Agenda

Advisory Committee on Rules of Civil Procedure

May 22, 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
Intervention Rules	4:05	Tab 2	Nancy Sylvester
Informal Trials: referral from the Judicial Council's Policy and Planning Committee	4:15	Tab 3	Judge Laura Scott and Nancy Sylvester
Rule 65C: service of petitions	4:45	Tab 4	Dawn Hautamaki, Nancy Sylvester
Licensed Paralegal Practitioners and the Civil Rules	5:00	Tab 5	Jim Hunnicutt (subcommittee chair), Larissa Lee, Mike Petrogeorge, Julie Emery (paralegal)
Discussion of Rule 68 and formation of subcommittee	5:15	Tab 6	Representative Brady Brammer
Rule 26. General provisions governing disclosure and discovery (multiple requests for rule amendments): Continue prior discussion at line 119.	5:30	Tab 7	Rod Andreason (subcommittee chair), Tim Pack, Trystan Smith, Leslie Slaugh
Multidistrict litigation under Rule 42: formation of subcommittee	5:50	Tab 8	Judge Holmberg, Jonathan Hafen
Other business: Committee notes schedule; rule amendment schedule through May	5:55		Jonathan Hafen, Nancy Sylvester

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

2019 Meeting Schedule:

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 – April 24, 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: Rep. Ken Ivory, Steve Johnson, Cathy Dupont, Michael Drechsel

(1) WELCOME AND APPROVAL OF MINUTES

Johnathan Hafen welcomed the committee and asked for approval of the minutes. Jim Hunnicutt moved to approve the corrected minutes. Rod Andreason seconded. The motion passed.

(2) DISCUSSION OF RULE 68.

Mr. Hafen introduced Rep. Ken Ivory as well as the issues surrounding Rule 68. Mr. Ivory described the practices in Nevada, which requires the parties to have a discussion of the merits of their cases early on. In Utah he found that Offers of Judgment didn't work the same way, particularly for plaintiffs. He spoke with Rep. Brady Brammer, who agreed that there were no practical teeth in Rule 68. He recognized the concern of plaintiffs being pushed into accepting unreasonable offers and that some types of cases would not apply. However, he believes that the Nevada rule could compel the parties to get serious about the merits of their claims, and thus increase efficiency in cases.

Leslie Slaugh opined that the test of this rule is not related to reasonableness; it relates to guessing what a jury will do. He questioned how to protect those parties. He worried the rule rewarded deep pockets, as others could not afford the risk. Mr. Ivory responded that in Nevada the option is for the court to order some of the costs, while others would be a shall. Mr. Slaugh responded that there was discretion but no standards. Mr. Ivory said he found that it did work both ways. Mr. Slaugh asked if there were any rules that were based upon reasonable offers, rather than successful offers. Mr. Slaugh questioned the Nevada approach and has concerns about this rule, as he has seen it used as a strong arm statute. He pointed out that even when a judge can decline to award a penalty, generally they do award them. Judge Holmberg pointed out that this changes the economics, as parties do not know the other party's attorney fees. He asked whether the Idaho statute was reviewed before this meeting, which allows for a pre-suit demand, which locks in attorney fees, and can serve as a trap for defendants. Judge Blanch worried that there could be an incentive for low ball offers that are not in good faith. Ms. Vogel asked if this would happen where one party was pro se. Mr. Ivory stated that he hadn't seen it.

Mr. Hunnicutt asked if there was data on whether this policy placed a larger burden on the Court of Appeals. Mr. Hafen asked if this would generally come up early or later in cases in Nevada. Mr. Ivory responded it would happen at both times. Judge Blanch stated that they are not seen often in Utah. He wasn't sure if it was because of the lack of fee shifting, or a culture question. Mr. Ivory believes culture can be developed with a rule. Mr. Hafen asked how many states have a fee provision. Mr. Ivory stated that Florida may, and he doesn't really know other than Nevada. Susan Vogel questioned why it wasn't used. Bryan Pattison opined that it would be difficult to get clients to move forward with this, as they might think it showed weakness. Judge Blanch opined that it would not be used when attorney fees were included under a statute or contract. Judge Scott agreed that she had not seen it.

Judge Blanch asked whether this was really a policy call for the Legislature: should Utah follow the English rule (the litigation loser pays attorney fees and costs)? Rep. Ivory said he believed that the Nevada rule would allow parties to choose which rule (American or English) to work with. He said that during his time practicing in Nevada, he found that the Nevada rule was best when the other party was not willing to move at all. Judge Blanch asked if there were any statistics on how often

the rule is used in Nevada. Mr. Ivory said he did not know, but in his experience it was 30-40% of cases. Mr. Hafen wondered what additional data could be found.

Rep. Ivory noted that another important difference between the Utah and Nevada rules is that under the Nevada rule, the Defendant could move for a dismissal based upon the offer of judgment. Mr. Hafen questioned if there would be legislative pushback for such a large change. Rep. Ivory thought push back would be coming from the bar but pointed out that costs are continuing to rise, both for parties and the state.

Rep. Ivory proposed contacting experts for additional information and then bringing this topic back up. Mr. Hafen proposed creating a preliminary report including data on how it could work, which the committee would then bring to the Court. The committee will continue to look into this issue with Rep. Ivory.

(3) LICENSED PARALEGAL PRACTITIONERS AND THE CIVIL RULES.

Steve Johnson and Mr. Hafen introduced the issue of how to bring the rules up to date with respect to Licensed Paralegal Practitioners. Mr. Johnson opined that the committee should be bold in solving this problem. He reported that LPPs could not go to court, but could help people fill out forms in three areas. They would also be able to negotiate with opposing counsel and provide the financial documents as required by Rule 26.1. He believed the committee would need to make changes to that rule. He agreed there were other rules that would need to be changed, particularly with regards to lawyers talking with other lawyers, since lawyers would also now be talking with LPPs as well. He proposed changing the wording to legal professional. Mr. Hafen pointed out that we do not have a definition section of the Rules of Civil Procedure.

Mr. Johnson reported that there were 15 potential LPPs taking the ethics course, with 12 in the family law course. He believes that there could be almost 40 within the first year, particularly as the only other state with this kind of licensing has higher standards. The swearing in will be in October. Mr. Hafen pointed out that this would require around four months to amend the rules.

Ms. Vogel questioned the demographics of the potential LPPs. Mr. Johnson responded that the LPPs were mostly from firms. Judge Holmberg asked if there would be a mentorship program. Mr. Johnson said currently they have some requirements for a number of hours of supervised practice before they can sit for the exam. Mr. Hunnicutt thought it was 500 hours for landlord tenant or collections and 1000 hours for family law. He also predicted that the LPPs will sit in court and the client will then need to discuss the question with the LPP, who is not allowed to speak. Mr. Johnson was concerned that lawyers would do things that would require attorneys, as LPPs are limited. Mr. Hafen stated that this would likely result in half unrepresented parties.

Lauren DiFrancesco questioned the scope of what an LPP could do to draft a motion, as there is a form labeled "Motion." Mr. Johnson answered that so long as there was a form they could fill it out.

Mr. Hafen proposed a subcommittee to go through the rules and evaluate it. James Hunnicutt volunteered to be on the committee. Nancy Sylvester volunteered him to be the chair. Larissa Lee agreed to be on this subcommittee. Mr. Hunnicutt requested that Michael Petrogeorge be assigned as well, which was agreed to, in addition to a paralegal from his firm who has been involved with the LPP Committee.

(4) COORDINATION OF INTERVENTION RULES: URCP 24, CRAP 25A, URCRP 12.

Ms. Sylvester introduced this issue. The Appellate Rules Committee preferred having the term "attorney representing the governmental entity," as it was a more general rule. This appears in Rule 24 at line 65. There may not be an appointed attorney, it could be a contract attorney, so they proposed this change. Mr. Hafen asked how the parties would know who that was. Ms. Sylvester said the parties would be required to find that out. Ms. Lee asked if this would include school boards. Judge Holmberg questioned whether this now made it less clear that one attorney would receive notice, as opposed to potentially many. Mr. Pattison argued that a contract attorney is still considered the city attorney, but would serving them be sufficient?

Mr. Hunnicutt proposed using the language from Rule 4 (d)(1)(F)-(K) and referencing back to the rule. Judge Amber Mettler stated that she did not take the view that in criminal cases the state was informed just because they were a party. Ms. Lee pointed out that the criminal rules were being amended, too. Mr. Slaugh reported that the AG's office was concerned that administrative personnel might not know where to take the notice. However, he believed that the contract attorney would have a similar problem, as they were not really a city attorney, but an attorney who was often hired by a governmental entity. Judge Holmberg approved of referencing Rule 4. Ms. Sylvester expressed concerned that the AG references should remain. Mr. Slaugh proposed leaving the AG references in, but referencing Rule 4 for the rest. Mr. Pattison proposed serving the clerk, or recorder. Mr. Slaugh recalled that the state was opposed to incorporating Rule 4, however Judge Holmberg recalled this was the state, but they are currently not included in the proposed incorporation. He pointed out that we have not received any notice of problems on the municipal level. Mr. Slaugh proposed using the governmental immunity site, as every entity must have a person who can receive notice. Mr. Hafen responded that the Court does not like referring to websites in the rules. He then asked if this language was really a problem that really exists, or if it could be just sent out for comment. Mr. Pattison does not believe that this is a practical problem, as he has never seen this. Mr. Slaugh asked if the rule could state "the person designated to receive a claim." Mr. Hunnicutt proposed that it must provide notice to "the person designated under Rule 4(d)(1)." Mr. Hafen and Judge Holmberg supported this proposal.

Mr. Slaugh proposed changing the "wills" to "must." Ms. Sylvester responded that for references to what the court does, "will" is generally used. Mr. Hafen questioned if the last two sentences should stay. Mr. Slaugh wanted to keep the first in, but cut the second as it was now addressed earlier in the rule. Mr. Hunnicutt and Judge Holmberg proposed changing "municipal attorney" in the second to last sentence to "municipality."

Judge Holmberg moved to send the rule, as it appears below, to the Court, and then out for comment. Mr. Hunnicutt seconded. Motion passed.

Rule 24. Intervention.

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

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

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

(b) Permissive intervention.

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

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

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

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

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

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

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

(c) Notice and Pleading Required. A motion to intervene must be served on the parties as provided in Rule 5. The motion must state the grounds for intervention and set 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 must notify the Attorney General of such fact as described in paragraphs (d)(1)(A), (d)(1)(B), and (d)(1)(C).

(d)(1)(A) **Form and Content**. The notice must (i) be in writing, (ii) be titled "Notice of Constitutional Challenge Under URCP 24(d)," (iii) concisely describe the nature of the challenge, and (iv) include, as an attachment, the pleading, motion, or other paper challenging the constitutionality of the statute.

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

(d)(1)(C) **Service**. The party must serve the notice on the Attorney General by email or, if circumstances prevent service by email, by mail at the 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 must 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 county or municipality has not appeared, the party raising the question of constitutionality must notify the county or municipality by providing notice to the person identified in Rule 4(d)(1). 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 procedures for the response by the county or municipality must be consistent with paragraph (d)(1)(D).

(d)(3) **Failure to provide notice.** Failure of a party to provide notice as required by this rule is not a waiver of any constitutional challenge otherwise timely asserted. If a party does not serve a notice as required under paragraphs (d)(1) or (d)(2), the court may postpone the hearing until the party serves the notice.

(5) NEW RULE 7A. MOTION FOR ORDER TO SHOW CAUSE.

Ms. DiFrancesco introduced this issue. The subcommittee tried to move orders to show cause to a one step process, but could not take the order out of the process. The proposed rule would allow for, but not require, a phone conference before the hearing. There is still the process of creating the order, as you could not have contempt without the order coming from the Court, with service, before the hearing. She also stated that on line 11, "party" would be too restrictive, so "person" should be used. Ms. Vogel suggested that lines 16 and 17 should be in the present tense. So it would state "is requesting" the non-moving person be held in contempt. Judge Holmberg pointed out that line 19 should also say "person." Mr. Pattison questioned if the non-party would be a party to the motion, and therefore the word "party" could be used. Mr. Hafen proposed that the term "party" remain.

Judge Mettler questioned how this would interact with Rule 37 with respect to sanctions. Judge Holmberg pointed out there would have to be an order in place, and Ms. DiFrancesco stated that Rule 37 would only apply to parties. Judge Mettler pointed out that the party could proceed under either of these rules, so long as an order was in place. Judge Holmberg stated you would be getting a different order under Rule 37. This made Judge Mettler concerned that discovery disputes could now involve jail. Ms. DiFrancesco stated discovery disputes could not be exempted entirely. She also stated that the timing constraints would mean litigants would not use rule 7a. Mr. Slaugh pointed out that Rule 37 already allowed for contempt for discovery disputes. Ms. Sylvester

proposed adding that "this rule does not apply to discovery disputes between the parties under Rule 37." Mr. Slaugh proposed stating that it did not apply to discovery disputes "within the scope of Rule 37." Mr. Hafen questioned what Rule 7A was intended to cover. Mr. Slaugh said that injunctions would be covered. Ms. Vogel said that it would also cover family law.

Mr. Hunnicutt pointed out that the schedule under this rule was consistent with rule 101. This was done because that will be the most likely use. Ms. Vogel pointed out that the rule was also flexible. Judge Mettler asked how the hearing would get on the calendar, as it would not happen without a request for hearing. Judge Holmberg thought that the language following Rule 7 would cover that requirement. Judge Blanch questioned if it would ever be discussed without a hearing, as without a hearing the briefing schedule would not work. Mr. Slaugh said he did not believe you could hold someone in contempt without a hearing. Ms. DiFrancesco agreed that you could reduce something to a judgment without a hearing, which would also fall under this rule. Mr. Slaugh proposed a rule like in bankruptcy where a hearing would be scheduled, but if the response is not received, the court can strike the hearing and grant the relief.

Mr. Hafen questioned if we would need an advisory committee note, as this was rather new. Mr. Slaugh proposed waiting for comments before adding any notes.

Mr. Slaugh moved to send the rule as below to the Court and for comment. Ms. Lee seconded. The motion passed.

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 is requesting that the nonmoving party be held in contempt and, if so, 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. This rule does not apply to discovery disputes within the scope of Rule 37.

(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.

(6) RULE 100: COORDINATION BETWEEN THE DISTRICT AND JUVENILE COURTS IN MINOR GUARDIANSHIP CASES.

Ms. Sylvester introduced this issue. The court visitor program found that there were many "whereabout cases" on guardianship cases, but the different courts were not informing one another when custody decisions were being made in the context of a district court minor guardianship. Mr. Hafen asked if there were any reasons not to accept the proposed rule change. Mr. Slaugh questioned if minor guardianship was a type of custody. However, he still believed this rule accomplished the result. Mr. Hunnicutt believed that minor guardianship was part of child custody, but that if we separated it out adoption would have to be added, and perhaps additional ones such as international parental abduction. He proposed adding adoption and any other similar child custody case.

Ms. Lee questioned the absence of oxford commas.

Mr. Slaugh moved to send the rule as below to the Court and for comment. Mr. Hunnicutt seconded. Motion passed.

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 support, parent time, or child custody, including minor guardianship, adoption, or any similar child custody case;

(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 support, parent time, or child custody 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).

(7) ADJOURNMENT.

The committee was reminded that committee notes were due in May, and would be discussed in June, and the committee adjourned at 5:59 pm. The next meeting will be held May 22, 2019 at 4:00 pm.

Tab 2

Administrative Office of the Courts

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

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

MEMORANDUM

To: Civil Rules Committee
From: Nancy Sylvester
Date: May 15, 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 governmental entity" rather than "attorney representing the governmental entity" since "governmental entity" more accurately relates to what the Attorney General is.

Another update is to move away from "county or municipal ordinance" since the discussions in both groups have been more broad in terms of the entities that may be implicated. So that terminology has become "the governmental entity's ordinance or regulation." This fits well, I think, with the reference to service under Rule 4(d)(1).

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 24. Intervention.

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

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

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

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

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

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

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

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

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

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

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

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

(d) Constitutionality of Utah statutes, ~~and~~ ordinances, and regulations.

(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 must 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 or regulation**. If a party challenges the constitutionality of a governmental entity's ordinance or regulation ~~county or municipal ordinance~~ in an action in which the ~~county or municipal~~ governmental entity ~~attorney~~ has not appeared, the party raising the question of constitutionality ~~shall~~ must notify the ~~county or municipal~~governmental entity by serving notice on the person identified in Rule 4(d)(1). ~~attorney of such fact.~~ The procedures for the party challenging the constitutionality of the ordinance or regulation 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 governmental entity must be consistent with paragraph (d)(1)(D).

(d)(3) **Failure to provide notice.** Failure of a party to provide notice as required by this rule is not a waiver of any constitutional challenge otherwise timely asserted. If a party does not serve a notice as

required under paragraphs (d)(1) or (d)(2), the court may postpone the hearing until the party serves the notice.

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

(a) **Notice to the Attorney General or ~~the county or municipal attorney~~other 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 an ~~county or municipal~~ ordinance or regulation in an appeal or petition for review in which the responsible ~~county or municipal~~governmental entity ~~attorney~~ has not appeared, every party must serve its principal brief and any subsequent brief on the governmental entity~~county or municipal attorney~~ on or before the date the brief is filed, and file proof of service with the court.

Comment [NS1]: Should this be governmental ordinance or regulation?

(a)(3) If an appellee or cross-appellant is the first party to challenge the constitutionality of a statute, ~~or~~ ordinance, or regulation, the appellant must serve its principal brief on the Attorney General or ~~the county or municipal~~ other 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 other governmental entity ~~county or municipal attorney~~; amicus brief.**

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

Comment [NS2]: Chris Ballard will propose some language here.

Comment [NS3]: Paul will take up this suggestion with the Supreme Court to figure out what the sentiment is behind this.

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

(b)(3) If the Attorney General or ~~other government attorney~~other 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~~other governmental entity ~~county or municipal attorney~~.** Any time a party challenges the constitutionality of a statute, ~~or~~ ordinance, or regulation, the appellate court may call for the views of the Attorney General or ~~of the county or municipal attorney~~other 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 governmental entity~~county or municipal attorney~~ files an amicus brief, the Attorney General or other governmental entity~~county or municipal attorney~~ will be permitted to participate at oral argument by timely declaring an intent to participate on the court's oral argument acknowledgment form. ~~.~~

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, ordinances, and regulations**.

(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 shall 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 or regulation.** If a party challenges the constitutionality of a governmental entity's ordinance or regulation in an action in which the governmental entity has not appeared, the party raising the question of constitutionality shall notify the governmental entity by serving notice on the person identified in Rule 4(d)(1) of the Utah Rules of Civil Procedure. 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 governmental entity will be consistent with paragraph (i)(1)(D).

(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 3

Administrative Office of the Courts

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

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

MEMORANDUM

To: Civil Rules Committee
From: Nancy Sylvester
Date: May 15, 2019
Re: Informal trials

At the Policy and Planning Committee's April meeting, the Probate Subcommittee proposed an informal trial rule for probate cases. Although Policy and Planning agreed generally with the idea of having informal trials in those case types, it questioned why this wouldn't be a rule of civil procedure. The Committee referred that rule and CJA Rule 4-904 (governing informal trials of domestic cases) to this committee for its consideration.

Policy and Planning also asked that this committee explore whether a referral should be made to the Evidence Advisory Committee regarding Evidence Rule 1101 since informal trials involve suspending the rules of evidence.

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 39.1 or 16.1. Informal trials.

~~Intent:~~

~~To allow the parties and judge to agree to a trial of select issues in an informal manner.~~

~~Applicability:~~

~~This rule applies to the district court.~~

~~Statement of the Rule:~~

(a) Upon waiver and stipulated motion of all parties and approval by the court, the court will conduct an informal trial of select issues~~child support, child custody and parent-time issues~~. The waiver and motion shall be made verbally on the record or in a signed writing. To qualify for an informal trial, the court must find that the parties have made a valid waiver of their right to a regular trial.

(b) If the court grants the motion, the informal trial shall proceed as follows:

(b)(1) The party who bears the burden of proof on an issue speaks to the court under oath about the dispute including his or her preferred resolution of the dispute~~his or her desires about child support, child custody and parent-time~~. The party is not questioned by counsel or the other party but may be questioned by the court.

(b)(2) That party may present any document or other evidence. The court shall determine what weight to give any documents or other evidence. The court may order the record to be supplemented.

(b)(3) Counsel for that party may identify any other areas of inquiry, and the court may make the inquiry.

(b)(4) The process is repeated for the other parties.

(b)(5) If there is an expert, the expert's report is entered into evidence as the court's exhibit. The expert may be questioned by counsel, parties, or the court upon request.

(b)(6) Each party is offered:

(b)(6)(i) the opportunity to respond to the statements, documents or other evidence of the other parties; and

(b)(6)(ii) the opportunity to make legal arguments.

(b)(7) The court will enter an order which has the same force and effect as if entered after a traditional trial. If the order is a final order, it may be appealed on any grounds that do not rely upon the Utah Rules of Evidence in accordance with Rules 4 and 5 of the Utah Rules of Appellate Procedure, as applicable.

Rule 4-904. Informal trial of support, custody and parent-time.

Intent:

To allow the parties and judge to agree to a trial of select issues in an informal manner.

Applicability:

This rule applies to the district court.

Statement of the Rule:

(a) Upon waiver and stipulated motion of all parties and approval by the court, the court will conduct an informal trial of child support, child custody and parent-time issues. The waiver and motion shall be made verbally on the record or in a signed writing. To qualify for an informal trial, the court must find that the parties have made a valid waiver of their right to a regular trial.

(b) If the court grants the motion, the informal trial shall proceed as follows:

(b)(1) The party who bears the burden of proof on an issue speaks to the court under oath about his or her desires about child support, child custody and parent-time. The party is not questioned by counsel or the other party but may be questioned by the court.

(b)(2) That party may present any document or other evidence. The court shall determine what weight to give any documents or other evidence. The court may order the record to be supplemented.

(b)(3) Counsel for that party may identify any other areas of inquiry, and the court may make the inquiry.

(b)(4) The process is repeated for the other parties.

(b)(5) If there is an expert, the expert's report is entered into evidence as the court's exhibit. The expert may be questioned by counsel, parties or the court upon request.

(b)(6) Each party is offered:

(b)(6)(i) the opportunity to respond to the statements, documents or other evidence of the other parties; and

(b)(6)(ii) the opportunity to make legal arguments.

(b)(7) The court will enter an order which has the same force and effect as if entered after a traditional trial. If the order is a final order, it may be appealed on any grounds that do not rely upon the Utah Rules of Evidence.

Rule 4-1001. Informal trial of probate disputes.

Intent:

To allow interested persons and the judge to agree to a trial of select probate disputes in an informal manner. Rule 26.4 of the Utah Rules of Civil Procedure defines “interested persons” and “probate dispute.”

Applicability:

This rule applies to the district court.

Statement of the Rule:

(a) Upon waiver and stipulated motion of all interested persons and approval by the court, the court will conduct an informal trial of a probate dispute(s) during which the Utah Rules of Evidence will not apply. The waiver and motion must be made verbally on the record or in a signed writing. To qualify for an informal trial, the court must find that the interested parties have made a valid waiver of their right to a regular trial.

(b) If the court grants the motion, the informal trial will proceed as follows:

(b)(1) The party who bears the burden of proof on an issue speaks to the court under oath about the probate dispute, including his or her preferred resolution of the dispute. The party is not questioned by counsel or the other parties but may be questioned by the court.

(b)(2) That party may present any document or other evidence. The court will determine what weight to give any documents or other evidence. The court may order the record to be supplemented.

(b)(3) Counsel for that party may identify any other areas of inquiry, and the court may make the inquiry.

(b)(4) The process is repeated for the other interested parties.

(b)(5) If there is an expert, the expert’s report is entered into evidence as the court’s exhibit. The expert may be questioned by counsel, parties or the court upon request.

(b)(6) Each interested party is offered:

(b)(6)(i) the opportunity to respond to the statements, documents or other evidence of the other parties; and

(b)(6)(ii) the opportunity to make legal arguments.

(b)(7) The court will enter an order which has the same force and effect as if entered after a traditional trial. If the order is a final order, it may be appealed on any grounds that do not rely upon the Utah Rules of Evidence in accordance with Rules 4 and 5 of the Utah Rules of Appellate Procedure as applicable.

Tab 4

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

Utah State Courts

Nancy Sylvester <nancyjs@utcourts.gov>

Amendments to URCP Rule 65C

Lee Nakamura <Lnakamura@agutah.gov> Mon, Apr 29, 2019 at 2:11 PM
To: Nancy Sylvester <nancyjs@utcourts.gov>

Dear Nancy, our post-conviction section met on this Wednesday, April 24th, and made some proposed changes to the wording in the 65C amendment draft you sent (proposed changes attached.)

We will not be creating a dedicated email address for Post-Conviction at this time, so adding our physical mailing address is sufficient, and should be very helpful.

You will see that one of our proposed changes to this amendment adds the underlying criminal record to the list of documents to be automatically served on our office when the Court requires a response to a 65C petition from us. We hope the rules committee will be willing to entertain this addition to the amendment as a possible solution to the added months of back and forth between our office and the Courts trying to get the complete record sent out. As mentioned in my original email communication to Clerks of Court, we need the record in the underlying criminal case in order to properly respond to a 65C petition, and getting the record released and sent to us has been problematic and often adds weeks, if not months, to our response time (see point 2 of my original communication.) Some judges and clerks assume we have access to the criminal record on CourtXchange, but because our office is usually not a party in the criminal case, we do not have access to the protected parts of the record on line, and we do not have access to the transcripts. Also, some of our post-conviction cases involve records that predate electronic filing. Paginated records are always created for appeals, and are likewise needed for post-conviction proceedings.

[Quoted text hidden]

URCP065C proposed changes 24 Apr 2019.docx
22K

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, and the record of the underlying criminal case being challenged, including all non-public documents, by mail upon the respondent.

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(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 by mail at the following address:

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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 5

Utah State Courts

Nancy Sylvester <nancyjs@utcourts.gov>

URCP Adv. Cmte. | LPP subcommittee

Jim Hunnicutt <jim@dolowitzhunnicutt.com> Mon, May 20, 2019 at 11:00 AM
To: Larissa Lee <LLee@joneswaldo.com>, Michael Petrogeorge <mppetrogeorge@gmail.com>
Cc: Jonathan Hafen <jhafen@parrbrown.com>, Nancy Sylvester <nancyjs@utcourts.gov>

Dear Larissa & Michael,

In the spirit of trying to avoid reinventing wheels, I looked at the Washington State rules of civil procedure (the "Superior Court Civil Rules"): they make no mention of the LLLTs (i.e., Limited License Legal Technicians, their version of the LPP). So as a starting point, I think we can take some solace knowing that although they've had LLLTs for about five years in WA, the powers-that-be there have not yet felt compelled to amend their rules of civil procedure.

Attached are all of the URCP that include the words "attorney," "lawyer," or "counsel." (Attached in both .doc and .pdf formats.) I flagged each occurrence of those words (unless the usage of the word does not relate generally to lawyers, e.g., I did not flag references to "attorney general"). I did flag references to "attorney fees" because I assume if someone is entitled to recover attorney fees, then they arguably could recover their LPP fees too.

When you have a moment, please review through the flags and see what you think. The question posed to this subcommittee was: What amendments should we consider to the URCP to address the entry of LPPs into the legal field, and ought we amend each reference in the rules to say something like "and/or LPPs" or should we implement a rule that broadly says all references in the URCP to "lawyer / attorney / counsel" presumably includes LPPs?

My initial suggestion is that we add a subpart (f) to Rule 81 ("Applicability of rules in general") that says something along the lines of:

> To the extent consistent with their limited scope of representing clients, licensed paralegal practitioners must be treated in the same fashion as attorneys for purposes of interpreting and implementing these rules. If a rule permits or requires an attorney to sign a document, a licensed paralegal practitioner only may do so if there is available an applicable court-approved form. References to 'attorneys fees' in these rules presumably include fees charged by licensed paralegal practitioners.

I submit this proposed language (or something like it) would address the vast majority of instances in which the Rules reference a lawyer / attorney / counsel.

We also should consider discussing Rules 74-75 as well, which address appearances and withdrawals of counsel. Perhaps we should add a subpart to Rule 74 and/or 75 giving clear guidance on how LPPs should comply with the requirements of those two rules.

Thank you.

Sincerely,

Jim

DOLOWITZ HUNNICUTT, PLLC

215 South State Street, Suite 560

Salt Lake City, Utah 84111

tel: 801-535-4340

www.dolowitzhunnicutt.com

2 attachments

URCP with flagged references to lawyers.pdf
986K

URCP with flagged references to lawyers.doc
502K

Utah State Courts

Nancy Sylvester <nancyjs@utcourts.gov>

LPP question

Jim Hunnicutt <jim@dolowitzhunnicutt.com> Wed, May 22, 2019 at 1:30 PM
To: Nancy Sylvester <nancyjs@utcourts.gov>, Jonathan Hafen <jhafen@parrbrown.com>
Cc: Larissa Lee <LLee@joneswaldo.com>, Michael Petrogeorge <mppetrogeorge@gmail.com>

Interesting from Washington State Bar Association:

From: Limited License Legal Technician <LLLT@wsba.org>
Sent: Wednesday, May 22, 2019 9:57 AM
To: Jim Hunnicutt
Cc: Limited License Legal Technician
Subject: RE: LLLT question

Hello Jim,

No, there is not a reference to LLLTs in Washington's Superior Court Civil Rules. LLLTs assist pro se clients and they must follow the Civil Rules.

Best regards,

Rachel Konkler | Innovative Licensing Analyst

Washington State Bar Association | ☎ 206.727.8289 | rachelk@wsba.org

1325 Fourth Avenue, Suite 600 | Seattle, WA 98101-2539 | www.wsba.org

The WSBA is committed to full access and participation by persons with disabilities. If you have questions about accessibility or require accommodation please contact barbarao@wsba.org.

From: Jim Hunnicutt <jim@dolowitzhunnicutt.com>
Sent: Monday, May 20, 2019 10:22 AM
To: Limited License Legal Technician <LLLT@wsba.org>
Subject: LLLT question

Dear Ms. Konkler,

I had a question about LLLTs, which we here in Utah are aiming to emulate. Knock on wood, we'll be admitting our first class into practice at the end of this year.

I've been asked to look at whether we should amend the Utah Rules of Civil Procedure. When I looked at Washington's Superior Court Civil Rules, I didn't notice any references to LLLTs.

Is there a written rule or policy connecting the LLLTs to Washington's Superior Court Civil Rules? E.g., I'm imagining perhaps a written rule/policy saying that to the extent consistent with the limitations on their practice, LLLTs need to follow the rules the same ways lawyers do.

Thank you very much.

Sincerely,

Jim

DOLOWITZ HUNNICUTT, PLLC

215 South State Street, Suite 560

Salt Lake City, Utah 84111

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Rule 3. Commencement of Action

(a)

How commenced. A civil action is commenced (1) by filing a complaint with the court, or (2) by service of a summons together with a copy of the complaint in accordance with Rule 4. If the action is commenced by the service of a summons and a copy of the complaint, then the complaint, the summons and proof of service, must be filed within ten days of such service. If, in a case commenced under paragraph (a)(2) of this rule, the complaint, summons and proof of service are not filed within ten days of service, the action commenced shall be deemed dismissed and the court shall have no further jurisdiction thereof. If a check or other form of payment tendered as a filing fee is dishonored, the party shall pay the fee by cash or cashier's check within 10 days after notification by the court. Dishonor of a check or other form of payment does not affect the validity of the filing, but may be grounds for such sanctions as the court deems appropriate, which may include dismissal of the action and the award of costs and attorney fees.

Commented [JH1]: Can litigants recover "LPP fees"?

(b)

Time of jurisdiction. The court shall have jurisdiction from the time of filing of the complaint or service of the summons and a copy of the complaint.

Cite as Utah. R. Civ. P. 3

Note:

Advisory Committee Notes

Rule 3 constitutes a significant change from the prior rule. The rule retains service of the ten-day summons as one of two means to commence an action, but the rule requires that the summons together with a copy of the complaint be served on the defendant pursuant to Rule 4. In so doing, the rule eliminates the requirement that a copy of the complaint be deposited with the clerk for the defendant whose address is unknown. The changes in Rule 3 must be read and should be interpreted in conjunction with coordinate changes in Rule 4 and with a change in Rule 12(a) that begins the running of the defendant's 20-day response time from the service of the summons and complaint.

Paragraph (a). This paragraph eliminates the requirement that a copy of the complaint be deposited with the clerk for the defendant whose address is unknown. Paragraph (b) of the former rule, which permitted the plaintiff to deposit copies of the complaint with the clerk for defendants not otherwise served with a copy at the time of the service of the summons, has also been eliminated. The rule requires, in effect, that both the summons and the complaint be served pursuant to Rule 4. Under a coordinate change in Rule 12(a), the defendant's time for answering or otherwise responding to the complaint does not begin to run until service of the summons and complaint pursuant to Rule 4.

Paragraph (b). This paragraph is substantially identical to paragraph (c) of the former rule.

Rule 4. Process

(a)

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

Commented [JH2]:

(b)

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

(c)

Contents of summons.

(c)(1)

The summons must:

(c)(1)(A)

contain the name and address of the court, the names of the parties to the action, and the county in which it is brought;

(c)(1)(B)

be directed to the defendant;

(c)(1)(C)

state the name, address and telephone number of the plaintiff's attorney, if any, and otherwise the plaintiff's address and telephone number;

Commented [JH3]:

(c)(1)(D)

state the time within which the defendant is required to answer the complaint in writing;

(c)(1)(E)

notify the defendant that in case of failure to answer in writing, judgment by default will be entered against the defendant;

(c)(1)(F)

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

(c)(2)

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

(c)(2)(A)

state that the defendant need not answer if the complaint is not filed within 10 days after service; and

(c)(2)(B)

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

(c)(3)

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

(d)

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

(d)(1)

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

Commented [JH4]:

(d)(1)(A)

Upon any individual other than one covered by paragraphs (d)(1)(B), (d)(1)(C) or (d)(1)(D), by delivering a copy of the summons and complaint to the individual personally, or by leaving them at the individual's dwelling house or usual place of abode with a person of suitable age and discretion who resides there, or by delivering them to an agent authorized by appointment or by law to receive process;

(d)(1)(B)

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

(d)(1)(C)

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

(d)(1)(D)

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

(d)(1)(E)

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

(d)(1)(F)

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

(d)(1)(G)

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

(d)(1)(H)

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

(d)(1)(I)

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

(d)(1)(J)

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

(d)(1)(K)

Upon a public board, commission or body, by delivering a copy of the summons and complaint as required by statute, or in the absence of a controlling statute, to any member of its governing board, or to its executive employee or secretary.

(d)(2)

Service by mail or commercial courier service.

(d)(2)(A)

The summons and complaint may be served upon an individual other than one covered by paragraphs (d)(1)(B) or (d)(1)(C) by mail or commercial courier service in any state or judicial district of the United States provided the defendant signs a document indicating receipt.

(d)(2)(B)

The summons and complaint may be served upon an entity covered by paragraphs (d)(1)(E) through (d)(1)(I) by mail or commercial courier service in any state or judicial district of the United States provided defendant's agent authorized by appointment or by law to receive service of process signs a document indicating receipt.

(d)(2)(C)

Service by mail or commercial courier service shall be complete on the date the receipt is signed as provided by this rule.

(d)(3)

Acceptance of service.

(d)(3)(A)

Duty to avoid expenses. All parties have a duty to avoid unnecessary expenses of serving the summons and complaint.

(d)(3)(B)

Acceptance of service by party. Unless the person to be served is a minor under 14 years old or an individual judicially declared to be incapacitated, of unsound mind, or incapable of conducting the individual's own affairs, a party may accept service of a summons and complaint by signing a document that acknowledges receipt of the summons and complaint.

(d)(3)(C)

Acceptance of service by attorney for party. An attorney may accept service of a summons and complaint on behalf of the attorney's client by signing a document that acknowledges receipt of the summons and complaint.

Commented [JH5]:

(d)(3)(D)

Effect of acceptance, proof of acceptance. A person who accepts service of the summons and complaint retains all defenses and objections, except for adequacy of service. Service is effective on the date of the acceptance. Filing the acceptance of service with the court constitutes proof of service under Rule 4(e).

(d)(4)

Service in a foreign country. Service in a foreign country must be made as follows:

(d)(4)(A)

by any internationally agreed means reasonably calculated to give notice, such as those means authorized by the Hague Convention on the Service Abroad of Judicial and Extrajudicial Documents;

(d)(4)(B)

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

(d)(4)(B)(i)

in the manner prescribed by the law of the foreign country for service in that country in an action in any of its courts of general jurisdiction;

(d)(4)(B)(ii)

as directed by the foreign authority in response to a letter of request issued by the court; or

(d)(4)(B)(iii)

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

(d)(4)(C)

by other means not prohibited by international agreement as may be directed by the court.

(d)(5)

Other service.

(d)(5)(A)

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

(d)(5)(B)

If the motion is granted, the court will order service of the complaint and summons by means reasonably calculated, under all the

circumstances, to apprise the named parties of the action. The court's order must also specify the content of the process to be served and the event upon which service is complete. Unless service is by publication, a copy of the court's order must be served with the process specified by the court.

(d)(5)(C)

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

(e)

Proof of Service.

(e)(1)

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

Commented [JH6]:

(e)(2)

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

(e)(3)

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

(e)(4)

Failure to file proof of service does not affect the validity of the service. The court may allow proof of service to be amended.

Cite as Utah. R. Civ. P. 4

History. Amended effective November 1, 2016; amended effective May 8, 2018.

Note:

Advisory Committee Notes

2016 Amendments

Paragraph (d)(3) contemplates delivery and acceptance of the summons and complaint by various methods, including electronic delivery and signature. Elimination of the express procedure for seeking waiver of service under paragraph (f) does not eliminate the parties' ability to agree to accept service under paragraph (d)(3).

Rule 4 constitutes a substantial change from prior practice. The rule modernizes and simplifies procedure relating to service of process. Although this rule and Rule 3 retain the ten-day summons procedure for commencement of actions, this rule endeavors to make practice under the ten-day summons provision more consistent with practice in actions commenced by the filing of a complaint. The rule retains portions of prior Rule 4, adopts portions of the present federal Rule 4, and adopts entirely new language in other areas. The rule eliminates the statement (appearing in paragraph (m) of the prior rule) that all writs and process may be served by any constable of the court. In the committee's view, this rule does not properly deal with the question of who may serve types of process other than the summons and complaint. In recommending the elimination of paragraph (m), the committee did not intend to change the law governing eligibility to serve such other process.

Paragraph (a). This paragraph eliminates the prior rule's reference to the issuance of summonses. See paragraph (b). Otherwise the paragraph is identical to the former paragraph (a).

Paragraph (b). This paragraph, a substantial change from the prior rule, requires that in an action commenced under Rule 3(a)(1), the summons, together with a copy of the complaint, must be served within 120 days of the filing of the complaint. The time period was borrowed from Rule 4(j), Federal Rules of Civil Procedure.

Paragraph (c). This paragraph makes minor revisions to the corresponding paragraph of the prior rule. In addition to data historically required to appear in the summons, the address of the court and information concerning the plaintiff or plaintiff's attorney are also required.

Commented [JH7]:

Paragraph (d). In prescribing the persons who may serve process, this paragraph eliminates the prior rule's distinction between in-state and out-of-state service. The paragraph is consistent with other changes in the rule designed to simplify and unify practice for in-state and out-of-state service. In order to be eligible to serve a summons or complaint, persons who are not sheriffs or other law enforcement personnel must be at least 18 years of age at the time of service. For eligibility to make service in a foreign country, see paragraph (d)(3). Subparagraph (d)(1)(A) presents the general rule for personal service on individuals who are not infants, incompetent, or incarcerated. Subparagraph (B) deals with service on infants and subparagraph (C) with service on incompetent persons. Subparagraphs (A), (B) and (C) are patterned after Rule 4(e), Federal Rules of Civil Procedure. Subparagraph (D) deals with service on persons who are incarcerated or committed to the custody of a state institution. Subparagraph (E) deals with service on business entities. Subparagraphs (F) through (I) change and modernize service on political subdivisions of the state. Subparagraphs (J) and (K) provide for service on the state and its departments, agencies, boards and commissions with only minor changes from the prior rule. Subparagraph (d)(2) adds a provision for service by mail or commercial courier service within any judicial district of the United States. The term "mail" refers to services provided by the United States Postal Service. The term "commercial courier service" refers to businesses that provide for the delivery of documents. Examples of "commercial courier service" include Federal Express and United Parcel Service. Methods of service by mail or commercial courier service must provide for a document indicating receipt. Subparagraphs (A) and (B) specify who must sign the document indicting receipt. For service under Subparagraph (d)(2) to be effective, the court must be clearly convinced that the proper person signed the document indicating receipt. Infants or incompetent persons may not be served by mail or commercial courier service. Subparagraph (C) details when service by mail or commercial courier service is complete.

Paragraph (d)(3). This paragraph provides several alternative means by which service must be made in foreign countries and provides for proof of such service.

Paragraph (d)(4). This paragraph replaces most of paragraph (f) of the prior rule. It is designed to permit alternative means of service where the identity or whereabouts of the person to be served is unknown, where personal service is impracticable, or where a party avoids personal service. Under the circumstances identified in the rule, this paragraph permits the court to fashion means of service reasonably calculated to apprise the parties of the pendency of the action. Use of this provision is not limited to actions traditionally considered in rem or quasi in rem. *See Carlson v. Bos*, 740 P.2d 1269, 1272 (Utah 1987). The present rule eliminates specific mention of service by telegraph or telephone (in paragraph (1) of the prior rule) since such service could be ordered under this paragraph if appropriate. The court's order of substituted service must specify the content of service and the event or events as of which service will be deemed complete. A copy of the order must itself be served so that the party served will be able to determine the sufficiency of service and the time as of which his or her response is due.

Paragraph (e). This paragraph replaces paragraph (g) in the prior rule. It requires proof of service to be filed "promptly" and in any event before a responsive pleading is due. The rule eliminates failure to file proof of service as a basis for challenging the validity of service. The rule contains specific requirements for proof of service depending upon who serves and what method of service is used. If the summons and complaint are served by mail or commercial courier service, subparagraph (1) requires the receipt signed by defendant or defendant's agent to be included in the proof of service.

Paragraph (f) adds an option for a plaintiff to request a defendant to waive service. This provision is similar to federal Rule (4)(d). The defendant is required to return the waiver of service within 20 days (30 days for a defendant outside the United States) from the date the request for waiver is sent. The rule grants a defendant who waives service additional time to file a response to the complaint. A defendant who does not return the request for waiver of service will be assessed plaintiff's actual costs in effecting service under other provisions of this rule.

Rule 5. Service and Filing of Pleadings and Other Papers

(a)

When service is required.

(1)

Papers that must be served. Except as otherwise provided in these rules or as otherwise directed by the court, the following papers must be served on every party:

(A)

a judgment;

(B)

an order that states it must be served;

(C)

a pleading after the original complaint;

(D)

a paper relating to disclosure or discovery;

(E)

a paper filed with the court other than a motion that may be heard ex parte; and

(F)

a written notice, appearance, demand, offer of judgment, or similar paper.

(2)

Serving parties in default. No service is required on a party who is in default except that:

(A)

a party in default must be served as ordered by the court;

(B)

a party in default for any reason other than for failure to appear must be served as provided in paragraph (a)(1);

(C)

a party in default for any reason must be served with notice of any hearing to determine the amount of damages to be entered against the defaulting party;

(D)

a party in default for any reason must be served with notice of entry of judgment under Rule 58A(d) ; and

(E)

a party in default for any reason must be served under Rule 4 with pleadings asserting new or additional claims for relief against the party.

(3)

Service in actions begun by seizing property. If an action is begun by seizing property and no person is or need be named as defendant, any service required before the filing of an answer, claim or appearance must be made upon the person who had custody or possession of the property when it was seized.

(b)

How service is made.

(1)

Whom to serve. If a party is represented by an attorney, a paper served under this rule must be served upon the attorney unless the court orders service upon the party. Service must be made upon the attorney and the party if

Commented [JH8]:

Commented [JH9]:

Commented [JH10]:

(A)

an attorney has filed a Notice of Limited Appearance under Rule 75 and the papers being served relate to a matter within the scope of the Notice; or

Commented [JH11]:

(B)

a final judgment has been entered in the action and more than 90 days has elapsed from the date a paper was last served on the attorney.

Commented [JH12]:

(2)

When to serve. If a hearing is scheduled 7 days or less from the date of service, a party must serve a paper related to the hearing by the method most likely to be promptly received. Otherwise, paper that is filed with the court must be served before or on the same day that it is filed.

(3)

Methods of service. A paper is served under this rule by:

(A)

except in the juvenile court, submitting it for electronic filing if the person being served has an electronic filing account;

(B)

emailing it to

(i)

the most recent email address provided by the person to the court under Rule 40 10(a)(3) or Rule 76, or

(ii)

to the email address on file with the Utah State Bar

(C)

mailing it to the person's last known address;

(D)

handing it to the person;

(E)

leaving it at the person's office with a person in charge or, if no one is in charge, leaving it in a receptacle intended for receiving deliveries or in a conspicuous place;

(F)

leaving it at the person's dwelling house or usual place of abode with a person of suitable age and discretion who resides there; or

(G)

any other method agreed to in writing by the parties.

(4)

When service is effective. Service by mail or electronic means is complete upon sending.

(5)

Who serves. Unless otherwise directed by the court:

(A)

every paper required to be served must be served by the party preparing it; and

(B)

an order or judgment prepared by the court will be served by the court.

(c)

Serving numerous defendants. If an action involves an unusually large number of defendants, the court, upon motion or its own initiative, may order that:

(1)

a defendant's pleadings and replies to them do not need to be served on the other defendants;

(2)

any cross-claim, counterclaim avoidance or affirmative defense in a defendant's pleadings and replies to them are deemed denied or avoided by all other parties;

(3)

filing a defendant's pleadings and serving them on the plaintiff constitutes notice of them to all other parties; and

(4)

a copy of the order must be served upon the parties.

(d)

Certificate of service. A paper required by this rule to be served, including electronically filed papers, must include a signed certificate of service showing the name of the document served, the date and manner of service and on whom it was served.Except in the juvenile court, this paragraph does not apply to papers required to be served under paragraph (b)(5)(B) when service to all parties is made under paragraph (b)(3)(A).

(e)

Filing. Except as provided in Rule 7(j) and Rule 26(f), all papers after the complaint that are required to be served must be filed with the court. Parties with an electronic filing account must file a paper electronically. A party without an electronic filing account

may file a paper by delivering it to the clerk of the court or to a judge of the court. Filing is complete upon the earliest of acceptance by the electronic filing system, the clerk of court or the judge.

(f)

Filing an affidavit or declaration. If a person files an affidavit or declaration, the filer may:

(1)

electronically file the original affidavit with a notary acknowledgment as provided by Utah Code Section 46-1-16(7) ;

(2)

electronically file a scanned image of the affidavit or declaration;

(3)

electronically file the affidavit or declaration with a conformed signature; or

(4)

if the filer does not have an electronic filing account, present the original affidavit or declaration to the clerk of the court, and the clerk will electronically file a scanned image and return the original to the filer.

The filer must keep an original affidavit or declaration of anyone other than the filer safe and available for inspection upon request until the action is concluded, including any appeal or until the time in which to appeal has expired.

Cite as Utah. R. Civ. P. 5

History. Amended November 27, 2017, effective May 1, 2018; amended December 21, 2018, effective May 1, 2019.

Note:

Advisory Committee Notes

The 1999 amendment to subdivision (b)(1)(B) does not authorize the court to conduct a hearing with less than 5 days notice, but rather specifies the manner of service of the notice when the court otherwise has that authority.

2001 amendments

Paragraph (b)(1)(A) has been changed to allow service by means other than U.S. Mail and hand delivery if consented to in writing by the person to be served, i.e. the attorney of the party. Electronic means include facsimile transmission, e-mail and other possible electronic means.

Commented [JH13]:

While it is not necessary to file the written consent with the court, it would be advisable to have the consent in the form of a stipulation suitable for filing and to file it with the court.

2015 amendments

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

Under paragraph (b)(3)(A), electronically filing a document has the effect of serving the document on lawyers who have an e-filing account. (Lawyers representing parties in the district court are required to have an account and electronically file documents. Code of Judicial Administration Rule 4-503.) The 2015 amendment excepts from this provision documents electronically filed in juvenile court.

Commented [JH14]:

Commented [JH15]:

Although electronic filing in the juvenile court presents to the parties the documents that have been filed, the juvenile court e-filing application (CARE), unlike that in the district court, does not deliver an email alerting the party to that fact. The Board of Juvenile

Court Judges and the Advisory Committee on the Rules of Juvenile Procedure believe this difference renders electronic filing alone insufficient notice of a document having been filed. So in the juvenile court, a party electronically filing a document must serve that document by one of the other permitted methods.

Rule 6. Time

(a)

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

(1)

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

(A)

exclude the day of the event that triggers the period;

(B)

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

(C)

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

(2)

When the period is stated in hours:

(A)

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

(B)

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

(C)

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

(3)

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

(A)

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

(B)

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

(4)

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

(A)

for electronic filing, before midnight; and

(B)

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

(5)

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

(6)

"Legal holiday" means the day for observing:

(A)

New Year's Day;

(B)

Dr. Martin Luther King, Jr. Day;

(C)

Washington and Lincoln Day;

(D)

Memorial Day;

(E)

Independence Day;

(F)

Pioneer Day;

(G)

Labor Day;

(H)

Columbus Day;

(I)

Veterans' Day;

(J)

Thanksgiving Day;

(K)

Christmas; and

(L)

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

(b)

Extending time.

(1)

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

(A)

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

(B)

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

(2)

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

(c)

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

(d)

Response time for an unrepresented party. When a party is not represented by an attorney, does not have an electronic filing account, and may or must act within a specified time after the filing of a paper, the period of time within which the party may or must act is counted from the service date and not the filing date of the paper.

Commented [JH16]:

(e)

Filing or service by inmate.

(1)

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

(2)

Papers filed or served by an inmate are timely filed or served if they are deposited in the institution's internal mail system on or before the last day for filing or service. Timely filing or service may be shown by a contemporaneously filed notarized statement or written declaration setting forth the date of deposit and stating that first-class postage has been, or is being, prepaid, or that the inmate has complied with any applicable requirements for legal mail set by the institution. Response time will be calculated from the date the papers are received by the court, or for papers served on parties that do not need to be filed with the court, the postmark date the papers were deposited in U.S. mail.

(3)

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

Cite as Utah. R. Civ. P. 6

History. Amended effective May 1, 2016; amended November 22, 2017, effective May 1, 2018

Rule 10. Form of Pleadings and Other Papers

(a)

Caption; names of parties; other necessary information.

(a)(1)

All pleadings and other papers filed with the court must contain a caption setting forth the name of the court, the title of the action, the file number, if known, the name of the pleading or other paper, and the name, if known, of the judge (and commissioner if applicable) to whom the case is assigned. A party filing a claim for relief, whether by original claim, counterclaim, cross-claim or third-party claim, must include in the caption the discovery tier for the case as determined under Rule 26.

(a)(2)

In the complaint, the title of the action must include the names of all the parties, but other pleadings and papers need only state the name of the first party on each side with an indication that there are other parties. A party whose name is not known must be designated by any name and the words "whose true name is unknown." In an action in rem, unknown parties must be designated as "all unknown persons who claim any interest in the subject matter of the action."

(a)(3)

Every pleading and other paper filed with the court must state in the top left hand corner of the first page the name, address, email address, telephone number and bar number of the attorney or party filing the paper, and, if filed by an attorney, the party for whom it is filed.

Commented [JH17]:

Commented [JH18]:

(a)(4)

A party filing a claim for relief, whether by original claim, counterclaim, cross-claim or third-party claim, must also file a completed cover sheet substantially similar in form and content to the cover sheet approved by the Judicial Council. The clerk may destroy the coversheet after recording the information it contains.

(b)

Paragraphs; separate statements. All statements of claim or defense must be made in numbered paragraphs. Each paragraph must be limited as far as practicable to a single set of circumstances; and a paragraph may be adopted by reference in all succeeding pleadings. Each claim founded upon a separate transaction or occurrence and each defense other than denials must be stated in a separate count or defense whenever a separation facilitates the clear presentation of the matters set forth.

(c)

Adoption by reference; exhibits. Statements in a paper may be adopted by reference in a different part of the same or another paper. An exhibit to a paper is a part thereof for all purposes.

(d)

Paper format. All pleadings and other papers, other than exhibits and court-approved forms, must be 8½ inches wide x 11 inches long, on white background, with a top margin of not less than 1½ inches, and a right, left and bottom margin of not less than 1 inch. All text or images must be clearly legible, must be double spaced, except for matters customarily single spaced, must be on one side only and must not be smaller than 12-point size.

(e)

Signature line. The name of the person signing must be typed or printed under that person's signature. If a proposed document ready for signature by a court official is electronically filed, the order must not include the official's signature line and must, at the end of the document, indicate that the signature appears at the top of the first page.

(f)

Non-conforming papers. The clerk of the court must examine the pleadings and other papers filed with the court. If they are not prepared in conformity with paragraphs (a)-(e), the clerk must accept the filing but may require counsel to substitute properly prepared papers for nonconforming papers. The clerk or the court may waive the requirements of this rule for parties appearing pro se. For good cause shown, the court may relieve any party of any requirement of this rule.

Commented [JH19]:

(g)

Replacing lost pleadings or papers. If an original pleading or paper filed in any action or proceeding is lost, the court may, upon motion, with or without notice, authorize a copy thereof to be filed and used in lieu of the original.

(h)

No improper content. The court may strike and disregard all or any part of a pleading or other paper that contains redundant, immaterial, impertinent or scandalous matter.

(i)

Electronic papers.

(i)(1)

Any reference in these rules to a writing, recording or image includes the electronic version thereof.

(i)(2)

A paper electronically signed and filed is the original.

(i)(3)

An electronic copy of a paper, recording or image may be filed as though it were the original. Proof of the original, if necessary, is governed by the Utah Rules of Evidence.

(i)(4)

An electronic copy of a paper must conform to the format of the original.

(i)(5)

An electronically filed paper may contain links to other papers filed simultaneously or already on file with the court and to electronically published authority.

Rule 11. Signing of Pleadings, Motions, Affidavits, and Other Papers; Representations to Court; Sanctions

(a)

Signature.

(a)(1)

Every pleading, written motion, and other paper must be signed by at least one attorney of record, or, if the party is not represented, by the party.

Commented [JH20]:

(a)(2)

A person may sign a paper using any form of signature recognized by law as binding. Unless required by statute, a paper need not be accompanied by affidavit or have a notarized, verified or acknowledged signature. If a rule requires an affidavit or a notarized, verified or acknowledged signature, the person may submit an unsworn declaration as described in Title 78B, Chapter 18a, Uniform Unsworn Declarations Act. If an affidavit or a paper with a notarized, verified or acknowledged signature is filed, the party must comply with Rule 5(f).

(a)(3)

An unsigned paper will be stricken unless omission of the signature is corrected promptly after being called to the attention of the attorney or party.

Commented [JH21]:

(b)

Representations to court. By presenting a pleading, written motion, or other paper to the court (whether by signing, filing, submitting, or advocating), an attorney or unrepresented party is certifying that to the best of the person's knowledge, information, and belief, formed after an inquiry reasonable under the circumstances,

Commented [JH22]:

(b)(1)

it is not being presented for any improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation;

(b)(2)

the claims, defenses, and other legal contentions are warranted by existing law or by a nonfrivolous argument for the extension, modification, or reversal of existing law or the establishment of new law;

(b)(3)

the allegations and other factual contentions have evidentiary support or, if specifically so identified, are likely to have evidentiary support after a reasonable opportunity for further investigation or discovery; and

(b)(4)

the denials of factual contentions are warranted on the evidence or, if specifically so identified, are reasonably based on a lack of information or belief.

(c)

Sanctions. If, after notice and a reasonable opportunity to respond, the court determines that paragraph (b) has been violated, the court may, subject to the conditions stated below, impose an appropriate sanction upon the attorneys, law firms, or parties that have violated paragraph (b) or are responsible for the violation.

Commented [JH23]:

(c)(1)

How initiated.

(c)(1)(A)

By motion. A motion for sanctions under this rule must be made separately from other motions or requests and must describe the specific conduct alleged to violate paragraph (b). It must be served as provided in Rule 5, but may not be filed with or presented to the court unless, within 21 days after service of the motion (or such other period as the court may prescribe), the challenged paper, claim, defense, contention, allegation, or denial is not withdrawn or appropriately corrected. If warranted, the court may award to the party prevailing on the motion the reasonable expenses and attorney fees incurred in presenting or opposing the motion. In appropriate circumstances, a law firm may be held jointly responsible for violations committed by its partners, members, and employees.

Commented [JH24]:

(c)(1)(B)

On court's initiative. On its own initiative, the court may enter an order describing the specific conduct that appears to violate paragraph (b) and directing an attorney, law firm, or party to show cause why it has not violated paragraph (b) with respect thereto.

Commented [JH25]:

(c)(2)

Nature of sanction; limitations. A sanction imposed for violation of this rule must be limited to what is sufficient to deter repetition of such conduct or comparable conduct by others similarly situated. Subject to the limitations in paragraphs (c)(2)(A) and (c)(2)(B), the sanction may consist of, or include, directives of a nonmonetary nature, an order to pay a penalty into court, or, if imposed on motion and warranted for effective deterrence, an order directing payment to the movant of some or all of the reasonable attorney fees and other expenses incurred as a direct result of the violation.

Commented [JH26]:

(c)(2)(A)

Monetary sanctions may not be awarded against a represented party for a violation of paragraph (b)(2).

(c)(2)(B)

Monetary sanctions may not be awarded on the court's initiative unless the court issues its order to show cause before a voluntary dismissal or settlement of the claims made by or against the party which is, or whose attorneys are, to be sanctioned.

Commented [JH27]:

(c)(3)

Order. When imposing sanctions, the court will describe the conduct determined to constitute a violation of this rule and explain the basis for the sanction imposed.

Cite as Utah. R. Civ. P. 11

History. Amended effective May 1, 2016; amended effective May 8, 2018.

Note:

Advisory Committee Notes

The 1997 amendments conform state Rule 11 with federal Rule 11. One difference between the rules concerns holding a law firm jointly responsible for violations by a member of the firm. Federal Rule 11(c)(1)(A) states: "Absent exceptional circumstances, a law firm shall be held jointly responsible for violations committed by its partners, associates, and employees." Under the federal rule, joint responsibility is presumed unless the judge determines not to impose joint responsibility. State Rule 11(c)(1)(A) provides: "In appropriate circumstances, a law firm may be held jointly responsible for violations committed by its partners, members, and employees." Under the state rule, joint responsibility is not presumed, and the judge may impose joint responsibility in appropriate circumstances. What constitutes appropriate circumstances is left to the discretion of the judge, but might include: repeated violations, especially after earlier sanctions; firm-wide sanctionable practices; or a sanctionable practice approved by a supervising attorney and committed by a subordinate.

Commented [JH28]:

Rule 16. Pretrial Conferences

(a)

Pretrial conferences. The court, in its discretion or upon motion, may direct the attorneys and, when appropriate, the parties to appear for such purposes as:

Commented [JH29]:

(a)(1)

expediting the disposition of the action;

(a)(2)

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

(a)(3)

discouraging wasteful pretrial activities;

(a)(4)

improving the quality of the trial through more thorough preparation;

(a)(5)

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

(a)(6)

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

(a)(7)

establishing the time to join other parties and to amend the pleadings;

(a)(8)

establishing the time to file motions;

(a)(9)

establishing the time to complete discovery;

(a)(10)

extending fact discovery;

(a)(11)

setting the date for pretrial and final pretrial conferences and trial;

(a)(12)

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

(a)(13)

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

(a)(14)

considering any other appropriate matters.

(b)

Trial settings. Unless an order sets the trial date, any party may and the plaintiff shall, at the close of all discovery, certify to the court that discovery is complete, that any required mediation or other ADR processes have been completed or excused and that the case is ready for trial. The court shall schedule the trial as soon as mutually convenient to the court and parties. The court shall notify parties of the trial date and of any final pretrial conference.

(c)

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

Commented [JH30]:

(d)

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

Commented [JH31]:

Commented [JH32]:

Commented [JH33]:

Commented [JH34]:

Cite as Utah. R. Civ. P. 16

Note:

Advisory Committee Notes

For the purposes of this rule, "ADR" is as defined in CJA Rule 4-510.

Rule 23. Class Actions

(a)

Prerequisites to a class action. One or more members of a class may sue or be sued as representative parties on behalf of all only if (1) the class is so numerous that joinder of all members is impracticable, (2) there are questions of law or fact common to the class, (3) the claims or defenses of the representative parties are typical of the claims or defenses of the class, and (4) the representative parties will fairly and adequately protect the interests of the class.

(b)

Class actions maintainable. An action may be maintained as a class action if the prerequisites of Subdivision (a) are satisfied, and in addition:

(b)(1)

The prosecution of separate actions by or against individual members of the class would create a risk of:

(b)(1)(A)

inconsistent or varying adjudications with respect to individual members of the class which would establish incompatible standards of conduct for the party opposing the class, or

(b)(1)(B)

adjudications with respect to individual members of the class which would as a practical matter be dispositive of the interests of the other members not parties to the adjudications or substantially impair or impede their ability to protect their interests; or

(b)(2)

The party opposing the class has acted or refused to act on grounds generally applicable to the class, thereby making appropriate final injunctive relief or corresponding declaratory relief with respect to the class as a whole; or

(b)(3)

The court finds that the questions of law or fact common to the members of the class predominate over any questions affecting only individual members, and that a class action is superior to other available methods for the fair and efficient adjudication of the controversy. The matters pertinent to the findings include: (A) the interest of members of the class in individually controlling the prosecution or defense of separate actions; (B) the extent and nature of any litigation concerning the controversy already commenced by or against members of the class; (C) the desirability or undesirability of concentrating the litigation of the claims in the particular forum; (D) the difficulties likely to be encountered in the management of a class action.

(c)

Determination by order whether class action to be maintained; notice; judgment; actions conducted partially as class actions.

(c)(1)

As soon as practicable after the commencement of an action brought as a class action, the court shall determine by order whether it is to be maintained. An order under this subdivision may be conditional, and may be altered or amended before the decision on the merits.

(c)(2)

In any class action maintained under Subdivision (b)(3), the court shall direct to the members of the class the best notice practicable under the circumstances, including individual notice to all members who can be identified through reasonable effort. The notice shall advise each member that (A) the court will exclude him from the class if he so requests by a specified date; (B) the judgment, whether favorable or not, will include all members who do not request exclusion; and (C) any member who does not request exclusion may, if he desires, enter an appearance through his counsel.

Commented [JH35]:

(c)(3)

The judgment in an action maintained as a class action under Subdivision (b)(1) or (b)(2), whether or not favorable to the class, shall include and describe those whom the court finds to be members of the class. The judgment in an action maintained as a class action under Subdivision (b)(3), whether or not favorable to the class, shall include and specify or describe those to whom the notice provided in Subdivision (c)(2) was directed, and who have not requested exclusion, and whom the court finds to be members of the class.

(c)(4)

When appropriate (A) an action may be brought or maintained as a class action with respect to particular issues, or (B) a class may be divided into subclasses and each subclass treated as a class, and the provisions of this rule shall then be construed and applied accordingly.

(d)

Orders in conduct of actions. In the conduct of actions to which this rule applies, the court may make appropriate orders: (1) determining the course of proceedings or prescribing measures to prevent undue repetition or complication in the presentation of evidence or argument; (2) requiring, for the protection of the members of the class or otherwise for the fair conduct of the action, that notice be given in such manner as the court may direct to some or all of the members of any step in the action, or of the proposed extent of the judgment, or of the opportunity of members to signify whether they consider the representation fair and adequate, to intervene and present claims or defenses, or otherwise to come into the action; (3) imposing conditions on the representative parties or on intervenors; (4) requiring that the pleadings be amended to eliminate therefrom allegations as to representation of absent persons, and that the action proceed accordingly; (5) dealing with similar procedural matters. The orders may be combined with an order under Rule 16, and may be altered or amended as may be desirable from time to time.

(e)

Dismissal or compromise. A class action shall not be dismissed or compromised without the approval of the court, and notice of the proposed dismissal or compromise shall be given to all members of the class in such manner as the court directs.

Rule 26. General Provisions Governing Disclosure and Discovery

(a)

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

(a)(1)

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

(a)(1)(A)

the name and, if known, the address and telephone number of:

(a)(1)(A)(i)

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

(a)(1)(A)(ii)

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

(a)(1)(B)

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

(a)(1)(C)

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

(a)(1)(D)

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

(a)(1)(E)

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

(a)(2)

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

(a)(2)(A)

by the plaintiff with 14 days after filing of the first answer to the complaint; and

(a)(2)(B)

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

(a)(3)

Exemptions.

(a)(3)(A)

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

(a)(3)(A)(i)

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

(a)(3)(A)(ii)

governed by Rule 65B or Rule 65C ;

(a)(3)(A)(iii)

to enforce an arbitration award;

(a)(3)(A)(iv)

for water rights general adjudication under Title 73, Chapter 4.

(a)(3)(B)

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

(a)(4)

Expert testimony.

(a)(4)(A)

Disclosure of expert testimony. A party shall, without waiting for a discovery request, serve on the other parties the following information regarding any person who may be used at trial to present evidence under Rules 702 of the Utah Rules of Evidence and who is retained or specially employed to provide expert testimony in the case or whose duties as an employee of the party regularly involve giving expert testimony: (i) the expert's name and qualifications, including a list of all publications authored with the preceding 10 years, and a list of any other cases in which the expert has testified as an expert at trial or by deposition within the preceding four years, (ii) a brief summary of the opinions to which the witness is expected to testify, (iii) all data a other information that will be relied upon by the witness in forming those opinions, and (iv) the compensation to be paid for the witness's study and testimony.

(a)(4)(B)

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

(a)(4)(C)

Timing for expert discovery.

(a)(4)(C)(i)

The party who bears the burden of proof on the issue for which expert testimony is offered shall serve on the other parties the information required by paragraph (a)(4)(A) within seven days after the close of fact discovery. Within seven days thereafter, the party opposing the expert may serve notice electing either a deposition of the expert pursuant to paragraph (a)(4)(B) and Rule 30, or a written report pursuant to paragraph (a)(4)(B). The deposition shall occur, or the report shall be served on the other parties, within 28 days after the election is served on the other parties. If no election is served on the other parties, then no further discovery of the expert shall be permitted.

(a)(4)(C)(ii)

The party who does not bear the burden of proof on the issue for which expert testimony is offered shall serve on the other parties the information required by paragraph (a)(4)(A) within seven days after the later of (A) the date on which the election under paragraph (a)(4)(C)(i) is due, or (B) receipt of the written report or the taking of the expert's depositon pursuant to paragraph (a)(4)(C)(i). Within seven days thereafter, the party opposing the expert may serve notice electing either a deposition of the expert pursuant to paragraph (a)(4)(B) andRule 30, or a written report pursuant to paragraph (a)(4)(B). The deposition shall occur, or the report shall be served on the other parties, within 28 days after the election is served on the other parties. If no election is served on the other parties, then no further discovery of the expert shall be permitted.

(a)(4)(C)(iii)

If the party who bears the burden of proof on an issue wants to designate rebuttal expert witnesses it shall serve on the other parties the information required by paragraph (a)(4)(A) within seven days after the later of (A) the date on which the election under paragraph (a)(4)(C)(ii) is due, or (B) receipt of the written report or the taking of the expert's deposition pursuant to paragraph (a)(4)(C)(ii). Within seven days thereafter, the party opposing the expert may serve notice electing either a deposition of the expert pursuant to paragraph (a)(4)(B) and Rule 30, or a written report pursuant to paragraph (a)(4)(B). The deposition shall occur, or the report shall be served on the other parties, within 28 days after the election is served on the other parties. If no election is served on the other parties, then no further discovery of the expert shall be permitted.

(a)(4)(D)

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

(a)(4)(E)

Summary of non-retained expert testimony. If a party intends to present evidence at trial under Rules 702 of the Utah Rules of Evidence from any person other than an expert witness who is retained or specially employed to provide testimony in the case or a person whose duties as an employee of the party regularly involve giving expert testimony, that party must serve on the other parties a written summary of the facts and opinions to which the witness is expected to testify in accordance with the deadlines set forth in paragraph (a)(4)(C). A deposition of such a witness may not exceed four hours.

(a)(5)

Pretrial disclosures.

(a)(5)(A)

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

(a)(5)(A)(i)

the name and, if not previously provided, the address and telephone number of each witness, unless solely for impeachment, separately identifying witnesses the party will call and witnesses the party may call:

(a)(5)(A)(ii)

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

(a)(5)(A)(iii)

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

(a)(5)(B)

Disclosure required by paragraph (a)(5) shall be served on the other parties at least 28 days before trial. At least 14 days before trial, a party shall serve and file counter designations of deposition testimony, objections and grounds for the objections to the use of a deposition designated and to the admissibility of exhibits. Other than objections under Rules of the Utah Rules of Evidence, objections not listed are waived unless excused by the court for good cause.

(b)

Discovery scope.

(b)(1)

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

(b)(2)

Proportionality. Discovery and discovery requests are proportional if:

(b)(2)(A)

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

(b)(2)(B)

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

(b)(2)(C)

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

(b)(2)(D)

the discovery is not unreasonably cumulative or duplicative;

(b)(2)(E)

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

(b)(2)(F)

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

(b)(3)

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

(b)(4)

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

(b)(5)

Trial preparation materials. A party may obtain otherwise discoverable documents and tangible things prepared in anticipation of

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

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(b)(6)

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

(b)(7)

Trial preparation; experts.

(b)(7)(A)

Trial-preparation protection for draft reports or disclosures. Paragraph (b)(5) protect draft of any report or disclosure required under paragraph (a)(4), regardless of the form in which the draft is recorded.

(b)(7)(B)

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

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(b)(7)(B)(i)

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

(b)(7)(B)(ii)

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

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(b)(7)(B)(iii)

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

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(b)(7)(C)

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

(b)(7)(C)(i)

as provided in Rule 35(b) ; or

(b)(7)(C)(ii)

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

(b)(8)

Claims of privilege or protection of trial preparation materials.

(b)(8)(A)

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

(b)(8)(B)

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

(c)

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

(c)(1)

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

(c)(2)

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

(c)(3)

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

(c)(4)

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

(c)(5)

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

(c)(6)

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

(c)(6)(A)

before the close of standard discovery and after reaching the limits of standard discovery imposed by these rules, a stipulated statement that extraordinary discovery is necessary and proportional under paragraph (b)(2) and that each party has reviewed and approved a discovery budget; or

(c)(6)(B)

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

(d)

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

(d)(1)

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

(d)(2)

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

(d)(3)

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

(d)(4)

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

(d)(5)

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

(e)

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

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(f)

Filing. Except as required by these rules or ordered by the court, a party shall not file with the court a disclosure, a request for discovery or response to a request for discovery, but shall file only the certificate of service stating that the disclosure, request for discovery or response has been served the other parties and the date of service.

Cite as Utah. R. Civ. P. 26

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

Note:

Advisory Committee Notes

Disclosure requirements and timing. Rule 26(a)(1). The 2011 amendments seek to reduce discovery costs by requiring each party to produce, at an early stage in the case, and without a discovery request, all of the documents and physical evidence the party may offer in its case-in-chief and the names of witnesses the party may call in its case-in-chief, with a description of their expected testimony. In this respect, the amendments build on the initial disclosure requirements of the prior rules. In addition to the disclosures required by the prior version of Rule 26(a)(1), a party must disclose each fact witness the party may call in its case-in-chief and a summary of the witness's expected testimony, a copy of all documents the party may offer in its case-in-chief, and all documents to which a party refers in its pleadings.

Not all information will be known at the outset of a case. If discovery is serving its proper purpose, additional witnesses, documents, and other information will be identified. The scope and the level of detail required in the initial Rule 26(a)(1) disclosures should be viewed in light of this reality. A party is not required to interview every witness it ultimately may call at trial in order to provide a summary of the witness's expected testimony. As the information becomes known, it should be disclosed. No summaries are required for adverse parties, including management level employees of business entities, because opposing lawyers are unable to interview them and their testimony is available to their own counsel. For uncooperative or hostile witnesses any summary of expected testimony would necessarily be limited to the subject areas the witness is reasonably expected to testify about. For example, defense counsel may be unable to interview a treating physician, so the initial summary may only disclose that the witness will be questioned concerning the plaintiff's diagnosis, treatment and prognosis. After medical records have been obtained, the summary may be expanded or refined.

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Subject to the foregoing qualifications, the summary of the witness's expected testimony should be just that - a summary. The rule does not require prefiled testimony or detailed descriptions of everything a witness might say at trial. On the other hand, it requires more than the broad, conclusory statements that often were made under the prior version of Rule 26(a)(1) (e.g., "The witness will testify about the events in question" or "The witness will testify on causation."). The intent of this requirement is to give the other side basic information concerning the subjects about which the witness is expected to testify at trial, so that the other side may determine the witness's relative importance in the case, whether the witness should be interviewed or deposed, and whether additional documents or information concerning the witness should be sought. This information is important because of the other discovery limits contained in the 2011 amendments, particularly the limits on depositions.

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

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

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

The 2011 amendments also change the time for making these required disclosures. Because the plaintiff controls when it brings the action, plaintiffs must make their disclosures within 14 days after service of the first answer. A defendant is required to make its disclosures within 28 days after the plaintiff's first disclosure or after that defendant's appearance, whichever is later. The purpose of early disclosure is to have all parties present the evidence they expect to use to prove their claims or defenses, thereby giving the opposing party the ability to better evaluate the case and determine what additional discovery is necessary and proportional.

The time periods for making Rule 26(a)(1) disclosures, and the presumptive deadlines for completing fact discovery, are keyed to the filing of an answer. If a defendant files a motion to dismiss or other Rule 12(b) motion in lieu of an answer, these time periods normally would be not begin to run until that motion is resolved.

Finally, the 2011 amendments eliminate two categories of actions that previously were exempt from the mandatory disclosure requirements. Specifically, the amendments eliminate the prior exemption for contract actions in which the amount claimed is $20,000 or less, and actions in which any party is proceeding pro se. In the committee's view, these types of actions will benefit from the early disclosure requirements and the overall reduced cost of discovery.

Expert disclosures and timing. Rule 26(a)(3). Expert discovery has become an ever-increasing component of discovery cost. The prior rules sought to eliminate some of these costs by requiring the written disclosure of the expert's opinions and other background information. However, because the expert was not required to sign these disclosures, and because experts often were allowed to deviate from the opinions disclosed, attorneys typically would take the expert's deposition to ensure the expert would not offer "surprise" testimony at trial, thereby increasing rather than decreasing the overall cost. The amendments seek to remedy this and other costs associated with expert discovery by, among other things, allowing the opponent to choose either a deposition of the expert or a written report, but not both; in the case of written reports, requiring more comprehensive disclosures, signed by the expert, and making clear that experts will not be allowed to testify beyond what is fairly disclosed in a report, all with the goal of making reports a reliable substitute for depositions; and incorporating a rule that protects from discovery most communications between an attorney and retained expert. Discovery of expert opinions and testimony is automatic under Rule 26(a)(3) and parties are not required to serve interrogatories or use other discovery devices to obtain this information.

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Disclosures of expert testimony are made in sequence, with the party who bears the burden of proof on the issue for which expert testimony will be offered going first. Within seven days after the close of fact discovery, that party must disclose: (i) the expert's curriculum vitae identifying the expert's qualifications, publications, and prior testimony; (ii) compensation information; (iii) a brief summary of the opinions the expert will offer; and (iv) a complete copy of the expert's file for the case. The file should include all of the facts and data that the expert has relied upon in forming the expert's opinions. If the expert has prepared summaries of data, spreadsheets, charts, tables, or similar materials, they should be included. If the expert has used software programs to make calculations or otherwise summarize or organize data, that information and underlying formulas should be provided in native form so it can be analyzed and understood. To the extent the expert is relying on depositions or materials produced in discovery, then a list of the specific materials relied upon is sufficient. The committee recognizes that experts frequently will prepare demonstrative exhibits or other aids to illustrate the expert's testimony at trial, and the costs for preparing these materials can be substantial. For that reason, these types of demonstrative aids may be prepared and disclosed later, as part of the Rule 26(a)(4) pretrial disclosures when trial is imminent.

Within seven days after this disclosure, the party opposing the retained expert may elect either a deposition or a written report from the expert. A deposition is limited to four hours, which is not included in the deposition hours under Rule 26(c)(5), and the party taking it must pay the expert's hourly fee for attending the deposition. If a party elects a written report, the expert must provide a signed report containing a complete statement of all opinions the expert will express and the basis and reasons for them. The intent is not to require a verbatim transcript of exactly what the expert will say at trial; instead the expert must fairly disclose the substance of and basis for each opinion the expert will offer. The expert may not testify in a party's case in chief concerning any matter that is not fairly disclosed in the report. To achieve the goal of making reports a reliable substitute for depositions, courts are expected to enforce this requirement. If a party elects a deposition, rather than a report, it is up to the party to ask the necessary questions to "lock in" the expert's testimony. But the expert is expected to be fully prepared on all aspects of his/her trial testimony at the time of the deposition and may not leave the door open for additional testimony by qualifying answers to deposition questions.

The report or deposition must be completed within 28 days after the election is made. After this, the party who does not bear the burden of proof on the issue for which expert testimony is offered must make its corresponding disclosures and the opposing party may then elect either a deposition or a written report. Under the deadlines contained in the rules, expert discovery should take less than three months to complete. However, as with the other discovery rules, these deadlines can be altered by stipulation of the parties or order of the court.

The amendments also address the issue of testimony from non-retained experts, such as treating physicians, police officers, or employees with special expertise, who are not retained or specially employed to provide expert testimony, or whose duties as an employee do not regularly involve giving expert testimony. This issue was addressed by the Supreme Court in *Drew v. Lee*, 2011 UT 15, wherein the court held that reports under the prior version of Rule 26(a)(3) are not required for treating physicians.

There are a number of difficulties inherent in disclosing expert testimony that may be offered from fact witnesses. First, there is often

not a clear line between fact and expert testimony. Many fact witnesses have scientific, technical or other specialized knowledge, and their testimony about the events in question often will cross into the area of expert testimony. The rules are not intended to erect artificial barriers to the admissibility of such testimony. Second, many of these fact witnesses will not be within the control of the party who plans to call them at trial. These witnesses may not be cooperative, and may not be willing to discuss opinions they have with counsel. Where this is the case, disclosures will necessarily be more limited. On the other hand, consistent with the overall purpose of the 2011 amendments, a party should receive advance notice if their opponent will solicit expert opinions from a particular witness so they can plan their case accordingly. In an effort to strike an appropriate balance, the rules require that such witnesses be identified and the information about their anticipated testimony should include that which is required under Rule 26(a)(1)(A)(ii), which should include any opinion testimony that a party expects to elicit from them at trial. If a party has disclosed possible opinion testimony in its Rule 26(a)(1)(A)(ii) disclosures, that party is not required to prepare a separate 26(a)(4)(E) disclosure for the witness. And if that disclosure is made in advance of the witness's deposition, those opinions should be explored in the deposition and not in a separate expert deposition. Otherwise, the timing for disclosure of non-retained expert opinions is the same as that for retained experts under Rule 26(a)(4)(C) and depends on whether the party has the burden of proof or is responding to another expert. Rule 26(a)(4)(E) and 26(a)(1)(A)(ii) are not intended to elevate form over substance - all they require is that a party fairly inform its opponent that opinion testimony may be offered from a particular witness. And because a party who expects to offer this testimony normally cannot compel such a witness to prepare a written report, further discovery must be done by interview or by deposition.

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Finally, the amendments include a new Rule 26(b)(7) that protects from discovery draft expert reports and, with limited exception, communications between an attorney and an expert. These changes are modeled after the recent changes to the Federal Rules of Civil Procedure and are intended to address the unnecessary and costly procedures that often were employed in order to protect such information from discovery, and to reduce "satellite litigation" over such issues.

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

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

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

Under the prior rule, the party objecting to the discovery request had the burden of proving that a discovery request was not proportional. The new rule changes the burden of proof. Today, the party seeking discovery beyond the scope of "standard" discovery has the burden of showing that the request is "relevant to the claim or defense of any party" and that the request satisfies the standards of proportionality. As before, ultimate admissibility is not an appropriate objection to a discovery request so long as the proportionality standard and other requirements are met.

The 2011 amendments establish three tiers of standard discovery in Rule 26(c). Ideally, rules of procedure should be crafted to promote predictability for litigants. Rules should limit the need to resort to judicial oversight. Tiered standard discovery seeks to achieve these ends. The "one-size-fits-all" system is rejected. Tiered discovery signals to judges, attorneys, and parties the amount of discovery which by rule is deemed proportional for cases with different amounts in controversy.

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

Standard and extraordinary discovery. Rule 26(c). As a counterpart to requiring more detailed disclosures under Rule 26(a), the 2011 amendments place new limitations on additional discovery the parties may conduct. Because the committee expects the enhanced disclosure requirements will automatically permit each party to learn the witnesses and evidence the opposing side will

offer in its case-in-chief, additional discovery should serve the more limited function of permitting parties to find witnesses, documents, and other evidentiary materials that are harmful, rather than helpful, to the opponent's case.

Rule 26(c) provides for three separate "tiers" of limited, "standard" discovery that are presumed to be proportional to the amount and issues in controversy in the action, and that the parties may conduct as a matter of right. An aggregation of all damages sought by all parties in an action dictates the applicable tier of standard discovery, whether such damages are sought by way of a complaint, counterclaim, or otherwise. The tiers of standard discovery are set forth in a chart that is embedded in the body of the rule itself. "Tier 1" describes a minimal amount of standard discovery that is presumed proportional for cases involving damages of $50,000 or less. "Tier 2" sets forth larger limits on standard discovery that are applicable in cases involving damages above $50,000 but less than $300,000. Finally, "Tier 3" prescribes still greater standard discovery for actions involving damages in excess of $300,000. Deposition hours are charged to a side for the time spent asking questions of the witness. In a particular deposition, one side may use two hours while the other side uses only 30 minutes. The tiers also provide presumptive limitations on the time within which standard discovery should be completed, which limitations similarly increase with the amount of damages at issue. A statement of discovery issues will not toll the period. Parties are expected to be reasonable and accomplish as much as they can during standard discovery. A statement of discovery issues may result in additional discovery and sanctions at the expense of a party who unreasonably fails to respond or otherwise frustrates discovery. After the expiration of the applicable time limitation, a case is presumed to be ready for trial. Actions for non-monetary relief, such as injunctive relief, are subject to the standard discovery limitations of Tier 2, absent an accompanying monetary claim of $300,000 or more, in which case Tier 3 applies. The committee determined these standard discovery limitations based on the expectation that for the majority of cases filed in the Utah State Courts, the magnitude of available discovery and applicable time parameters available under the three-tiered system should be sufficient for cases involving the respective amounts of damages.

Despite the expectation that standard discovery according to the applicable tier should be adequate in the typical case, the 2011 amendments contemplate there will be some cases for which standard discovery is not sufficient or appropriate. In such cases, parties may conduct additional discovery that is shown to be consistent with the principle of proportionality. There are two ways to obtain such additional discovery. The first is by stipulation. If the parties can agree additional discovery is necessary, they may stipulate to as much additional discovery as they desire, provided they stipulate the additional discovery is proportional to what is at stake in the litigation and counsel for each party certifies that the party has reviewed and approved a budget for additional discovery. Such a stipulation should be filed before the close of the standard discovery time limit, but only after reaching the limits for that type of standard discovery available under the rule. If these conditions are met, the Court will not second-guess the parties and their counsel and must approve the stipulation.

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The second method to obtain additional discovery is by a statement of discovery issues. The committee recognizes there will be some cases in which additional discovery is appropriate, but the parties cannot agree to the scope of such additional discovery. These may include, among other categories, large and factually complex cases and cases in which there is a significant disparity in the parties' access to information, such that one party legitimately has a greater need than the other party for additional discovery in order to prepare properly for trial. To prevent a party from taking advantage of this situation, the 2011 amendments allow any party to request additional discovery. As with stipulations for extraordinary discovery, a party requesting extraordinary discovery should do so before the close of the standard discovery time limit, but only after the party has reached the limits for that type of standard discovery available to it under the rule. By taking advantage of this discovery, counsel should be better equipped to articulate for the court what additional discovery is needed and why. The requesting party must demonstrate that the additional discovery is proportional and certify that the party has reviewed and approved a discovery budget. The burden to show the need for additional discovery, and to demonstrate relevance and proportionality, always falls on the party seeking additional discovery. However, cases in which such additional discovery is appropriate do exist, and it is important for courts to recognize they can and should permit additional discovery in appropriate cases, commensurate with the complexity and magnitude of the dispute.

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Protective order language moved to Rule 37. The 2011 amendments delete in its entirety the prior language of Rule 26(c) governing motions for protective orders. The substance of that language is now found in Rule 37. The committee determined it was preferable to cover requests for an order to compel, for a protective order, and sanctions in a single rule, rather than two separate rules.

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

determine how properly to address this issue in a given case, the usual and expected result should be exclusion of the evidence.

Legislative Note

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

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

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

Rule 26.1. Disclosure and Discovery in Domestic Relations Actions

(a)

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

(b)

Time for disclosure. In addition to the disclosures required in Rule 26, in all domestic relations actions, the documents required in this rule must be served on the other parties:

(b)(1)

by the plaintiff within 14 days after filing of the first answer to the complaint; and

(b)(2)

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

(c)

Financial declaration. Each party must disclose to all other parties a fully completed court-approved Financial Declaration and attachments. Each party must attach to the Financial Declaration the following:

(c)(1)

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

(c)(2)

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

(c)(3)

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

(c)(4)

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

(c)(5)

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

(c)(6)

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

(c)(7)

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

(d)

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

(e)

Exempted agencies. Agencies of the State of Utah are not subject to these disclosure requirements.

(f)

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

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(g)

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

(h)

Notice of requirements. Notice of the requirements of this rule must be served on the Respondent and all joined parties with the initial petition.

Cite as Utah. R. Civ. P. 26.1

History. Amended effective November 1, 2016.

Note:

Advisory Committee Note

Rule 26.1 was developed by the Family Law Section of the Utah State Bar. It represents the type of discovery or disclosure rule that the advisory committee anticipated when drafting proposed Rule 26(a).

Rule 26.2. Disclosures in Personal Injury Actions

(a)

Scope. This rule applies to all actions seeking damages arising out of personal physical injuries or physical sickness.

(b)

Plaintiff's additional initial disclosures. Except to the extent that plaintiff moves for a protective order, plaintiff's Rule 26(a) disclosures shall also include:

(b)(1)

A list of all health care providers who have treated or examined the plaintiff for the injury at issue, including the name, address, approximate dates of treatment, and a general description of the reason for the treatment.

(b)(2)

A list of all other health care providers who treated or examined the plaintiff for any reason in the 5 years before the event giving rise to the claim, including the name, address, approximate dates of treatment, and a general description of the reason for the treatment.

(b)(3)

Plaintiff's Social Security number (SSN) or Medicare health insurance claim number (HICN), full name, and date of birth. The SSN and HICN may be used only for the purposes of the action, including compliance with the Medicare, Medicaid, and SCHIP Extension Act of 2007, unless otherwise ordered by the court.

(b)(4)

A description of all disability or income-replacement benefits received if loss of wages or loss of earning capacity is claimed, including the amounts, payor's name and address, and the duration of the benefits.

(b)(5)

A list of plaintiff's employers for the 5 years preceding the event giving rise to the claim if loss of wages or loss of earning capacity is claimed, including the employer's name and address and plaintiff's job description, wage, and benefits

(b)(6)

Copies of all bills, statements, or receipts for medical care, prescriptions, or other out-of-pocket expenses incurred as a result of the injury at issue.

(b)(7)

Copies of all investigative reports prepared by any public official or agency and in the possession of plaintiff or counsel that describe the event giving rise to the claim.

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(b)(8)

Except as protected by Rule 26(b)(5), copies of all written or recorded statements of individuals, in the possession of plaintiff or counsel, regarding the event giving rise to the claim or the nature or extent of the injury.

Commented [JH57]:

(c)

Defendant's additional disclosures. Defendant's Rule 26(a) disclosures shall also include:

(c)(1)

A statement of the amount of insurance coverage applicable to the claim, including any potential excess coverage, and any

deductible, self-insured retention, or reservations of rights, giving the name and address of the insurer.

(c)(2)

Unless the plaintiff makes a written request for a copy of an entire insurance policy to be disclosed under Rule 26(a)(1)(D), it is sufficient for the defendant to disclose a copy of the declaration page or coverage sheet for any policy covering the claim.

(c)(3)

Copies of all investigative reports, prepared by any public official or agency and in the possession of defendant, defendant's insurers, or counsel, that describe the event giving rise to the claim.

Commented [JH58]:

(c)(4)

Except as protected by Rule 26(b)(5), copies of all written or recorded statements of individuals, in the possession of defendant, defendant's insurers, or counsel, regarding the event giving rise to the claim or the nature or extent of the injury.

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(c)(5)

The information required by Rule 9(l).

(d)

Deleted eff. Apr. 1, 2013.

Cite as Utah. R. Civ. P. 26.2

Note:

Advisory Committee Note

This rule requires disclosure of the key fact elements that are typically requested in initial interrogatories in personal injury actions. The Medicare information disclosure, including Social Security numbers, is designed to facilitate compliance with the requirements for insurers under 42 U.S.C. § 1395(b)(8)(C). *See*, *Hackley v. Garofano*, 2010 WL 3025597 (Conn.Super.) and *Seger v. Tank Connection*, 2010 WL 1665253 (D.Neb.).

The committee anticipates full disclosures in most cases as a matter of course. However, there may be rare circumstances warranting a protective order in which a party would otherwise have to disclose particularly sensitive information wholly unrelated to the injury at issue, such as a particularly sensitive healthcare procedure or treatment. Information and documents not included in the application for a protective order must be provided within the timeframe of this rule.

This rule is intended to apply to actions based on personal injury and personal sickness using the broad definitions under 26 U.S.C. Sec. 104(a)(2). This includes wrongful death actions, in which case the disclosures will usually be of the decedent's records rather than of the plaintiff's, and emotional distress accompanied by physical injury or physical sickness.

Rule 26.3. Disclosure in unlawful detainer actions

(a)

Scope. This rule applies to all actions for eviction or damages arising out of an unlawful detainer under Title 78B, Chapter 6, Part 8, Forcible Entry and Detainer when the tenant is not a commercial tenant.

(b)

Plaintiff's disclosures.

(1)

Disclosures served with complaint and summons. Instead of the disclosures and timing of disclosures required by Rule 26(a), and unless included in the complaint, the plaintiff must serve on the defendant with the summons and complaint:

(A)

any written rental agreement;

(B)

the eviction notice that was served;

(C)

an itemized calculation of rent past due, damages, costs and attorney fees at the time of filing;

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(D)

an explanation of the factual basis for the eviction; and

(E)

notice to the defendant of the defendant's obligation to serve the disclosures required by paragraph (c).

(2)

Disclosures for occupancy hearing.

(A)

If the plaintiff requests an evidentiary hearing to determine occupancy under Section 78B-6-810, the plaintiff must serve on the defendant with the request:

(i)

any document not yet disclosed that the plaintiff will offer at the hearing; and

(ii)

the name and, if known, the address and telephone number of each fact witness the plaintiff may call at the occupancy hearing and, except for an adverse party, a summary of the expected testimony.

(B)

If the defendant requests an evidentiary hearing to determine occupancy, the plaintiff must serve the disclosures required by paragraph (b)(2)(A) on the defendant no less than 2 days before the hearing. The plaintiff must serve the disclosures by the method most likely to be promptly received.

(c)

Defendant's disclosures for evidentiary hearing.

(1)

If the defendant requests an evidentiary hearing under Section 78B-6-810, the defendant must serve on the plaintiff with the request:

(A)

any document not yet disclosed that the defendant will offer at the hearing; and

(B)

the name and, if known, the address and telephone number of each fact witness the defendant may call at the evidentiary hearing and, except for an adverse party, a summary of the expected testimony.

(2)

If the plaintiff requests an evidentiary hearing under Section 78B-6-810, the defendant must serve the disclosures required by paragraph (c)(1) on the plaintiff no less than 2 days before the hearing. The defendant must serve the disclosures by the method most likely to be promptly received.

(d)

Pretrial disclosures; objections. No later than 14 days before trial, the parties must serve the disclosures required by Rule 26(a)(5)(A). No later than 7 days before trial, each party must serve and file counter designations of deposition testimony, objections and grounds for the objections to the use of a deposition and to the admissibility of exhibits.

Cite as Utah. R. Civ. P. 26.3

History. Added effective November 1, 2016. Amended November 22, 2017, effective May 1, 2018

Note:

Advisory Committee Note

Rule 26.1 was developed by the Family Law Section of the Utah State Bar. It represents the type of discovery or disclosure rule that the advisory committee anticipated when drafting proposed Rule 26(a).

Rule 27. Depositions Before Action or Pending Appeal

(a)

Before action.

(a)(1)

Petition. A person who desires to perpetuate testimony regarding any matter that may be cognizable in any court of this state may file a verified petition in the district court of the county in which any expected adverse party may reside. The petition shall be entitled in the name of the petitioner and shall state: (1) that the petitioner expects to be a party to an action cognizable in a court of this state but is presently unable to bring it or cause it to be brought, (2) the subject matter of the expected action and the petitioner's interest therein, (3) the facts to be established by the proposed testimony and the reasons to perpetuate it, (4) the names or a description of the persons expected to be adverse parties and their addresses so far as known, and (5) the names and addresses of the persons to be examined and the substance of the testimony expected to be elicited from each, and shall ask for an order authorizing the petitioner to take the depositions of the persons to be examined named in the petition, for the purpose of perpetuating their testimony.

(a)(2)

Notice and service. The petitioner shall thereafter serve a notice upon each person named in the petition as an expected adverse party, together with a copy of the petition, stating that the petitioner will apply to the court, at a time and place named therein, for the order described in the petition. At least 21 days before the date of hearing the notice shall be served either within or without the district or state in the manner provided in Rule 4(d) for service of summons; but if such service cannot with due diligence be made upon any expected adverse party named in the petition, the court may make such order as is just for service by publication or otherwise, and shall appoint, for persons not served in the manner provided in Rule 4(d), an attorney who shall represent them, and, in case they are not otherwise represented, shall cross-examine the deponent. If any expected adverse party is a minor or incompetent the provisions of Rule 17(c) apply.

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(a)(3)

Order and examination. If the court is satisfied that the perpetuation of the testimony may prevent a failure or delay of justice, it shall make an order designating or describing the persons whose depositions may be taken and specifying the subject matter of the examination and whether the depositions shall be taken upon oral examination or written interrogatories. The depositions may then be taken in accordance with these rules; and the court may make orders of the character provided for by Rules 34 and 35. For the purpose of applying these rules to depositions for perpetuating testimony, each reference therein to the court in which the action is pending shall be deemed to refer to the court in which the petition for such deposition was filed.

(a)(4)

Use of deposition. If a deposition to perpetuate testimony is taken under these rules or if, although not so taken, it would be admissible in evidence in the courts of the state in which it is taken, it may be used in any action involving the same subject matter subsequently brought in any court of this state, in accordance with the provisions of Rule 32(a).

(b)

Pending appeal. If an appeal has been taken from a judgment of a district court or before the taking of an appeal if the time therefor has not expired, the district court in which the judgment was rendered may allow the taking of the depositions of witnesses to perpetuate their testimony for use in the event of further proceedings in such court. In such case the party who desires to perpetuate the testimony may make a motion in the district court for leave to take the depositions, upon the same notice and service thereof as if the action was pending in the district court. The motion shall show (1) the names and addresses of persons to be examined and the substance of the testimony which expected to be elicited from each; and (2) the reasons for perpetuating their testimony. If the court finds that the perpetuation of the testimony is proper to avoid a failure or delay of justice, it may make an order allowing the depositions to be taken and may make orders of the character provided for by Rules 34 and 35, and thereupon the depositions may be taken and used in the same manner and under the same conditions as are prescribed in these rules for depositions taken in actions pending in the district court.

(c)

Perpetuation by action. This rule does not limit the power of a court to entertain an action to perpetuate testimony.

Cite as Utah. R. Civ. P. 27

Note:

Advisory Committee Notes

For a complete explanation of the 1999 amendments to this rule and the interrelationship of these amendments with the other discovery changes, see the advisory committee note appended to Rule 26. The Supreme Court order approving the amendments directed that the new procedures be applicable only to cases filed on or after November 1, 1999.

Rule 28. Persons Before Whom Depositions May Be Taken

(a)

Within the United States. Within the United States or within a territory or insular possession subject to the jurisdiction of the United States, depositions shall be taken before an officer authorized to administer oaths by the laws of the United States or of the place where the examination is held, or before a person appointed by the court in which the action is pending. A person so appointed has power to administer oaths and take testimony. The term "officer" as used in Rules 30, 31, and 32 includes a person appointed by the court or designated by the parties under Rule 29.

(b)

In foreign countries. In a foreign country, depositions may be taken (1) on notice before a person authorized to administer oaths in the place in which the examination is held, either by the law thereof or by the law of the United States, or (2) before a person commissioned by the court, and a person so commissioned shall have the power by virtue of his commission to administer any necessary oath and take testimony, or (3) pursuant to a letter rogatory. A commission or a letter rogatory shall be issued on application and notice and on terms that are just and appropriate. It is not requisite to the issuance of a commission or a letter rogatory that the taking of the deposition in any other manner is impracticable or inconvenient; and both a commission and a letter rogatory may be issued in proper cases. A notice or commission may designate the person before whom the deposition is to be taken either by name or descriptive title. A letter rogatory may be addressed "To the Appropriate Authority in [here name of country]." Evidence obtained in response to a letter rogatory need not be excluded merely for the reason that it is not a verbatim transcript or that the testimony was not taken under oath or for any similar departure from the requirements for depositions taken within the United States under these rules.

(c)

Disqualification for interest. No deposition shall be taken before a person who is a relative or employee or attorney or counsel of any of the parties, or is a relative or employee of such attorney or counsel, or is financially interested in the action.

Cite as Utah. R. Civ. P. 28

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Rule 30. Depositions Upon Oral Questions

(a)

When depositions may be taken; when leave required. A party may depose a party or witness by oral questions. A witness may not be deposed more than once in standard discovery. An expert who has prepared a report disclosed under Rule 26(a)(3)(B) may not be deposed.

(b)

Notice of deposition; general requirements; special notice; non-stenographic recording; production of documents and things; deposition of organization; deposition by telephone.

(b)(1)

The party deposing a witness shall give reasonable notice in writing to every other party. The notice shall state the date, time and place for the deposition and the name and address of each witness. If the name of a witness is not known, the notice shall describe the witness sufficiently to identify the person or state the class or group to which the person belongs. The notice shall designate any documents and tangible things to be produced by a witness. The notice shall designate the officer who will conduct the deposition.

(b)(2)

The party notice shall designate the method by which the deposition will be recorded. With prior notice to the officer, witness and other parties, any party may designate a recording method in addition to the method designated in the notice. Depositions may be recorded by sound, sound-and-visual, or stenographic means, and the party designating the recording method shall bear the cost of the recording. The appearance or demeanor of witnesses or attorneys shall not be distorted through recording techniques.

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(b)(3)

A deposition shall be conducted before an officer appointed or designated under Rule 28 and shall begin with a statement on the record by the officer that includes (A) the officer's name and business address; (B) the date, time and place of the deposition; (C) the name of the witness; (D) the administration of the oath or affirmation to the witness; and (E) an identification of all persons present. If the deposition is recorded other than stenographically, the officer shall repeat items (A) through (C) at the beginning of each unit of the recording medium. At the end of the deposition, the officer shall state on the record that the deposition is complete and shall state any stipulations.

(b)(4)

The notice to a party witness may be accompanied by a request under Rule 34 for the production of documents and tangible things at the deposition. The procedure of Rule 34 shall apply to the request. The attendance of a nonparty witness may be compelled by subpoena under Rule 45. Documents and tangible things to be produced shall be stated in the subpoena.

(b)(5)

A deposition may be taken by remote electronic means. A deposition taken by remote electronic means is considered to be taken at the place where the witness is located.

(b)(6)

A party may name as the witness corporation, a partnership, an association, or a governmental agency, describe with reasonable particularity the matters on which questioning is requested, and direct the organization to designate one or more officers, directors, managing agents, or other persons to testify on its behalf. The organization shall state, for each person designated, the matters on which the person will testify. A subpoena shall advise a nonparty organization of its duty to make such a designation. The person so designated shall testify as to matters known or reasonably available to the organization.

(c)

Examination and cross-examination; objections.

(c)(1)

Questioning of witnesses may proceed as permitted at the trial under the Utah Rules of Evidence, except Rules 103 and 615.

(c)(2)

All objections shall be recorded, but the questioning shall proceed and the testimony taken subject to the objections.Any objection shall be stated concisely and in a non-argumentative and non-suggestive manner. A person may instruct a witness not to answer only to preserve a privilege, to enforce a limitation on evidence directed by the court, or to present a motion for a protective order under Rule 37. Upon demand of the objecting party or witness, the deposition shall be suspended for the time necessary to make a motion. The party taking the deposition may complete or adjourn the deposition before moving for an order to compel discovery under Rule 37.

(d)

Limits. During standard discovery, oral questioning of a nonparty shall not exceed four hours, and oral questioning of a party shall not exceed seven hours.

(e)

Submission to witness; changes; signing. Within 28 days after being notified by the officer that the transcript or recording is available, a witness may sign a statement of changes to the form or substance of the transcript or recording and the reasons for the changes. The officer shall append any changes timely made by the witness.

(f)

Record of deposition; certification and delivery by officer; exhibits; copies.

(f)(1)

The officer shall record the deposition or direct another person present to record the deposition. The officer shall sign a certificate, to accompany the record, that the witness was under oath or affirmation and that the record is a true record of the disposition. The officer shall keep a copy of the record. The officer shall securely seal the record endorsed with the title of the action and marked "Deposition of (name). Do not open." and shall promptly send the sealed record to the attorney or the party who designated the recording method. An attorney or party receiving the record shall store it under conditions that will protect it against loss, destruction, tampering, or deterioration.

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(f)(2)

Every party may inspect and copy documents and things produced for inspection and must have a fair opportunity to compare copies and originals. Upon the request of a party, documents and things produced for inspection shall be marked for identification and added to the record. If the witness wants to retain the originals, that person shall offer the originals to be copied, marked for identification, and added to the record.

(f)(3)

Upon payment of reasonable charges, the officer shall furnish a copy of the record to any party or to the witness.

(g)

Failure to attend or to serve subpoena; expenses. If the party giving the notice of a deposition fails to attend or fails to serve a subpoena upon a witness who fails to attend, and another party attends in person or by attorney, the court may order the party giving the notice to pay the other party the reasonable costs, expenses and attorney fees incurred.

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(h)

Deposition in action pending in another state. Any party to an action in another state may take the deposition of any person within this state in the same manner and subject to the same conditions and limitations as if such action were pending in this state. Notice of the deposition shall be filed with the clerk of the court of the county in which the person whose deposition is to be taken resides or is

to be served. Matters required to be submitted to the court shall be submitted to the court in the county where the deposition is being taken.

(i)

Stipulations regarding deposition procedures. The parties may by written stipulation provide that depositions may be taken before any person, at any time or place, upon any notice, and in any manner and when so taken may be used like other depositions.

Rule 37. Statement of Discovery Issues; Sanctions; Failure to Admit, to Attend Deposition or to Preserve Evidence

(a)

Statement of discovery issues.

(a)(1)

A party or the person from whom discovery is sought may request that the judge enter an order regarding any discovery issue, including:

(a)(1)(A)

failure to disclose under Rule 26 ;

(a)(1)(B)

extraordinary discovery under Rule 26 ;

(a)(1)(C)

a subpoena under Rule 45 ;

(a)(1)(D)

protection from discovery; or

(a)(1)(E)

compelling discovery from a party who fails to make full and complete discovery.

(a)(2)

Statement of discovery issues length and content. The statement of discovery issues must be no more than 4 pages, not including permitted attachments, and must include in the following order:

(a)(2)(A)

the relief sought and the grounds for the relief sought stated succinctly and with particularity;

(a)(2)(B)

a certification that the requesting party has in good faith conferred or attempted to confer with the other affected parties in person or by telephone in an effort to resolve the dispute without court action;

(a)(2)(C)

a statement regarding proportionality under Rule 26(b)(2) ; and

(a)(2)(D)

if the statement requests extraordinary discovery, a statement certifying that the party has reviewed and approved a discovery budget.

(a)(3)

Objection length and content. No more than 7 days after the statement is filed, any other party may file an objection to the statement of discovery issues. The objection must be no more than 4 pages, not including permitted attachments, and must address the issues raised in the statement.

(a)(4)

Permitted attachments. The party filing the statement must attach to the statement only a copy of the disclosure, request for discovery or the response at issue

(a)(5)

Proposed order. Each party must file a proposed order concurrently with its statement or objection.

(a)(6)

Decision. Upon filing of the objection or expiration of the time to do so, either party may and the party filing the statement must file a Request to Submit for Decision under Rule 7(g). The court will promptly:

(a)(6)(A)

decide the issues on the pleadings and papers;

(a)(6)(B)

conduct a hearing by telephone conference or other electronic communication; or

(a)(6)(C)

order additional briefing and establish a briefing schedule.

(a)(7)

Orders. The court may enter orders regarding disclosure or discovery or to protect a party or person from discovery being conducted in bad faith or from annoyance, embarrassment, oppression, or undue burden or expense, or to achieve proportionality under Rule 26(b)(2), including one or more of the following:

(a)(7)(A)

that the discovery not be had or that additional discovery be had;

(a)(7)(B)

that the discovery may be had only on specified terms and conditions, including a designation of the time or place;

(a)(7)(C)

that the discovery may be had only by a method of discovery other than that selected by the party seeking discovery;

(a)(7)(D)

that certain matters not be inquired into, or that the scope of the discovery be limited to certain matters;

(a)(7)(E)

that discovery be conducted with no one present except persons designated by the court;

(a)(7)(F)

that a deposition after being sealed be opened only by order of the court;

(a)(7)(G)

that a trade secret or other confidential information not be disclosed or be disclosed only in a designated way;

(a)(7)(H)

that the parties simultaneously deliver specified documents or information enclosed in sealed envelopes to be opened as directed by the court;

(a)(7)(I)

that a question about a statement or opinion of fact or the application of law to fact not be answered until after designated discovery has been completed or until a pretrial conference or other later time;

(a)(7)(J)

that the costs, expenses and attorney fees of discovery be allocated among the parties as justice requires; or

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(a)(7)(K)

that a party pay the reasonable costs, expenses and attorney fees incurred on account of the motion statement of discovery issues if the relief requested is granted or denied, or if a party provides discovery or withdraws a discovery request after a statement of discovery issues is filed and if the court finds that the party, witness, or attorney did not act in good faith or asserted a position that was not substantially justified.

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(a)(8)

Request for sanctions prohibited. A statement of discovery issues or an objection may include a request for costs, expenses and attorney fees but not a request for sanctions.

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(a)(9)

Statement of discovery issues does not toll discovery time. A statement of discovery issues does not suspend or toll the time to complete standard discovery.

(b)

Motion for sanctions. Unless the court finds that the failure was substantially justified, the court, upon motion, may impose appropriate sanctions for the failure to follow its orders, including the following:

(b)(1)

deem the matter or any other designated facts to be established in accordance with the claim or defense of the party obtaining the order;

(b)(2)

prohibit the disobedient party from supporting or opposing designated claims or defenses or from introducing designated matters into evidence;

(b)(3)

stay further proceedings until the order is obeyed;

(b)(4)

dismiss all or part of the action, strike all or part of the pleadings, or render judgment by default on all or part of the action;

(b)(5)

order the party or the attorney to pay the reasonable costs, expenses, and attorney fees, caused by the failure;

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(b)(6)

treat the failure to obey an order, other than an order to submit to a physical or mental examination, as contempt of court; and

(b)(7)

instruct the jury regarding an adverse inference.

(c)

Motion for costs, expenses and attorney fees on failure to admit. If a party fails to admit the genuineness of a document or the truth of a matter as requested under Rule 36, and if the party requesting the admissions proves the genuineness of the document or the truth of the matter, the party requesting the admissions may file a motion for an order requiring the other party to pay the reasonable costs, expenses and attorney fees incurred in making that proof. The court must enter the order unless it finds that:

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(c)(1)

the request was held objectionable pursuant to Rule 36(a) ;

(c)(2)

the admission sought was of no substantial importance;

(c)(3)

there were reasonable grounds to believe that the party failing to admit might prevail on the matter;

(c)(4)

that the request was not proportional under Rule 26(b)(2) ; or

(c)(5)

there were other good reasons for the failure to admit.

(d)

Motion for sanctions for failure of party to attend deposition. If a party or an officer, director, or managing agent of a party or a person designated under Rule 30(b)(6) to testify on behalf of a party fails to appear before the officer taking the deposition after service of the notice, any other party may file a motion for sanctions under paragraph (b). The failure to appear may not be excused on the ground that the discovery sought is objectionable unless the party failing to appear has filed a statement of discovery issues under paragraph (a).

(e)

Failure to preserve evidence. Nothing in this rule limits the inherent power of the court to take any action authorized by paragraph (b) if a party destroys, conceals, alters, tampers with or fails to preserve a document, tangible item, electronic data or other evidence in violation of a duty. Absent exceptional circumstances, a court may not impose sanctions under these rules on a party for failing to provide electronically stored information lost as a result of the routine, good-faith operation of an electronic information system.

Cite as Utah. R. Civ. P. 37

Note:

Advisory Committee Notes

The 2011 amendments to Rule 37 make two principal changes. First, the amended Rule 37 consolidates provisions for motions for a protective order (formerly set forth in Rule 26(c)) with provisions for motions to compel. By consolidating the standards for these two motions in a single rule, the Advisory Committee sought to highlight some of the parallels and distinctions between the two types of motions and to present them in a single rule.

Second, the amended Rule 37 incorporates the new Rule 26 standard of "proportionality" as a principal criterion on which motions to compel or for a protective order should be evaluated. As to motions to compel, Rule 37(a)(3) requires that a party moving to compel discovery certify to the court "that the discovery being sought is proportional under Rule 26(b)(2)." Rule 37(b) makes clear that a lack of proportionality may be raised as ground for seeking a protective order, indicating that "the party seeking the discovery has the burden of demonstrating that the information being sought is proportional."

Paragraph (h) and its predecessors have long authorized the court to take the drastic steps authorized by paragraph (e)(2) for failure to disclose as required by the rules or for failure to amend a response to discovery. The federal counterpart to this provision is similar. Yet the courts historically have limited those more drastic sanctions to circumstances in which a party fails to comply with a court order, persists in dilatory conduct, or acts in bad faith.

The 2011 amendments have brought new attention to paragraph (h). Those amendments, which emphasized greater and earlier disclosure, also emphasized the enforcement of that requirement by prohibiting the party from using the undisclosed information as evidence at a hearing. The committee intends that courts should impose sanctions under (e)(2) for failure to disclose in only the most egregious circumstances. In most circumstances exclusion of the evidence seems an adequate sanction for failure to disclose or failure to amend discovery.

2015 Amendments.

Paragraph (a) adopts the expedited procedures for statements of discovery issues formerly found in Rule 4-502 of the Code of Judicial Administration. Statements of discovery issues replace discovery motions, and paragraph (a) governs unless the judge orders otherwise

Former paragraph (a)(2), which directed a motion for a discovery order against a nonparty witness to be filed in the judicial district where the subpoena was served or deposition was to be taken, has been deleted. A statement of discovery issues related to a nonparty must be filed in the court in which the action is pending.

Former paragraph (h), which prohibited a party from using at a hearing information not disclosed as required, was deleted because the effect of non-disclosure is adequately governed by Rule 26(d). See also *The Townhomes At Pointe Meadows Owners Association v. Pointe Meadows Townhomes, LLC*, 2014 UT App 52 ¶14. The process for resolving disclosure issues is included in paragraph (a).

Rule 39. Trial by Jury or by the Court

(a)

By jury. When trial by jury has been demanded as provided in Rule 38, the action shall be designated upon the register of actions as a jury action. The trial of all issues so demanded shall be by jury, unless

(a)(1)

The parties or their attorneys of record, by written stipulation filed with the court or by an oral stipulation made in open court and entered in the record, consent to trial by the court sitting without a jury, or

Commented [JH77]:

(a)(2)

The court upon motion or of its own initiative finds that a right of trial by jury of some or all of those issues does not exist, or

(a)(3)

Either party to the issue fails to appear at the trial.

(b)

By the court. Issues not demanded for trial by jury as provided in Rule 38 shall be tried by the court; but, notwithstanding the failure of a party to demand a jury in an action in which such a demand might have been made of right, the court in its discretion upon motion may order a trial by a jury of any or all issues.

(c)

Advisory jury and trial by consent. In all actions not triable of right by a jury the court upon motion or of its own initiative may try any issue with an advisory jury or, with the consent of both parties, may order a trial with a jury whose verdict has the same effect as if trial by jury had been a matter of right.

Rule 45. Subpoena

(a)

Form; issuance.

(1)

Every subpoena shall:

(A)

issue from the court in which the action is pending;

(B)

state the title and case number of the action, the name of the court from which it is issued, and the name and address of the party or attorney responsible for issuing the subpoena;

Commented [JH78]:

(C)

command each person to whom it is directed

(i)

to appear and give testimony at a trial, hearing or deposition, or

(ii)

to appear and produce for inspection, copying, testing or sampling documents, electronically stored information or tangible things in the possession, custody or control of that person, or

(iii)

to copy documents or electronically stored information in the possession, custody or control of that person and mail or deliver the copies to the party or attorney responsible for issuing the subpoena before a date certain, or

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(iv)

to appear and to permit inspection of premises;

(D)

if an appearance is required, specify the date, time and place for the appearance; and

(E)

include a notice to persons served with a subpoena in a form substantially similar to the approved subpoena form. A subpoena may specify the form or forms in which electronically stored information is to be produced.

(2)

The clerk shall issue a subpoena, signed but otherwise in blank, to a party requesting it, who shall complete it before service. An attorney admitted to practice in Utah may issue and sign a subpoena as an officer of the court.

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(b)

Service; fees; prior notice.

(1)

A subpoena may be served by any person who is at least 18 years of age and not a party to the case. Service of a subpoena upon the person to whom it is directed shall be made as provided in Rule 4(d).

(2)

If the subpoena commands a person's appearance, the party or attorney responsible for issuing the subpoena shall tender with the subpoena the fees for one day's attendance and the mileage allowed by law. When the subpoena is issued on behalf of the United States, or this state, or any officer or agency of either, fees and mileage need not be tendered.

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(3)

If the subpoena commands a person to copy and mail or deliver documents or electronically stored information, to produce documents, electronically stored information or tangible things for inspection, copying, testing or sampling or to permit inspection of premises, the party or attorney responsible for issuing the subpoena shall serve each party with notice of the subpoena by delivery or other method of actual notice before serving the subpoena.

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(c)

Appearance; resident; non-resident.

(1)

A person who resides in this state may be required to appear:

(A)

at a trial or hearing in the county in which the case is pending; and

(B)

at a deposition, or to produce documents, electronically stored information or tangible things, or to permit inspection of premises only in the county in which the person resides, is employed, or transacts business in person, or at such other place as the court may order.

(2)

A person who does not reside in this state but who is served within this state may be required to appear:

(A)

at a trial or hearing in the county in which the case is pending; and

(B)

at a deposition, or to produce documents, electronically stored information or tangible things, or to permit inspection of premises only in the county in which the person is served or at such other place as the court may order.

(d)

Payment of production or copying costs. The party or attorney responsible for issuing the subpoena shall pay the reasonable cost of producing or copying documents, electronically stored information or tangible things. Upon the request of any other party and the payment of reasonable costs, the party or attorney responsible for issuing the subpoena shall provide to the requesting party copies of all documents, electronically stored information or tangible things obtained in response to the subpoena or shall make the tangible things available for inspection.

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Commented [JH84]:

(e)

Protection of persons subject to subpoenas; objection.

(1)

The party or attorney responsible for issuing a subpoena shall take reasonable steps to avoid imposing an undue burden or expense on the person subject to the subpoena. The court shall enforce this duty and impose upon the party or attorney in breach of this duty an appropriate sanction, which may include, but is not limited to, lost earnings and a reasonable attorney fee.

Commented [JH85]:

Commented [JH86]:

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(2)

A subpoena to copy and mail or deliver documents or electronically stored information, to produce documents, electronically stored information or tangible things, or to permit inspection of premises shall comply with Rule 34(a) and (b)(1), except that the person subject to the subpoena must be allowed at least 14 days after service to comply.

(3)

The person subject to the subpoena or a non-party affected by the subpoena may object under Rule 37 if the subpoena:

(A)

fails to allow reasonable time for compliance;

(B)

requires a resident of this state to appear at other than a trial or hearing in a county in which the person does not reside, is not employed, or does not transact business in person;

(C)

requires a non-resident of this state to appear at other than a trial or hearing in a county other than the county in which the person was served;

(D)

requires the person to disclose privileged or other protected matter and no exception or waiver applies;

(E)

requires the person to disclose a trade secret or other confidential research, development, or commercial information;

(F)

subjects the person to an undue burden or cost;

(G)

requires the person to produce electronically stored information in a form or forms to which the person objects;

(H)

requires the person to provide electronically stored information from sources that the person identifies as not reasonably accessible because of undue burden or cost; or

(I)

requires the person to disclose an unretained expert's opinion or information not describing specific events or occurrences in dispute and resulting from the expert's study that was not made at the request of a party.

(4)

(A)

If the person subject to the subpoena or a non-party affected by the subpoena objects, the objection must be made before the date for compliance.

(B)

The objection shall be stated in a concise, non-conclusory manner.

(C)

If the objection is that the information commanded by the subpoena is privileged or protected and no exception or waiver applies, or requires the person to disclose a trade secret or other confidential research, development, or commercial information, the objection shall sufficiently describe the nature of the documents, communications, or things not produced to enable the party or attorney responsible for issuing the subpoena to contest the objection.

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(D)

If the objection is that the electronically stored information is from sources that are not reasonably accessible because of undue burden or cost, the person from whom discovery is sought must show that the information sought is not reasonably accessible because of undue burden or cost.

(E)

The objection shall be served on the party or attorney responsible for issuing the subpoena. The party or attorney responsible for issuing the subpoena shall serve a copy of the objection on the other parties.

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Commented [JH90]:

(5)

If objection is made, or if a party requests a protective order, the party or attorney responsible for issuing the subpoena is not entitled to compliance but may request an order to compel compliance under Rule 37(a). The objection or request shall be served on the other parties and on the person subject to the subpoena. An order compelling compliance shall protect the person subject to or affected by the subpoena from significant expense or harm. The court may quash or modify the subpoena. If the party or attorney responsible for issuing the subpoena shows a substantial need for the information that cannot be met without undue hardship, the court may order compliance upon specified conditions.

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(f)

Duties in responding to subpoena.

(1)

A person commanded to copy and mail or deliver documents or electronically stored information or to produce documents, electronically stored information or tangible things shall serve on the party or attorney responsible for issuing the subpoena a declaration under penalty of law stating in substance:

Commented [JH93]:

(A)

that the declarant has knowledge of the facts contained in the declaration;

(B)

that the documents, electronically stored information or tangible things copied or produced are a full and complete response to the subpoena;

(C)

that the documents, electronically stored information or tangible things are the originals or that a copy is a true copy of the original; and

(D)

the reasonable cost of copying or producing the documents, electronically stored information or tangible things.

(2)

A person commanded to copy and mail or deliver documents or electronically stored information or to produce documents, electronically stored information or tangible things shall copy or produce them as they are kept in the usual course of business or shall organize and label them to correspond with the categories in the subpoena.

(3)

If a subpoena does not specify the form or forms for producing electronically stored information, a person responding to a subpoena must produce the information in the form or forms in which the person ordinarily maintains it or in a form or forms that are reasonably usable.

(4)

If the information produced in response to a subpoena is subject to a claim of privilege or of protection as trial-preparation material, the person making the claim may notify any party who received the information of the claim and the basis for it. After being notified, the party must promptly return, sequester, or destroy the specified information and any copies of it and may not use or disclose the information until the claim is resolved. A receiving party may promptly present the information to the court under seal for a determination of the claim. If the receiving party disclosed the information before being notified, it must take reasonable steps to retrieve the information. The person who produced the information must preserve the information until the claim is resolved.

(g)

Contempt. Failure by any person without adequate excuse to obey a subpoena served upon that person is punishable as contempt of court.

(h)

Procedure when witness evades service or fails to attend. If a witness evades service of a subpoena or fails to attend after service of a subpoena, the court may issue a warrant to the sheriff of the county to arrest the witness and bring the witness before the court.

(i)

Procedure when witness is an inmate. If the witness is an inmate as defined in Rule 6(e)(1), a party may move for an order to examine the witness in the institution or to produce the witness before the court or officer for the purpose of being orally examined.

(j)

Subpoena unnecessary. A person present in court or before a judicial officer may be required to testify in the same manner as if the person were in attendance upon a subpoena.

History. Amended March 17, 2017, effective May 1, 2017; amended November 22, 2017, effective May 1, 2018.

Note:

Advisory Committee Notes

The form subpoena formerly part of the Appendix of Forms described in Rule 81 has been replaced by forms approved by the Board of District Court Judges found on the court website at http://www.utcourts.gov/resources/forms/subpoena/. The website includes information and forms for domestic subpoenas and subpoenas from other states. Utah has adopted the Uniform Interstate Depositions and Discovery Act, and the act differentiates between the requirements for a subpoena issued by a state that also has adopted the uniform act and the requirements for a subpoena issued by a state that has not.

Rule 47. Jurors

(a)

Examination of jurors. The court may permit the parties or their attorneys to conduct the examination of prospective jurors or may itself conduct the examination. In the latter event, the court shall permit the parties or their attorneys to supplement the examination by such further inquiry as is material and proper or shall itself submit to the prospective jurors such additional questions of the parties or their attorneys as is material and proper. Prior to examining the jurors, the court may make a preliminary statement of the case. The court may permit the parties or their attorneys to make a preliminary statement of the case, and notify the parties in advance of trial.

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(b)

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

(c)

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

(d)

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

(e)

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

(f)

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

(f)(1)

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

(f)(2)

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

(f)(3)

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

(f)(4)

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

(f)(5)

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

(f)(6)

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

(g)

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

(g)(1)

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

(g)(2)

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

(g)(3)

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

(h)

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

(i)

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

(j)

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

(j)(1)

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

(j)(2)

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

(j)(3)

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

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(k)

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

(l)

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

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(m)

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

(n)

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

(o)

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

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(p)

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

(q)

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

(r)

Declaration of verdict. When the jury or three-fourths of them, or such other number as may have been agreed upon by the parties pursuant to Rule 48, have agreed upon a verdict they must be conducted into court, their names called by the clerk, and the verdict rendered by their foreperson; the verdict must be in writing, signed by the foreperson, and must be read by the clerk to the jury, and the inquiry made whether it is their verdict. Either party may require the jury to be polled, which shall be done by the court or clerk asking each juror if it is the juror's verdict. If, upon such inquiry or polling there is an insufficient number of jurors agreeing therewith, the jury must be sent out again; otherwise the verdict is complete and the jury shall be discharged from the cause.

(s)

Correction of verdict. If the verdict rendered is informal or insufficient, it may be corrected by the jury under the advice of the court, or the jury may be sent out again.

Cite as Utah. R. Civ. P. 47

Note:

Advisory Committee Notes

Paragraph (a) The preliminary statement of the case does not serve the same purpose as the opening statement presented after the jury is selected. The preliminary statement of the case serves only to provide a brief context in which the jurors might more knowledgeably answer questions during voir dire. A preliminary opening statement is not required and may serve no useful purpose in short trials or trials with relatively simple issues. The judge should be particularly attuned to prevent argument or posturing at this early stage of the trial.

Paragraph (f)(6). The Utah Supreme Court has noted a tendency of trial court judges to rule against a challenge for cause in the face of legitimate questions about a juror's biases. The Supreme Court limited the following admonition to capital cases, but it is a sound philosophy even in trials of lesser consequence.

[W]e take this opportunity to address an issue of growing concern to this court. We are perplexed by the trial courts' frequent insistence on passing jurors for cause in death penalty cases when legitimate concerns about their suitability have been raised during voir dire. While the abuse-of-discretion standard of review affords trial courts wide latitude in making their for-cause determinations,

we are troubled by their tendency to "push the edge of the envelope," especially when capital voir dire panels are so large and the death penalty is at issue. Moreover, capital cases are extremely costly, in terms of both time and money. Passing questionable jurors increases the drain on the state's resources and jeopardizes an otherwise valid conviction and/or sentence. ... If a party raises legitimate questions as to a potential juror's beliefs, biases, or physical ability to serve, the potential juror should be struck for cause, even where it would not be legally erroneous to refuse. *State v. Carter*, 888 P.2d 629 (Utah 1995).

In determining challenges for cause, the task of the judge is to find the proper balance. It is not the judge's duty to seat a jury from a too-small venire panel or to seat a jury as quickly as possible. Although thorough questioning of a juror to determine the existence, nature and extent of a bias is appropriate, it is not the judge's duty to extract the "right" answer from or to "rehabilitate" a juror. The judge should accept honest answers to understood questions and, based on that evidence, make the sometimes difficult decision to seat only those jurors the judge is convinced will act fairly and impartially. This higher duty demands a sufficient venire panel and sufficient voir dire. The trial court judge enjoys considerable discretion in limiting voir dire when there is no apparent link between a question and potential bias, but "when proposed voir dire questions go directly to the existence of an actual bias, that discretion disappears. The trial court must allow such inquiries." The court should ensure the parties have a meaningful opportunity to explore grounds for challenges for cause and to ask follow-up questions, either through direct questioning or questioning by the court.

The objective of a challenge for cause is to remove from the venire panel persons who cannot act impartially in deliberating upon a verdict. The lack of impartiality may be due to some bias for or against one of the parties; it may be due to an opinion about the subject matter of the action or about the action itself. The civil rules of procedure have a few-and the criminal rules many more-specific circumstances, usually a relationship with a party or a circumstance of the juror, from which the bias of the juror is inferred. In addition to these enumerated grounds for a challenge for cause, both the civil rules and the criminal rules close with the following grounds: formulation by the juror of a state of mind that will prevent the juror from acting impartially. However, the rules go on to provide that no person shall be disqualified as a juror by reason of having formed an opinion upon the matter if it satisfactorily appears to the court that the person will, notwithstanding that opinion, act impartially.

The amendments focus on the "state of mind" clause. In determining whether a person can act impartially, the court should focus not only on that person's state of mind but should consider the totality of the circumstances. These circumstances might include the experiences, conduct, statements, opinions, or associations of the juror. Rather than determining that the juror is "prevented" from acting impartially, the court should determine whether the juror "is not likely to act impartially." These amendments conform to the directive of the Supreme Court: If there is a legitimate question about the ability of a person to act impartially, the court should remove that person from the panel.

There is no need to modify this determination with the statement that a juror who can set aside an opinion based on public journals, rumors or common notoriety and act impartially should not be struck. Having read or heard of the matter and even having an opinion about the matter do not meet the standard of the rule. Well-informed and involved citizens are not automatically to be disqualified from jury service. Sound public policy supports knowledgeable, involved citizens as jurors. The challenge for the court is to evaluate the impact of this extra-judicial information on the ability of the person to act impartially. Information and opinions about the case remain relevant to but not determinative of the question: "Will the person be a fair and impartial juror?"

In stating that no person may serve as a juror unless the judge is "convinced" the juror will act impartially, the Committee uses the term "convinced" advisedly. The term is not intended to suggest the application of a clear and convincing standard of proof in determining juror impartiality, such a high standard being contrary to the Committee's objectives. Nor is the term intended to undermine the long-held presumption that potential jurors who satisfy the basic requirements imposed by statutes and rules are qualified to serve. Rather, the term is intended to encourage the trial judge to be thorough and deliberative in evaluating challenges for cause. Although not an evidentiary standard at all, the term "convinced" implies a high standard for judicial decision-making. Review of the decision should remain limited to an abuse of discretion.

This new standard for challenges for cause represents a balance more easily stated than achieved. These amendments encourage judges to exercise greater care in evaluating challenges for cause and to resolve legitimate doubts in favor of removal. This may mean some jurors now removed by peremptory challenge will be removed instead for cause. It may also mean the court will have to summon more prospective jurors for voir dire. Whether lawyers will use fewer peremptory challenges will have to await the judgment of experience.

Commented [JH103]:

Paragraph (m). The committee recommends amending paragraph (m) to establish the right of jurors to take notes and to have those notes with them during deliberations. The committee recommends removing depositions from the paragraph not in order to permit the jurors to have depositions but to recognize that depositions are not evidence. Depositions read into evidence will be treated as any other oral testimony. These amendments and similar amendments to the Rules of Criminal Procedure will make the two provisions

identical.

Advisory Committee Note. Paragraph (j) The committee intends neither to encourage nor to discourage the practice of inviting jurors to submit written questions of witnesses, but only to regulate and make uniform the procedure by which it occurs should the judge exercise discretion in favor of the practice. In exercising that discretion, the committee encourages the judge to discuss the matter beforehand, at the pretrial conference if possible, and consider points in favor of or opposed to the practice. In instructing the jurors and to promote restraint among them, the committee encourages the judge to remind jurors that lawyers are trained to elicit the evidence necessary to decide the case.

Commented [JH104]:

Rule 53. Masters

(a)

Appointment and compensation. Any or all of the issues in an action may be referred by the court to a master upon the written consent of the parties, or the court may appoint a master in an action, in accordance with the provisions of Subdivision (b) of this rule. As used in these rules the word "master" includes a referee, an auditor, and an examiner. The compensation to be allowed to a master shall be fixed by the court, and shall be charged upon such of the parties or paid out of any fund or subject matter of the action, which is in the custody and control of the court as the court may direct. The master shall not retain his report as security for his compensation; but when the party ordered to pay the compensation allowed by the court does not pay it after notice and within the time prescribed by the court, the master is entitled to a writ of execution against the delinquent party.

(b)

Reference. A reference to a master shall be the exception and not the rule. In actions to be tried by a jury, a reference shall be made only when the issues are complicated; in actions to be tried without a jury, save in matters of account, a reference shall, in the absence of the written consent of the parties, be made only upon a showing that some exceptional condition requires it.

(c)

Powers. The order of reference to the master may specify or limit his powers and may direct him to report only upon particular issues or to do or perform particular acts or to receive and report evidence only and may fix the time and place for beginning and closing the hearings and for the filing of the master's report. Subject to the specifications and limitations stated in the order, the master has and shall exercise the power to regulate all proceedings in every hearing before him and to do all acts and take all measures necessary or proper for the efficient performance of his duties under the order. He may require the production before him of evidence upon all matters embraced in the reference, including the production of all books, papers, vouchers, documents, and writings applicable thereto. He may rule upon the admissibility of evidence unless otherwise directed by the order of reference and has the authority to put witnesses on oath and may himself examine them and may call the parties to the action and examine them upon oath. When a party so requests, the master shall make a record of the evidence offered and excluded in the same manner and subject to the same limitations as provided in the Utah Rules of Evidence for a court sitting without a jury.

(d)

Proceedings.

(d)(1)

Meetings. When a reference is made, the clerk shall forthwith furnish the master with a copy of the order of reference. Upon receipt thereof unless the order of reference otherwise provides, the master shall forthwith set a time and place for the first meeting of the parties or their attorneys to be held within 21 days after the date of the order of reference and shall notify the parties or their attorneys. It is the duty of the master to proceed with all reasonable diligence. Either party, on notice to the parties and master, may apply to the court for an order requiring the master to speed the proceedings and to make his report. If a party fails to appear at the time and place appointed, the master may proceed ex parte or, in his discretion, adjourn the proceedings to a future day, giving notice to the absent party of the adjournment.

Commented [JH105]:

Commented [JH106]:

(d)(2)

Witnesses. The parties may procure the attendance of witnesses before the master by the issuance and service of subpoenas as provided in Rule 45. If without adequate excuse a witness fails to appear or give evidence, he may be punished as for a contempt and be subjected to the consequences, penalties, and remedies provided in Rules 37 and 45.

(d)(3)

Statement of accounts. When matters of accounting are in issue before the master, he may prescribe the form in which the accounts shall be submitted and in any proper case may require or receive in evidence a statement by a certified public accountant who is called as a witness. Upon objection of a party to any of the items thus submitted or upon a showing that the form of statement is insufficient, the master may require a different form of statement to be furnished, or the accounts or specific items thereof to be proved by oral examination of the accounting parties or upon written interrogatories or in such other manner as he directs.

(e)

Report.

(e)(1)

Contents and filing. The master shall prepare a report upon the matters submitted to him by the order of reference and, if required to make findings of fact and conclusions of law, he shall set them forth in the report. He shall file the report with the clerk of the court and in an action to be tried without a jury, unless otherwise directed by the order of reference, shall file with it a transcript of the proceedings and of the evidence and the original exhibits. The clerk shall forthwith mail to all parties notice of the filing.

(e)(2)

In non-jury actions. In an action to be tried without a jury the court shall accept the master's findings of fact unless clearly erroneous. Within 14 days after being served with notice of the filing of the report any party may serve written objections thereto upon the other parties. Application to the court for action upon the report and upon objections thereto shall be by motion and upon notice as prescribed in Rule 6(d). The court after hearing may adopt the report or may modify it or may reject it in whole or in part or may receive further evidence or may recommit it with instructions.

(e)(3)

In jury actions. In an action to be tried by a jury the master shall not be directed to report the evidence. His findings upon the issues submitted to him are admissible as evidence of the matters found and may be read to the jury, subject to the ruling of the court upon any objections in point of law which may be made to the report.

(e)(4)

Stipulation as to findings. The effect of a master's report is the same whether or not the parties have consented to the reference; but, when the parties stipulate that a master's findings of fact shall be final, only questions of law arising upon the report shall thereafter be considered.

(e)(5)

Draft report. Before filing his report a master may submit a draft thereof to counsel for all parties for the purpose of receiving their suggestions.

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(f)

Objections to appointment of master. A party may object to the appointment of any person as a master on the same grounds as a party may challenge for cause any prospective trial juror in the trial of a civil action. Such objections must be heard and disposed of by the court in the same manner as a motion.

Cite as Utah. R. Civ. P. 53

Rule 54. Judgments; Costs

(a)

Definition; form. "Judgment" as used in these rules includes a decree or order that adjudicates all claims and the rights and liabilities of all parties or any other order from which an appeal of right lies. A judgment should not contain a recital of pleadings, the report of a master, or the record of prior proceedings.

(b)

Judgment upon multiple claims and/or involving multiple parties. When an action presents more than one claim for relief-whether as a claim, counterclaim, cross claim, or third party claim-and/or when multiple parties are involved, the court may enter judgment as to one or more but fewer than all of the claims or parties only if the court expressly determines that there is no just reason for delay. Otherwise, any order or other decision, however designated, that adjudicates fewer than all the claims or the rights and liabilities of fewer than all the parties does not end the action as to any of the claims or parties, and may be changed at any time before the entry of judgment adjudicating all the claims and the rights and liabilities of all the parties.

(c)

Demand for judgment. A default judgment must not differ in kind from, or exceed in amount, what is demanded in the pleadings. Every other judgment should grant the relief to which each party is entitled, even if the party has not demanded that relief in its pleadings.

(d)

Costs.

(d)(1)

To whom awarded. Unless a statute, these rules, or a court order provides otherwise, costs should be allowed to the prevailing party. Costs against the state of Utah, its officers and agencies may be imposed only to the extent permitted by law.

(d)(2)

How assessed. The party who claims costs must not later than 14 days after the entry of judgment file and serve a verified memorandum of costs. A party dissatisfied with the costs claimed may, within 7 days after service of the memorandum of costs, object to the claimed costs.

(d)(3)

Memorandum filed before judgment. A memorandum of costs served and filed after the verdict, or at the time of or subsequent to the service and filing of the findings of fact and conclusions of law, but before the entry of judgment, is deemed served and filed on the date judgment is entered.

(e)

Amending the judgment to add costs or attorney fees. If the court awards costs under 27 paragraph (d) or attorney fees under Rule 73 after the judgment is entered, the prevailing party must file 28 and serve an amended judgment including the costs or attorney fees. The court will enter the amended 29 judgment unless another party objects within 7 days after the amended judgment is filed.

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Cite as Utah. R. Civ. P. 54

History. Amended effective November 1, 2016.

Note:

Advisory Committee Notes

In *Butler v. Corporation of The President of the Church of Jesus Christ of Latter-Day Saints*, 2014 UT 41, the Supreme Court

established the requirements of a judgment entered by means of a Rule 54(b) certification:

First, it must be entered in an action involving multiple claims or multiple parties. Second, it must have been entered on an order that would otherwise be appealable but for the fact that other claims or parties remain in the action. ... Third, the trial court, in its discretion, must make a determination that there is no just reason for delay of the appeal. *Id.*¶28 To satisfy the second requirement, the Supreme Court in *Butler* included, in addition to the other requirements of appealability, the principle that the order must include one of the three indicia of finality imposed by former Rule 7(f) (2) : a proposed order submitted with the supporting or opposing memorandum; an order prepared at the direction of the judge; an express indication that a further order was not required. The 2015 amendments to Rule 7 replace these indicia with the judge's signature. The 2015 amendments of Rule 7 , Rule 54 and Rule 58A do not disturb the principles established in Butler; they do make simpler the task of satisfying the requirement that the interlocutory order be complete under Rule 7 before it can be certified under Rule 54.

2016 amendments

Paragraph (e) describes the process by which the determination of costs or fees becomes part of the judgment. If there is legal error in entering judgment for costs or attorney fees, that error is reviewable on appeal just like any other.

Commented [JH111]:

Rule 56. Summary Judgment

(a)

Motion for summary judgment or partial summary judgment. A party may move for summary judgment, identifying each claim or defense-or the part of each claim or defense-on which summary judgment is sought. The court shall grant summary judgment if the moving party shows that there is no genuine dispute as to any material fact and the moving party is entitled to judgment as a matter of law. The court should state on the record the reasons for granting or denying the motion. The motion and memoranda must follow Rule 7 as supplemented below.

(a)(1)

Instead of a statement of the facts under Rule 7, a motion for summary judgment must contain a statement of material facts claimed not to be genuinely disputed. Each fact must be separately stated in numbered paragraphs and supported by citing to materials in the record under paragraph (c)(1) of this rule.

(a)(2)

Instead of a statement of the facts under Rule 7, a memorandum opposing the motion must include a verbatim restatement of each of the moving party's facts that is disputed with an explanation of the grounds for the dispute supported by citing to materials in the record under paragraph (c)(1) of this rule. The memorandum may contain a separate statement of additional materials facts in dispute, which must be separately stated in numbered paragraphs and similarly supported.

(a)(3)

The motion and the memorandum opposing the motion may contain a concise statement of facts, whether disputed or undisputed, for the limited purpose of providing background and context for the case, dispute and motion.

(a)(4)

Each material fact set forth in the motion or in the memorandum opposing the motion under paragraphs (a)(1) and (a)(2) that is not disputed is deemed admitted for the purposes of the motion.

(b)

Time to file a motion. A party seeking to recover upon a claim, counterclaim or cross-claim or to obtain a declaratory judgment may move for summary judgment at any time after service of a motion for summary judgment by the adverse party or after 21 days from the commencement of the action. A party against whom a claim, counterclaim, or cross-claim is asserted or a declaratory judgment is sought may move for summary judgment at any time. Unless the court orders otherwise, a party may file a motion for summary judgment at any time no later than 28 days after the close of all discovery.

(c)

Procedures.

(c)(1)

Supporting factual positions. A party asserting that a fact cannot be genuinely disputed or is genuinely disputed must support the assertion by:

(c)(1)(A)

citing to particular parts of materials in the record, including depositions, documents, electronically stored information, affidavits or declarations, stipulations (including those made for purposes of the motion only), admissions, interrogatory answers, or other materials; or

(c)(1)(B)

showing that the materials cited do not establish the absence or presence of a genuine dispute.

(c)(2)

Objection that a fact is not supported by admissible evidence. A party may object that the material cited to support or dispute a fact cannot be presented in a form that would be admissible in evidence.

(c)(3)

Materials not cited. The court need consider only the cited materials, but it may consider other materials in the record.

(c)(4)

Affidavits or declarations. An affidavit or declaration used to support or oppose a motion must be made on personal knowledge, must set out facts that would be admissible in evidence, and must show that the affiant or declarant is competent to testify on the matters stated.

(d)

When facts are unavailable to the nonmoving party. If a nonmoving party shows by affidavit or declaration that, for specified reasons, it cannot present facts essential to justify its opposition, the court may:

(d)(1)

defer considering the motion or deny it without prejudice;

(d)(2)

allow time to obtain affidavits or declarations or to take discovery; or

(d)(3)

issue any other appropriate order.

(e)

Failing to properly support or address a fact. If a party fails to properly support an assertion of fact or fails to properly address another party's assertion of fact as required by paragraph (c), the court may:

(e)(1)

give an opportunity to properly support or address the fact;

(e)(2)

consider the fact undisputed for purposes of the motion;

(e)(3)

grant summary judgment if the motion and supporting materials-including the facts considered undisputed-show that the moving party is entitled to it; or

(e)(4)

issue any other appropriate order.

(f)

Judgment independent of the motion. After giving notice and a reasonable time to respond, the court may:

(f)(1)

grant summary judgment for a nonmoving party;

(f)(2)

grant the motion on grounds not raised by a party; or

(f)(3)

consider summary judgment on its own after identifying for the parties material facts that may not be genuinely in dispute.

(g)

Failing to grant all the requested relief. If the court does not grant all the relief requested by the motion, it may enter an order stating any material fact-including an item of damages or other relief-that not genuinely in dispute and treating the fact as established in the case.

(h)

Affidavit or declaration submitted in bad faith. If satisfied that an affidavit or declaration under this rule is submitted in bad faith or solely for delay, the court-after notice and a reasonable time to respond-may order the submitting party to pay the other party the reasonable expenses, including attorney's fees, it incurred as a result. The court may also hold an offending party or attorney in contempt or order other appropriate sanctions.

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Cite as Utah. R. Civ. P. 56

Note:

Advisory Committee Notes

The objective of the 2015 amendments is to adopt the style of Federal Rule of Civil Procedure 56 without changing the substantive Utah law. The 2015 amendments also move to this rule the special briefing requirements of motions for summary judgment formerly found in Rule 7. Nothing in these changes should be interpreted as changing the line of Utah cases regarding the burden of proof in motions for summary judgment.

Rule 58A. Entry of Judgment; Abstract of Judgment

(a)

Separate document required. Every judgment and amended judgment must be set out in a separate document ordinarily titled "Judgment"-or, as appropriate, "Decree."

(b)

Separate document not required. A separate document is not required for an order disposing of a post-judgment motion:

(b)(1)

for judgment under Rule 50(b) ;

(b)(2)

to amend or make additional findings under Rule 52(b) ;

(b)(3)

for a new trial, or to alter or amend the judgment, under Rule 59 ;

(b)(4)

for relief under Rule 60 ;or

(b)(5)

for attorney fees under Rule 73.

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(c)

Preparing a judgment.

(c)(1)

Preparing and serving a proposed judgment. The prevailing party or a party directed by the court must prepare and serve on the other parties a proposed judgment for review and approval as to form. The proposed judgment shall be served within 14 days after the jury verdict or after the court's decision. If the prevailing party or party directed by the court fails to timely serve a proposed judgment, any other party may prepare a proposed judgment and serve it on the other parties for review and approval as to form.

(c)(2)

Effect of approval as to form. A party's approval as to form of a proposed judgment certifies that the proposed judgment accurately reflects the verdict or the court's decision. Approval as to form does not waive objections to the substance of the judgment.

(c)(3)

Objecting to a proposed judgment. A party may object to the form of the proposed judgment by filing an objection within 7 days after the judgment is served.

(c)(4)

Filing proposed judgment. The party preparing a proposed judgment must file it:

(c)(4)(A)

after all other parties have approved the form of the judgment; (The party preparing the proposed judgment must indicate the means by which approval was received: in person; by telephone; by signature; by email; etc.)

(c)(4)(B)

after the time to object to the form of the judgment has expired; (The party preparing the proposed judgment must also file a certificate of service of the proposed judgment.) or

(c)(4)(C)

within 7 days after a party has objected to the form of the judgment. (The party preparing the proposed judgment may also file a response to the objection.)

(d)

Judge's signature; judgment filed with the clerk. Except as provided in paragraph (h) and Rule 55(b)(1), all judgments must be signed by the judge and filed with the clerk. The clerk must promptly record all judgments in the docket.

(e)

Time of entry of judgment.

(e)(1)

If a separate document is not required, a judgment is complete and is entered when it is signed by the judge and recorded in the docket.

(e)(2)

If a separate document is required, a judgment is complete and is entered at the earlier of these events:

(e)(2)(A)

the judgment is set out in a separate document signed by the judge and recorded in the docket; or

(e)(2)(B)

150 days have run from the clerk recording the decision, however designated, that provides the basis for the entry of judgment.

(f)

Award of attorney fees. A motion or claim for attorney fees does not affect the finality of a 43 judgment for any purpose, but under Rule of Appellate Procedure 4, the time in which to file the notice of 44 appeal runs from the disposition of the motion or claim.

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(g)

Notice of judgment. The party preparing the judgment shall promptly serve a copy of the signed judgment on the other parties in the manner provided in Rule 5 and promptly file proof of service with the court. Except as provided in Rule of Appellate Procedure 4(g), the time for filing a notice of appeal is not affected by this requirement.

(h)

Judgment after death of a party. If a party dies after a verdict or decision upon any issue of fact and before judgment, judgment may nevertheless be entered.

(i)

Judgment by confession. If a judgment by confession is authorized by statute, the party seeking the judgment must file with the clerk a statement, verified by the defendant as follows:

(i)(1)

If the judgment is for money due or to become due, the statement must concisely state the claim and that the specified sum is due or

to become due.

(i)(2)

If the judgment is for the purpose of securing the plaintiff against a contingent liability, the statement must state concisely the claim and that the specified sum does not exceed the liability.

(i)(3)

The statement must authorize the entry of judgment for the specified sum.

The clerk must sign the judgment for the specified sum.

(j)

Abstract of judgment. The clerk may abstract a judgment by a signed writing under seal of the court that:

(j)(1)

identifies the court, the case name, the case number, the judge or clerk that signed the judgment, the date the judgment was signed, and the date the judgment was recorded in the registry of actions and the registry of judgments;

(j)(2)

states whether the time for appeal has passed and whether an appeal has been filed;

(j)(3)

states whether the judgment has been stayed and when the stay will expire; and

(j)(4)

if the language of the judgment is known to the clerk, quotes verbatim the operative language of the judgment or attaches a copy of the judgment.

Cite as Utah. R. Civ. P. 58A

History. Amended effective November 1, 2016.

Note:

Advisory Committee Note

The 2015 amendments to Rule 58A adopt the requirement, found in Rule 58 of the Federal Rules of Civil Procedure, that a judgment be set out in a separate document. In the past, problems have arisen when the district court entered a decision with dispositive language, but without the other formal elements of a judgment, resulting in uncertainty about whether the decision started the time for appeals. This problem was compounded by uncertainty under Rule 7 about whether the decision was the court's final ruling on the matter or whether the prevailing party was expected to prepare an order confirming the decision.

The 2015 amendments of Rule 7, Rule 54 and Rule 58A are intended to reduce this confusion by requiring "that there be a judgment set out on a separate document-distinct from any opinion or memorandum-which provides the basis for the entry of judgment." See Advisory Committee Notes to 1963 Amendments to Fed. R. Civ. P. 58 . Courts and practitioners are encouraged to use appropriate titles with separate documents intended to operate as judgments, such as "Judgment" or "Decree," and to avoid using such titles on documents that are not appealable. The parties should consider the form of judgment included in the Appendix of Forms. On the question of what constitutes a separate document, the Committee refers courts and practitioners to existing case law interpreting Fed. R. Civ. P. 58 . For example, *In re Cendant Corp.*, 454 F.3d 235, 242-244 (3d Cir. 2006) offers three criteria:

(1) the judgment must be set forth in a document that is independent of the court's opinion or decision;

(2) it must contain ordering clauses stating the relief to which the prevailing party is entitled, and not merely refer to orders made in other documents or state that a motion has been granted; and

(3) it must substantially omit recitation of facts, procedural history, and the reasons for disposing of the parties' claims.

While "some trivial departures" from these criteria-such as a one-sentence explanation of reasoning, a single citation to authority, or a reference to a separate memorandum decision-"must be tolerated in the name of common sense," any explanation must be "very sparse." *Kidd v. District of Columbia*, 206 F.3d 35, 39 (D.C. Cir. 2000).

The concurrent amendments to Rule 7 remove the separate document requirement formerly applicable to interlocutory orders. Henceforward, the separate document requirement will apply only to judgments, a change that should reduce the tendency to confuse judgments with other orders. Rule 7 has also been amended to modify the process by which orders on motions are prepared. The process for preparing judgments is the same.

Under amended Rule 7(j), a written decision, however designated, is complete-is the judge's last word on the motion-when it is signed, unless the court expressly requests a party to prepare an order confirming the decision. But this should not be confused with the need to prepare a separate judgment when the decision has the effect of disposing of all clams in the case. If a decision disposes of all claims in the action, a separate judgment is required whether or not the court directs a party to prepare an order confirming the decision.

State Rule 58A is similar to Fed. R. Civ. P. 58 in determining the time of entry of judgment when a separate document is required but not prepared. This situation involves the "hanging appeals" problem that the Supreme Court asked this Committee to address in *Central Utah Water Conservancy District v. King*, 2013 UT 13, ¶27. Under the 2015 amendments, if a separate document is required but is not prepared, judgment is deemed to have been entered 150 days from the date the decision-or the order confirming the decision-was entered on the docket.

2016 amendments

The 2016 amendments in paragraphs (b) and (f) are part of a coordinated effort with the Advisory Committee on the Rules of Appellate Procedure to change the effect of a motion for attorney fees on the appealability of a judgment. The combined amendments of this rule and Rule of Appellate Procedure effectively overturn *ProMax Development Corp. v. Raile*, 2000 UT 4, 998 P.2d 254 and *Meadowbrook, LLC v. Flower*, 959 P.2d 115 (Utah 1998). Paragraph (f) also addresses any doubts about the enforceability of a judgment while a motion for attorney fees is pending.

Under *ProMax* and *Meadowbrook* a judgment was not final until the claim for attorney fees had been resolved. An appeal filed before a claim for attorney fees had been resolved was premature and would be dismissed. Under the 2016 amendments, the time to appeal runs from the order disposing of a timely motion for attorney fees, just as it does timely motions under Rules 50, 52 and 59. The 2016 amendments to appellate Rule 4(b) also add a motion under Rule 60(b), but only if the motion is filed within 28 days after the judgment.

If a notice of appeal is filed before the order resolving the timely motion, the appeal is not dismissed; it is treated as filed on the day the order ultimately is entered, although the party must file an amended notice of appeal to appeal from the order disposing of the motion.

Although this change overturns *ProMax* and *Meadowbrook*, it is not the same as the federal rule. Under Federal Rule of Civil Procedure 58(e):

Ordinarily, the entry of judgment may not be delayed, nor the time for appeal extended, in order to tax costs or award fees. But if a timely motion for attorney's fees is made under Rule 54(d)(2), the court may act before a notice of appeal has been filed and become effective to order that the motion have the same effect under Federal Rule of Appellate Procedure 4 (a)(4) as a timely motion under Rule 59.

In other words, a motion for attorney fees extends the time to appeal, but only if the trial court judge rules that it does. In the 2016 amendment of the state rules, a timely motion for attorney fees automatically has that effect.

Although the 2016 amendments change a policy of long standing in the Utah state courts, the amendments will help to protect the appellate rights of parties and avoid the cost of premature appeals.

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Rule 58B. Satisfaction of Judgment

(a)

Satisfaction by acknowledgment. Within 28 days after full satisfaction of the judgment, the owner or the owner's attorney must file an acknowledgment of satisfaction in the court in which the judgment was entered. If the owner is not the original judgment creditor, the owner or owner's attorney must also file proof of ownership. If the satisfaction is for part of the judgment or for fewer than all of the judgment debtors, it must state the amount paid or name the debtors who are released.

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(b)

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

(c)

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

(d)

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

Cite as Utah. R. Civ. P. 58B

Rule 62. Stay of Proceedings to Enforce a Judgment

(a)

Delay in execution. No execution or other writ to enforce a judgment may issue until the expiration of 14 days after entry of judgment, unless the court in its discretion otherwise directs.

(b)

Stay on motion for new trial or for judgment. In its discretion and on such conditions for the security of the adverse party as are proper, the court may stay the execution of, or any proceedings to enforce, a judgment pending the disposition of a motion for a new trial or to alter or amend a judgment made pursuant to Rule 59, or of a motion for relief from a judgment or order made pursuant to Rule 60, or of a motion for judgment in accordance with a motion for a directed verdict made pursuant to Rule 50, or of a motion for amendment to the findings or for additional findings made pursuant to Rule 52(b).

(c)

Injunction pending appeal. When an appeal is taken from an interlocutory order or final judgment granting, dissolving, or denying an injunction, the court in its discretion may suspend, modify, restore, or grant an injunction during the pendency of the appeal upon such conditions as it considers proper for the security of the rights of the adverse party.

(d)

Stay upon appeal. When an appeal is taken, the appellant by giving a supersedeas bond may obtain a stay, unless such a stay is otherwise prohibited by law or these rules. The bond may be given at or after the time of filing the notice of appeal. The stay is effective when the supersedeas bond is approved by the court.

(e)

Stay in favor of the state, or agency thereof. When an appeal is taken by the United States, the state of Utah, or an officer or agency of either, or by direction of any department of either, and the operation or enforcement of the judgment is stayed, no bond, obligation, or other security shall be required from the appellant.

(f)

Stay in quo warranto proceedings. Where the defendant is adjudged guilty of usurping, intruding into or unlawfully holding public office, civil or military, within this state, the execution of the judgment shall not be stayed on an appeal.

(g)

Power of appellate court not limited. The provisions in this rule do not limit any power of an appellate court or of a judge or justice thereof to stay proceedings or to suspend, modify, restore, or grant an injunction, or extraordinary relief or to make any order appropriate to preserve the status quo or the effectiveness of the judgment subsequently to be entered.

(h)

Stay of judgment upon multiple claims. When a court has ordered a final judgment on some but not all of the claims presented in the action under the conditions stated in Rule 54(b), the court may stay enforcement of that judgment until the entering of a subsequent judgment or judgments and may prescribe such conditions as are necessary to secure the benefit thereof to the party in whose favor the judgment is entered.

(i)

Form of supersedeas bond; deposit in lieu of bond; waiver of bond; jurisdiction over sureties to be set forth in undertaking.

(i)(1)

A supersedeas bond given under Subdivision (d) may be either a commercial bond having a surety authorized to transact insurance business under Title 31A, or a personal bond having one or more sureties who are residents of Utah having a collective net worth of

at least twice the amount of the bond, exclusive of property exempt from execution. Sureties on personal bonds shall make and file an affidavit setting forth in reasonable detail the assets and liabilities of the surety.

(i)(2)

Upon motion and good cause shown, the court may permit a deposit of money in court or other security to be given in lieu of giving a supersedeas bond under Subdivision (d).

(i)(3)

The parties may by written stipulation waive the requirement of giving a supersedeas bond under Subdivision (d) or agree to an alternate form of security.

(i)(4)

A supersedeas bond given pursuant to Subdivision (d) shall provide that each surety submits to the jurisdiction of the court and irrevocably appoints the clerk of the court as the surety's agent upon whom any papers affecting the surety's liability on the bond may be served, and that the surety's liability may be enforced on motion and upon such notice as the court may require without the necessity of an independent action.

(j)

Amount of supersedeas bond.

(j)(1)

Except as provided in subsection (j)(2), a court shall set the supersedeas bond in an amount that adequately protects the judgment creditor against loss or damage occasioned by the appeal and assures payment in the event the judgment is affirmed. In setting the amount, the court may consider any relevant factor, including:

(j)(1)(A)

the judgment debtor's ability to pay the judgment;

(j)(1)(B)

the existence and value of security;

(j)(1)(C)

the judgment debtor's opportunity to dissipate assets;

(j)(1)(D)

the judgment debtor's likelihood of success on appeal; and

(j)(1)(E)

the respective harm to the parties from setting a higher or lower amount.

(j)(2)

Notwithstanding subsection (j)(1):

(j)(2)(A)

the presumptive amount of a bond for compensatory damages is the amount of the compensatory damages plus costs and attorney fees, as applicable, plus 3 years of interest at the applicable interest rate;

Commented [JH127]:

(j)(2)(B)

the bond for compensatory damages shall not exceed $25 million in an action by plaintiffs certified as a class under Rule 23 or in an action by multiple plaintiffs in which compensatory damages are not proved for each plaintiff individually; and

(j)(2)(C)

no bond shall be required for punitive damages.

(j)(3)

If the court permits a bond that is less than the presumptive amount of compensatory damages, the court may also enter such orders as are necessary to protect the judgment creditor during the appeal.

(j)(4)

If the court finds that the judgment debtor has violated an order or has otherwise dissipated assets, the court may set the bond under subsection (j)(1) without regard to the limits in subsection (j)(2).

(k)

Objecting to sufficiency or amount of security. Any party whose judgment is stayed or sought to be stayed pursuant to Subdivision (d) may object to the sufficiency of the sureties on the supersedeas bond or the amount thereof, or to the sufficiency or amount of other security given to stay the judgment by filing and giving notice of such objection. The party so objecting shall be entitled to a hearing thereon upon five days notice or such shorter time as the court may order. The burden of justifying the sufficiency of the sureties or other security and the amount of the bond or other security, shall be borne by the party seeking the stay, unless the objecting party seeks a bond greater than the presumed limits of this rule. The fact that a supersedeas bond, its surety or other security is generally permitted under this rule shall not be conclusive as to its sufficiency or amount.

Advisory Committee Notes

The 1995 amendments to this rule eliminated references to writs of mandate and prohibition in Subdivision (g) since the extraordinary relief procedure of Rule 65B has eliminated the concept of the "writ." Subdivision (i) was substantially rewritten to define the requirements for both commercial and personal supersedeas bonds and to allow the court to permit a cash deposit or other form of security in lieu of a supersedeas bond. The committee concluded that individual circumstances will determine the degree to which a particular form of security may be affected by bankruptcy, financial instability or other uncertainty, and that the court should be given broad discretion to permit such forms of security as the facts may require. Subdivision (j) was amended to allow a party whose judgment is stayed to object to the amount or sufficiency of the security. The rule does not specify a time within which a party must object to security; thus a party may respond appropriately to changing circumstances affecting the sufficiency or form of security originally approved by the court.

2005 Amendment. In considering conditions for setting a bond of less than the presumed amount under paragraph (j)(1), the judge's objective is to protect both a judgment creditor's interest in collecting a judgment affirmed on appeal and to afford a judgment debtor a reasonable opportunity to prosecute an appeal without unduly and unnecessarily affecting the judgment debtor's operations. Among the options the judge might consider are to:

(1) require periodic financial reports;

(2) appoint a receiver or master;

(3) require the debtor to abstract the judgment to all jurisdictions in which the debtor has significant assets;

(4) require the debtor's corporate officers to personally acknowledge receiving the judgment and to consent to personal jurisdiction for the purpose of enforcing the judgment;

(5) limit loans other than in the ordinary course of business;

(6) limit transfer or disposition of assets other than in the ordinary course of business; and

(7) limit payment of dividends.

Rule 63. Disability or Disqualification of a Judge

(a)

Substitute judge; Prior testimony. If the judge to whom an action has been assigned is unable to perform his or her duties, then any other judge of that district or any judge assigned pursuant to Judicial Council rule is authorized to perform those duties. The judge to whom the case is reassigned may rehear the evidence or some part of it.

(b)

Motion to disqualify; affidavit or declaration.

(b)(1)

A party to an action or the party's attorney may file a motion to disqualify a judge. The motion must be accompanied by a certificate that the motion is filed in good faith and must be supported by an affidavit or unsworn declaration as described in Title 78B, Chapter 18a, Uniform Unsworn Declarations Act stating facts sufficient to show bias, prejudice or conflict of interest. The motion must also be accompanied by a request to submit for decision.

Commented [JH128]:

(b)(2)

The motion must be filed after commencement of the action, but not later than 21 days after the last of the following:

(b)(2)(A)

assignment of the action or hearing to the judge;

(b)(2)(B)

appearance of the party or the party's attorney; or

Commented [JH129]:

(b)(2)(C)

the date on which the moving party knew or should have known of the grounds upon which the motion is based.

If the last event occurs fewer than 21 days before a hearing, the motion must be filed as soon as practicable.

(b)(3)

Signing the motion or affidavit or declaration constitutes a certificate under Rule 11 and subjects the party or attorney to the procedures and sanctions of Rule 11.

Commented [JH130]:

(b)(4)

No party may file more than one motion to disqualify in an action, unless the second or subsequent motion is based on grounds that the party did not know of and could not have known of at the time of the earlier motion.

(b)(5)

If timeliness of the motion is determined under paragraph (b)(2)(C) or paragraph (b)(4), the affidavit or declaration supporting the motion must state when and how the party came to know of the reason for disqualification.

(c)

Reviewing judge.

(c)(1)

The judge who is the subject of the motion must, without further hearing or a response from another party, enter an order granting the motion or certifying the motion and affidavit or declaration to a reviewing judge. The judge must take no further action in the

case until the motion is decided. If the judge grants the motion, the order will direct the presiding judge of the court to assign another judge to the action or hearing. Assignment in justice court cases will be in accordance with Utah Code of Judicial 34 Administration Rule 9-109. The presiding judge of the court, any judge of the district, or any judge of a court of like jurisdiction may serve as the reviewing judge.

(c)(2)

If the reviewing judge finds that the motion and affidavit or declaration are timely filed, filed in good faith and legally sufficient, the reviewing judge shall assign another judge to the action or hearing or request the presiding judge to do so Assignment in justice court cases will be in accordance with Utah Code of Judicial Administration 41 Rule 9-109..

(c)(3)

In determining issues of fact or of law, the reviewing judge may consider any part of the record of the action and may request of the judge who is the subject of the motion an affidavit or declaration responding to questions posed by the reviewing judge.

(c)(4)

The reviewing judge may deny a motion not filed in a timely manner.

Cite as Utah. R. Civ. P. 63

History. Amended effective May 1, 2016; amended effective April 1, 2018; amended effective May 8, 2018.

Rule 64. Writs in General

(a)

Definitions. As used in Rules 64, 64A, 64B /a, href="rb://s/3017"64C, 64D, 64E, 69A, 69B and 69C:

(a)(1)

"Claim" means a claim, counterclaim, cross claim, third party claim or any other claim.

(a)(2)

"Defendant" means the party against whom a claim is filed or against whom judgment has been entered.

(a)(3)

"Deliver" means actual delivery or to make the property available for pick up and give to the person entitled to delivery written notice of availability.

(a)(4)

"Disposable earnings" means that part of earnings for a pay period remaining after the deduction of all amounts required by law to be withheld.

(a)(5)

"Earnings" means compensation, however denominated, paid or payable to an individual for personal services, including periodic payments pursuant to a pension or retirement program. Earnings accrue on the last day of the period in which they were earned.

(a)(6)

"Notice of exemptions" means a form that advises the defendant or a third person that certain property is or may be exempt from seizure under state or federal law. The notice shall list examples of exempt property and indicate that other exemptions may be available. The notice shall instruct the defendant of the deadline for filing a reply and request for hearing.

(a)(7)

"Officer" means any person designated by the court to whom the writ is issued, including a sheriff, constable, deputy thereof or any person appointed by the officer to hold the property.

(a)(8)

"Plaintiff" means the party filing a claim or in whose favor judgment has been entered.

(a)(9)

"Property" means the defendant's property of any type not exempt from seizure. Property includes but is not limited to real and personal property, tangible and intangible property, the right to property whether due or to become due, and an obligation of a third person to perform for the defendant.

(a)(10)

"Serve" with respect to parties means any method of service authorized by Rule 5 and with respect to non-parties means any manner of service authorized by Rule 4.

(b)

Security.

(b)(1)

Amount. When security is required of a party, the party shall provide security in the sum and form the court deems adequate. For security by the plaintiff the amount should be sufficient to reimburse other parties for damages, costs and attorney fees incurred as a result of a writ wrongfully obtained. For security by the defendant, the amount should be equivalent to the amount of the claim or judgment or the value of the defendant's interest in the property. In fixing the amount, the court may consider any relevant factor. The court may relieve a party from the necessity of providing security if it appears that none of the parties will incur damages, costs or attorney fees as a result of a writ wrongfully obtained or if there exists some other substantial reason for dispensing with security. The amount of security does not establish or limit the amount of damages, costs or attorney fees recoverable if the writ is wrongfully obtained.

Commented [JH131]:

Commented [JH132]:

Commented [JH133]:

(b)(2)

Jurisdiction over surety. A surety submits to the jurisdiction of the court and irrevocably appoints the clerk of the court as agent upon whom papers affecting the surety's liability may be served. The surety shall file with the clerk of the court the address to which the clerk may mail papers. The surety's liability may be enforced on motion without the necessity of an independent action. If the opposing party recovers judgment or if the writ is wrongfully obtained, the surety will pay the judgment, damages, costs and attorney fees not to exceed the sum specified in the contract. The surety is responsible for return of property ordered returned.

Commented [JH134]:

(b)(3)

Objection. The court may issue additional writs upon the original security subject to the objection of the opposing party. The opposing party may object to the sufficiency of the security or the sufficiency of the sureties within five days after service of the writ. The burden to show the sufficiency of the security and the sufficiency of the sureties is on the proponent of the security.

(b)(4)

Security of governmental entity. No security is required of the United States, the State of Utah, or an officer, agency, or subdivision of either, nor when prohibited by law.

(c)

Procedures in aid of writs.

(c)(1)

Referee. The court may appoint a referee to monitor hearings under this subsection.

(c)(2)

Hearing; witnesses; discovery. The court may conduct hearings as necessary to identify property and to apply the property toward the satisfaction of the judgment or order. Witnesses may be subpoenaed to appear, testify and produce records. The court may permit discovery.

(c)(3)

Restraint. The court may forbid any person from transferring, disposing or interfering with the property.

(d)

Issuance of writ; service

(d)(1)

Clerk to issue writs. The clerk of the court shall issue writs. A court in which a transcript or abstract of a judgment or order has been filed has the same authority to issue a writ as the court that entered the judgment or order. If the writ directs the seizure of real property, the clerk of the court shall issue the writ to the sheriff of the county in which the real property is located. If the writ directs the seizure of personal property, the clerk of the court may issue the writ to an officer of any county.

(d)(2)

Content. The writ may direct the officer to seize the property, to keep the property safe, to deliver the property to the plaintiff, to sell the property, or to take other specified actions. If the writ is to enforce a judgment or order for the payment of money, the writ shall specify the amount ordered to be paid and the amount due.

(d)(2)(A)

If the writ is issued ex parte before judgment, the clerk shall attach to the writ plaintiff's affidavit, detailed description of the property, notice of hearing, order authorizing the writ, notice of exemptions and reply form.

(d)(2)(B)

If the writ is issued before judgment but after a hearing, the clerk shall attach to the writ plaintiff's affidavit and detailed description of the property.

(d)(2)(C)

If the writ is issued after judgment, the clerk shall attach to the writ plaintiff's application, detailed description of the property, the judgment, notice of exemptions and reply form.

(d)(3)

Service.

(d)(3)(A)

Upon whom; effective date. The officer shall serve the writ and accompanying papers on the defendant, and, as applicable, the garnishee and any person named by the plaintiff as claiming an interest in the property. The officer may simultaneously serve notice of the date, time and place of sale. A writ is effective upon service.

(d)(3)(B)

Limits on writs of garnishment.

(d)(3)(B)(i)

A writ of garnishment served while a previous writ of garnishment is in effect is effective upon expiration of the previous writ; otherwise, a writ of garnishment is effective upon service.

(d)(3)(B)(ii)

Only one writ of garnishment of earnings may be in effect at one time. One additional writ of garnishment of earnings for a subsequent pay period may be served on the garnishee while an earlier writ of continuing garnishment is in effect.

(d)(3)(C)

Return; inventory. Within 14 days after service, the officer shall return the writ to the court with proof of service. If property has been seized, the officer shall include an inventory of the property and whether the property is held by the officer or the officer's designee. If a person refuses to give the officer an affidavit describing the property, the officer shall indicate the fact of refusal on the return, and the court may require that person to pay the costs of any proceeding taken for the purpose of obtaining such information.

(d)(3)(D)

Service of writ by publication. The court may order service of a writ by publication upon a person entitled to notice in circumstances in which service by publication of a summons and complaint would be appropriate under Rule 4.

(d)(3)(D)(i)

If service of a writ is by publication, substantially the following shall be published under the caption of the case:

To _____, [Defendant/Garnishee/Claimant]:

A writ of _____ has been issued in the above-captioned case commanding the officer of _____ County as follows:

[Quoting body of writ]

Your rights may be adversely affected by these proceedings. Property in which you have an interest may be seized to pay a judgment or order. You have the right to claim property exempt from seizure under statutes of the United States or this state, including Utah Code, Title 78B, Chapter 5, Part 5.

(d)(3)(D)(ii)

The notice shall be published in a newspaper of general circulation in each county in which the property is located at least 14 days prior to the due date for the reply or at least 14 days prior to the date of any sale, or as the court orders. The date of publication is the date of service.

(e)

Claim to property by third person.

(e)(1)

Claimant's rights. Any person claiming an interest in the property has the same rights and obligations as the defendant with respect to the writ and with respect to providing and objecting to security. Any claimant named by the plaintiff and served with the writ and accompanying papers shall exercise those rights and obligations within the same time allowed the defendant. Any claimant not named by the plaintiff and not served with the writ and accompanying papers may exercise those rights and obligations at any time before the property is sold or delivered to the plaintiff.

(e)(2)

Join claimant as defendant. The court may order any named claimant joined as a defendant in interpleader. The plaintiff shall serve the order on the claimant. The claimant is thereafter a defendant to the action and shall answer within 14 days, setting forth any claim or defense. The court may enter judgment for or against the claimant to the limit of the claimant's interest in the property.

(e)(3)

Plaintiff's security. If the plaintiff requests that an officer seize or sell property claimed by a person other than the defendant, the officer may request that the court require the plaintiff to file security.

(f)

Discharge of writ; release of property.

(f)(1)

By defendant. At any time before notice of sale of the property or before the property is delivered to the plaintiff, the defendant may file security and a motion to discharge the writ. The plaintiff may object to the sufficiency of the security or the sufficiency of the sureties within 7 days after service of the motion. At any time before notice of sale of the property or before the property is delivered to the plaintiff, the defendant may file a motion to discharge the writ on the ground that the writ was wrongfully obtained. The court shall give the plaintiff reasonable opportunity to correct a defect. The defendant shall serve the order to discharge the writ upon the officer, plaintiff, garnishee and any third person claiming an interest in the property.

(f)(2)

By plaintiff. The plaintiff may discharge the writ by filing a release and serving it upon the officer, defendant, garnishee and any third person claiming an interest in the property.

(f)(3)

Disposition of property. If the writ is discharged, the court shall order any remaining property and proceeds of sales delivered to the defendant.

(f)(4)

Copy filed with county recorder. If an order discharges a writ upon property seized by filing with the county recorder, the officer or a party shall file a certified copy of the order with the county recorder.

(f)(5)

Service on officer; disposition of property. If the order discharging the writ is served on the officer:

(f)(5)(A)

before the writ is served, the officer shall return the writ to the court;

(f)(5)(B)

while the property is in the officer's custody, the officer shall return the property to the defendant; or

(f)(5)(C)

after the property is sold, the officer shall deliver any remaining proceeds of the sale to the defendant.

Cite as Utah. R. Civ. P. 64

Rule 64D. Writ of Garnishment

(a)

Availability. A writ of garnishment is available to seize property of the defendant in the possession or under the control of a person other than the defendant. A writ of garnishment is available after final judgment or after the claim has been filed and prior to judgment. The maximum portion of disposable earnings of an individual subject to seizure is the lesser of:

(a)(1)

50% of the defendant's disposable earnings for a writ to enforce payment of a judgment for failure to support dependent children or 25% of the defendant's disposable earnings for any other judgment; or

(a)(2)

the amount by which the defendant's disposable earnings for a pay period exceeds the number of weeks in that pay period multiplied by thirty times the federal minimum hourly wage prescribed by the Fair Labor Standards Act in effect at the time the earnings are payable.

(b)

Grounds for writ before judgment. In addition to the grounds required in Rule 64A, the grounds for a writ of garnishment before judgment require all of the following:

(b)(1)

that the defendant is indebted to the plaintiff;

(b)(2)

that the action is upon a contract or is against a defendant who is not a resident of this state or is against a foreign corporation not qualified to do business in this state;

(b)(3)

that payment of the claim has not been secured by a lien upon property in this state;

(b)(4)

that the garnishee possesses or controls property of the defendant; and

(b)(5)

that the plaintiff has attached the garnishee fee established by Utah Code Section 78A-2-216.

(c)

Statement. The application for a post-judgment writ of garnishment shall state:

(c)(1)

if known, the nature, location, account number and estimated value of the property and the name, address and phone number of the person holding the property;

(c)(2)

whether any of the property consists of earnings;

(c)(3)

the amount of the judgment and the amount due on the judgment;

(c)(4)

the name, address and phone number of any person known to the plaintiff to claim an interest in the property; and

(c)(5)

that the plaintiff has attached or will serve the garnishee fee established by Utah Code Section 78A-2-216.

(d)

Defendant identification. The plaintiff shall submit with the affidavit or application a copy of the judgment information statement described in Utah Code Section 78B-5-201 or the defendant's name and address and, if known, the last four digits of the defendant's social security number and driver license number and state of issuance.

(e)

Interrogatories. The plaintiff shall submit with the affidavit or application interrogatories to the garnishee inquiring:

(e)(1)

whether the garnishee is indebted to the defendant and the nature of the indebtedness;

(e)(2)

whether the garnishee possesses or controls any property of the defendant and, if so, the nature, location and estimated value of the property;

(e)(3)

whether the garnishee knows of any property of the defendant in the possession or under the control of another, and, if so, the nature, location and estimated value of the property and the name, address and phone number of the person with possession or control;

(e)(4)

whether the garnishee is deducting a liquidated amount in satisfaction of a claim against the plaintiff or the defendant, a designation as to whom the claim relates, and the amount deducted;

(e)(5)

the date and manner of the garnishee's service of papers upon the defendant and any third persons;

(e)(6)

the dates on which previously served writs of continuing garnishment were served; and

(e)(7)

any other relevant information plaintiff may desire, including the defendant's position, rate and method of compensation, pay period, and the computation of the amount of defendant's disposable earnings.

(f)

Content of writ; priority. The writ shall instruct the garnishee to complete the steps in subsection (g) and instruct the garnishee how to deliver the property. Several writs may be issued at the same time so long as only one garnishee is named in a writ. Priority among writs of garnishment is in order of service. A writ of garnishment of earnings applies to the earnings accruing during the pay period in which the writ is effective.

(g)

Garnishee's responsibilities. The writ shall direct the garnishee to complete the following within seven business days of service of the writ upon the garnishee:

(g)(1)

answer the interrogatories under oath or affirmation;

(g)(2)

serve the answers on the plaintiff; and

(g)(3)

serve the writ, answers, notice of exemptions and two copies of the reply form upon the defendant and any other person shown by the records of the garnishee to have an interest in the property.

The garnishee may amend answers to interrogatories to correct errors or to reflect a change in circumstances by serving the amended answers in the same manner as the original answers.

(h)

Reply to answers; request for hearing.

(h)(1)

The plaintiff or defendant may file and serve upon the garnishee a reply to the answers, a copy of the garnishee's answers, and a request for a hearing. The reply shall be filed and served within 14 days after service of the answers or amended answers, but the court may deem the reply timely if filed before notice of sale of the property or before the property is delivered to the plaintiff. The reply may:

(h)(1)(A)

challenge the issuance of the writ;

(h)(1)(B)

challenge the accuracy of the answers;

(h)(1)(C)

claim the property or a portion of the property is exempt; or

(h)(1)(D)

claim a set off.

(h)(2)

The reply is deemed denied, and the court shall conduct an evidentiary hearing as soon as possible and not to exceed 14 days.

(h)(3)

If a person served by the garnishee fails to reply, as to that person:

(h)(3)(A)

the garnishee's answers are deemed correct; and

(h)(3)(B)

the property is not exempt, except as reflected in the answers.

(i)

Delivery of property. A garnishee shall not deliver property until the property is due the defendant. Unless otherwise directed in the writ, the garnishee shall retain the property until 21 days after service by the garnishee under subsection (g). If the garnishee is served with a reply within that time, the garnishee shall retain the property and comply with the order of the court entered after the hearing on the reply. Otherwise, the garnishee shall deliver the property as provided in the writ.

(j)

Liability of garnishee.

(j)(1)

A garnishee who acts in accordance with this rule, the writ or an order of the court is released from liability, unless answers to interrogatories are successfully controverted.

(j)(2)(A)

If the garnishee fails to comply with this rule, the writ or an order of the court, the court may order the garnishee to appear and show cause why the garnishee should not be ordered to pay such amounts as are just, including the value of the property or the balance of the judgment, whichever is less, and reasonable costs and attorney fees incurred by parties as a result of the garnishee's failure. If the garnishee shows that the steps taken to secure the property were reasonable, the court may excuse the garnishee's liability in whole or in part.

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(j)(2)(B)

The creditor must attach to the motion for an order to show cause a statement that the creditor has in good faith conferred or attempted to confer with the garnishee in an effort to settle the issue without court action.

(j)(3)

No person is liable as garnishee by reason of having drawn, accepted, made or endorsed any negotiable instrument that is not in the possession or control of the garnishee at the time of service of the writ.

(j)(4)

Any person indebted to the defendant may pay to the officer the amount of the debt or so much as is necessary to satisfy the writ, and the officer's receipt discharges the debtor for the amount paid.

(j)(5)

A garnishee may deduct from the property any liquidated claim against the plaintiff or defendant.

(k)

Property as security.

(k)(1)

If property secures payment of a debt to the garnishee, the property need not be applied at that time but the writ remains in effect, and the property remains subject to being applied upon payment of the debt. If property secures payment of a debt to the garnishee, the plaintiff may obtain an order authorizing the plaintiff to buy the debt and requiring the garnishee to deliver the property.

(k)(2)

If property secures an obligation that does not require the personal performance of the defendant and that can be performed by a third person, the plaintiff may obtain an order authorizing the plaintiff or a third person to perform the obligation and requiring the

garnishee to deliver the property upon completion of performance or upon tender of performance that is refused.

(l)

Writ of continuing garnishment.

(l)(1)

After final judgment, the plaintiff may obtain a writ of continuing garnishment against any non exempt periodic payment. All provisions of this rule apply to this subsection, but this subsection governs over a contrary provision.

(l)(2)

A writ of continuing garnishment applies to payments to the defendant from the effective date of the writ until the earlier of the following:

(l)(2)(A)

one year;

(l)(2)(B)

120 days after service of a second or subsequent writ of continuing garnishment;

(l)(2)(C)

the last periodic payment;

(l)(2)(D)

the judgment is stayed, vacated or satisfied in full; or

(l)(2)(E)

the writ is discharged.

(l)(3)

Within seven days after the end of each payment period, the garnishee shall with respect to that period:

(l)(3)(A)

answer the interrogatories under oath or affirmation;

(l)(3)(B)

serve the answers to the interrogatories on the plaintiff, the defendant and any other person shown by the records of the garnishee to have an interest in the property; and

(l)(3)(C)

deliver the property as provided in the writ.

(l)(4)

Any person served by the garnishee may reply as in subsection (g), but whether to grant a hearing is within the judge's discretion.

(l)(5)

A writ of continuing garnishment issued in favor of the Office of Recovery Services or the Department of Workforce Services of the

state of Utah to recover overpayments:

(l)(5)(A)

is not limited to 120 days;

(l)(5)(B)

has priority over other writs of continuing garnishment; and

(l)(5)(C)

if served during the term of another writ of continuing garnishment, tolls that term and preserves all priorities until the expiration of the state's writ.

Cite as Utah. R. Civ. P. 64D

Rule 65A. Injunctions

(a)

Preliminary injunctions.

(a)(1)

Notice. No preliminary injunction shall be issued without notice to the adverse party.

(a)(2)

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

(b)

Temporary restraining orders.

(b)(1)

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

Commented [JH136]:

(b)(2)

Form of order. Every temporary restraining order shall be endorsed with the date and hour of issuance and shall be filed forthwith in the clerk's office and entered of record. The order shall define the injury and state why it is irreparable. The order shall expire by its terms within such time after entry, not to exceed 14 days, as the court fixes, unless within the time so fixed the order, for good cause shown, is extended for a like period or unless the party against whom the order is directed consents that it may be extended for a longer period. The reasons for the extension shall be entered of record.

(b)(3)

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

(b)(4)

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

(c)

Security.

(c)(1)

Requirement. The court shall condition issuance of the order or injunction on the giving of security by the applicant, in such sum and form as the court deems proper, unless it appears that none of the parties will incur or suffer costs, attorney fees or damage as the

result of any wrongful order or injunction, or unless there exists some other substantial reason for dispensing with the requirement of security. No such security shall be required of the United States, the State of Utah, or of an officer, agency, or subdivision of either; nor shall it be required when it is prohibited by law.

(c)(2)

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

(c)(3)

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

(d)

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

Commented [JH137]:

(e)

Grounds. A restraining order or preliminary injunction may issue only upon a showing by the applicant that:

(e)(1)

The applicant will suffer irreparable harm unless the order or injunction issues;

(e)(2)

The threatened injury to the applicant outweighs whatever damage the proposed order or injunction may cause the party restrained or enjoined;

(e)(3)

The order or injunction, if issued, would not be adverse to the public interest; and

(e)(4)

There is a substantial likelihood that the applicant will prevail on the merits of the underlying claim, or the case presents serious issues on the merits which should be the subject of further litigation.

(f)

Domestic relations cases. Nothing in this rule shall be construed to limit the equitable powers of the courts in domestic relations cases.

Cite as Utah. R. Civ. P. 65A

Note:

Advisory Committee Notes

Rule 65A has been materially revised from the former rule. Some of the changes in the rule are the result of suggestions from Utah's judges, all of whom were asked for their comments on specific ways to improve injunction practice. Although most paragraphs have been changed, there are two major revisions. First, under paragraph (b) of the present rule, the court now has explicit authority to order the consolidation of trial on the merits with the hearing on a preliminary injunction. Second, the grounds for the issuance of temporary restraining orders and preliminary injunctions have been modernized and clarified in paragraph (e). Portions of the rule have been reorganized for purposes of clarity.

Paragraph (a). Subparagraph (a)(1) is identical to paragraph (a) of the former rule. It is also identical to the corresponding subparagraph in Rule 65, Federal Rules of Civil Procedure. Subparagraph (a)(2) is entirely new to the Utah rules. It is borrowed from subparagraph (a)(2) of the federal rule. It allows the court, in its discretion, to adjudicate the entire case at the time of the preliminary injunction hearing. If the court decides not to consolidate the trial on the merits with the preliminary injunction hearing, admissible evidence received at the preliminary injunction hearing nevertheless becomes part of the trial record and need not be introduced again.

Paragraph (b). This paragraph is similar to paragraph (b) of the former rule. It has been reorganized for clarity and has been modernized in other respects. Subparagraph (1) prohibits the issuance of a temporary restraining order unless two conditions are met. First, as in the former rule, the record must disclose that irreparable injury, loss, or damage will result if the court does not intervene. Second, the applicant or the applicant's attorney must provide written certification of any effort to give notice and the reasons for which notice should not be required. The latter requirement is new. The language in subparagraphs (3) and (4) has been modernized and clarified.

Commented [JH138]:

Paragraph (c). This paragraph has been revised to reflect developments in the case law and a new rule in this state on damages for wrongfully issued injunctions. Subparagraph (1) makes it clear that the court may decline to require security if it appears that none of the parties will suffer expense or damages from a wrongful temporary restraining order or preliminary injunction, or if, in the particular case, there is some other substantial reason for dispensing with the requirement of security. *See Corporation of President of Church of Jesus Christ of Latter-Day Saints v. Wallace*, 573 P.2d 1285, 1286-87 (Utah 1978). Otherwise, the court should require security in an appropriate amount. Subparagraph (2), which is new, makes it clear that the amount of the security required by the court does not limit the recovery that may be awarded to a wrongfully restrained party. This provision represents a change in Utah law. Compare with *Mountain States Tel. & Tel. Co. v. Atkin, Wright & Mills*, 681 P.2d 1258 (Utah 1984). In the committee's view, the prior rule was unfair to the wrongfully enjoined party whose damages from the injunction may far exceed the amount of security estimated at the outset of the case. Subparagraph (2) also explicitly allows a wrongfully enjoined party to recover attorney fees. Subparagraph (3) is closely similar to language in a portion of the former rule's paragraph (c).

Commented [JH139]:

Paragraph (d). This paragraph is similar to the corresponding paragraph in the former rule. Borrowing a concept from paragraph (b) of the former rule, it requires the court to state its reasons for granting a temporary restraining order without notice.

Paragraph (e). This paragraph completely revises the corresponding paragraph of the former rule. The committee sought to modernize the grounds for the issuance of injunctive orders by incorporating standards consistent with national trends. There is little case law in Utah interpreting the grounds for injunctive orders, and the committee was divided as to whether the development of grounds should be left entirely to the courts. A majority of the committee believed, however, that courts and litigants would benefit from explicit standards drawn from sound authority. The standards set forth in paragraph (e) are derived from *Tri-State Generation & Transmission Ass'n. v. Shoshone River Power, Inc.*, 805 F.2d 351, 355 (10th Cir. 1986), and *Otero Savings & Loan Ass'n. v. Federal Reserve Bank*, 665 F.2d 275, 278 (10th Cir. 1981). Federal courts require proof of compliance with each of the four standards, but the weight given to each standard may vary. The substantial body of federal case authority in this area should assist the Utah courts in developing the law under paragraph (e).

Paragraph (f). This paragraph is new. It acknowledges that in domestic relations cases courts must occasionally enter prohibitory or mandatory orders under circumstances that do not permit compliance with the procedures in Rule 65A. The committee believed that this rule should not be construed to limit the authority of the court in domestic relations cases.

Rule 65B. Extraordinary Relief

(a)

Availability of remedy. Where no other plain, speedy and adequate remedy is available, a person may petition the court for extraordinary relief on any of the grounds set forth in paragraph (b) (involving wrongful restraint on personal liberty), paragraph (c) (involving the wrongful use of public or corporate authority) or paragraph (d) (involving the wrongful use of judicial authority, the failure to exercise such authority, and actions by the Board of Pardons and Parole). There shall be no special form of writ. Except for instances governed by Rule 65C, the procedures in this rule shall govern proceedings on all petitions for extraordinary relief. To the extent that this rule does not provide special procedures, proceedings on petitions for extraordinary relief shall be governed by the procedures set forth elsewhere in these rules.

(b)

Wrongful restraints on personal liberty.

(b)(1)

Scope. Except for instances governed by Rule 65C, this paragraph shall govern all petitions claiming that a person has been wrongfully restrained of personal liberty, and the court may grant relief appropriate under this paragraph.

(b)(2)

Commencement. The proceeding shall be commenced by filing a petition with the clerk of the court in the district in which the petitioner is restrained or the respondent resides or in which the alleged restraint is occurring.

(b)(3)

Contents of the petition and attachments. The petition shall contain a short, plain statement of the facts on the basis of which the petitioner seeks relief. It shall identify the respondent and the place where the person is restrained. It shall state the cause or pretense of the restraint, if known by the petitioner. It shall state whether the legality of the restraint has already been adjudicated in a prior proceeding and, if so, the reasons for the denial of relief in the prior proceeding. The petitioner shall attach to the petition any legal process available to the petitioner that resulted in restraint. The petitioner shall also attach to the petition a copy of the pleadings filed by the petitioner in any prior proceeding that adjudicated the legality of the restraint.

(b)(4)

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.

(b)(5)

Dismissal of frivolous claims. On review of the petition, if it is apparent to the court that the legality of the restraint has already been adjudicated in a prior proceeding, or if for any other reason any claim in the petition shall appear frivolous on its face, the court shall forthwith issue an order dismissing the claim, stating that the claim is frivolous on its face and the reasons for this conclusion. The order need not state findings of fact or conclusions of law. The order shall be sent by mail to the petitioner. Proceedings on the claim shall terminate with the entry of the order of dismissal.

(b)(6)

Responsive pleadings. If the petition is not dismissed as being frivolous on its face, the court shall direct the clerk of the court to serve a copy of the petition and a copy of any memorandum upon the respondent by mail. At the same time, the court may issue an order directing the respondent to answer or otherwise respond to the petition, specifying a time within which the respondent must comply. If the circumstances require, the court may also issue an order directing the respondent to appear before the court for a hearing on the legality of the restraint. An answer to a petition shall state plainly whether the respondent has restrained the person alleged to have been restrained, whether the person so restrained has been transferred to any other person, and if so, the identity of the transferee, the date of the transfer, and the reason or authority for the transfer. Nothing in this paragraph shall be construed to prohibit the court from ruling upon the petition based upon a dispositive motion.

(b)(7)

Temporary relief. If it appears that the person alleged to be restrained will be removed from the court's jurisdiction or will suffer irreparable injury before compliance with the hearing order can be enforced, the court shall issue a warrant directing the sheriff to bring the respondent before the court to be dealt with according to law. Pending a determination of the petition, the court may place the person alleged to have been restrained in the custody of such other persons as may be appropriate.

(b)(8)

Alternative service of the hearing order. If the respondent cannot be found, or if it appears that a person other than the respondent has custody of the person alleged to be restrained, the hearing order and any other process issued by the court may be served on the person having custody in the manner and with the same effect as if that person had been named as respondent in the action.

(b)(9)

Avoidance of service by respondent. If anyone having custody of the person alleged to be restrained avoids service of the hearing order or attempts wrongfully to remove the person from the court's jurisdiction, the sheriff shall immediately arrest the responsible person. The sheriff shall forthwith bring the person arrested before the court to be dealt with according to law.

(b)(10)

Hearing or other proceedings. In the event that the court orders a hearing, the court shall hear the matter in a summary fashion and shall render judgment accordingly. The respondent or other person having custody shall appear with the person alleged to be restrained or shall state the reasons for failing to do so. The court may nevertheless direct the respondent to bring before it the person alleged to be restrained. If the petitioner waives the right to be present at the hearing, the court shall modify the hearing order accordingly. The hearing order shall not be disobeyed for any defect of form or any misdescription in the order or the petition, if enough is stated to impart the meaning and intent of the proceeding to the respondent.

(c)

Wrongful use of or failure to exercise public authority.

(c)(1)

Who may petition the court; security. The attorney general may, and when directed to do so by the governor shall, petition the court for relief on the grounds enumerated in this paragraph. Any person who is not required to be represented by the attorney general and who is aggrieved or threatened by one of the acts enumerated in subparagraph (2) of this paragraph may petition the court under this paragraph if (A) the person claims to be entitled to an office unlawfully held by another or (B) if the attorney general fails to file a petition under this paragraph after receiving notice of the person's claim. A petition filed by a person other than the attorney general under this paragraph shall be brought in the name of the petitioner, and the petition shall be accompanied by an undertaking with sufficient sureties to pay any judgment for costs and damages that may be recovered against the petitioner in the proceeding. The sureties shall be in the form for bonds on appeal provided for in Rule 73.

(c)(2)

Grounds for relief. Appropriate relief may be granted: (A) where a person usurps, intrudes into, or unlawfully holds or exercises a public office, whether civil or military, a franchise, or an office in a corporation created by the authority of the state of Utah; (B) where a public officer does or permits any act that results in a forfeiture of the office; (C) where persons act as a corporation in the state of Utah without being legally incorporated; (D) where any corporation has violated the laws of the state of Utah relating to the creation, alteration or renewal of corporations; or (E) where any corporation has forfeited or misused its corporate rights, privileges or franchises.

(c)(3)

Proceedings on the petition. On the filing of a petition, the court may require that notice be given to adverse parties before issuing a hearing order, or may issue a hearing order requiring the adverse party to appear at the hearing on the merits. The court may also grant temporary relief in accordance with the terms of Rule 65A.

(d)

Wrongful use of judicial authority or failure to comply with duty; actions by board of pardons and parole.

(d)(1)

Who may petition. A person aggrieved or whose interests are threatened by any of the acts enumerated in this paragraph may petition the court for relief.

(d)(2)

Grounds for relief. Appropriate relief may be granted: (A) where an inferior court, administrative agency, or officer exercising judicial functions has exceeded its jurisdiction or abused its discretion; (B) where an inferior court, administrative agency, corporation or person has failed to perform an act required by law as a duty of office, trust or station; (C) where an inferior court, administrative agency, corporation or person has refused the petitioner the use or enjoyment of a right or office to which the petitioner is entitled; or (D) where the Board of Pardons and Parole has exceeded its jurisdiction or failed to perform an act required by constitutional or statutory law.

(d)(3)

Proceedings on the petition. On the filing of a petition, the court may require that notice be given to adverse parties before issuing a hearing order, or may issue a hearing order requiring the adverse party to appear at the hearing on the merits. The court may direct the inferior court, administrative agency, officer, corporation or other person named as respondent to deliver to the court a transcript or other record of the proceedings. The court may also grant temporary relief in accordance with the terms of Rule 65A.

(d)(4)

Scope of review. Where the challenged proceedings are judicial in nature, the court's review shall not extend further than to determine whether the respondent has regularly pursued its authority.

Cite as Utah. R. Civ. P. 65B

Note:

Advisory Committee Notes

This rule represents a complete reorganization of the former rule. This rule also revises parts of the former rule dealing with habeas corpus and post-conviction remedies. The rule applies generally to proceedings that are necessitated by the absence of another plain, speedy and adequate remedy in the court. After the rule's introductory paragraph, each subsequent paragraph is intended to deal with a separate type of proceeding. Thus, subparagraph (b) deals with proceedings involving wrongful restraint on personal liberty other than those governed by Rule 65C ; paragraph (c) deals with proceedings involving the wrongful use of public or corporate authority; and paragraph (d) deals with proceedings involving the wrongful use of judicial authority or the failure to exercise such authority. Paragraph (d) also deals with petitions challenging actions by the Board of Pardons and Parole and the failure of the Board to perform a required act. To the extent that the special procedures set forth in these paragraphs do not cover specific procedural issues that arise during a proceeding, the normal rules of civil procedure will apply.

This rule effectively eliminates the concept of the "writ" from extraordinary relief procedure. In the view of the advisory committee, the concept was used inconsistently and confusingly in the former rule, and there was disagreement among judges and lawyers as to what it meant in actual practice. The concept has been replaced with terms such as "hearing order" and "relief" that are more descriptive of the procedural reality.

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Paragraph (b). This paragraph governs all petitions claiming that a person has been wrongfully restrained of personal liberty other than those specifically governed by paragraph Rule 65C. It replaces paragraph (f) of the former rule. Paragraph (b) endeavors to simplify the procedure in habeas corpus cases and provides for a means of summary dismissal of frivolous claims. Thus, if it is apparent to the court that the claim is "frivolous on its face", the court may issue an order dismissing the claim, which terminates the proceeding. Apart from this significant change from former practice, paragraph (b) is patterned after the former rule.

Paragraphs (c) and (d) replace paragraph (b) of the former rule. The committee's general purpose in drafting these paragraphs was to

simplify and clarify the requirements of the preexisting paragraph.

Paragraph (c). Paragraph (c) replaces paragraph (b)(1) of the former rule. This paragraph deals generally with proceedings for the unlawful use of public office or corporate franchises. As a general matter, the attorney general may seek relief on grounds enumerated in the paragraph. Any other person, including a governmental officer or entity not required to be represented by the attorney general, may also seek relief under paragraph (c) if the person claims to be entitled to an office unlawfully held by another or if the attorney general fails to file a petition under paragraph (c) after receiving notice of the person's claim. In allowing appropriate governmental entities and officers to proceed under this paragraph, the rule eliminates a procedural barrier that previously prevented anyone other than the attorney general and "private" persons to seek relief. Although the rule removes the procedural barrier, it was not intended to modify the substantive rules that limit the authority or standing of any governmental entity or officer. Nor was the rule intended to modify the constitutional or statutory authority of the attorney general. Since paragraph (c) provides only a general outline of procedures to be used in such proceedings, litigants should look to the other rules of civil procedure for guidance on specific questions not covered by paragraph (c). In proceedings under this paragraph and paragraph (d), parties seeking temporary relief in advance of a hearing on the merits should comply with the requirements of Rule 65A.

Paragraph (d). This paragraph governs relatively unusual proceedings in which the normal rules of appellate procedure are inadequate to provide redress for an abuse by a court, administrative agency, or officer exercising judicial or administrative functions. This paragraph replaces subparagraph (2), (3) and (4) of paragraph (b) of the former rule. This paragraph allows the court wide discretion in the manner in which such proceedings are handled. Like the former rule, the scope of review under this paragraph is limited to determining whether the respondent has regularly pursued its authority.

1992 Revisions.

These revisions harmonize parallel provisions of the rule and address technical problems relating to venue and the content of memoranda and orders in habeas corpus and post-conviction proceedings.

Paragraph (b). Changes to this paragraph affect the venue requirements for one category of extraordinary relief petition. The general rule established in the paragraph is that petitions governed by paragraph (b) must be commenced in the district court in the county in which the commitment leading to confinement was issued. Challenges to parole violation proceedings, however, should be filed in the district court in the county in which the petitioner is located.

Paragraph (c). The changes to this paragraph enlarge the discretion of the court in dealing with those petitions for wrongful restraint that the paragraph governs. In dismissing claims that are frivolous on their face, the court is relieved of the responsibility to state findings of fact or conclusions of law. This change harmonizes paragraph (c) with the parallel requirements of paragraph (b)(7) of the rule. Other changes allow the court more discretion in ordering a hearing concerning unlawful restraints. The remaining changes in this paragraph clarify the contents of pleadings and memoranda filed with the court.

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. If the petition is a challenge to a felony conviction or sentence, the respondent is the state of Utah represented by the Attorney General. 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.

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(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.

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(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 102 conviction, are deemed part of the trial court record in the petition for post-conviction relief. A record 103 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.

Cite as Utah. R. Civ. P. 65C

History. Last amended March 17, 2017, effective May 1, 2017.

Note:

Advisory Committee Notes

This rule replaces former paragraph (b) of Rule 65B. It governs proceedings challenging a conviction or sentence, regardless whether the claim relates to an original commitment, a commitment for violation of probation, or a sentence other than commitment. Claims relating to the terms or conditions of confinement are governed by paragraph (b) of the Rule 65B. This rule, as a general matter, simplifies the pleading requirements and contains two significant changes from procedure under the former rule. First, the paragraph requires the clerk of court to assign post-conviction relief to the judge who sentenced the petitioner if that judge is available. Second, the rule allows the court to dismiss frivolous claims before any answer or other response is required. This provision is patterned after the federal practice pursuant to 28 U.S.C. § 2254. The advisory committee adopted the summary

procedures set forth as a means of balancing the requirements of fairness and due process on the one hand against the public's interest in the efficient adjudication of the enormous volume of post-conviction relief cases.

The requirement in paragraph (l) for a determination that discovery is necessary to discover relevant evidence that is likely to be admissible at an evidentiary hearing is a higher standard than is normally used in determining motions for discovery.

The requirement in paragraph (m) for a determination that discovery is necessary to discover relevant evidence that is likely to be admissible at an evidentiary hearing is a higher standard than is normally used in determining motions for discovery.

The 2009 amendments embrace Utah's Post-Conviction Remedies Act as the law governing post-conviction relief. It provides an independent and adequate procedural basis for dismissal without the necessity of a merits review. *See Gardner v. Galetka*, 568 F.3d 862, 884-85 (10th Cir. 2009). It is the committee's view that the added restrictions which the Act places on post-conviction petitions do not amount to a suspension of the writ of habeas corpus. *See Felker v. Turpin*, 518 U.S. 651, 664 (1996) (relying on *McCleskey v. Zant*, 499 U.S. 467, 489 (1991)). Section 78B-9-202 governs the payment of counsel in death penalty cases.

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Rule 66. Receivers

(a)

Grounds for appointment. The court may appoint a receiver:

(a)(1)

in any action in which property is in danger of being lost, removed, damaged or is insufficient to satisfy a judgment, order or claim;

(a)(2)

to carry the judgment into effect, to dispose of property according to the judgment and to preserve property during the pendency of an appeal;

(a)(3)

when a writ of execution has been returned unsatisfied or when the judgment debtor refuses to apply property in satisfaction of the judgment;

(a)(4)

when a corporation has been dissolved or is insolvent or in imminent danger of insolvency or has forfeited its corporate rights; or

(a)(5)

in all other cases in which receivers have been appointed by courts of equity.

(b)

Appointment of receiver. No party or attorney to the action, nor any person who is not impartial and disinterested as to all the parties and the subject matter of the action may be appointed receiver without the written consent of all interested parties.

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(c)

The court may require security from a receiver in accordance with Rule 64.

(d)

Oath. A receiver shall swear or affirm to perform duties faithfully.

(e)

Powers of receivers. A receiver has, under the direction of the court, power to bring and defend actions, to seize property, to collect, pay and compromise debts, to invest funds, to make transfers and to take other action as the court may authorize.

(f)

Payment of taxes before sale or pledge of personal property. Before the receiver may sell, transfer or pledge personal property, the receiver shall pay applicable taxes and shall file receipts showing payment of taxes. If there are insufficient assets to pay the taxes, the court may authorize the sale, transfer or pledge with the proceeds to be used to pay taxes. Within 14 days after payment, the receiver shall file receipts showing payment of taxes.

(g)

Real property. Before a receiver is vested with real property, the receiver shall file a certified copy of the appointment order in the office of the county recorder of the county in which the real property is located.

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.

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Rule 73. Attorney Fees

(a)

Time in which to claim. Attorney fees must be claimed by filing a motion for attorney fees no later than 14 days after the judgment is entered, except as provided in paragraph (f) of this rule, or in accordance with Utah Code § 75-3-718, and no objection to the fee has been made.

(b)

Content of motion. The motion must:

(b)(1)

specify the statute, rule, contract, judgment, or other basis entitling the party to the award;

(b)(2)

disclose, if the court orders, the terms of any agreement about fees for the services for which the claim is made;

(b)(3)

specify factors showing the reasonableness of the fees, if applicable;

(b)(4)

specify the amount of attorney fees claimed and any amount previously awarded; and

(b)(5)

disclose if the attorney fees are for services rendered to an assignee or a debt collector, the terms of any agreement for sharing the fee and a statement that the attorney will not share the fee in violation of Rule of Professional Conduct 5.4.

(c)

Supporting affidavit. The motion must be supported by an affidavit or declaration that reasonably 21 describes the time spent and work performed, including for each item of work the name, position (such as 22 attorney, paralegal, administrative assistant, etc.) and hourly rate of the persons who performed the work, and establishes that the claimed fee is reasonable.

(d)

Liability for fees. The court may decide issues of liability for fees before receiving submissions 24 on the value of services. If the court has established liability for fees, the party claiming them may file an 25 affidavit and a proposed order. The court will enter an order for the claimed amount unless another party 26 objects within 7 days after the affidavit and proposed order are filed.

(e)

Fees claimed in complaint. If a party claims attorney fees under paragraph (f), the complaint must state the basis for attorney fees, cite the law or attach a copy of the contract authorizing the award, and state that the attorney will not share the fee in violation of Rule of Professional Conduct 5.4.

(f)

Fees. Attorney fees awarded under this rule may be augmented only upon submission of a motion and supporting affidavit meeting the requirements of paragraphs (b) and (c) within a reasonable time after the fees were incurred, except as provided in paragraphs (f)(1), (f)(2) and (f)(3), and only where the augmented fees sought exceed those already awarded.

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Fees upon entry of uncontested judgment. When a party seeks a judgment , the responding party does not contest entry of judgment by presenting at a hearing either evidence or argument, and the party seeking the judgment has complied with paragraph (e) of this rule, the request for judgment may include a request for attorney fees, and the clerk or the court shall allow any amount requested up to $350.00 for such attorney fees without a supporting affidavit.

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(f)(2)

Fees upon entry of judgment after contested proceeding. When a party seeks a judgment, the responding party contests the judgment by presenting at a hearing either evidence or argument, and the party seeking the judgment has established its right to attorney fees, the request for judgment may include a request for attorney fees, and the clerk or the court shall allow any amount requested up to $750 for such attorney fees without a supporting affidavit.

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(f)(3)

Post Judgment Collections. When a party has established its entitlement to attorney fees under any paragraph of this rule, and subsequently:

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(f)(3)(A)

applies for any writ pursuant to Rules 64, 64A, 64B, 64C, 64D, or 64E ; or

(f)(3)(B)

files a motion pursuant to Rules 64(c)(2) or 58C or pursuant to Utah Code § 35A-4-314, the party may request as part of its application for a writ or its motion that the party's judgment be augmented according to the following schedule, and the clerk or the court shall allow such augmented attorney fees request without a supporting affidavit if it approves the writ or motion:

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Action

Attorney Fees Allowed

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Application for any writ under Rules 64, 64A, 64B, 64C, or 64E, and first application for a writ under Rule 64D to any particular garnishee;

$75.00

Any subsequent application for a writ under Rule 64D to the same garnishee;

$25.00

Any motion filed with the court under Rule 64(c)(2), Utah Code § 35A-4-314, or Rule 58C ;

$75.00

Any subsequent motion under Rule 64(c)(2), Utah Code § 35A-4-314, or Rule 58C filed within 6 months of the previous motion.

$25.00

(f)(4)

Fees in excess of the schedule. If a party seeks attorney fees in excess of the amounts set forth in paragraphs (f)(1), (f)(2), or (f)(3), the party shall comply with paragraphs (a) through (c) of this rule.

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(f)(5)

Objections. Nothing in this paragraph shall be deemed to eliminate any right a party may have to object to any claimed attorney fees.

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Cite as Utah. R. Civ. P. 73

History. Amended effective November 1, 2016; amended effetive November 1, 2018; amended April 23, 2019, effective May 1, 2019.

Note:

New 2019 Committee Note

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.

Advisory Committee Notes

To substitute the current 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.

The schedule does not limit the amount of a reasonable attorney fee if an affidavit is submitted. The schedule of attorney fees includes amounts for routine orders supplemental to the judgment and routine collection writs. For attorney fees for collection efforts beyond such routine steps, the lawyer should apply to the court under subsections (a) and (b).

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Rule 74. Withdrawal of Counsel

(a)

Notice of withdrawal. An attorney may withdraw from the case by filing with the court and serving on all parties a notice of withdrawal. The notice of withdrawal shall include the address of the attorney's client and a statement that no motion is pending and no hearing or trial has been set. If a motion is pending or a hearing or trial has been set, an attorney may not withdraw except upon motion and order of the court. The motion to withdraw shall describe the nature of any pending motion and the date and purpose of any scheduled hearing or trial.

(b)

Withdrawal of limited appearance. An attorney who has entered a limited appearance under Rule 75 shall withdraw from the case upon the conclusion of the purpose or proceeding identified in the Notice of Limited Appearance:

(b)(1)

by filing and serving a notice of withdrawal; or

(b)(2)

if permitted by the judge, by orally announcing the withdrawal on the record in a proceeding.

An attorney who seeks to withdraw before the conclusion of the purpose or proceeding shall proceed under subdivision (a).

(c)

Notice to Appear or Appoint Counsel. If an attorney withdraws other than under subdivision (b), dies, is suspended from the practice of law, is disbarred, or is removed from the case by the court, the opposing party shall serve a Notice to Appear or Appoint Counsel on the unrepresented party, informing the party of the responsibility to appear personally or appoint counsel. A copy of the Notice to Appear or Appoint Counsel must be filed with the court. No further proceedings shall be held in the case until 21 days after filing the Notice to Appear or Appoint Counsel unless the unrepresented party waives the time requirement or unless otherwise ordered by the court.

(d)

Substitution of counsel. An attorney may replace the counsel of record by filing and serving a notice of substitution of counsel signed by former counsel, new counsel and the client. Court approval is not required if new counsel certifies in the notice of substitution that counsel will comply with the existing hearing schedule and deadlines.

Cite as Utah. R. Civ. P. 74

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Rule 75. Limited Appearance

(a)

Purposes. An attorney acting pursuant to an agreement with a party for limited representation that complies with the Utah Rules of Professional Conduct may enter an appearance limited to one or more of the following purposes:

(a)(1)

filing a pleading or other paper;

(a)(2)

acting as counsel for a specific motion;

(a)(3)

acting as counsel for a specific discovery procedure;

(a)(4)

acting as counsel for a specific hearing, including a trial, pretrial conference, or an alternative dispute resolution proceeding; or

(a)(5)

any other purpose with leave of the court.

(b)

Notice. Before commencement of the limited appearance the attorney shall file a Notice of Limited Appearance signed by the attorney and the party or, if permitted by the judge, orally announce the limited appearance on the record in a proceeding. The Notice shall specifically describe the purpose and scope of the appearance and state that the party remains responsible for all matters not specifically described in the Notice. The clerk shall enter on the docket the attorney's name and a brief statement of the limited appearance. The Notice of Limited Appearance and all actions taken pursuant to it are subject to Rule 11.

(c)

Motion to clarify. Any party may move to clarify the description of the purpose and scope of the limited appearance.

(d)

Party remains responsible. A party on whose behalf an attorney enters a limited appearance remains responsible for all matters not specifically described in the Notice.

Cite as Utah. R. Civ. P. 75

Rule 76. Notice of Contact Information Change

An attorney and unrepresented party must promptly notify the court in writing of any change in that person's address, e-mail address, phone number or fax number.

Cite as Utah. R. Civ. P. 76

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Rule 83. Vexatious Litigants

(a)

Definitions.

(a)(1)

The court may find a person to be a "vexatious litigant" if the person, including an attorney acting pro se, without legal representation, does any of the following:

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(a)(1)(A)

In the immediately preceding seven years, the person has filed at least five claims for relief, other than small claims actions, that have been finally determined against the person, and the person does not have within that time at least two claims, other than small claims actions, that have been finally determined in that person's favor.

(a)(1)(B)

After a claim for relief or an issue of fact or law in the claim has been finally determined, the person two or more additional times re-litigates or attempts to re-litigate the claim, the issue of fact or law, or the validity of the determination against the same party in whose favor the claim or issue was determined.

(a)(1)(C)

In any action, the person three or more times does any one or any combination of the following:

(a)(1)(C)(i)

files unmeritorious pleadings or other papers,

(a)(1)(C)(ii)

files pleadings or other papers that contain redundant, immaterial, impertinent or scandalous matter,

(a)(1)(C)(iii)

conducts unnecessary discovery or discovery that is not proportional to what is at stake in the litigation, or

(a)(1)(C)(iv)

engages in tactics that are frivolous or solely for the purpose of harassment or delay.

(a)(1)(D)

The person purports to represent or to use the procedures of a court other than a court of the United States, a court created by the Constitution of the United States or by Congress under the authority of the Constitution of the United States, a tribal court recognized by the United States, a court created by a state or territory of the United States, or a court created by a foreign nation recognized by the United States.

(a)(2)

"Claim" and "claim for relief" mean a petition, complaint, counterclaim, cross claim or third-party complaint.

(b)

Vexatious litigant orders. The court may, on its own motion or on the motion of any party, enter an order requiring a vexatious litigant to:

(b)(1)

furnish security to assure payment of the moving party's reasonable expenses, costs and, if authorized, attorney fees incurred in a pending action;

(b)(2)

obtain legal counsel before proceeding in a pending action;

(b)(3)

obtain legal counsel before filing any future claim for relief;

(b)(4)

abide by a prefiling order requiring the vexatious litigant to obtain leave of the court before filing any paper, pleading, or motion in a pending action;

(b)(5)

abide by a prefiling order requiring the vexatious litigant to obtain leave of the court before filing any future claim for relief; or

(b)(6)

take any other action reasonably necessary to curb the vexatious litigant's abusive conduct.

(c)

Necessary findings and security.

(c)(1)

Before entering an order under subparagraph (b), the court must find by clear and convincing evidence that:

(c)(1)(A)

the party subject to the order is a vexatious litigant; and

(c)(1)(B)

there is no reasonable probability that the vexatious litigant will prevail on the claim.

(c)(2)

A preliminary finding that there is no reasonable probability that the vexatious litigant will prevail is not a decision on the ultimate merits of the vexatious litigant's claim.

(c)(3)

The court shall identify the amount of the security and the time within which it is to be furnished. If the security is not furnished as ordered, the court shall dismiss the vexatious litigant's claim with prejudice.

(d)

Prefiling orders in a pending action.

(d)(1)

If a vexatious litigant is subject to a prefiling order in a pending action requiring leave of the court to file any paper, pleading, or motion, the vexatious litigant shall submit any proposed paper, pleading, or motion to the judge assigned to the case and must:

(d)(1)(A)

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demonstrate that the paper, pleading, or motion is based on a good faith dispute of the facts;

(d)(1)(B)

demonstrate that the paper, pleading, or motion is warranted under existing law or a good faith argument for the extension, modification, or reversal of existing law;

(d)(1)(C)

include an oath, affirmation or declaration under criminal penalty that the proposed paper, pleading or motion is not filed for the purpose of harassment or delay and contains no redundant, immaterial, impertinent or scandalous matter;

(d)(2)

A prefiling order in a pending action shall be effective until a final determination of the action on appeal, unless otherwise ordered by the court.

(d)(3)

After a prefiling order has been effective in a pending action for one year, the person subject to the prefiling order may move to have the order vacated. The motion shall be decided by the judge to whom the pending action is assigned. In granting the motion, the judge may impose any other vexatious litigant orders permitted in paragraph (b).

(d)(4)

All papers, pleadings, and motions filed by a vexatious litigant subject to a prefiling order under this paragraph (d) shall include a judicial order authorizing the filing and any required security. If the order or security is not included, the clerk or court shall reject the paper, pleading, or motion.

(e)

Prefiling orders as to future claims.

(e)(1)

A vexatious litigant subject to a prefiling order restricting the filing of future claims shall, before filing, obtain an order authorizing the vexatious litigant to file the claim. The presiding judge of the judicial district in which the claim is to be filed shall decide the application. In granting an application, the presiding judge may impose in the pending action any of the vexatious litigant orders permitted under paragraph (b).

(e)(2)

To obtain an order under paragraph (e)(1), the vexatious litigant's application must:

(e)(2)(A)

demonstrate that the claim is based on a good faith dispute of the facts;

(e)(2)(B)

demonstrate that the claim is warranted under existing law or a good faith argument for the extension, modification, or reversal of existing law;

(e)(2)(C)

include an oath, affirmation, or declaration under criminal penalty that the proposed claim is not filed for the purpose of harassment or delay and contains no redundant, immaterial, impertinent or scandalous matter;

(e)(2)(D)

include a copy of the proposed petition, complaint, counterclaim, cross-claim, or third party complaint; and

(e)(2)(E)

include the court name and case number of all claims that the applicant has filed against each party within the preceding seven years and the disposition of each claim.

(e)(3)

A prefiling order limiting the filing of future claims is effective indefinitely unless the court orders a shorter period.

(e)(4)

After five years a person subject to a pre-filing order limiting the filing of future claims may file a motion to vacate the order. The motion shall be filed in the same judicial district from which the order entered and be decided by the presiding judge of that district.

(e)(5)

A claim filed by a vexatious litigant subject to a prefiling order under this paragraph (e) shall include an order authorizing the filing and any required security. If the order or security is not included, the clerk of court shall reject the filing.

(f)

Notice of vexatious litigant orders.

(f)(1)

The clerks of court shall notify the Administrative Office of the Courts that a pre-filing order has been entered or vacated.

(f)(2)

The Administrative Office of the Courts shall disseminate to the clerks of court a list of vexatious litigants subject to a prefiling order.

(g)

Statute of limitations or time for filing tolled. Any applicable statute of limitations or time in which the person is required to take any action is tolled until 7 days after notice of the decision on the motion or application for authorization to file.

(h)

Contempt sanctions. Disobedience by a vexatious litigant of a pre-filing order may be punished as contempt of court.

(i)

Other authority. This rule does not affect the authority of the court under other statutes and rules or the inherent authority of the court.

Rule 101. Motion Practice Before Court Commissioners

(a)

Written motion required. An application to a court commissioner for an order must be by motion which, unless made during a hearing, must be made in accordance with this rule. A motion must be in writing and state succinctly and with particularity the relief sought and the grounds for the relief sought. Any evidence necessary to support the moving party's position must be presented by way of one or more affidavits or declarations or other admissible evidence. The moving party may also file a supporting memorandum.

(b)

Time to file and serve. The moving party must file the motion and any supporting papers with the clerk of the court and obtain a hearing date and time. The moving party must serve the responding party with the motion and supporting papers, together with notice of the hearing at least 28 days before the hearing. If service is more than 90 days after the date of entry of the most recent appealable order, service may not be made through counsel.

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(c)

Response. Any other party may file a response, consisting of any responsive memorandum, affidavit(s) or declaration(s). The response must be filed and serve served on the moving party at least 14 days before the hearing.

(d)

Reply. The moving party may file a reply, consisting of any reply memorandum, affidavit(s) or declaration(s). The reply must be filed and served on the responding party at least 7 days before the hearing. The contents of the reply must be limited to rebuttal of new matters raised in the response to the motion.

(e)

Counter motion. Responding to a motion is not sufficient to grant relief to the responding party. A responding party may request affirmative relief by way of a counter motion. A counter motion need not be limited to the subject matter of the original motion. All of the provisions of this rule apply to counter motions except that a counter motion must be filed and served with the response. Any response to the counter motion must be filed and served no later than the reply to the motion. Any reply to the response to the counter motion must be filed and served at least 3 business days before the hearing. The reply must be served in a manner that will cause the reply to be actually received by the party responding to the counter motion (i.e. hand-delivery, fax or other electronic delivery as allowed by rule or agreed by the parties) at least 3 business days before the hearing. A separate notice of hearing on counter motions is not required.

(f)

Necessary documentation. Motions and responses regarding temporary orders concerning alimony, child support, division of debts, possession or disposition of assets, or litigation expenses, must be accompanied d by verified financial declarations with documentary income verification attached as exhibits, unless financial declarations and documentation are already in the court's file and remain current. Attachments for motions and responses regarding child support and child custody shall must also include a child support worksheet.

(g)

No other papers. No moving or responding papers other than those specified in this rule are permitted.

(h)

Exhibits; objection to failure to attach.

(h)(1)

Except as provided in paragraph (h)(3) of this rule, any documents such as tax returns, bank statements, receipts, photographs,

correspondence, calendars, medical records, forms, or photographs must be supplied to the court as exhibits to one or more affidavits (as appropriate) establishing the necessary foundational requirements. Copies of court papers such as decrees, orders, minute entries, motions, or affidavits, already in the court's case file, may not be filed as exhibits. Court papers from cases other than that before the court, such as protective orders, prior divorce decrees, criminal orders, information or dockets, and juvenile court orders (to the extent the law does not prohibit their filing), may be submitted as exhibits.

(h)(2)

If papers or exhibits referred to in a motion or necessary to support the moving party's position are not served with the motion, the responding party may file and serve an objection to the defect with the response. If papers or exhibits referred to in the response or necessary to support the responding party's position are not served with the response, the moving party may file and serve an objection to the defect with the reply. The defect must be cured within 2 business days after notice of the defect or at least 3 business days before the hearing, whichever is earlier.

(h)(3)

Voluminous exhibits which cannot conveniently be examined in court may not be filed as exhibits, but the contents of such documents may be presented in the form of a summary, chart or calculation under Rule 1006 of the Utah Rules of Evidence. Unless they have been previously supplied through discovery or otherwise and are readily identifiable, copies of any such voluminous documents must be supplied to the other parties at the time of the filing of the summary, chart or calculation. The originals or duplicates of the documents must be available at the hearing for examination by the parties and the commissioner. Collections of documents, such as bank statements, checks, receipts, medical records, photographs, e-mails, calendars and journal entries, that collectively exceed ten pages in length must be presented in summary form. Individual documents with specific legal significance, such as tax returns, appraisals, financial statements and reports prepared by an accountant, wills, trust documents, contracts, or settlement agreements must be submitted in their entirety.

(i)

Length. Initial and responding memoranda may not exceed 10 pages of argument without leave of the court. Reply memoranda may not exceed 5 pages of argument without leave of the court. The total number of pages submitted to the court by each party may not exceed 25 pages, including affidavits, attachments and summaries, but excluding financial declarations and income verification. The court commissioner may permit the party to file an over-length memorandum upon ex parte application and showing of good cause.

(j)

Late filings; sanctions. If a party files or serves papers beyond the time required in this rule, the court commissioner may hold or continue the hearing, reject the papers, impose costs and attorney fees caused by the failure and by the continuance, and impose other sanctions as appropriate.

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(k)

Limit on order to show cause. An application to the court for an order to show cause may be made only for enforcement of an existing order or for sanctions for violating an existing order. An application for an order to show cause must be supported by affidavit or other evidence sufficient to show cause to believe a party has violated a court order.

(l)

Hearings.

(l)(1)

The court commissioner may not hold a hearing on a motion for temporary orders before the deadline for an appearance by the respondent under Rule 12.

(l)(2)

Unless the court commissioner specifically requires otherwise, when the statement of a person is set forth in an affidavit, declaration or other document accepted by the commissioner, that person need not be present at the hearing. The statements of any person not set

forth in an affidavit, declaration or other acceptable document may not be presented by proffer unless the person is present at the hearing and the commissioner finds that fairness requires its admission.

(m)

Motions to judge. The following motions must be to the judge to whom the case is assigned: motion for alternative service; motion to waive 30-day waiting period; motion to waive divorce education class; motion for leave to withdraw after a case has been certified as ready for trial; and motions in limine. A court may provide that other motions be considered by the judge.

(n)

Objection to court commissioner's recommendation. A recommendation of a court commissioner is the order of the court until modified by the court. A party may object to the recommendation by filing an objection under Rule 108.

Cite as Utah. R. Civ. P. 101

History. Amended effective May 8, 2018.

Rule 102. Motion and Order for Payment of Costs and Fees

(a)

In an action under Utah Code Section 30-3-3(1), either party may move the court for an order requiring the other party to provide costs, attorney fees, and witness fees, including expert witness fees, to enable the moving party to prosecute or defend the action. The motion shall be accompanied by an affidavit setting forth the factual basis for the motion and the amount requested. The motion may include a request for costs or fees incurred:

Commented [JH218]:

(a)(1)

prior to the commencement of the action;

(a)(2)

during the action; or

(a)(3)

after entry of judgment for the costs of enforcement of the judgment.

(b)

The court may grant the motion if the court finds that:

(b)(1)

the moving party lacks the financial resources to pay the costs and fees;

(b)(2)

the non moving party has the financial resources to pay the costs and fees;

(b)(3)

the costs and fees are necessary for the proper prosecution or defense of the action; and

(b)(4)

the amount of the costs and fees are reasonable.

(c)

The court may deny the motion or award limited payment of costs and fees if the court finds that one or more of the grounds in paragraph (b) is missing or enters in the record the reason for denial of the motion.

(d)

The order shall specify the costs and fees to be paid within 30 days of entry of the order or the court shall enter findings of fact that a delay in payment will not create an undue hardship to the moving party and will not impair the ability of the moving party to prosecute or defend the action. The order shall specify the amount to be paid. The court may order the amount to be paid in a lump sum or in periodic payments. The court may order the fees to be paid to the moving party or to the provider of the services for which the fees are awarded.

Rule 107. Decree of Adoption; Petition to Open Adoption Records

(a)

An adoptive parent or adult adoptee may obtain a certified copy of the adoption decree upon request and presentation of positive identification.

(b)

A petition to open the court's adoption records shall identify the type of information sought and shall state good cause for access, and, in the following circumstances, shall provide the information indicated below:

(b)(1)

If the petition seeks health, genetic or social information, the petition shall state why the health history, genetic history or social history of the Bureau of Vital Statistics is insufficient for the purpose.

(b)(2)

If the petition seeks identifying information, the petition shall state why the voluntary adoption registry of the Bureau of Vital Statistics is insufficient for the purpose.

(c)

The court may order the petition served on any person having an interest in the petition, including the placement agency, the attorney handling a private placement, or the birth parents. If the court orders the petition served on any person whose identity is confidential, the court shall proceed in a manner that gives that person notice and the opportunity to be heard without revealing that person's identity or location.

Commented [JH219]:

(d)

The court shall determine whether the petitioner has shown good cause and whether the reasons for disclosure outweigh the reasons for non-disclosure.

(e)

If the court grants the petition, the court shall permit the petitioner to inspect and copy only those records that serve the purpose of the petition. The order shall expressly permit the petitioner to inspect and copy such records.

(f)

The clerk of the court shall reseal the records after the petitioner has inspected and copied them.

Tab 6

Utah State Courts

Nancy Sylvester <nancyjs@utcourts.gov>

Rule 68

Brady Brammer <bbrammer@le.utah.gov> Wed, Apr 24, 2019 at 11:32 AM
To: Nancy Sylvester <nancyjs@utcourts.gov>
Cc: Catherine Dupont <cathyd@utcourts.gov>, "Jonathan O. Hafen" <jhafen@parrbrown.com>, Mike Drechsel <michaelcd@utcourts.gov>

Nancy,

Please remove me from the agenda for today. I have not been able to coordinate with Ken (my fault) and I don't want to be in a situation where we are covering the same areas or presenting conflicting views on it. I will try to monitor what Ken has in mind for rule 68, but without better coordination, I don't feel it will be productive to have us both make presentations today. I am cc'ing Ken so that he is aware of the points made below and can take any he feels would be helpful to his presentation or effort.

With that in mind, I want to tell you the major points of what I am looking at with regards to rule 68 changes to inform the committee for today's discussion:

1. Case Load: As a member of the Executive and Judicial Compensation Commission, the primary complaint of judges is the increased case load per judge. Case load is not necessarily a perfect indicator of judicial backlog because not all cases take substantial judicial time. That said, the later stages of a case typically require much more work for judges than the earlier and middle stages (i.e. MSJs and trials). Accordingly, addressing case load and encouraging settlement prior to this point has traditionally been a priority. Many litigants have been using mediation more frequently at the encouragement of our bench. However, without potential leverage points (such as rule 68), the ability of parties to litigate

2. Rule 68: The primary purpose of rule 68 is to encourage settlement. However, the "levers" in the rule are largely ineffectual and the language is poor. Specifically:

a. Costs: It typically only includes a limited array of costs. Most cases have reasonable costs that far exceed the costs contemplated in Rule 68. Moreover, the costs are determined in a fairly arbitrary way before the courts. It would be useful to identify the costs that would be awarded and then allow the judge to determine if they are reasonable. Specific cost categories should include: filing fees, deposition fees, expert witness fees, witness fees, jury fees, etc. There should also be specific areas that are not included. By including the specific costs, it allows the parties to evaluate and make settlement offers at various stages. For example, it would encourage a Rule 68 offer prior to engagement of experts. Such costs are regularly included in other states for just this reason.

b. Fee Shifting: Rule 68 has very confusing language as to how offers are to be structured to cut off attorney fee liability through Rule 68 for parties subject to contract or statute that awards attorney fees to the prevailing party. For example, the language for "Adjusted Award" in rule 68(d) is strange and confusing. Our inns of court spent a significant time debating how to deal with the language in the rule and no one was sure what it meant. The rule should be amended to clarify Rule 68 to provide clear methods that would cut off attorney fee liability through Rule 68 offers in instances that the parties have a right to attorney fees under contract or statute.

c. Attorney Fees: The Rules committee should consider a sliding scale for attorneys fees. For example, in Florida: if the Defendant in a litigation files a "proposal for settlement" under Florida Rule of Civil Procedure 1.442, the Plaintiff must obtain a verdict of higher than seventy five percent of the amount proposed by the Defendant. If there is a defense verdict or the verdict is less than seventy five percent of the verdict, then the Plaintiff is responsible for the Defendant's reasonable attorney's fees and costs. A Plaintiff has thirty days from the date of receipt to accept or reject the Defendant's offer. They are usually sent by certified mail. If the Plaintiff does not accept the offer within thirty days of receipt, it is deemed rejected by law. The Plaintiff has the option of taking advantage of this rule as well. If the Plaintiff files a proposal for settlement under the above rules, and a verdict exceeds the offer by twenty five percent or more, then the Defendant is responsible for all of the Plaintiff's attorneys' fees and costs. I believe that 50% for both defense and Plaintiff would be appropriate for Utah's market, but I'm sure that many would have a lot to say on this and there are many ways to skin a cat (if we even want it skinned).

I would like to see items (a) and (b) addressed sooner rather than later. Item (c) is a more substantial change and needs significant debate from the stakeholders.

Basically, Rule 68 should provide pressure on parties for earlier case evaluation as well as pressure to accept reasonable settlements. As it stands now, it fails in both regards.

Thanks,

Brady Brammer

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801-839-4653 (Cell)

[Quoted text hidden]

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 7

Rule 26 Subcommittee Responses to Potential Rule Changes (May 20, 2019)

Rule	Topic	Raised By	Pending Since	Subcommittee Comments
26	Add to Rule 26(a)(1)(A): 26(a)(1)(A)(iii) each non-party identified under Rule 9(m)(1).	Nathan Whittaker	2015/12	**No change recommended.** URCP 9(l) addresses this issue; initial disclosures seems too early for this.
26	Timing of initial disclosures for third parties (see Rule 26(a)(2)) – the rule speaks only to plaintiff and defendant.	Amber Mettler	2017/ 05/01	**Change recommended.** There may be multiple defendants; some of them may seek to file a motion to dismiss or similar motion after appearance that is not an answer, and such should not have to provide initial disclosures before such motion is resolved. Also, although we felt that all parties be considered either a “plaintiff” or a “defendant,” generally speaking, we thought that “party” would make it plain that all

				parties besides plaintiffs must file their initial closures as discussed in this paragraph, and so that such is not an unfair burden to a co-defendant who has filed a motion to dismiss, that such be required within 42 days after that party's own answer filing.
26	Rule 26 has an apparent hole in it for pretrial disclosures. The required objection to the pretrial disclosures Here is some proposed language: (a)(5)Pretrial disclosures. (a)(5)(A) A party shall, without waiting for a discovery request, serve on the other parties: (a)(5)(A)(i) the name and, if not previously provided, the address and telephone number of each witness, unless solely for impeachment, separately identifying witnesses the party will call and witnesses the party may call; (a)(5)(A)(ii) the name of witnesses whose testimony is expected to be presented by transcript of a deposition and a copy of the transcript with the proposed testimony designated; and (a)(5)(A)(iii) a copy of each exhibit, including charts, summaries and demonstrative exhibits, unless solely for impeachment, separately identifying those which the party will offer and those which the party may offer. (a)(5)(B) Disclosure required by paragraph (a)(5) shall be served on the other parties at least 28 days before trial. At least 14 days before trial, a party shall serve and file counter	Judge Holmberg	2017/09	**Change recommended.** Need parallel reference to objections to witnesses as well as other disclosures. Although many objections to witnesses, as well as exhibits, must be considered within the scope of their offering at trial, this funnels down the scope of such potential objections. (If this is too demanding as to witnesses, it is likely too demanding for exhibits as well, requiring both to be

	designations of deposition testimony, objections and grounds for the objections to the use of a deposition, to witnesses, and to the admissibility of exhibits. Other than objections under Rules 402 and 403 of the Utah Rules of Evidence, objections not listed are waived unless excused by the court for good cause.			removed).
26	1. URCP 26(a)(2) - There seems to be some confusion about how URCP 26(a)(2)(B) operates in cases with multiple defendants, specifically whether each defendant has to serve its initial disclosures within 42 days of the first defendant's answer or within 42 days of its first answer. This can be problematic when 1 defendant answers and the other moves to dismiss - does the moving defendant have to serve its initial disclosures before motion to dismiss is ruled on because (1) the first answer has been filed (by the other defendant) and (2) this defendant appeared when the motion to dismiss was filed? I propose one of the following two options to clarify (with a preference for the first): **Option A** (a)(2) Timing of initial disclosures. The disclosures required by paragraph (a)(1) shall be served on the other parties: (a)(2)(A) by the plaintiff within 14 days after filing of the first answer to the complaint; and (a)(2)(B) by the defendant within 42 days after filing of the its first answer to the complaint or within 28 days after that defendant's appearance, whichever is later. **Option B** (a)(2) Timing of initial disclosures. The disclosures required by paragraph (a)(1) shall be served on the other parties: (a)(2)(A) by the plaintiff within 14 days after filing of the first answer to the complaint; and (a)(2)(B) by the defendant within 42 days after filing of the that defendant's first answer to the complaint or within 28 days after that defendant's appearance, whichever is later	Lauren DiFrancesco	2018/04	**Changes recommended**. The first change is addressed above. The second change is to state that URCP 34 governs the form of producing documents, ESI, etc. with initial disclosures.

	2. URCP 26(a)(1)(B) - I understand there have been instances where parties are producing documents in unreasonably burdensome formats (i.e., very large PDFs) which are not how they are kept in the ordinary course of business -- as is required when documents are produced pursuant to URCP 34(c). I think this could be solved with an advisory committee note to say that any documents produced pursuant to this rule should be produced in accordance with Rule 34(c).			
26	I have a case where I represent the defendant and I have hired an expert on causation, an issue for which the plaintiff bears the burden of proof. I anticipated that my expert would respond to the plaintiff's disclosed causation expert's opinion. Lo and behold, plaintiff did not disclose any causation expert. I looked at the timing of disclosure rule on disclosures for experts offered by the party without the burden of proof—my situation here. I cannot find in that rule any timing for an expert offered by a party who does not bear the burden of proof on the issue—here, causation—when the party with the burden of proof has disclosed no expert on that issue. Any guidance on what my disclosure timing obligations might be? Tuesday is my deadline for election if the plaintiff had disclosed an expert but there is no expert to make an election on. My expert's opinions that causation does not exist are not finalized because we anticipated responding to what is now a non-existent expert.	David W. Scofield	2018/06	**Change recommended.** Parties without the burden must disclose based on the deadline for the disclosure of parties with burden, not the election (in case none is disclosed). That deadline is extended to 14 days, along with other extensions to give parties sufficient time.
26	Today in our Forms Committee meeting the Committee struggled a bit with the initial disclosures form. Rule 26(a)(1)(B) states that the party must initially disclose copies of "documents, data compilations, electronically stored information, and tangible things." Randy Dryer stated that in his experience electronically stored information is not shared at this stage. And others stated that it seems unreasonable to serve copies of tangible things. The Committee suggested that maybe the rule should not require service of those	Brent Johnson/ Forms Committee	2018/05	**No change recommended.** The policy is to require parties to produce such documents upfront. Parties should conform to the policy. While producing a "copy" of a tangible item is odd, it is also rare and may be

	things but instead the person should describe what they have and arrangements can later be made on how those things can be accessed. The Committee ultimately approved the form with it only calling for a description of those things and they suggested that maybe your committee may want to review the rule and determine what they really want. I'm just passing this on for what it's worth. The Forms Committee does not expect any type of response unless your committee wants to tell us that, absolutely, copies of those things should be provided and we should change our form accordingly.			addressed in those situations by agreement or resort to court guidance.
26	Rule 26(a)(4)(E) – can we amend to specifically state that in the situation of a non-retained expert, the opposing party may not receive a report and that a deposition not to exceed 4 hours is the only discovery allowed after the disclosure?	Mike Petrogeorge	2018/06	**Change recommended.** Language added to exclude requiring a report. However, no limit placed on issuance of document subpoenas under URCP 49.
26	File all dispositive motions or certificate of readiness for trial within 28 days after close of expert discovery. Include in notice form.	Jon Hafen	2013/10	**No change recommended.** Revised URCP 56 provides 28-day deadline for MSJs. Addressing further dispositive motions appears more suitable to a new URCP 7(b)(6). Certificates of readiness addressed in URCP 16(b).
26	Frank Carney raised a discussion point with Jonathan Hafen about a decision that Judge Kara Petit recently issued. The plaintiff pleaded his case as a Tier 2, got a $641,000 verdict, and then wanted to amend up (after verdict) to make it Tier 3. Judge Petit followed what the rules committee thought was the proper outcome in such a situation and denied the motion. Reexamine rule 26? Measure tiers by special	Jon Hafen, Frank Carney, Paul Stancil	2016/10; 2017/04	**No change recommended.** Court of Appeals addressed this issue in Pilot v. Hill, 2019 UT 10. Parties who designate a tier are bound by its monetary limits.

	damages? (Rules 26 and 8)			
26	LUIS LUNA, Appellant, v. MARIA LUNA, Appellee., 2019 UT App 57 (footnote 5):"To the extent that the text of the rules does not match local custom, that is a matter the parties can bring to the attention of the committee tasked with drafting and amending the rules." ¶47 Luna argues—and Sister does not dispute—that there exists a "custom" among lawyers in Utah that the party requesting a deposition pay the court reporter's fee for the original deposition transcript, and analogizes that the same rule should hold true for hourly fees charged by non-retained experts. See Caldwell v. Wheeler, 89 F.R.D. 145, 147 (D. Utah 1981) (citing a study indicating that, "[p]rior to 1970, ... the overwhelming custom among lawyers was that the instigating party paid for the original deposition" transcript); see also Kirkham v. Societe Air France, 236 F.R.D. 9, 12 (D.D.C. 2006) (stating that "professional standards in some areas may permit treating physicians to be compensated for time spent as a witness or at a deposition"). But in the posture of this case, questions about the existence of any such "custom" are academic because, even if it were the custom in Utah that the party requesting the deposition of a non-retained expert should pay any costs or fees associated with that deposition, such a custom would not serve to create a mandatory obligation in the absence of a rule so stating, and could conceivably be varied in appropriate cases. OTHER ISSUE: who pays for experts, generally?	Court of Appeals; George Burbidge	2019/04	**Change recommended.** Proposed new 26(a)(4)(F) requires parties taking the deposition of a retained expert to pay for that expert's time at the deposition, but only at a reasonable rate, while declining to require payment for a non-retained expert's deposition time.

Rule 26. General provisions governing disclosure and discovery.

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

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

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

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

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

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

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

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

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

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

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

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

(a)(3) Exemptions.

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

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

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

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

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

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

(a)(4) Expert testimony.

(a)(4)(A) Disclosure of retained expert testimony. A party shall, without waiting for a discovery request, serve on the other parties the following information regarding any person who may be used at trial to present evidence under Rule 702 of the Utah Rules of Evidence and who is retained or specially employed to provide expert testimony in the case or whose duties as an employee of the party regularly involve giving expert testimony: (i) the expert's name and

Comment [RNA1]: Reason: There may be multiple plaintiffs, some of who may join the case at a later date.

Comment [RNA2]: Reason: There may be multiple defendants; some of them may seek to file a motion to dismiss or similar motion after appearance that is not an answer, and such should not have to provide initial disclosures before such motion is resolved.

Also, although we felt that all parties be considered either a "plaintiff" or a "defendant," generally speaking, we thought that "party" would make it plain that all parties besides plaintiffs must file their initial closures as discussed in this paragraph, and so that such is not an unfair burden to a co-defendant who has filed a motion to dismiss, that such be required within 42 days after that party's own answer filing.

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Comment [RNA3]: Reason: Clarity; this paragraph only pertains to this type of expert witness.

qualifications, including a list of all publications authored within the preceding 10 years, and a list of any other cases in which the expert has testified as an expert at trial or by deposition within the preceding four years, (ii) a brief summary of the opinions to which the witness is expected to testify, (iii) ~~all~~ the facts and data and other information specific to the case that will be relied upon by the witness in forming those opinions, and (iv) the compensation to be paid for the witness's study and testimony.

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

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

(a)(4)(C)(i) The party who bears the burden of proof on the issue for which expert testimony is offered shall serve on the other parties the information required by paragraph (a)(4)(A) within ~~seven~~ 14 days after the close of fact discovery. Within ~~seven~~ 14 days thereafter, the party opposing the expert may serve notice electing either a deposition of the expert pursuant to paragraph (a)(4)(B) and Rule 30, or a written report pursuant to paragraph (a)(4)(B). The deposition shall occur, or the report shall be served on the other parties, within ~~28~~ 42 days after the election is served on the other parties. If no election is served on the other parties, then no further discovery of the expert shall be permitted.

(a)(4)(C)(ii) The party who does not bear the burden of proof on the issue for which expert testimony is offered shall serve on the other parties the information required by paragraph (a)(4)(A) within 14 ~~seven~~ days after the later of (A) the date on which the ~~election~~ disclosure under paragraph (a)(4)(C)(i) is due, or (B) ~~receipt~~ service of the written report or the taking of the expert's deposition pursuant to paragraph (a)(4)(C)(i). Within ~~seven~~ 14 days thereafter, the party opposing the expert may serve notice electing either a deposition of the expert pursuant to paragraph (a)(4)(B) and Rule 30, or a written report pursuant to paragraph (a)(4)(B). The deposition shall occur, or the report shall be served on the other parties, within ~~28~~ 42 days after the election is served on the other parties. If no election is served on the other parties, then no further discovery of the expert shall be permitted.

(a)(4)(C)(iii) If the party who bears the burden of proof on an issue wants to designate rebuttal expert witnesses, it shall serve on the other parties the information required by paragraph (a)(4)(A) within 14 ~~seven~~ days after the later of (A) the date on which the election under paragraph (a)(4)(C)(ii) is due~~,~~ or (B) ~~receipt~~ service of the written report or the taking of the expert's deposition pursuant to paragraph (a)(4)(C)(ii). Within ~~seven~~ 14 days thereafter, the party opposing the expert may serve notice electing either a deposition of the expert pursuant to paragraph (a)(4)(B) and Rule 30, or a written report pursuant to paragraph (a)(4)(B). The deposition shall occur, or the report shall be served on the other parties, within ~~28~~ 42 days after the election is served on the other parties. If no election is served on the other parties, then no further discovery of the expert shall be permitted. An expert disclosed only as a rebuttal witness cannot be used in the case in chief.

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

(a)(4)(E) Summary of non-retained expert testimony. If a party intends to present evidence at trial under Rule 702 of the Utah Rules of Evidence from any person other than an expert witness who is retained or specially employed to provide testimony in the case or a person

Comment [RNA4]: Reason: Practitioners reportedly need more time.

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

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

Comment [RNA7]: Reason: When the party bearing the burden fails to disclose an expert, the party who does not bear the burden currently has no triggering event for providing its expert disclosure.

Comment [RNA8]: Reason: Practitioners reportedly need more time.

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

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

whose duties as an employee of the party regularly involve giving expert testimony, that party must serve on the other parties a written summary of the facts and opinions to which the witness is expected to testify in accordance with the deadlines set forth in paragraph (a)(4)(C). Such a witness cannot be required to provide a report pursuant to paragraph (a)(4)(B). A deposition of such a witness may not exceed four hours.

(a)(4)(F) Payment for expert deposition. Parties taking the deposition of a retained expert must pay for that expert's time at the deposition. A retained expert's hourly rate must not exceed the reasonable rate charged by persons with similar background and experience. Parties taking the deposition of a non-retained expert do not need to pay for that expert's time at the deposition.

(a)(5) Pretrial disclosures.

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

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

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

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

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

(a)(6) Form of disclosure and discovery production. Rule 34 governs the form of producing all documents, data compilations, electronically stored information, tangible things, and evidentiary material pursuant to this Rule.

(b) Discovery scope.

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

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

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

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

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

Comment [RNA11]: Reason: Judges reportedly want to see these items, although not all of the proposed trial exhibits (need judges' input/confirmation).

Comment [RNA12]: Reason: Need parallel reference to objections to witnesses as well as other disclosures. Although many objections to witnesses, as well as exhibits, must be considered within the scope of their offering at trial, this funnels down the scope of such potential objections. (If this is too demanding as to witnesses, it is likely too demanding for exhibits as well, requiring both to be removed).

Comment [RNA13]: Reason: ensure compliance with URCP 34 in initial disclosure document production.

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

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

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

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

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

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

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

(b)(7) Trial preparation; experts.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Tier	Amount of Damages	Total Fact Deposition Hours	Rule 33 Interrogatories including all discrete subparts	Rule 34 Requests for Production	Rule 36 Requests for Admission	Days to Complete Standard Fact Discovery

1	$50,000 or less	3	0	5	5	120
2	More than $50,000 and less than $300,000 or non-monetary relief	15	10	10	10	180
3	$300,00 or more	30	20	20	20	210

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

(c)(6)(A) before the close of standard discovery and after reaching the limits of standard discovery imposed by these rules, a stipulation complying with Rule 29;~~ed statement that extraordinary discovery is necessary and proportional under paragraph (b)(2) and that each party has reviewed and approved a discovery budget;~~ ~~or~~

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

(c)(6(C), after the expiration of a discovery deadline, by making a request for extraordinary discovery under Rule 37(a) and showing the party's failure to timely request extraordinary discovery was because of excusable neglect.

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

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

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

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

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

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

(e) Signing discovery requests, responses, and objections. Every disclosure, request for discovery, response to a request for discovery, and objection to a request for discovery shall be in writing and signed by at least one attorney of record or by the party if the party is not represented. The signature of the attorney or party is a certification under Rule 11. If a request or response is not signed, the

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Comment [RNA14]: Reason: Rule 29 appears to govern this situation, making an additional reference here redundant.

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Comment [RNA15]: Reason: This area of potential extraordinary discovery is not currently addressed.

receiving party does not need to take any action with respect to it. If a certification is made in violation of the rule, the court, upon motion or upon its own initiative, may take any action authorized by Rule 11 or Rule 37(b).

(f) Filing. Except as required by these rules or ordered by the court, a party shall not file with the court a disclosure, a request for discovery, or a response to a request for discovery, but shall file only the certificate of service stating that the disclosure, request for discovery, or response has been served on the other parties and the date of service.

Advisory Committee Notes

Legislative Note

Rule 29. Stipulations regarding disclosure and discovery procedure.

The parties may modify the limits and procedures for disclosure and discovery by filing, before the close of standard discovery and after reaching the limits of standard discovery imposed by these rules, a stipulated statement that the extraordinary discovery is necessary and proportional under Rule 26(b)(2) ~~and that each party has reviewed and approved a discovery budget~~ and, for each party represented by an attorney, a statement that the attorney consulted with the client about the request for extraordinary discovery. Stipulations extending the time for disclosure ~~or discovery~~ do not require a statement regarding proportionality or ~~discovery budgets~~ consultation with a represented party. Stipulations extending the time for or limits of disclosure or discovery require court approval only if the extension would interfere with a court order for completion of discovery or with the date of a hearing or trial.

Tab 8

Utah State Courts

Nancy Sylvester <nancyjs@utcourts.gov>

Multi-district case management

11 messages

Judge Kent Holmberg Thu, Jan 3, 2019 at 8:54 AM
To: Nancy Sylvester <nancyjs@utcourts.gov>, "Jonathan O. Hafen" <jhafen@parrbrown.com>

The issue of consolidation of cases across district lines is not addressed in the Utah Rules of Civil Procedure. Rule 42 is the Rule on consolidation and it is silent on cross-District consolidation. This issue has arisen in the state-wide opioid litigation. Although it may not be of any assistance to the opioid litigation, in the interest of efficient use of court resources and litigant cost containment, the Rules should provide for management of similar cases across district lines.

Here is a rule which has been in use in Minnesota since 1994 (which at that time had a population and a bar of similar size as Utah is now):

> **Rule 113.03. Assignment of Cases in More Than One District to a Single Judge**
>
> **(a) Assignment by Chief Justice.** When two or more cases pending in more than one judicial district involve one or more common questions of fact or are otherwise related cases in which there is a special need for or desirability of central or coordinated judicial management, a motion by a party or a court's request for assignment of the cases to a single judge may be made to the chief justice of the supreme court.
>
> **(b) Procedure.** The motion shall identify by court, case title, case number, and judge assigned, if any, each case for which assignment to a single judge is requested. The motion shall also indicate the extent to which the movant anticipates that additional related cases may be filed. The motion shall be filed with the clerk of appellate courts and shall be served on other counsel and any self-represented litigants in all cases for which assignment is requested and shall be served on the chief judge of each district in which such an action is pending. Any party may file and serve a response within 5 days after service of the motion. Any reply shall be filed and served within 2 days of service of the response. Except as otherwise provided in this rule, the motion and any response shall comply with the requirements of Minn. R. Civ. App. P. 127 and 132.02.
>
> **(c) Mechanics and Effect of Transfer.** When such a motion is made, the chief justice may, after consultation with the chief judges of the affected districts and the state court administrator, assign the cases to a judge in one of the districts in which any of the cases is pending or in any other district. If the motion is to be granted, in selecting a judge the chief justice may consider, among other things, the scope of the cases and their possible impact on judicial resources, the availability of adequate judicial resources in the affected districts, and the ability, interests, training and experience of the available judges. As necessary, the chief justice may assign an alternate or back-up judge or judges to assist in the management and disposition of the cases. The assigned judge may refer any case to the chief judge of the district in which the case was pending for trial before a judge of that district selected by the chief judge.
>
> MN ST GEN PRAC Rule 113.03

Note that this rule in Minnesota is not a part of the Minnesota Rules of Civil Procedure but is part of what they call the General Rules of Practice for the District Courts and is somewhat analogous to Utah's Rules of Judicial Administration.

I have circulated this Rule among some of the Third District Court judges including those on the Board of District Court Judges and the Judicial Counsel and have not received any negative feedback. I am waiting for Brent Johnson to get back to me with his thoughts.

Do you think this is something to address with the Supreme Court before presenting it to the Rules Committee or should I just present it to the Rules Committee? Perhaps it is more appropriate as a Utah Rule of Judicial Administration? What are your thoughts?

Kent