Agenda

Advisory Committee on Rules of Civil Procedure

October 16, 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	Rod Andreason, Chair Pro Tem
Rule 26.4: final review (additional conforming amendments)	4:05	Tab 2	Nancy Sylvester and Judge Laura Scott
Rule 4 and electronic acceptance of service	4:10	Tab 3	Justin Toth, Judge Laura Scott, Lauren DiFrancesco, Susan Vogel
Amendments to Rule 7A based on comments, new Rule 7B Approval of Rule 100	4:40	Tab 4	Lauren DiFrancesco (subcommittee chair), Jim Hunnicutt, Judge Holmberg, Susan Vogel.
Rule 68 Subcommittee Report	5:10	Tab 5	Judge Clay Stucki (subcommittee chair), Leslie Slaugh, Rod Andreason, Susan Vogel, Rep. Brady Brammer, Ken Ivory Guests: Charles Stormont; Douglas B. Cannon, Utah Association for Justice
Advisory committee notes	As time permits	Tab 6	Group C: Rod N. Andreason, Leslie Slaugh, Trystan Smith, Tim Pack Group D: Judge Andrew Stone, Judge James Blanch, Bryan Pattison, Judge Laura Scott
Forming a technology subcommittee	As time permits		Trevor Lee, Susan Vogel
Other business	5:55		Rod Andreason, Chair Pro Tem

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

2019-2020 Meeting Schedule:

November 20, 2019

January 22, 2020

February 26, 2020

March 25, 2020

April 22, 2020

May 27, 2020

June 24, 2020

September 23, 2020

October 28, 2020

November 18, 2020

Tab 1

UTAH SUPREME COURT ADVISORY COMMITTEE ON RULES OF CIVIL PROCEDURE

Meeting Minutes – September 25, 2019

Committee members & staff	Present	Excused	Appeared by Phone
Jonathan Hafen, Chair	**X**		
Rod N. Andreason	**X**		
Judge James T. Blanch	**X**		
Lauren DiFrancesco	**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**		
Brooke McKnight	**X**		
Ash McMurray, Recording Secretary		**X**	
Nancy Sylvester, Staff	**X**		

(1) WELCOME AND APPROVAL OF MINUTES

Jonathan Hafen welcomed the committee and asked for approval of the minutes. The minutes were approved unanimously.

(2) PROBATE RULE 26.4

The committee discussed each comment to the rule and made several amendments, such as adding in a good cause standard for dealing with timing and a provision addressing respondents who are unable to provide a written objection. Judge Laura Scott, seconded by Judge Andrew Stone, moved to recommended that the Supreme Court take final action on the rule as drafted below. The motion passed unanimously.

The committee also posed a question for the Rule 26 subcommittee: Do disclosure requirements apply to evidentiary hearings?

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

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

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

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

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

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

(c)(2)(A) Any oral objection ~~must be~~ made at a scheduled hearing on the petition ~~and~~ must then be reduced to writing within 7 days, unless the written objection has been previously filed with the court. The court may for good cause accept an objection using the person's preferred means of communication and document the objection in the court record.

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

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

(c)(2)(D) The court may modify the timing for making an objection in accordance with Rule 6(b).

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

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

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

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

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

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

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

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

(c)(3)(D) The court may for good cause modify the content and timing of the disclosures required in this rule or in Rule 26(a) in accordance with Rule 6(b). ~~for any reason justifying departure from these rules.~~

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

(c)(4)(A) In addition to the disclosures required by Rule 26(a), and unless included in the petition, the following documents must be served by the party in possession or control of the documents within 14 days after a written objection has been filed: any other document purporting to nominate a personal representative or trustee after death, including wills, trusts, and any amendments to those documents, copies of which must be served upon all interested persons. This paragraph supersedes Rule 26(a)(2).

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

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

(c)(4)(D) The court may for good cause modify the content and timing of the disclosures required in this rule or in Rule 26(a) in accordance with Rule 6(b). ~~for any reason justifying departure from these rules.~~

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

(d) **Pretrial disclosures under Rule 26(a)(5) ~~objections~~.** The term "trial" in Rule 26(a)(5)(B) also refers to evidentiary hearings for purposes of this rule. ~~No later than 14 days prior to an evidentiary hearing or trial, the parties must serve the disclosures required by Rule 26(a)(5)(A).~~

(3) LICENSED PARALEGAL PRACTITIONER RULE 86

The committee reviewed proposed Rule 86, which is intended to be a one-stop-shopping rule of sorts for the Civil Rules LPP provisions. The committee has grappled for months with how and what changes to make throughout the rules to address LPP's and ultimately determined that a simpler approach was preferable, especially in the infancy of this new profession. The committee made several edits to the draft rule, discussing in particular how to deal with discovery. The committee ultimately determined that LPP's were limited in the kind of discovery they can do: "Licensed paralegal practitioners are permitted to prepare and serve initial, supplemental, and pretrial disclosures under Rules 26, 26.1, and 26.3." Brooke McKnight, seconded by Judge Laura Scott, move to recommend that the Supreme Court take action on the rule. The motion passed unanimously. The committee anticipates that, given the immanency of LPP licensure, the rule will likely be expedited, subject to a comment period.

Forms to discuss with the Forms Committee:

- Form for initial, supplemental, and pretrial disclosures
- Form motion for fees?
- Form objection?
- Form motion to compel disclosures?

Rule 86. Licensed Paralegal Practitioners.

(a) **Application of the Rules of Civil Procedure to licensed paralegal practitioners.** To the extent consistent with their limited license, licensed paralegal practitioners must be treated in the same manner as attorneys for purposes of interpreting and implementing these rules. If a rule permits or requires an attorney to sign or file a document, a licensed paralegal practitioner may do so only if there is an applicable court-approved form available and the practice is consistent with the scope of the licensed paralegal practitioner's license.

(b) **Terms "attorney" and "counsel."** Throughout these rules, where the terms "attorney," "lawyer," and "counsel" are used, they refer to legal professionals. Legal professionals include licensed paralegal

practitioners in the practice areas for which licensed paralegal practitioners are authorized to practice. Those practice areas are set forth in Utah Special Practice Rule 14-802 unless specifically carved out in this rule.

(c) **Papers served under Rule 5**. If a party is represented by a licensed paralegal practitioner, a paper served under Rule 5 must be served upon both the party and the licensed paralegal practitioner.

(d) **Disclosures under Rules 26, 26.1, and 26.3.** Licensed paralegal practitioners are permitted to prepare and serve initial, supplemental, and pretrial disclosures under Rules 26, 26.1, and 26.3.

(e) **Licensed paralegal fees.** Where these rules refer to attorney fees, they also mean licensed paralegal practitioner fees. Under Rule 73, licensed paralegal practitioners may recover fees with a supporting affidavit. Rule 73(f)(1)-(3) does not apply to licensed paralegal practitioners.

(f) **Limited appearance.** Under Rule 75, a licensed paralegal practitioner whose agreement with a party is limited to the preparation, but not the filing, of a pleading or other paper is not required to enter an appearance.

(4) RULE 65C

The amendments to Rule 65C are the result of discussions between the Attorney General's post-conviction section and the clerks of court about service of post-conviction petitions and the underlying court record. The committee made a minor edit to the amendments, in particular with respect to the kind of storage device that can be sent to the Attorney General's office. The committee also clarified that the underlying record was the court's record (not the parties'). Judge Stone, seconded by Paul Stancil, moved to recommended that the Supreme Court circulate the rule for comment. The motion passed unanimously.

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 court record of the underlying criminal case being challenged, including all non-public documents, by mail upon the respondent. In lieu of mailing paper copies, the clerk may mail to the respondent a storage medium containing electronic copies of the records enumerated above.

(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 on the Attorney General shall be by mail at the following address:

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

(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

(5) RULE 45 SUBPOENAS

In response to a proposal to amend the quality and quantity of forms sent out with a subpoena, the committee elected not to amend the rule and instead left the issue of how to tailor the subpoena form to the Forms Committee.

(6) RULE 68 SUBCOMMITTEE UPDATE

The subcommittee updated the committee on its progress. Judge Stucki said they had one more meeting to go over a proposed compromise draft rule. The committee will take up Rule 68 at its October 16 meeting. The legislators involved in the subcommittee work will be invited to attend as well as Charles Stormont, who has weighed in from an unrepresented parties view, and the Utah Association for Justice, which has concerns from a plaintiffs' perspective.

(7) ADVISORY COMMITTEE NOTE GROUP D

The committee began discussing Group D's recommendations to eliminate all of the committee notes it had reviewed. The committee discussed the propriety of keeping some of the historical references and where they may otherwise be found. The committee will continue this discussion at its next meeting.

(8) ADJOURNMENT

The remaining items were deferred until the next meeting. The meeting adjourned at 6:05 p.m. The next meeting will be held October 16, 2019.

Tab 2

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

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

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

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

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

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

(c)(2)(A) Any oral objection ~~must be~~ made at a scheduled hearing on the petition ~~and~~ must then be reduced to writing within 7 days, unless the written objection has been previously filed with the court. The court may for good cause in a guardianship or conservatorship case accept an objection using the person's preferred means of communication and document the objection in the court record.

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

(c)(2)(C) An objection made using the person's preferred means of communication under paragraph (c)(2)(A) must also set forth the grounds for the objection and any supporting authority to the extent possible. The court will mail the objection to the parties named in the petition and any interested persons, as that term is defined provided in Utah Code § 75-1-201.

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

(c)(2)(E) The court may modify the timing for making an objection in accordance with Rule 6(b).

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

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

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

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

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

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

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

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

(c)(3)(D) The court may for good cause modify the content and timing of the disclosures required in this rule or in Rule 26(a) in accordance with Rule 6(b). ~~for any reason justifying departure from these rules~~.

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

(c)(4)(A) In addition to the disclosures required by Rule 26(a), and unless included in the petition, the following documents must be served by the party in possession or control of the documents within 14 days after a written objection has been filed: any other document purporting to nominate a personal representative or trustee after death, including wills, trusts, and any amendments to those documents, copies of which must be served upon all interested persons. This paragraph supersedes Rule 26(a)(2).

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

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

(c)(4)(D) The court may for good cause modify the content and timing of the disclosures required in this rule or in Rule 26(a) in accordance with Rule 6(b). ~~for any reason justifying departure from these rules~~.

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

(d) **Pretrial disclosures under Rule 26(a)(5), ~~objections~~.** The term "trial" in Rule 26(a)(5)(B) also refers to evidentiary hearings for purposes of this rule. ~~No later than 14 days prior to an evidentiary hearing or trial, the parties must serve the disclosures required by Rule 26(a)(5)(A).~~

Tab 3

Rule 4. Process.

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

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

(c) Contents of summons.

(c)(1) The summons must:

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

(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)(B)(i) Content of proof of electronic acceptance. If acceptance is obtained electronically, the proof of acceptance must demonstrate on its face that the electronic signature is attributable to the party served and was voluntarily executed by the party. The proof of acceptance must demonstrate that the party received readable copies of the summons and complaint prior to signing the acceptance of service.

(d)(3)(B)(ii) Duty to avoid deception. A request to accept service must not state or imply that the request to accept service originates with a judicial officer or court.

(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.

(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 complaint to the individual personally or by any form of mail requiring a signed receipt, addressed and dispatched by the clerk of the court to the party to be served; or

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

(d)(5) Other service.

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

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

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

(e) Proof of service.

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

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

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

(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.

Advisory Committee Notes

Tab 4

Utah State Courts

Nancy Sylvester

Rule 7A subcommittee proposal

DiFrancesco, Lauren E.H. Fri, Sep 20, 2019 at 9:53 AM
To: Nancy Sylvester, Jim Hunnicutt, Judge Kent Holmberg , Leslie Slaugh, Susan Vogel
Cc: "DiFrancesco, Lauren E.H."

Nancy –

The Rule 7A subcommittee met last night and here are our final drafts for the committee for new proposed Rules 7A and 7B. With these two new rules, I think Rule 7(q) should now be deleted. And we recognize the adoption Rule 7B may require some changes to Rule 101, which Judge Holmberg has agreed to discuss with the appropriate committee. We believe our changes address the comments, and to the extent it's not clear from the text that they do, we are happy to discuss it. Please let me know if there's anything else you need from our subcommittee before next week's meeting.

Best,
Lauren

Lauren E.H. DiFrancesco (née Hosler) | Attorney
STOEL RIVES LLP |

2 attachments

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18K

URCP 007B FINAL.docx
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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 an ex-parte motion to enforce order and for sanctions (if requested), pursuant to this rule and Rule 7. The motion must be filed in the same case in which that order was entered. The timeframes set forth in this rule, rather than those set forth in Rule 7, govern motions to enforce orders and for sanctions.

(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 request to submit for decision and a proposed order to attend hearing, which must:

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

(c)(2) state the relief sought in the motion;

(c)(3) state whether the motion is requesting that the other 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 other party to appear personally or through counsel at a specific place (the court's address) and date and time (left blank for the court clerk to fill in) to explain whether the nonmoving party has violated the order; and

(c)(5) state that no written response to the motion is required but is permitted if filed within 14 days of service of the order, unless the court sets a different time, and that any written response must follow the requirements of Rule 7.

(d)

(d) Service of the order. If the court issues an order to attend a hearing, the moving party must have the order, motion, and all supporting affidavits served on the nonmoving party at least 28 days before the hearing. Service must be in a manner provided in Rule 4 if the nonmoving party is not represented by counsel in the case. If the nonmoving party is represented by counsel in the case, service must be made on the nonmoving party's counsel of record in a manner provided in Rule 5. For purposes of this rule, a party is represented by counsel if, within the last 120 days, counsel for that party has served or filed any documents in the case. The court may shorten the 28 day period 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) Opposition. A written opposition is not required, but if filed, must be filed within 14 days of service of the order, unless the court sets a different time, and must follow the requirements of Rule 7.

(f) Reply. If the nonmoving party files a written opposition, the moving party may file a reply within 7 days of the filing of the opposition to the motion, unless the court sets a different time. Any reply must follow the requirements of Rule 7.

(g) 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.

(h) Limitations. This rule does not apply to an order that is issued by the court on its own initiative. This rule does not apply in criminal cases or motions filed under Rule 37. Nothing in this rule is intended to limit or alter the inherent power of the court to initiate order to show cause proceedings to assess whether cases should be dismissed for failure to prosecute or to otherwise manage the court’s docket, or to limit the authority of the court to hold a party in contempt for failure to appear pursuant to a court order.

(i) 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 Utah law.

Rule 7B. Motion to enforce order and for sanctions in domestic law matters.

(a) Motion. To enforce a court order or to obtain a sanctions order for violation of an order, a party must file an ex-parte motion to enforce order and for sanctions (if requested), pursuant to this rule and Rule 7. The motion must be filed in the same case in which that order was entered. 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 decree.

(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 request to submit for decision and a proposed order to attend hearing, which must:

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

(c)(2) state the relief sought in the motion;

(c)(3) state whether the motion is requesting that the other 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 other party to appear personally or through counsel at a specific place (the court's address) and date and time (left blank for the court clerk to fill in) to explain whether the nonmoving party has violated the order; and

(c)(5) state that no written response to the motion 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 issues an order to attend a hearing, the moving party must have the order, motion, and all supporting affidavits served on the nonmoving party at least 28 days before the hearing. Service must be in a manner provided in Rule 4 if the nonmoving party is not represented by counsel in the case. If the nonmoving party is represented by counsel in the case, service must be made on the nonmoving party's counsel of record in a manner provided in Rule 5. For purposes of this rule, a party is represented by counsel if, within the last 120 days, counsel for that party has served or filed any documents in the case. The court may shorten the 28 day period 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) Opposition. A written opposition is not required, but if filed, must be filed at least 14 days before the hearing, unless the court sets a different time, and must follow the requirements of Rule 7, and Rule 101 if the hearing will be before a commissioner.

(f) Reply. If the nonmoving party files a written opposition, the moving party may file a reply at least 7 days before the hearing, unless the court sets a different time. Any reply must follow the requirements of Rule 7, and Rule 101 if the hearing will be before a commissioner.

(g) 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.

(h) Counter Motions. A responding party may request affirmative relief only by filing a counter motion, to be heard at the same hearing. 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 opposition. Any opposition to the counter motion must be filed and served no later than the reply to the motion. Any reply to the opposition to the counter motion must be filed and served at least 3 business days before the hearing 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). The party who filed the counter motion bears the burden of proof on all claims made in the counter motion. A separate proposed order is required only for counter motions to enforce a court order or to obtain a sanctions order for violation of an order, in which case the proposed order for the counter motion must:

(h)(1) state the title and date of entry of the order that the counter motion seeks to enforce;

(h)(2) state the relief sought in the counter motion;

(h)(3) state whether the counter motion is requesting that the other 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;

(h)(4) order the other party to appear personally or through counsel at the scheduled hearing to explain whether that party has violated the order; and

(h)(5) state that no written response to the countermotion is required, but that a written response is permitted if filed at least 7 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.

(i) Limitations. This rule does not apply to an order that is issued by the court on its own initiative. This rule applies only to domestic relations actions, including divorce; temporary separation; separate maintenance; parentage; custody; child support; adoptions; cohabitant abuse protective orders; child protective orders; civil stalking injunctions; grandparent visitation; and modification actions. Nothing in this

rule is intended to limit or alter the inherent power of the court to initiate order to show cause proceedings to assess whether cases should be dismissed for failure to prosecute or to otherwise manage the court's docket, or to limit the authority of the court to hold a party in contempt for failure to appear pursuant to a court order.

(j) 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 Utah law.

Tab 5

Rule 68. Settlement Offers.

(a) Offer. Not less than thirty days before the trial or arbitration begins, any party may serve upon an adverse party that has filed its initial pleading an offer to settle any claim(s) for money or non-monetary relief requested and to enter into an agreement dismissing any claim(s) to allow dismissal to be entered accordingly.

(1) **Apportionment**. An offer need not be apportioned by claim(s) but shall be apportioned to each offeree.

(2) **Multiple Offerors**. Multiple parties may make a joint offer to a single offeree. Such an offer need not be apportioned by offeror.

(3) **Multiple Offerees**. One or more offers may be made to multiple offerees. If a single offer is made to multiple offerees, that offer shall be apportioned to each offeree. If fewer than all offerees accept, the acceptance shall be considered enforceable as to offeror and accepting offeree as long as:

i. the offer is not expressly conditioned upon acceptance by all offerees, and

ii. the offeror or accepting offeree serves a notice of acceptance to all other parties no later than 14 days after the offer expires.

All non-accepting offerees shall be bound by the remainder of this rule, including, but not limited to, the potential sanctions discussed herein.

(4) **Cross Claims and Counterclaims**: For purposes of this rule, cross claimants and counterclaimants that make offers pursuant to this rule to resolve the claim(s) in the cross-claim or counter-claim shall be considered "Plaintiffs" and cross-defendants and counter-defendants that make offers pursuant to this rule to resolve the claim(s) in the cross-claim or counter-claim shall be considered "Defendants." A party with multiple designations seeking to resolve all claim(s) with an adverse party (e.g. defendant and counterclaimant) need not make an offer for each designation but shall specifically identify each designation of both the offeror as well as the offeree in the offer.

(5) **Subsequent Offers**. The fact that an offer is made under this rule but not accepted does not preclude subsequent offers.

(6) **Proof of Service**. A proof of service for any offer filed pursuant to this rule shall be filed with the Court at the time the offer is made. The offer shall not be filed with the Court.

(b) Form of Offer. A valid offer under this rule must be made in writing and shall substantially comply with the following requirements:

(1) the name of the offeror(s);

(2) the name of the offeree(s);

(3) a statement that the offer is made pursuant to Rule 68;

(4) the offer;

(5) one of the following statements:

i. "This offer does not include attorneys fees and costs" if there is no claim to a statutory or contractual right to attorneys fees and costs; or

ii. "This offer includes attorneys fees and costs" if there is a claim to a statutory or contractual right to attorneys fees and costs;

iii. The offerees inclusion or exclusion of any right to attorneys fees and costs shall have no effect on the determination of whether the offeror is entitled to fees under contract or under statute.

(6) a statement that if acceptance of the offer is not made within 14 days of the offer being made, it shall automatically expire;

(7) a place for the offeree(s) to sign indicating acceptance of the offer;

(8) instructions for return of any accepted offer; and

(9) if the offeree is not represented by counsel, the offer shall include instructions for obtaining legal assistance as set forth in the advisory notes to this rule.

(c) Acceptance. If within 14 days after the service of the offer the offeree serves written notice that the offer is accepted, either party may then file with the Court a copy of the offer and notice of acceptance together with a proof of service and a request to submit. The clerk shall designate the offer, notice of acceptance, and settlement as a Private Court Record pursuant to Utah Rules of Judicial Administration 4-202.02(4)(F). Acceptance of an offer pursuant to this rule shall extinguish any contractual or statutory rights to attorney fees and/or costs.

(d) Nonacceptance. An offer not accepted shall be deemed withdrawn and evidence thereof is not admissible into evidence except to determine sanctions or fee shifting under this rule.

(e) Sanctions. In cases where the offeree is not entitled to statutory or contractual awards of attorney fees:

(1) **Defendant's Offer.** if the judgment or arbitration award finally obtained by the plaintiff offeree is not equal to at least 75% of an offer by Defendant, then the plaintiff will not be able to recover post-offer costs and shall pay defendant's post-offer reasonable court costs, reasonable expert witness fees, and reasonable attorneys fees. If defendant is not represented by

counsel the Court shall determine the reasonable equivalent of post-offer attorneys fees.

(2) **Plaintiff's Offer.** If there is a judgment or arbitration award for the plaintiff offeror greater than 125% of an offer by plaintiff, then the defendant shall pay plaintiff's post-post offer reasonable court costs, reasonable expert witness fees, and reasonable attorneys fees. If plaintiff is not represented by counsel the Court shall determine the reasonable equivalent of post-offer attorneys fees.

(3) **Limitations.** Sanctions awarded against a plaintiff in an action seeking personal injury damages shall be limited to an offset against damages awarded to that plaintiff.

(f) Fee Shifting. In cases where the offeree is entitled to a statutory or contractual award of attorneys fees:

(1) **Defendant's Offer.** If a defendant makes an offer which is not accepted by the plaintiff and the judgment or arbitration award finally obtained by the plaintiff is not equal to or better than the offer by defendant, then the plaintiff will not be able to recover post-offer costs and shall pay the reasonable court costs, expert witness fees, and attorneys fees incurred by the defendant after the making of the offer.

(2) **Plaintiff's Offer.** If a plaintiff makes an offer which is not accepted by the defendant and the judgment or arbitration award finally obtained by the plaintiff is not equal to or worse than an offer by plaintiff, then the defendant will not be able to recover post-offer costs and shall pay the reasonable court costs, expert witness fees, and attorneys fees incurred by the defendant after the making of the offer.

(g) Multiple Offers. If multiple offers were made by a single party that meet the criteria for sanctions or fee shifting, the earliest qualifying offer should be used. If both parties made offers that would qualify for sanctions or fee shifting, the earliest offer that would result in sanctions is the offer that will be considered by the court.

(h) Reasonableness. The trial court shall have discretion to modify the application of this rule for purposes of sanctions and fee shifting in the interests of equity. If the trial court exercises this discretion, the trial court shall set forth its reasons for such modification in the form of an order. The trial court may consider but is not required to consider nor is limited to considering, the information known at the time of the offer, the issues contested, the sophistication of the parties, and general public policy.

(i) Offer After Judgment. When the liability of one party to another has been determined by verdict, order, or judgment, but the exact amount or extent of that liability remains to be determined by further proceedings, either party may make an offer of settlement, which shall have the same effect as an offer made before trial or arbitration,

so long as it is served within ten days prior to the commencement of hearings to determine the amount or extent of that liability.

(j) Exceptions. This rule does not apply in class actions, family law and divorce actions, eminent domain actions, or claim(s) involving only injunctive relief.

Comments to Rule 68 Revision
Douglas B. Cannon, President of Utah Association of Justice

The proposed changes to Rule 68 by and large abrogate the historical approach American law and courts have adopted regarding the payment of legal fees in court cases. The concept that each party pays their own attorney's fees is so ingrained in our system that it is referred to as "The American Rule." *Arcambel v. Wiseman,* 3 U.S. 306, 1 L.Ed. 613, 3 Dall. 306 (1796). ("The general practice of the United States is in opposition to [the notion of loser pays legal fees]; and even if that practice were not strictly correct in principle, it is entitled to the respect of the court, till it is changed, or modified, by statute.") It has always been contrasted by the "English Rule" where the loser pays.

The adoption of the English Rule is particularly worrisome for injured parties.

Significant Denial of Access to Justice for Injured People:

Utah has invested much time, effort and money in improving public access to the courts, particularly for those with limited resources. Personal injury attorneys willing to take cases on a contingency fee, allow injured people access to the court when they have no other avenue. Changing Rule 68 risks denying access to the courts for the most vulnerable-people injured by products, cars, property owners and abuse-by requiring them to pay hefty attorney's fees if they lose a case against a much larger and well-funded corporation.

The defendants in personal injury cases are most often represented by insurance companies, large corporations or large associations. These companies have millions if not billions of dollars in assets. In contrast, the plaintiff at best may have a home and some limited savings. Under this proposed rule the attorney at the outset will need to tell the injured party that if the defendant makes any offer even as small as one dollar and we lose the case, i.e. "no caused" at trial, the injured party will have to pay out of their own pockets the attorney's fees and expert costs of the insurance company or the Johnson & Johnsons of the world. In short, that plaintiff will lose everything he has saved if he loses the case. Many horribly injured plaintiffs who have a good case, i.e., 75% chance of recovering damages at trial will decide not to bring the case because a 25% risk of losing everything and having to pay the defendant's legal fees is simply too great.

It is easy to see why people will decide not to bring good cases because if they lose, they risk losing 100% of what they have to the insurance companies. In contrast, if the defendant loses, the defendant loses .00001% of their assets. It is easy to see how this rule completely shifts access to the courts against the injured party or individual and in favor of the insurance companies and large corporations.

The law fundamentally manages and balances relationships between people and things. The proposed changes to Rule 68 destroys the harmony and balance currently in place by the American Rule of legal fees.

Potential for Abuse by Insurance Companies/Large Manufacturers/ Health Care Facilities is High:

Under the proposed Rule 68, the Defendant on day one can file (and will likely file) an offer of judgment for $1. Under that scenario, an injured party who loses will have to pay the defendant's attorney's fees and expert costs. I am certain that defendants will use the proposed Rule 68 as a tactic to force low value settlements. Why would they not? These large-funded defendants are intelligent and will see that a loss to them is just a cost of doing business and does not affect their bottom line. In contrast, a loss to a plaintiff means loss of everything and likely bankruptcy. I have been involved in some pretty intense battles with the likes of Johnson & Johnson, Wright Medical and Biomet and their fees in defending a case run into the hundreds of thousands and sometimes millions of dollars. These defendants will recognize their significant bargaining position and will use it to force small settlements; then, if the plaintiff does not take the low settlement the Johnsons and Johnsons of the world will go to trial in the hopes of getting huge attorney's fees against the plaintiff. It will only take a few times for plaintiffs to get the message not to bring even good cases.

Calculation of Reasonable Attorney's Fees-Injured Party v. Insurance Company:

What constitutes a reasonable fee will produce some really strange results. For example, I had a difficult case which I took to trial. Because I wanted to help the plaintiff, I invested substantial attorney time in the case. My client won a $90,000 verdict after a difficult two-week trial, exceeding the defendants offer of judgment by $40,000. Under proposed Rule 68, I assume my fee would be calculated to be 1/3 of the $90,000 or $30,000. That amount does not reflect the actual time value of the services rendered. In this example, had I been billing my time at an hourly rate, I would have received three times that amount in fees. I believe the defendant (or the insurance company which was State Farm in this example) had spent probably $100,000 in fees in the case. If we had lost, my client would have faced an award against her of $100,000 plus the expert costs associated with her case. In short, under the rule, I would have received $30,000 in fees. If the defendant had won, my client would have faced $100,000 in fees. That does not seem equitable.

Increased Litigation Concerning Attorney Fees:

One of the purposes I think of this rule change is to force settlement and avoid litigation. The rule may have just the opposite effect. Now after most cases, there will be a fight concerning attorney's fees. Attorneys will need to do discovery to determine whether the fees and expert fees are reasonable. For example, a losing plaintiff on a transvaginal defect[1] came may be presented with an attorney fee bill of $500,000 by Johnson and Johnson where attorneys are billing $600 an hour. The losing plaintiff will want Johnson & Johnson to produce all the billing records showing tasks and time. This of course creates significant problems with attorney client privilege, but if the plaintiff (and the court) do not have access to the billing records how can they determine if the fee is reasonable. After reviewing the billing records, the losing plaintiff's attorney should then be allowed to depose the billing attorneys. Questions concerning

[1] These transvaginal cases are good cases with plaintiff's prevailing 66% of the time. Nevertheless, one never knows what a jury will do and a plaintiff can lose even the best case because of the unpredictability of a jury.

billing practices should certainly include the following: 1) how do you write your time down-do you write it down immediately, at the end of the week or do you sort of try to remember at the end of the month, 2) do you bill by the minute, the 1/10 of an hour or ¼ of an hour, 3) do you always round up 4) why were there so many people in this conference or on this conference call, 5) why did you have 2 people at this deposition, etc.[2]

Will plaintiff's attorneys now be required to keep time records so they can bill at an hourly rate if they win?

Does the losing party have a constitutional right to a jury trial on the reasonableness of the fees? *See J.R. Simplot v. Chevron Pipeline Co.,* 563 F.2d 1102 1115-20 (10th Cir. 2009) (court eventually held on contract allowing attorney's fees that jury not the court must decide whether fees are reasonable).

Does the winning party get to add attorney's fees incurred in the trial phase assessing the attorney's fees and costs?

The problems are endless.

The present rule avoids all these problems because the costs assessed are usually not more than a few thousand dollars.

Need/Why

I am also not sure there is a problem. I think the proposed rule is a solution in search of a problem. In setting trial dates in the state court, I have not found that the courts are overly busy. I can usually get a trial set as soon as I want after the certificate of readiness is filed. The place where there is significant delay is in the federal courts and that has nothing to do with the presence of personal injury cases. Moreover, we already have in place various safeguards which prevent frivolous lawsuits.

Confidentiality

The confidentiality provision is very concerning. Proposed Rule 68 automatically grants confidentiality to a Defendant. That provision is usually negotiated between the parties. A number of courts have expressed significant concern about making settlements which relate to the public good confidential.

[2] This analysis will likely require an expert opinion to determine the reasonableness of the billing practices and fees.

Self-Represented Litigants in Disposed Cases - All Districts FY19

Run: September 4, 2019

		Count					Percent				
	Disposed Cases	Both Parties Self-Represented	Both Parties Not Self-Represented	One Party Self-Represented	Self-Represented Petitioner	Self-Represented Respondent	Both Parties Self-Represented	Both Parties Not Self-Represented	One Party Self-Represented	Self-Represented Petitioner	Self-Represented Respondent
Adoption	**1,250**	17	1,005	228	229	33	1%	80%	18%	18%	3%
Civil Stalking	**1,167**	837	127	203	919	958	72%	11%	17%	79%	82%
Conservatorship	**177**	2	161	14	16	2	1%	91%	8%	9%	1%
Contract: Empl Discr	**6**		1	5	1	4	0%	17%	83%	17%	67%
Contract: Fraud	**93**	2	50	41	4	41	2%	54%	44%	4%	44%
Contracts	**2,359**	17	822	1,520	25	1,529	1%	35%	64%	1%	65%
Custody and Support	**1,261**	395	302	564	433	921	31%	24%	45%	34%	73%
Debt Collection	**62,436**	6	1,416	61,014	7	61,019	0%	2%	98%	0%	98%
Divorce/Annulment	**14,182**	6,345	2,516	5,321	6,526	11,485	45%	18%	38%	46%	81%
Estate Personal Rep	**2,482**	1	2,061	420	419	3	0%	83%	17%	17%	0%
Eviction	**6,528**	600	273	5,655	622	6,233	9%	4%	87%	10%	95%
Guardian-Adult	**387**	2	326	59	59	4	1%	84%	15%	15%	1%
Guardian-Adult Child	**398**	5	241	152	156	6	1%	61%	38%	39%	2%
Guardian-Minor	**990**	2	313	675	676	3	0%	32%	68%	68%	0%
Guardianship	**3**		1	2	2		0%	33%	67%	67%	0%
Name Change	**1,147**	6	287	854	857	9	1%	25%	74%	75%	1%
Paternity	**878**	99	362	417	120	495	11%	41%	47%	14%	56%
Protective Orders	**5,218**	2,386	1,205	1,627	2,753	3,646	46%	23%	31%	53%	70%
Small Claim	**8**	5	2	1	6	5	63%	25%	13%	75%	63%
Temporary Separation	**108**	61	13	34	67	89	56%	12%	31%	62%	82%

All Districts FY'18		Percent of Case Filings				
Case Type	Case Filings	Both Parties with Attorney	One Party with Attorney	No Party with Attorney	Self Represented Petitioner	Self Represented Respondent
Adoption	1,287	1%	78%	22%	22%	3%
Civil Stalking	1,064	10%	16%	74%	83%	80%
Conservatorship	160	0%	79%	21%	21%	1%
Contracts	126	49%	48%	3%	5%	49%
Custody and Support	1,326	17%	44%	39%	45%	76%
Debt Collection	58,918	2%	98%	0%	0%	98%
Divorce/Annulment	13,395	17%	26%	57%	61%	80%
Estate Personal Rep	2,530	0%	80%	20%	20%	0%
Eviction	6,973	4%	85%	11%	11%	96%
Guardianship	1,756	1%	44%	55%	57%	2%
Name Change	1,140	0%	15%	85%	85%	1%
Paternity	904	38%	42%	21%	24%	59%
Protective Orders	4,948	22%	32%	46%	53%	71%
Small Claim	5	20%	60%	20%	80%	20%
Temporary Separation	124	7%	29%	64%	69%	88%

Count				
Both Parties with Attorney	One Party with Attorney	No Party with Attorney	Self Represented Petitioner	Self Represented Respondent
7	1,000	280	281	44
109	169	786	888	852
0	127	33	34	2
62	60	4	6	62
230	578	518	603	1,008
1,080	57,824	14	19	57,833
2,218	3,504	7,673	8,107	10,731
0	2,012	518	518	5
278	5,929	766	799	6,661
9	779	968	993	43
0	175	965	965	11
339	378	187	220	531
1,102	1,571	2,275	2,609	3,511
1	3	1	4	1
9	36	79	85	109

Tab 6

URCP 26.
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.

Subject to the foregoing qualifications, the summary of the witness's expected testimony should be just that– a summary. The rule does not require prefiled testimony or detailed descriptions of everything a witness might say at trial. On the other hand, it requires more than the broad, conclusory statements that often were made under the prior version of Rule 26(a)(1)(e.g., "The witness will testify about the events in question" or "The witness will testify on causation."). The intent of this requirement is to give the other side basic information concerning the subjects about which the witness is expected to testify at trial, so that the other side may determine the witness's relative importance in the case, whether the witness should be interviewed or deposed, and whether additional documents or information concerning the witness should be sought. *See RJW Media Inc. v. Heath*, 2017 UT App 34, ¶¶ 23-25, 392 P.3d 956. This information is important because of the other discovery limits ~~contained in the 2011 amendments, particularly the limits on depositions~~contained in Rule 26.

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

~~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.~~

Comment [TP1]: I like this note because it makes clear that you can't start your discovery until at least after the answer is filed. I'm dealing with a case where I filed a MTD rather than answer. The plaintiff served initial disclosures and discovery requests prior to the resolution of the MTD and prior to the filing of an answer. So lets make it clear in the actual rule then delete this note.

~~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~~ Disclosure of the identity and subjects of expert opinions and testimony is automatic under Rule 26(a)(3) and parties are not required to serve interrogatories or use other discovery devices to obtain this information.

~~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 copy of the expert's 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 e~~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.

Comment [LS2]: This is contrary to the language of the rule. The rule does not require the "expert's file." The rule instead requires all data and other information that will be relied upon by the witness in forming those opinions" The expert is not required to disclose information that will not be relied upon.

~~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 Rule 26 (a)(4)(E) disclosure for the witness. And if that disclosure is made in advance of the witness's deposition, those opinions should be explored in the deposition and not in a separate expert deposition. Otherwise, the timing for disclosure of non-retained expert opinions is the same as that for retained experts under Rule 26(a)(4)(C) and depends on whether the party has the burden of proof or is responding to another expert. ~~Rules 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.~~

Comment [TP3]: First sentence is quoted by *Willis v. Adams & Smith Inc.*, 2019 UT App 84, ¶ 33, 443 P.3d 1239, 1248

~~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.~~

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.~~

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 nonmonetary relief, such as injunctive relief, are subject to the standard discovery limitations of Tier 2, absent an accompanying monetary claim of $300,000 or more, in which case Tier 3 applies. ~~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.~~

~~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.~~

~~**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.

URCP 26.1

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).~~

URCP 26.2

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. § 1395y(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~~ applies to 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.

URCP 027
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.~~

URCP 032
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.~~

URCP 034
Advisory Committee Notes
The 2017 amendments to paragraph (b)(2) adopt 1) the specificity requirement in the 2015 amendments to Federal Rule of Civil Procedure 34(b)(2)(B), 2) a portion of Federal Rule 34(b)(2)(C) dealing with the basis for an objection to production, and 3) some clarifying language from the federal note.

Rule 35
Advisory Committee Notes
~~Rule 35 has been substantially revised. A medical examination is not a matter of right, but should only be permitted by the trial court upon a showing of good cause. Rule 35 has always provided, and still provides, that the proponent of an examination must demonstrate good cause for the examination. And, as before, the motion and order should detail the specifics of the proposed examination.~~

~~The parties and the trial court should refrain from the use of the phrase "independent medical examiner," using instead the neutral appellation "medical examiner," "Rule 35 examiner," or the like.~~

Comment [RNA4]: Substantive direction, should be deleted or put into the Rule.

~~The committee has determined that the benefits of recording generally outweigh the downsides in a typical case. The amended rule therefore provides that recording shall be permitted as a matter of course~~

~~unless the person moving for the examination demonstrates the recording would unduly interfere with the examination. Nothing in the rule requires that the recording be conducted by a professional, and it is not the intent of the committee that this extra cost should be necessary. The committee also recognizes that recording may require the presence of a third party to manage the recording equipment, but this must be done without interference and as unobtrusively as possible.~~

~~The former requirement of Rule 35(c) providing for the production of prior reports on other examinees by the examiner was a source of great confusion and controversy. It is the committee's view that this provision is better eliminated, and in the amended rule there is no longer an automatic requirement for the production of prior reports of other examinations.~~

~~A report must be provided for all examinations under this rule. The Rule 35 report is expected to include the same type of content and observations that would be included in a medical record generated by a competent medical professional following an examination of a patient, but need not otherwise include the matters required to be included in a Rule 26(a)(4) expert report. If the examiner is going to be called as an expert witness at trial, then the designation and disclosures under Rule 26(a)(4) are also required, and the opposing party has the option of requiring, in addition to the Rule 35(b) report, the expert's report or deposition under Rule 26(a)(4)(C). The rule permits a party who furnishes a report under Rule 35 to include within it the expert disclosures required under Rule 26(a)(4) in order to avoid the potential need to generate a separate Rule 26(a)(4) report later if the opposing party elects a report rather than a deposition. But submitting such a combined report will not limit the opposing party's ability to elect a deposition if the Rule 35 examiner is designated as an expert.~~

URCP 37.
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).~~

Additional Note from Tim Pack:

Cases that cite to the Advisory Committee notes to Rule 26 since 2017:

Keystone Ins. Agency, LLC v. Inside Ins., LLC, 2019 UT 20, ¶ 16
Willis v. Adams & Smith Inc., 2019 UT App 84, ¶ 33, 443 P.3d 1239
Ghidotti v. Waldron, 2019 UT App 67, ¶ 16, 442 P.3d 1237, 1242
Luna v. Luna, 2019 UT App 57, ¶ 46, 442 P.3d 1155
Arreguin-Leon v. Hadco Constr. LLC, 2018 UT App 225, ¶ 21, 438 P.3d 25, 32, *cert. granted*, No. 20190121, 2019 WL 2751143 (Utah May 22, 2019)
MacBean v. Farmers New World Life Ins. Co., No. 2:17-CV-00131, 2018 WL 3405268, at *3 (D. Utah July 12, 2018)
Northgate Vill. Dev. LC v. Orem City, 2018 UT App 89, ¶ 27, 427 P.3d 391, 399, *cert. granted sub nom. Northgate Vill. v. Orem City*, 429 P.3d 461 (Utah 2018)
Salo v. Tyler, 2018 UT 7, ¶ 55, 417 P.3d 581, 591
Williams v. Anderson, 2017 UT App 91, 400 P.3d 1071, 1072
RJW Media Inc. v. Heath, 2017 UT App 34, ¶ 23, 392 P.3d 956, 961

Utah State Courts

Nancy Sylvester <nancyjs@utcourts.gov>

Fwd: Section D working group on Civil Rules

Ahstone Wed, Aug 28, 2019 at 5:43 PM
To: Nancyjs <nancyjs@utcourts.gov>, "Jonathan O. Hafen" <jhafen@parrbrown.com>

Begin forwarded message:

From: Judge Andrew Stone
Date: Aug 26, 2019 at 9:27 AM
To: Bryan Pattison, Judge James Blanch, Judge Laura Scott
Subject: Section D working group on Civil Rules

I know Nancy says we probably don't need to be ready on Wednesday, but I thought I'd get the ball rolling with our group by passing along my thoughts on the comments to Rules 41, 43, 45, 47, 50 and 52.

In short, I think we can eliminate all of the comments to these rules (the only rules in our section with comments).
Rule 41 explains the history of the rule (it follows the federal rule change) and explains why one section is moved to Rule 52. None of this seems necessary.
Rule 43 encourages telephone hearings. It is unnecessary given the Rule's text.
Rule 45 explains a change from the approved forms contained in the Rules to a form issued by the Board of District Court Judges. It's outdated (Forms are now approved by the Forms Committee) and unnecessary. Folks can find the form on their own. Perhaps retain a reference to "forms for subpoenas may be found at . . . "
47- Is very long and primarily concerns challenges for cause in jury selection. I have to admit I've referred to this frequently, but it really doesn't add anything to the Rule's text. It perhaps gives good context, commentary, and examples for applying the Rule, but isn't that precisely what we are trying to eliminate? The other sections are similar--they purport to add emphasis and encourage practices permitted under the rule beyond the text of the Rule itself.
50 just quotes the federal rules committee. Doesn't add anything to the text of the Rule itself.
52 explains that the provisions for a ruling in a bench trial after a side has finished its case are now in 52 instead of 41. This seems unnecessary and not particularly helpful.

I look forward to hearing all of your thoughts.
-Andy

--
Andrew Stone
Third District Judge