney fees of any other party resulting from that failure.

(b) **Notice by the Attorney General or the attorney representing the governmental entity ~~county or municipal attorney~~; amicus brief.**

(b)(1) Within 14 days after service of the brief that presents a constitutional challenge the Attorney General or ~~other government~~ attorney representing the governmental entity will notify the appellate court whether ~~it~~ the entity intends to file an amicus brief. The Attorney General or ~~other government~~ attorney representing the governmental entity may seek up to an additional 7 days' extension of time from the court. Should the Attorney General or ~~other government~~ attorney representing the governmental entity decline to file an amicus brief, that entity should plainly state the reasons therefor.

(b)(2) If the Attorney General or ~~other government~~ attorney representing the governmental entity declines to file an amicus brief, the briefing schedule is not affected.

(b)(3) If the Attorney General or ~~other government~~ attorney representing the governmental entity intends to file an amicus brief, that brief will come due 30 days after the notice of intent is filed. Each governmental entity may file a motion to extend that time as provided under Rule 22. On a governmental entity filing a notice of intent, the briefing schedule established under Rule 13 is vacated, and the next brief of a party will come due 30 days after the amicus brief is filed.

(c) **Call for the views of the Attorney General or attorney representing the governmental entity ~~county or municipal attorney~~.** Any time a party challenges the constitutionality of a statute or ordinance, the appellate court may call for the views of

the Attorney General or ~~of the county or municipal attorney~~the other attorney representing the governmental entity and set a schedule for filing an amicus brief and supplemental briefs by the parties, if any.

(d) **Participation in oral argument.** If the Attorney General or other attorney representing the governmental entity~~county or municipal attorney~~ files an amicus brief, the Attorney General or other attorney representing the governmental entity~~county or municipal attorney~~ will be permitted to participate at oral argument by providing notice to the court at least 28 days before oral argument.

Rule 12. Motions.

(a) **Motions**. An application to the court for an order shall be by motion, which, unless made during a trial or hearing, shall be in writing and in accordance with this rule. A motion shall state succinctly and with particularity the grounds upon which it is made and the relief sought. A motion need not be accompanied by a memorandum unless required by the court.

(b) **Request to Submit for Decision**. If neither party has advised the court of the filing nor requested a hearing, when the time for filing a response to a motion and the reply has passed, either party may file a request to submit the motion for decision. If a written Request to Submit is filed it shall be a separate pleading so captioned. The Request to Submit for Decision shall state the date on which the motion was served, the date the opposing memorandum, if any, was served, the date the reply memorandum, if any, was served, and whether a hearing has been requested. The notification shall contain a certificate of mailing to all parties. If no party files a written Request to Submit, or the motion has not otherwise been brought to the attention of the court, the motion will not be considered submitted for decision.

(c) **Time for filing specified motions**. Any defense, objection or request, including request for rulings on the admissibility of evidence, which is capable of determination without the trial of the general issue may be raised prior to trial by written motion.

(c)(1) The following shall be raised at least 7 days prior to the trial:

(c)(1)(A) defenses and objections based on defects in the indictment or information ;

(c)(1)(B) motions to suppress evidence;

(c)(1)(C) requests for discovery where allowed;

(c)(1)(D) requests for severance of charges or defendants;

(c)(1)(E) motions to dismiss on the ground of double jeopardy ; or

(c)(1)(F) motions challenging jurisdiction, unless good cause is shown why the issue could not have been raised at least 7 days prior to trial.

(c)(2) Motions for a reduction of criminal offense at sentencing pursuant to Utah Code Section 76-3-402(1) shall be in writing and filed at least 14 days prior to the date of sentencing unless the court sets the date for sentencing within ten days of the entry of conviction. Motions for a reduction of criminal offense pursuant to Utah Code Section 76-3-402(2) may be raised at any time after sentencing upon proper service of the motion on the appropriate prosecuting entity.

(d) **Motions to Suppress**. A motion to suppress evidence shall:

(d)(1) describe the evidence sought to be suppressed;

(d)(2) set forth the standing of the movant to make the application; and

(d)(3) specify sufficient legal and factual grounds for the motion to give the opposing party reasonable notice of the issues and to enable the court to determine what proceedings are appropriate to address them.

If an evidentiary hearing is requested, no written response to the motion by the non-moving party is required, unless the court orders otherwise. At the conclusion of the evidentiary hearing, the court may provide a reasonable time for all parties to respond to the issues of fact and law raised in the motion and at the hearing.

(e) **Motions made before trial.** A motion made before trial shall be determined before trial unless the court for good cause orders that the ruling be deferred for later determination. Where factual issues are involved in determining a motion, the court shall state its findings on the record.

(f) **Failure to timely raise defenses or objections.** Failure of the defendant to timely raise defenses or objections or to make requests which must be made prior to trial or at the time set by the court shall constitute waiver thereof, but the court for cause shown may grant relief from such waiver.

(g) A verbatim record shall be made of all proceedings at the hearing on motions, including such findings of fact and conclusions of law as are made orally.

(h) **Defects in the institution of the prosecution or indictment or information.** If the court grants a motion based on a defect in the institution of the prosecution or in the indictment or information, it may also order that bail be continued for a reasonable and specified time pending the filing of a new indictment or information. Nothing in this rule shall be deemed to affect provisions of law relating to a statute of limitations.

(i) **Motions challenging the constitutionality of Utah statutes and ordinances**.

(i)(1) **Challenges to a statute.** If a party in a court of record 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 as described in paragraphs (i)(1)(A), (i)(1)(B), and (i)(1)(C). The court shall permit the state to be heard upon timely application.

(i)(1)(A) **Form and Content**. The notice shall (i) be in writing, (ii) be titled "Notice of Constitutional Challenge Under URCrP 12(i)," (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.

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

(i)(1)(C) **Service**. The party shall serve the notice on the Attorney General by email or, if circumstances prevent service by email, by mail at the address 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

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

(i)(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.

(i)(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.

(i)(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.

(i)(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.

(i)(2) **Challenges to an ordinance.** If a party challenges the constitutionality of a county or municipal ordinance in an action in which the attorney representing the governmental entity has not appeared, the party raising the question of constitutionality shall notify the attorney representing the governmental entity of such fact. The procedures shall be as provided in paragraphs (i)(1)(A), (i)(1)(B), and (i)(1)(C) except that service will be on the individual governmental entity. The procedures for the response by the attorney representing the governmental entity will be consistent with paragraph (i)(1)(D). It is the party's responsibility to find and use the correct email address for the relevant attorney representing the governmental entity, or if circumstances prevent service by email, it is the party's responsibility to find and use the correct mailing address.

(i)(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 (i)(1) or (i)(2), the court may postpone the hearing until the party serves the notice.

Tab 6

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

hearing to preliminarily address any issues related to the motion, including whether the court would like to order a briefing schedule other than as set forth in this rule.

(g) Limitations. This rule does not apply to an order to show cause that is issued by the court on its own initiative. A motion to enforce order and for sanctions presented to a court commissioner must also follow Rule 101, including all time limits set forth in Rule 101. This rule applies only in civil actions, and does not apply in criminal cases.

(h) Orders to show cause. The process set forth in this rule replaces and supersedes the prior order to show cause procedure. An order to attend hearing serves as an order to show cause as that term is used in statute.

Tab 7

From Lee Nakamaura – Attorney General's Office

We do not have a problem with any one clerk or court, just hoping to increase understanding of what is happening at our end. Judges do not like the delays caused by these service problems, but the delays are not always under our control. Before there was efiling, it was generally understood that our post-conviction section needed to be served with hard copies by the court. There is nothing wrong with electronic service, but depending on how a document is uploaded to the system, the state district efiling system does not automatically serve us.

We compiled several specific examples in 2015, the last time you and I talked about this. I don't have those examples anymore, but here is one recent example, and all of the situations we discussed in 2015 still exist.

1. **Service of Orders to Respond and petitions**:

The current rule, Utah R. Civ. P. 65C(i) states: "If, on review of the petition, the court concludes that all or part of the petition should not be summarily dismissed, the court shall designate the portions of the petition that are not dismissed and direct the clerk to serve a copy of the petition, attachments and memorandum by mail upon the respondent."

Judges mostly follow this rule. They issue an order with this language to their clerk. Most district court clerks, and I'm sorry I cannot tell you specifically which ones, upload the petition and the order to the docket, and send out the order by mail or email, without a copy of the petition, and they do not always know who to serve. Sometimes the order goes by email to a local AG in one of our satellite offices, or mailed to the wrong office. Eventually the order will find its way to us, but our time to respond starts running when the order is issued. There is an assumption that because documents are available through Xchange, we do not have to be "served" with the petition, but A) the rule says we are to be served with the petition by mail, and B) documents uploaded to the docket rather than efiled through the efiling system are not automatically served electronically, and C) we have not yet entered an appearance for specific service (documents sent to the wrong attorney or address = delays in response. You could compare this to us sending a document to the wrong district court or the wrong judge and assuming it will find its way to the right case file.)

We have had the same problem with service of orders, notices, decisions, and pro se documents uploaded to the docket rather than efiled. When clerks manually serve an attorney by email, they do not include all of the emails listed on the attorney's profile for service. If that attorney is away from the office . . . more delays.

In a recent case, the Judge ordered, "The Clerk of Court shall mail a copy of petitioner's documents to the Weber County Attorney's Office as soon as practical." When the error in service to the county instead of AG was realized, an amended order was issued that stated "A copy of the petitioner's moving documents are available on-line through the

Xchange Case Search program." The only document that the State received was the Amended Order Requiring Responsive Pleading from Respondent. The petition was not attached.

2. **Requests for records:**

In order to properly respond to a post-conviction petition that challenges a criminal conviction or sentence, we have to see the record in the criminal case that is being challenged. When ordered to respond to a civil post-conviction petition, we file a motion in the criminal case asking that the record be released to us. The state is almost always represented by the County in felony prosecutions, so our office was not a party and does not have access to the complete record. Clerks assume that we can download or print all documents from Xchange, but only the attorney of record has access to private and sealed documents through Xchange, plus transcripts are not available on Xchange. We can file a limited appearance for the purpose of accessing the record, but that results in our attorney being listed as attorney of record and being served all future filings that should be served on the county prosecutor, and still will not give us the transcripts.

If judges are wondering why we always request extensions to respond to post-conviction petitions, once we receive an order to respond, we move for release of the criminal record, allow for the required 2 weeks for a response, and then file a notice to submit and proposed order. Our proposed order always specifies that the clerk send us the entire record. Once the judge grants our motion, we often do not receive the record. We give the clerk a week to comply with the order and then call. Most clerks will tell us we can download the record from Xchange, and some will even argue with us after we explain that we do not have access to all of the record on Xchange. All of this adds up to weeks of delay while our time to respond is running.

3. **No uniformity among state courts.**

Forms and process for requests for recordings are different from court to court. This may only affect our office, since we handle cases in all of the districts, but it might be worth mentioning.

Record requests are also handled differently from court to court and from judge to judge. Some judges release the entire record to us for post-conviction proceedings, and some require us to file a motion to unseal in order to access the complete record.

Bottom line: Please let the clerks know that we need to be officially served with petitions per the rule, and that we do not automatically receive notices and orders and pro se documents, and that we do not have access to the entire record through Xchange.

Are the clerks able to "efile" orders and documents with the same gov't efiling system we use, rather than uploading them?

Criminal records and service for documents related to post-conviction challenges to felony convictions or sentences should be sent to:

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

I'll see about setting up an email address for post-conviction, but that won't solve these service problems.
Lee Nakamura <Lnakamura@agutah.gov>
Subject: Re: Clerks of Court meeting

Rule 65C. Post-conviction relief.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

(h)(2)(A) the facts alleged do not support a claim for relief as a matter of law;

(h)(2)(B) the claim has no arguable basis in fact; or

(h)(2)(C) the claim challenges the sentence only and the sentence has expired prior to the filing of the petition.

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

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

(i) Service of petitions. If, on review of the petition, the court concludes that all or part of the petition should not be summarily dismissed, the court shall designate the portions of the petition that are not dismissed and direct the clerk to serve a copy of the petition, attachments and memorandum by mail upon the respondent.

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

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

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

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

(k) Answer or other response. Within 30 days after service of a copy of the petition upon the respondent, or within such other period of time as the court may allow, the respondent shall answer or

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

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

(l)(1) consider the formation and simplification of issues;

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

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

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

(n) Discovery; records.

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

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

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

(o) Orders; stay.

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

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

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

(p) Costs. The court may assign the costs of the proceeding, as allowed under Rule 54(d), to any party as it deems appropriate. If the petitioner is indigent, the court may direct the costs to be paid by the governmental entity that prosecuted the petitioner. If the petitioner is in the custody of the Department of

Corrections, Utah Code Title 78A, Chapter 2, Part 3 governs the manner and procedure by which the trial court shall determine the amount, if any, to charge for fees and costs.

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

Advisory Committee Notes

Tab 8

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: April 18, 2019
Re: Intervention rules coordination: URCP 24, URAP 25A, and URCrP 12

Parties have not been advising the juvenile court that there is a minor guardianship in place when the juvenile court is entering custody orders. This creates a lot of work down the road for the district court when it loses contact with the guardian and the minor. To start resolving this issue, the Guardianship Reporting and Monitoring (court visitor) Program and juvenile court administrators request the following amendment to Rule 100:

Rule 100. Coordination of cases pending in district court and juvenile court.

(a) Notice to the court. In a case in which child custody, child support or parent time is an issue, all parties have a continuing duty to notify the court:

(a)(1) of a case in which a party or the party's child is a party to or the subject of a petition or order involving child custody, child support or parent time, including minor guardianship;

450 South State Street / P.O. Box 140241 / Salt Lake City, Utah 84114-0241 / Tel: 801-578-3808 / Fax: 801-578-3843 / email: nancyjs@utcourts.gov

Rule 100. Coordination of cases pending in district court and juvenile court.

(a) Notice to the court. In a case in which child custody, child support or parent time is an issue, all parties have a continuing duty to notify the court:

(a)(1) of a case in which a party or the party's child is a party to or the subject of a petition or order involving child custody, child support or parent time, including minor guardianship;

(a)(2) of a criminal or delinquency case in which a party or the party's child is a defendant or respondent;

(a)(3) of a protective order case involving a party regardless whether a child of the party is involved.

The notice shall be filed with a party's initial pleading or as soon as practicable after the party becomes aware of the other case. The notice shall include the case caption, file number and name of the judge or commissioner in the other case.

(b) Communication among judges and commissioners. The judge or commissioner assigned to a case in which child custody, child support or parent time is an issue shall communicate and consult with any other judge or commissioner assigned to any other pending case involving the same issues and the same parties or their children. The objective of the communication is to consider the feasibility of consolidating the cases before one judge or commissioner or of coordinating hearings and orders.

(c) Participation of parties. The judges and commissioners may allow the parties to participate in the communication. If the parties have not participated in the communication, the parties shall be given notice and the opportunity to present facts and arguments before a decision to consolidate the cases.

(d) Consolidation of cases.

(d)(1) The court may consolidate cases within a county under Rule 42.

(d)(2) The court may transfer a case to the court of another county with venue or to the court of any county in accordance with Utah Code Section 78B-3-309.

(d)(3) If the district court and juvenile court have concurrent jurisdiction over cases, either court may transfer a case to the other court upon the agreement of the judges or commissioners assigned to the cases.

(e) Judicial reassignment. A judge may hear and determine a case in another court or district upon assignment in accordance with CJA Rule 3-108(3).

Tab 9

Advisory Committe Notes Project

Civil Rules	Committee Note?	Subcommittee
Part I Scope of Rules - One Form of Action		**A**
Rule 1 General provisions.	Yes	
Rule 1 General provisions. (superseded 11/1/2011)	n/a	
Rule 2 One form of action.	No	
Part II Commencement of Action; Service of Process, Pleadings, Motions and Orders		**A**
Rule 3 Commencement of action.	Yes	
Rule 4 Process.	Yes	
Rule 5 Service and filing of pleadings and other papers.	Yes	
Rule 6 Time.	No	
Part III Pleadings, Motions, and Orders		**B**
Rule 7 Pleadings allowed; motions, memoranda, hearings, orders.	Yes	**(Group A did this one)**
Rule 8 General rules of pleadings.	Yes	
Rule 8 General rules of pleadings. (superseded 11/1/2011)	n/a	
Rule 9 Pleading special matters.	Yes	
Rule 9 Pleading special matters. (superseded 11/1/2011)	n/a	
Rule 10 Form of pleadings and other papers.	Yes	
Rule 11 Signing of pleadings, motions, and other papers; representations to court; sanctions.	Yes	
Rule 12 Defenses and objections.	No	
Rule 13 Counterclaim and cross-claim.	No	
Rule 14 Third-party practice.	No	
Rule 15 Amended and supplemental pleadings.	Yes	
Rule 16 Pretrial conferences.	Yes	
Rule 16 Pretrial conferences. (superseded 11/1/2011)	n/a	
Part IV Parties		**A**
Rule 17 Parties plaintiff and defendant.	Yes	**(Assign to Group B)**
Rule 18 Joinder of claims and remedies.	No	

A	B
Lauren DiFrancesco	Prof. Lincoln Davies
Larissa Lee	Prof. Paul Stancil
Trevor Lee	Michael Petrogeorge
Susan Vogel	Judge Kent Holmberg
Dawn Hautamaki	Jim Hunnicut
C	**D**
Rod N. Andreason	Judge Andrew Stone
Leslie Slaugh	Judge James Blanch□
Trystan Smith	Bryan Pattison
Tim Pack	Judge Laura Scott
	E
	Judge Amber Mettler
	Judge Clay Stucki
	Justin Toth
	Heather Sneddon

Rule 19 Joinder of persons needed for just adjudication.	No	
Rule 20 Permissive joinder of parties.	No	
Rule 21 Misjoinder and non-joinder of parties.	No	
Rule 22 Interpleader.	No	
Rule 23 Class actions.	No	
Rule 23A Derivative actions by shareholders.	No	
Rule 24 Intervention.	No	
Rule 25 Substitution of parties.	No	
Part V Depositions and Discovery		**C**
Rule 26 General provisions governing disclosure and discovery.	Yes (long)	
Rule 26 General provisions governing disclosure and discovery. (superseded 11/1/2011)	n/a	
Rule 26.1 Disclosure in domestic relations actions.	Yes	
Rule 26.2. Disclosures in personal injury actions.	Yes	
Rule 26.3. Disclosure in unlawful detainer actions.	No	
Rule 27 Depositions before action or pending appeal.	Yes	
Rule 28 Persons before whom depositions may be taken.	Yes	
Rule 29 Stipulations regarding disclosure and discovery procedure.	No	
Rule 29 Stipulations regarding disclosure and discovery procedure. (superseded 11/1/2011)	n/a	
Rule 30 Depositions upon oral questions.	No	
Rule 30 Depositions upon oral questions. (superseded 11/1/2011)	n/a	
Rule 31 Depositions upon written questions.	No	
Rule 31 Depositions upon written questions. (superseded 11/1/2011)	n/a	
Rule 32 Use of depositions in court proceedings.	Yes	
Rule 33 Interrogatories to parties.	No	
Rule 33 Interrogatories to parties. (superseded 11/1/2011)	n/a	
Rule 34 Production of documents and things and entry upon land for inspection and other purposes.	Yes	
Rule 34 Production of documents and things and entry upon land for inspection and other purposes. (superseded 11/1/2011)	n/a	

Rule 35 Physical and mental examination of persons.	Yes	
Rule 35 Physical and mental examination of persons. (superseded 11/1/2011)	n/a	
Rule 36 Request for admission.	Yes	
Rule 36 Request for admission. (superseded 11/1/2011)	n/a	
Rule 37 Statement of discovery issues; Sanctions; Failure to admit, to attend deposition or to preserve evidence.	Yes	
Rule 37 Discovery and disclosure motions; Sanctions. (superseded 11/1/2011)	n/a	
Part VI Trials		**D**
Rule 38 Jury trial of right.	No	
Rule 39 Trial by jury or by the court.	No	
Rule 40 Assignment of cases for trial; continuance.	No	
Rule 41 Dismissal of actions.	Yes	
Rule 42 Consolidation; separate trials.	No	
Rule 43 Evidence.	Yes	
Rule 44 Proof of official record.	No	
Rule 45 Subpoena.	Yes	
Rule 46 Exceptions unnecessary.	No	
Rule 47 Jurors.	Yes (long)	
Rule 48 Juries of less than eight - Majority verdict.	No	
Rule 49 Special verdicts and interrogatories.	No	
Rule 50 Judgment as a matter of law in a jury trial; related motion for a new trial; conditional ruling.	Yes	
Rule 51 Instructions to jury; objections.	No	
Rule 52 Findings by the court; correction of the record.	Yes	
Rule 53 Masters.	No	
Part VII Judgment		**E**
Rule 54 Judgments; costs.	Yes	
Rule 54 Judgments; costs. (superseded 11/1/2011)	n/a	
Rule 55 Default.	No	
Rule 56 Summary judgment.	Yes	
Rule 57 Declaratory judgments.	No	
Rule 58A Entry of judgment; abstract of judgment.	Yes (long)	
Rule 58B Satisfaction of judgment.	No	
Rule 58C Motion to renew judgment.	Yes	

Rule 59 New trials; amendments of judgment.	No	
Rule 60 Relief from judgment or order.	Yes	
Rule 61 Harmless error.	No	
Rule 62 Stay of proceedings to enforce a judgment.	Yes	
Rule 63 Disability or disqualification of a judge.	No	
Rule 63A Change of judge as a matter of right.	No	
Part VIII Provisional and Final Remedies and Special Proceedings		**E**
Rule 64 Writs in general.	No	
Rule 64A Prejudgment writs in general.	No	
Rule 64B Writ of replevin.	No	
Rule 64C Writ of attachment.	No	
Rule 64D Writ of garnishment.	No	
Rule 64E Writ of execution.	No	
Rule 64F REPEALED.	n/a	
Rule 64G REPEALED.	n/a	
Rule 65A Injunctions.	Yes	
Rule 65B Extraordinary relief.	Yes	
Rule 65C Post-conviction relief.	Yes	
Rule 66 Receivers.	No	
Rule 67 Deposit in court.	No	
Rule 68 Settlement offers.	Yes	
Rule 69 REPEALED.	n/a	
Rule 69A Seizure of property.	No	
Rule 69B Sale of property; delivery of property.	No	
Rule 69C Redemption of real property after sale.	No	
Rule 70 Judgment for specific acts; vesting title.	No	
Rule 71 Process in behalf of and against persons not parties.	No	
Rule 71B REPEALED.	n/a	
Rule 72 Property bonds.	No	
Part IX Attorneys		**B**
Rule 73 Attorney fees.	Yes	
Rule 74 Withdrawal of counsel.	No	
Rule 75 Limited appearance.	No	
Rule 76 Notice of contact information change.	No	
Part X District courts and clerks		**A**
Rule 77 District courts and clerks.	Yes	
Rule 78 REPEALED.	n/a	

Rule 79 REPEALED.	n/a	
Rule 80 REPEALED.	n/a	
Part XI General Provisions		**None**
Rule 81 Applicability of rules in general.	No	
Rule 82 Jurisdiction and venue unaffected.	No	
Rule 83 Vexatious litigants.	No	
Rule 84 REPEALED.	n/a	
Rule 85 Title.	No	
Part XII Family Law		**None**
Rule 100 Coordination of cases pending in district court and juvenile court.	No	
Rule 101 Motion practice before court commissioners.	No	
Rule 102 Motion and order for payment of costs and fees.	No	
Rule 103 REPEALED.	n/a	
Rule 104 Divorce decree upon affidavit.	No	
Rule 105. Shortening 30 day waiting period in divorce actions.	No	
Rule 106 Modification of final domestic relations order.	No	
Rule 107 Decree of adoption; Petition to open adoption records.	No	
Rule 108 Objection to court commissioner's recommendation.	No	
FAQs About Disclosure and Discovery		
Appendix Of Forms		

URCP 073

Advisory Committee Notes.

2018 Amendments

An overwhelming number of cases filed in the courts, especially debt collection cases, result in the entry of an uncontested judgment. The work required in most cases to obtain an uncontested judgment does not typically depend on the amount at issue. As such, the prior schedule of fees based on the amount of damages has been eliminated, and instead replaced by a single fee upon entry of an uncontested judgment that is intended to approximate the work required in the typical case. A second amount is provided where the case is contested and fees are allowed, again in an effort to estimate the typical cost of litigating such cases. Where additional work is required to collect on the judgment, the revised rule provides a default amount for writs and certain motions and eliminates the "considerable additional efforts" limitation of the prior rule. It also recognizes that defendants often change jobs, and thus provides for such default amounts to vary depending on whether a new garnishee is required to collect on the outstanding amount of the judgment. Thus, the amended rule attempts to match the scheduled amounts to the work required of attorneys, rather than tying the scheduled amounts solely to the damages claimed. But the rule remains flexible so that when attorney fees exceed the scheduled amounts, a party remains free to file an affidavit requesting appropriate fees in accordance with the rule.

2019 Amendments

Rule 73 has been amended in response to *McQuarrie v. McQuarrie*, 2017 UT App 209, and *Chaparro v. Torero*, 2018 UT App 181, to clarify that the rule applies to all motions for attorney fees, not just post-judgment motions.

Prior rule amendments and committee discussions

For more information on prior rule amendments, please visit https://www.utcourts.gov/utc/rules-approved/. Prior versions of the court rules and pre-2004 court rule amendments are also available at the State Law Library: https://www.utcourts.gov/lawlibrary/.

For discussion materials on rule amendments, please visit the web blog of the Advisory Committee on the Utah Rules of Civil Procedure at https://www.utcourts.gov/utc/civproc/.

Effective May 1, 2019