Agenda

Advisory Committee on Rules of Civil Procedure

August 26, 2020

4:00 to 6:00 p.m.

Via Webex

Welcome and approval of minutes.	Tab 1	Jonathan Hafen, Chair
Legislative standing agenda item • Reserved		---
Rules amended in response to the pandemic Rules 43 and 45: • Moving provisions of 4-106 (proposal to repeal) to Rule 43	Tab 2	Lauren DiFrancesco, Susan Vogel, Judge Clay Stucki, Judge Laura Scott
Rules amended in response to the pandemic Rule 47: • Request from Board of District Court Judges regarding empaneling of jurors	Tab 3	Judge Stone
Rule 26: • Continue discussion of amendments from previous meetings • New discussion of interplay with CJA Rule 4-206	Tab 4	Rod Andreason, Chris Palmer
Other business		Jonathan Hafen, Chair
Next month's tentative agenda: • Expungement procedures (guests) • Other rule revisions related to the pandemic (Lauren's group) • Rule 7 and word limits (Trevor)		---

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

2020 Meeting Schedule: May 27, 2020, June 24, 2020, September 23, 2020, October 28, 2020, November 18, 2020

Tab 1

Attached are the draft July 2020 minutes for the committee's review and vote.

UTAH SUPREME COURT ADVISORY COMMITTEE
ON RULES OF CIVIL PROCEDURE

Summary Minutes – July 29, 2020

DUE TO THE COVID-19 PANDEMIC AND STATE OF EMERGENCY
THIS MEETING WAS CONDUCTED ELECTRONICALLY VIA WEBEX

Committee members, staff & guests	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	X		
Nancy Sylvester, Staff	X		
Michael Drechsel, Guest	X		

(1) WELCOME AND APPROVAL OF MINUTES

Jonathan Hafen welcomed the committee and asked for approval of the minutes. Jim Hunnicutt moved to approve the minutes. Susan Vogel seconded the motion. The minutes were approved unanimously.

(2) RULE 83

Nancy Sylvester introduced a legislative request for the committee to amend Rule 83, which prohibits vexatious litigation. Ms. Sylvester introduced Michael Drechsel to provide additional background. Mr. Drechsel explained that Senator Diedre Henderson expressed concerns with Rule 83 in response to constituents who have contacted her and claimed to be the target of vexatious litigation by former spouses; Rule 83 currently applies only to unrepresented parties, which has reportedly allowed represented parties in the domestic context to engage in litigation intended to harass their former spouses. Mr. Drechsel noted that courts may take action against an attorney, but not the represented client, who is engaging in litigation intended to harass another party. Mr. Hafen expressed the committee's interest in addressing the issue and asked Mr. Hunnicutt to comment.

Mr. Hunnicutt commented that family-law litigation can pose a particular challenge for parties who often feel harassed due to the nature of the issues at stake. Mr. Hunnicutt noted that because courts already have the ability to sanction attorneys under Rule 11, expanding Rule 83 to include represented parties could create a problem for judges who may need to choose to apply the standards of Rule 11 or Rule 83 or both. Mr. Hunnicutt also noted that it is unclear how expanding Rule 83 would interact with Rule 11's 21-day safe harbor in the family-law context where domestic commissioners may also be involved. Mr. Hunnicutt commented that the proposed amendment could be beneficial but recommended further discussing the intersection of Rule 83 and Rule 11 to possibly provide direction regarding when the standards of each rule should apply.

Leslie Slaugh commented that Rule 11 applies to both represented and unrepresented parties and that it is unclear why Rule 83 should not similarly apply to all parties. Mr. Hafen noted that although Rule 11 can be used to address baseless lawsuits, Rule 83's scope is narrower and requires higher standards to be met. Mr. Hafen agreed that excluding represented parties from Rule 83 only because they can afford representation is not well justified. The committee briefly discussed why represented parties may have been excluded from Rule 83.

Mr. Hafen asked for comments regarding the language of the proposed amendment to Rule 83. Trevor Lee commented that the use of the phrase "any court" in the proposed amendment may introduce issues of ambiguity similar to those that courts have identified in Rule 42. Additionally, Mr. Slaugh commented that the proposed amendment may not fully address the vexatious litigant issues raised by Senator Henderson's constituents because the rule's limited application to claims that are narrowly defined and, therefore, may not apply to other relevant contexts. Mr. Drechsel informed the committee that Senator Henderson had expressed an interest in seeing stronger and

more defined sanctions incorporated into Rule 83 but that domestic commissioners expressed concerns that doing so would chill the legitimate claims of parties that have fewer resources.

The committee discussed whether to shorten the 21-day safe harbor in Rule 11. Mr. Hafen commented that shortening the safe harbor could help shorten litigation but that any attempt to do so may face resistance from the bar. Ms. Sylvester suggested shortening the safe harbor only in family-law cases. Mr. Hunnicutt further suggested shortening the safe harbor only in family-law cases involving a domestic commissioner.

Timothy Pack cautioned that motions for sanctions under Rule 11 are often emotional and that the 21 days act as a cooling period. Mr. Hafen commented that shortening the safe harbor may unintentionally increase motion practice rather than reduce it. Mr. Hunnicutt agreed that expanding methods for litigants to punish each other encourages increased motion practice and noted that the domestic system incentivizes mediation that disincentivizes vexatious litigants. Judge Laura Scott cautioned that judges must take care in family-law cases where options exist that are not typically available in other civil cases, including the power to adjust attorney fees based on a party's ability to pay and to award attorney fees based on individual claims. Susan Vogel noted that bad actors in family-law cases often find new attorneys to represent them when their previous attorneys withdraw, preventing Rule 83 from applying to parties who otherwise may qualify as vexatious litigants. Judge Kent Holmberg concurred with Judge Scotts comments and noted that there is some uncertainty regarding how changing Rule 11 could impact the awarding of attorney fees. The committee elected not to amend Rule 11 at this time.

Returning to the issue raised by Mr. Lee, the committee discussed the use and scope of the phrase "any court" in Rule 83, including how the phrase has been recently interpreted and whether the phrase includes federal courts or only state courts. After concluding discussion, the committee elected not to alter the phrase at this time.

After the discussion concluded, Mr. Hafen called for a motion. Susan Vogel moved to send the proposed amendment to Rule 83 to the Supreme Court for comment. Timothy Pack seconded the motion. The motion passed unanimously.

The committee approved the following proposed amendments to send to the Court:

> **Rule 83. Vexatious litigants.**
> **(a) Definitions.**
> (a)(1) The court may find a person to be a "vexatious litigant" if the person, with or without legal representation, including an attorney acting pro se[~~, without legal representation~~], does any of the following: . . . .
> . . . .
> **(b) Vexatious litigant orders.** The court may, on its own motion or on the motion of any party, enter an order requiring a vexatious litigant to: . . . .
> . . . .

(b)(5) abide by a prefiling order requiring the vexatious litigant to obtain leave of the court before filing any future claim for relief in any court; . . . .
. . . .
(e) Prefiling orders as to future claims.
(e)(1) A vexatious litigant subject to a prefiling order restricting the filing of future claims shall, before filing, obtain an order authorizing the vexatious litigant to file the claim. The presiding judge of the judicial district in which the claim is to be filed, in consultation with the judge who entered the vexatious litigant order, shall decide the application. In granting an application, the presiding judge may impose in the pending action any of the vexatious litigant orders permitted under paragraph (b).
. . . .
(j) Applicability of vexatious litigant order to other courts. After a court has issued a vexatious litigant order, any other court may rely upon that court's findings and order its own restrictions against the litigant as provided in paragraph (b).

(3) RULES 4, 7, 8, 36, 101

The committee reviewed the language of proposed amendments to Rules 4, 7, 8, 36, and 101, and made revisions to coordinate the proposed language regarding notice as follows:

Rule 4: (c)(1)(G) include the bilingual notice set forth in the form summons approved by the Utah Judicial Council.

Rule 7: (c)(2) **Caution language.** For all dispositive motions, the motion must include the following caution language at the top right corner of the first page, in bold type:
This motion requires you to respond. Please see the Notice to Responding Party.
(c)(3) **Bilingual notice.** All motions must include or attach the bilingual Notice to Responding Party approved by the Judicial Council.
(c)(4) **Failure to include caution language and notice.** Failure to include the caution language in paragraph (c)(2) and the bilingual notice in paragraph (c)(3) may be grounds to continue the hearing on the motion, or may provide the non-moving party with a basis under Rule 60(b) for excusable neglect to set aside the order resulting from the motion. Parties may opt out of receiving the notices set forth in paragraphs (c)(2 and (c)(3) while represented by counsel.

Rule 8: **(a) Claims for relief.** . . . A pleading requesting relief must include the following caution language at the top right of the first page, in bold print:
If you do not respond to this document within applicable time limits, judgment could be entered against you as requested.
Failure to include the caution language may provide the responding party with a basis under Rule 60(b) for excusable neglect to set aside any resulting judgment or order.

Rule 36: **(b) Required caution language on request for admission.**
(b)(1) All requests for admission must include the following caution language at the top right corner of the first page of the document, in bold type: **You must respond to these requests for admissions within 28 days or the court will consider you to have admitted these requests as true.**
(b)(2) Failure to include the caution language may provide the non-requesting party with a basis under Rule 60(b) for excusable neglect to set aside any resulting order or judgment.

Rule 101: (a)(2) All motions must provide the bilingual Notice to Responding Party approved by the Judicial Council.
(a)(3) Each motion to a court commissioner must include the following caution language at the top right corner of the first page, in bold type: **This motion will be decided by the court commissioner at an upcoming hearing. If you do not appear at the hearing, the Court might make a decision against you without your input. In addition, you may also file a written response at least 14 days before the hearing.**
(a)(4) Failure to provide the bilingual Notice to Responding Party or to include the caution language may provide the non-moving party with a basis under Rule 60(b) for excusable neglect to set aside any resulting order or judgment.

After the committee finalized the revisions, Mr. Hafen called for a motion. Jim Hunnicutt moved to send the proposed amendments to Rules 4, 7, 8, 36, and 101, as revised, to the Supreme Court for comment. Susan Vogel seconded the motion. The motion passed unanimously.

(4) RULE 24

The committee discussed the appropriateness of the term "agency" as used in proposed amendments to Rule 24. Ms. Sylvester informed the committee of Judge Holmberg's comments regarding whether the term "agency," "political subdivision," or "governmental entity" would be most appropriate in the rule. Judge Holmberg and Ms. Sylvester recommended using "governmental entity," which is used in other areas of the rule. The committee adopted the recommendation.

After discussion concluded, Mr. Hafen called for a motion. Paul Stancil moved to send the proposed amendment, as revised, to send to the Supreme Court. Susan Vogel seconded the motion. The motion passed unanimously.

The committee approved the following revised language to send to the Court in addition to other proposed amendments to Rule 24:

(b)(2) **By a Governmental Entity.** On timely motion, the court may permit a governmental entity, to intervene if a party's claim or defense is based on:
(b)(2)(A) a statute or executive order administered by the governmental entity; or

(b)(2)(B) any regulation, order, requirement, or agreement issued or made under the statute or executive order.

(5) ADJOURNMENT

The remaining items were deferred until August 26, 2020. Before adjourning, the committee briefly discussed the need to review rules for potential changes related to the COVID-19 pandemic. The meeting adjourned at 5:49 p.m.

Tab 2

Remote Hearings:
Below are some of the items the Remote Hearings subcommittee discussed as well as the remaining items left to discuss with the full committee.

-Susan Vogel is going to look at whether we should include something about TTY for those who are hearing impaired if the hearing format won't be video conference (where a sign language interpreter would make the necessary accommodation).

-The subcommittee made the default for evidentiary hearings videoconference and opted not to make videoconference the default for Rule 12 and 56 motions as well.

-The subcommittee discussed and is still considering whether we should include an Advisory Committee Note for Rule 45 indicating that the person to contact for technical difficulties should not be the court as the courts don't have tech support folks to help in this area. Instead, the purpose of having someone to call is more to notify the parties and the court that attempts are being made and the person didn't no-show and perhaps change the format to telephone if video isn't working.

-An alternative to a committee note would be to just say in the rule that it should be either the issuing attorney (or pro se party) or someone at the issuing attorney's office as that is the person with the greatest interest in having the witness attend (and the person who needs to know what efforts were or weren't made to attend for follow-up motion practice).

Rule 43. Evidence.

(a) Form. In all trials and evidentiary hearings, the testimony of witnesses shall be taken in open court, unless otherwise provided by these rules, the Utah Rules of Evidence, or a statute of this state. The court may, upon request or on its own order, ~~F~~for good cause and with appropriate safeguards, ~~the court may~~ permit testimony in open court by contemporaneous transmission from a different location. Whenever possible, contemporaneous transmission shall be conducted via videoconference. For good cause shown, the court may permit testimony via telephonic means. Appropriate safeguards must include:

(a)(1) notice of the date, time, and method of transmission, including instructions for participation and who to contact if there are technical difficulties;

(a)(2) a party and the party's counsel to communicate confidentially;

(a)(3) documents, photos and other things that are delivered in the courtroom to be delivered previously or simultaneously to the remote participants;

(a)(4) an interpreter, if needed; and

(a)(5) a verbatim record of the testimony.

(b) Evidence on motions. When a motion is based on facts not in the record, the court may hear the matter on affidavits, declarations, oral testimony or depositions.

Advisory Committee Note

Federal Rule of Civil Procedure 43 has permitted testimony by contemporaneous transmission since 1996. State court judges have been conducting telephone conferences for many decades. These range from simple scheduling conferences to resolution of discovery disputes to status conferences to pretrial conferences. These conferences tend not to involve testimony, although judges sometimes permit testimony by telephone or more recently by video conference with the consent of the parties. The 2016 amendments are part of a coordinated effort by the Supreme Court and the Judicial Council to authorize a convenient practice that is more frequently needed in an increasingly connected society and to bring a level of quality to that practice suitable for a court record. As technology evolves the methods of contemporaneous transmission will change.

Rule 7. Pleadings allowed; motions, memoranda, hearings, orders.

(h) Hearings.

(h)(1) The court may hold a hearing on any motion. A party may request a hearing in the motion, in a memorandum or in the request to submit for decision. A request for hearing must be separately identified in the caption of the document containing the request. The court must grant a request for a hearing on a motion under Rule 56 or a motion that would dispose of the action or any claim or defense in the action unless the court finds that the motion or opposition to the motion is frivolous or the issue has been authoritatively decided.

(h)(2) The court may, upon request or on its own order, for good cause and with appropriate safeguards, conduct any hearing remotely or permit a witness, a party, or counsel to participate in a hearing remotely. Appropriate safeguards must include:

(h)(2)(A) notice of the date, time, and method of transmission, including instructions for participation and who to contact if there are technical difficulties

(h)(2)(B) a party and the party's counsel to communicate confidentially;

(h)(2)(C) documents, photos and other things that are delivered in the courtroom to be delivered previously or simultaneously to the remote participants;

(h)(2)(D) an interpreter, if needed; and

(h)(2)(E) a verbatim record of the testimony.

Rule 45. Subpoena.

(a) Form; issuance.

(a)(1) Every subpoena shall:

(a)(1)(A) issue from the court in which the action is pending;

(a)(1)(B) state the title and case number of the action, the name of the court from which it is issued, and the name and address of the party or attorney responsible for issuing the subpoena;

(a)(1)(C) command each person to whom it is directed

(a)(1)(C)(i) to appear and give testimony at a trial, hearing or deposition, or

(a)(1)(C)(ii) to appear and produce for inspection, copying, testing or sampling documents, electronically stored information or tangible things in the possession, custody or control of that person, or

(a)(1)(C)(iii) to copy documents or electronically stored information in the possession, custody or control of that person and mail or deliver the copies to the party or attorney responsible for issuing the subpoena before a date certain, or

(a)(1)(C)(iv) to appear and to permit inspection of premises;

(a)(1)(D) if an appearance is required, ~~specify~~ notice of the date, time and place for the appearance and, if remote transmission is requested, instructions for participation and who to contact if there are technical difficulties; and

(a)(1)(E) include a notice to persons served with a subpoena in a form substantially similar to the approved subpoena form. A subpoena may specify the form or forms in which electronically stored information is to be produced.

(a)(2) The clerk shall issue a subpoena, signed but otherwise in blank, to a party requesting it, who shall complete it before service. An attorney admitted to practice in Utah may issue and sign a subpoena as an officer of the court.

Tab 3

The Board of District Court Judges is proposing a rule change regarding empaneling jurors in response to issues that have arisen during the COVID-19 pandemic.

The committee should discuss whether the proposal raises any constitutional concerns.

Rule 47. Jurors.

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

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

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

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

(e) **Challenges to individual jurors; number of peremptory challenges.** The challenges to individual jurors are either peremptory or for cause. Each party shall be entitled to three peremptory challenges. Several defendants or several plaintiffs shall be considered as a single party for the purposes of making peremptory challenges unless there is a substantial controversy between them, in which case the court shall allow as many additional peremptory challenges as

is just. If one or two alternate jurors are called, each party is entitled to one peremptory challenge in addition to those otherwise allowed. If the jury panel is of a number where a jury cannot be seated if some or all peremptory challenges are exercised, the court may, prior to any side exercising peremptory challenges, equally reduce the number of peremptory challenges to which each side is entitled, to allow a jury to be seated.

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

(f)(1) A want of any of the qualifications prescribed by law to render a person competent as a juror.

(f)(2) Consanguinity or affinity within the fourth degree to either party, or to an officer of a corporation that is a party.

(f)(3) Standing in the relation of debtor and creditor, guardian and ward, master and servant, employer and employee or principal and agent, to either party, or united in business with either party, or being on any bond or obligation for either party; provided, that the relationship of debtor and creditor shall be deemed not to exist between a municipality and a resident thereof indebted to such municipality by reason of a tax, license fee, or service charge for water, power, light or other services rendered to such resident.

(f)(4) Having served as a juror, or having been a witness, on a previous trial between the same parties for the same cause of action, or being then a witness therein.

(f)(5) Pecuniary interest on the part of the juror in the result of the action, or in the main question involved in the action, except interest as a member or citizen of a municipal corporation.

(f)(6) Conduct, responses, state of mind or other circumstances that reasonably lead the court to conclude the juror is not likely to act impartially. No person may serve as a juror,

if challenged, unless the judge is convinced the juror can and will act impartially and fairly.

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

(g)(1) **Strike and replace method.** The court shall summon the number of jurors that are to try the cause plus such an additional number as will allow for any alternates, for all peremptory challenges permitted, and for all challenges for cause that may be granted. At the direction of the judge, the clerk shall call jurors in random order. The judge may hear and determine challenges for cause during the course of questioning or at the end thereof. The judge may and, at the request of any party, shall hear and determine challenges for cause outside the hearing of the jurors. After each challenge for cause sustained, another juror shall be called to fill the vacancy, and any such new juror may be challenged for cause. When the challenges for cause are completed, the clerk shall provide a list of the jurors remaining, and each side, beginning with the plaintiff, shall indicate thereon its peremptory challenge to one juror at a time in regular turn until all peremptory challenges are exhausted or waived. The clerk shall then call the remaining jurors, or so many of them as shall be necessary to constitute the jury, including any alternate jurors, and the persons whose names are so called shall constitute the jury. If alternate jurors have been selected, the last jurors called shall be the alternates, unless otherwise ordered by the court prior to voir dire.

(g)(2) **Struck method.** The court shall summon the number of jurors that are to try the cause plus such an additional number as will allow for any alternates, for all peremptory challenges permitted and for all challenges for cause that may be granted. At the direction of the judge, the clerk shall call jurors in random order. The judge may hear and determine challenges for cause during the course of questioning or at the end thereof. The judge may and, at the request of any party, shall hear and determine challenges for cause outside the hearing of the jurors. When the challenges for cause are completed, the clerk shall provide a list of the jurors remaining, and each side, beginning with the plaintiff, shall indicate thereon its peremptory challenge to one juror at a time in regular turn until

all peremptory challenges are exhausted or waived. The clerk shall then call the remaining jurors, or so many of them as shall be necessary to constitute the jury, including any alternate jurors, and the persons whose names are so called shall constitute the jury. If alternate jurors have been selected, the last jurors called shall be the alternates, unless otherwise ordered by the court prior to voir dire.

(g)(3) In courts using lists of prospective jurors generated in random order by computer, the clerk may call the jurors in that random order.

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

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

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

(j)(1) If the judge permits jurors to submit questions, the judge shall control the process to ensure the jury maintains its role as the impartial finder of fact and does not become an investigative body. The judge may disallow any question from a juror and may discontinue questions from jurors at any time.

(j)(2) If the judge permits jurors to submit questions, the judge should advise the jurors that they may write the question as it occurs to them and submit the question to the bailiff for transmittal to the judge. The judge should advise the jurors that some questions might not be allowed.

(j)(3) The judge shall review the question with counsel and unrepresented parties and rule upon any objection to the question. The judge may disallow a question even though no objection is made. The judge shall preserve the written question in the court file. If the question is allowed, the judge shall ask the question or permit counsel or an

unrepresented party to ask it. The question may be rephrased into proper form. The judge shall allow counsel and unrepresented parties to examine the witness after the juror's question.

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

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

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

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

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

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

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

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

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

Tab 4

We have two tasks on Rule 26:
(1) Finalizing the edits the committee began making last year; and
(2) Coordinating amendments with Rule 4-206.

Regarding (1), I have attached the relevant portions of the February 2019 minutes to these materials, which was the last month we addressed Rule 26.

Regarding (2), Chris Palmer, Court Security Director, heads a work group that is addressing an audit of the courts' evidence storage procedures. The work group amended Code of Judicial Administration Rule 4-206 (repeal and replace). Policy and Planning reviewed the amended rule and noted that it may conflict with the Rules of Civil Procedure. My observation is that paragraph (1)(b) of Rule 4-206 should probably be moved to Rule 26 of the Rules of Civil Procedure, while leaving behind a coordinating reference to Rule 26. That rule is attached.

Rule 26. General provisions governing disclosure and discovery.

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

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

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

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

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

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

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

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

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

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

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

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

(a)(3) Exemptions.

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

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

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

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

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

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

(a)(4) Expert testimony.

(a)(4)(A) Disclosure of retained expert testimony. A party shall, without waiting for a discovery request, serve on the other parties the following information regarding any person who may be used at trial to present evidence under Rule 702 of the Utah Rules of Evidence and who is retained or specially employed to provide expert testimony in the case or whose duties as an employee of the party regularly involve giving expert testimony: (i) the expert's name and

Comment [RNA1]: Reason: There may be multiple plaintiffs, some of who may join the case at a later date.

Comment [RNA2]: Reason: There may be multiple defendants; some of them may seek to file a motion to dismiss or similar motion after appearance that is not an answer, and such should not have to provide initial disclosures before such motion is resolved.

Comment [RNA3]: Reason: Clarity; this paragraph only pertains to this type of expert witness.

qualifications, including a list of all publications authored within the preceding 10 years, and a list of any other cases in which the expert has testified as an expert at trial or by deposition within the preceding four years, (ii) a brief summary of the opinions to which the witness is expected to testify, (iii) ~~all~~ the facts and data and other information specific to the case that will be relied upon by the witness in forming those opinions, and (iv) the compensation to be paid for the witness's study and testimony.

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

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

(a)(4)(C)(i) The party who bears the burden of proof on the issue for which expert testimony is offered shall serve on the other parties the information required by paragraph (a)(4)(A) within ~~seven~~ 14 days after the close of fact discovery. Within ~~seven~~ 14 days thereafter, the party opposing the expert may serve notice electing either a deposition of the expert pursuant to paragraph (a)(4)(B) and Rule 30, or a written report pursuant to paragraph (a)(4)(B). The deposition shall occur, or the report shall be served on the other parties, within ~~28~~ 42 days after the election is served on the other parties. If no election is served on the other parties, then no further discovery of the expert shall be permitted.

(a)(4)(C)(ii) The party who does not bear the burden of proof on the issue for which expert testimony is offered shall serve on the other parties the information required by paragraph (a)(4)(A) within 14 ~~seven~~ days after the later of (A) the date on which the ~~election~~ disclosure under paragraph (a)(4)(C)(i) is due, or (B) ~~receipt~~ service of the written report or the taking of the expert's deposition pursuant to paragraph (a)(4)(C)(i). Within ~~seven~~ 14 days thereafter, the party opposing the expert may serve notice electing either a deposition of the expert pursuant to paragraph (a)(4)(B) and Rule 30, or a written report pursuant to paragraph (a)(4)(B). The deposition shall occur, or the report shall be served on the other parties, within ~~28~~ 42 days after the election is served on the other parties. If no election is served on the other parties, then no further discovery of the expert shall be permitted.

(a)(4)(C)(iii) If the party who bears the burden of proof on an issue wants to designate rebuttal expert witnesses, it shall serve on the other parties the information required by paragraph (a)(4)(A) within 14 ~~seven~~ days after the later of (A) the date on which the election under paragraph (a)(4)(C)(ii) is due~~,~~ or (B) ~~receipt~~ service of the written report or the taking of the expert's deposition pursuant to paragraph (a)(4)(C)(ii). Within ~~seven~~ 14 days thereafter, the party opposing the expert may serve notice electing either a deposition of the expert pursuant to paragraph (a)(4)(B) and Rule 30, or a written report pursuant to paragraph (a)(4)(B). The deposition shall occur, or the report shall be served on the other parties, within ~~28~~ 42 days after the election is served on the other parties. If no election is served on the other parties, then no further discovery of the expert shall be permitted. An expert disclosed only as a rebuttal witness cannot be used in the case in chief.

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

(a)(4)(E) Summary of non-retained expert testimony. If a party intends to present evidence at trial under Rule 702 of the Utah Rules of Evidence from any person other than an expert witness who is retained or specially employed to provide testimony in the case or a person

Comment [RNA4]: Reason: Practitioners reportedly need more time.

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

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

Comment [RNA7]: Reason: When the party bearing the burden fails to disclose an expert, the party who does not bear the burden currently has no triggering event for providing its expert disclosure.

Comment [RNA8]: Reason: Practitioners reportedly need more time.

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

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

whose duties as an employee of the party regularly involve giving expert testimony, that party must serve on the other parties a written summary of the facts and opinions to which the witness is expected to testify in accordance with the deadlines set forth in paragraph (a)(4)(C). Such a witness cannot be required to provide a report pursuant to paragraph (a)(4)(B). A deposition of such a witness may not exceed four hours and the party taking the deposition shall pay the expert's reasonable hourly fees for attendance at the deposition..

Comment [NS11]: From HJR023 3/5/2020

(a)(5) Pretrial disclosures.

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

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

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

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

(a)(5)(B) Disclosure required by paragraph (a)(5)(A) shall be served on the other parties at least 28 days before trial. Disclosures required by paragraph (a)(5)(A)(i) and (a)(5)(A)(ii) shall also be filed. At least 14 days before trial, a party shall serve and file any counter designations of deposition testimony~~,~~ and any objections and grounds for the objections to the use of any deposition, witness, ~~and~~ or ~~to the admissibility of~~ exhibits~~.~~. Other than objections under Rules 402 and 403 of the Utah Rules of Evidence, objections not listed are waived unless excused by the court for good cause.

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

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

(a)(6) Form of disclosure and discovery production. Rule 34 governs the form of producing all documents, data compilations, electronically stored information, tangible things, and evidentiary material pursuant to this Rule.

Comment [RNA14]: Reason: ensure compliance with URCP 34 in initial disclosure document production.

(b) Discovery scope.

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

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

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

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

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

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

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

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

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

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

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

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

(b)(7) Trial preparation; experts.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Comment [RNA15]: Reason: The current requirement has been universally ignored and may be too onerous and expensive relative to its desired goal: ensuring that parties know that extraordinary discovery will result in additional expense.

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

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

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

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

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

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

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

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

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

Advisory Committee Notes

Legislative Note

Rule 4-206. Exhibits.

(1) Prior to Trial.

(1)(A) **Marking Exhibits.** Each party must mark all the exhibits it intends to introduce during trial by utilizing exhibit labels in the format prescribed by the clerk of court. Each party must use a label or tag which shall contain, at a minimum, a case number and exhibit number/letter. Parties may use electronic labels that conform to the minimum standards of case number and exhibit number/letter. Each party must designate the source of the exhibit with an appropriate party designation. The court may prescribe an alternate marking system.

(1)(B) **Preparation for Trial.** After completion of discovery and prior to trial, each party shall (i) prepare and serve on opposing party a list that identifies and briefly describes all marked exhibits the party will offer at trial; and (ii) afford opposing party an opportunity to examine the listed exhibits. Exhibits are part of the public record and personal information shall be redacted in accordance with Rule 4-202.09(10).

Comment [JCP1]: Possible Rule of Civil Procedure conflict? – Please Review

Comment [NS2]: I think this should go in Civil Rule 26 and then this paragraph can contain a reference to Rule 26. I.e. "Exhibit preparation for trial shall be in accordance with Rule 26 of the Utah Rules of Civil Procedure. "

(2) During Trial.

(2b) During Trial.

(2)(A) Custody of the Court. Exhibits that are received into evidence during trial and that are suitable for filing and transmission to the appellate courts, as a part of the record on appeal, must be placed in the custody of the clerk of court or designee. The clerk of court or designee must list exhibits in the exhibit list. The exhibit list means either the court's designated case management system or a form approved by the Judicial Council. The exhibit list shall be made part of the case record.

(2)(B) Custody of the Parties. Exhibits other than those described in paragraph (2)(A), that are received into evidence during trial, will be retained in the custody of the party offering the exhibit. Such exhibits will include, but not be limited to, items requiring law enforcement chain of custody, the following types of bulky or sensitive exhibits or evidence: biohazard, controlled substances, firearms, ammunition, explosive devices, pornographic materials, jewelry, poisonous or dangerous chemicals, intoxicating liquors, money or articles of high monetary value, counterfeit money, original digital storage media and documents or physical exhibits of unusual bulk or weight. With approval of the court, a printed photograph may be offered by the submitting party as a representation of the original exhibit. The clerk of court or designee must list these exhibits in the exhibit list and note that the original exhibit is in the custody of the party.

(2)(C) **Exhibit Custody.** Upon daily adjournment, the clerk of court or designee must compare the exhibit list with the exhibits received that day. The exhibits received, under subsection (2)(A) must be stored in an envelope or container, marked with the case number, and placed into a secured storage location that meets the requirements outlined in subsection (~~2~~3)(~~i~~ii).

The clerk of court or designee may store exhibits in a temporary secured location for recesses lasting less than 72 hours. The temporary location must be sufficient to prevent access by unauthorized persons and secured via key lock, with the clerk of court, judge or designee maintaining sole access. The clerk must note in the record the date and time the exhibit was transferred to or from a temporary location or secured storage.

Comment [JCP3]: The purpose is to allow the judge to store the exhibits in their chambers so long as they have sole access which can be done by judicial order on the door.

(3) After Trial.

(3)(A) **Exhibits in the Custody of the Court.** When the court takes custody of exhibits under subsection (2)(A) of this rule, those exhibits may not be taken from the custody of the clerk of court or designee until final disposition of the matter, except upon order of the court and execution of a receipt that identifies the material taken, which receipt will be filed in the case.

(3)(i) **Exhibit Manager.** The clerk of court shall appoint an exhibit manager with responsibility for the security, maintenance, documentation of chain of custody, and disposition of exhibits. The clerk of court may also appoint a person to act as exhibit manager during periods when the primary exhibit manager is absent. Unaccompanied access to the exhibit storage area by anyone other than the exhibit manager, acting exhibit manager, or the clerk of court is prohibited without a court order.

(3)(ii) **Secured Storage Location.** Each court must provide a secured location within their facility for storing exhibits retained by the court under subsection (2)(A). The secured location must be sufficient to prevent access from unauthorized persons through key, combination lock, or electronic access. The facility must also protect exhibits from theft or damage. The secured storage location shall be certified by the Court Security Director through a written request fully describing the secured storage location, local access procedures, and security controls. Any changes to the location, access procedures, or security controls will require recertification by the Court Security Director.

(3)(B) **Removal of Exhibits.** Parties shall remove all exhibits in the custody of the court after the time for appeal has expired or after all appeals are resolved.

(3)(C) **Exhibits in the Custody of the Parties.** Unless the court orders otherwise, the party offering exhibits of the kind described in subsection (2)(B) of this rule will retain custody of the exhibits and be responsible to the court for preserving them in the same condition as the time of admission, until the time for appeal has expired or after all appeals are resolved. The party is also responsible for retaining exhibits ~~that may be~~ needed for any post-conviction proceedings.

(3)(D) **Access to Exhibits by Parties.** In case of an appeal, the appellate court or any party, may file a written request for access to an exhibit admitted in the trial court. The party with custody of the exhibits, will promptly make available any or all original exhibits in its possession, or true copies of the exhibit.

(3)(E) **Exhibits in Appeals.** Upon request of the appellate court, each party will prepare and submit to the clerk of the appropriate appellate court a list that designates which exhibits are necessary for the determination of the appeal and in whose custody they remain. Parties who have custody of exhibits are charged with the responsibility for their safekeeping and transportation, if required, to the appellate courts. All other exhibits that are not necessary for the determination of the appeal, and are not in the custody of the clerk of the appellate court, will remain in the custody of the respective party.

(3)(F) **Disposal of exhibits.** After sixty days have expired from final disposition, the time for appeal has expired, ~~or~~ after all appeals are resolved, or the statute of limitations for ~~timelensess related to~~ post-conviction relief has expired, the exhibit manager shall dispose of any exhibits in the court's possession as follows:

(3)(F)(i) Property having no monetary value shall be destroyed by the exhibit manager. The exhibit manager shall create a certificate of destruction which includes a description, case number, and exhibit number. The certificate of destruction is to be maintained in the record.

(3)(F)(ii) Property having monetary value shall be returned to its owner or, if unclaimed, shall be given to the sheriff of the county or other law enforcement agency to be sold in accordance with Utah Code Section 24-3-103. The agency receiving the property shall furnish the court with a receipt to be maintained in the record.

Comment [JCP4]: Feedback was given to include any post convition relief. Unsure how to structure the paragraph.

Comment [NS5]: The post-conviction piece is a tricky one because it's such a moving target. See below. It can go on forever, which makes it challenging for the courts to know when to destroy or return exhibits. It may make sense to set a limit, like 5 years. But I'd want to get feedback on this from the Rocky Mountain Innocence Center and the AG's office.

78B-9-107. Statute of limitations for postconviction relief.

(1) A petitioner is entitled to relief only if the petition is filed within one year after the cause of action has accrued.

(2) For purposes of this section, the cause of action accrues on the latest of the following dates:

(a) the last day for filing an appeal from the entry of the final judgment of conviction, if no appeal is taken;

(b) the entry of the decision of the appellate court which has jurisdiction over the case, if an appeal is taken;

(c) the last day for filing a petition for writ of certiorari in the Utah Supreme Court or the United States Supreme Court, if no petition for writ of certiorari is filed;

(d) the entry of the denial of the petition for writ of certiorari or the entry of the decision on the petition for certiorari review, if a petition for writ of certiorari is filed;

(e) the date on which petitioner knew or should have known, in the exercise of reasonable diligence, of evidentiary facts on which the petition is based; or

(f) the date on which the new rule described in Subsection 78B-9-104(1)(f) is established.

(3) The limitations period is tolled for any period during which the petitioner was prevented from filing a petition due to state action in violation of the United States Constitution, due to physical or mental incapacity, or for claims arising under Subsection 78B-9-104(1)(g), due to force, fraud, or coercion as defined in Section 76-5-308. The petitioner has the burden of proving by a preponderance of the evidence that the petitioner is entitled to relief under this Subsection (3).

(4) The statute of limitations is tolled during the pendency of the outcome of a petition asserting:

(a) exoneration through DNA testing under Section 78B-9-303; or

(b) factual innocence under Section 78B-9-401.

(5) Sections 77-19-8, 78B-2-104, and 78B-2-111 do not extend the limitations period established in this section.

UTAH SUPREME COURT ADVISORY COMMITTEE ON RULES OF CIVIL PROCEDURE

Meeting Minutes – February 27, 2019

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(4) RULE 26. GENERAL PROVISIONS GOVERNING DISCLOSURE AND DISCOVERY (MULTIPLE REQUESTS FOR RULE AMENDMENTS): CONTINUE PRIOR DISCUSSION AT PARAGRAPH (a)(4)(A)

Rod Andreason noted that the committee was discussing what Rule 26 should say about expert disclosures. The committee was attempting to make this rule narrow enough to allow for the disclosures to be specific to the case, but also broad enough that all items reasonably relied upon were included. Paul Stancil argued it was odd to ask for what was going to be relied upon. Ms. DiFrancesco pointed out that the expert would not yet have relied upon anything.

Judge Scott asked if the rule was intending to limit these disclosures to only those things used for the specific case. Judge Stone agreed that this was the purpose. He said he wondered about the proprietary tools that may not be specific to the case. In such situations the other party should be able to see them, and they must be disclosed since they are not public documents. Judge Stucki questioned where you draw the line; there could be unfair surprise by relying upon an article that is not specific to the case, but might be outside a normal expert's knowledge. Judge Stone argued that most science relies upon knowledge any expert should have. If the information is not available in the literature, it must be disclosed. The Utah standard for experts is a generous standard, and so the disclosures are needed. Mr. Slaugh argued that the report must disclose further documents. Judge Stucki responded that the rule cannot avoid all arguments and judgment calls.

Ms. DiFrancesco proposed moving lines 21 and 22 to paragraph (a)(6) to clarify that the all experts are subject to Rule 34.

Mr. Hafen questioned the language on non-retained experts, which appears to narrow the discovery on this topic. Mr. Andreason answered that the discovery from non-retained experts should be limited to a deposition. Judge Mettler questioned if the fact witness who was also a non-retained expert could be deposed twice. Mr. Andreason answered that the rule was intended to allow an expert deposition. Mr. Sneddon proposed adding that no further expert discovery was allowed, aside from the 4 hour deposition.

Mr. Hunnicutt questioned if this would require any subpoenas of files to occur before fact discovery closed. Mr. Andreason agreed that such a subpoena would be fact discovery. Ms. DiFrancesco asked what additional discovery was possible. Mr. Andreason answered that the rule addressed any discovery beyond the deposition. Mr. Pack noted that the rule does not allow for the subpoena of a retained expert either. Mr. Hunnicutt pointed out that the added line just makes non-retained experts the same as retained experts. Ms. DiFrancesco was troubled by the fact that the parties could not get the file of a non-retained expert, as that may not be practical to get in fact discovery.

Mr. Pack proposed adding a reference to Rule 45 regarding subpoenas. Ms. DiFrancesco and Mr. Toth proposed that retained experts files should also be able to be subpoenaed. Mr. Toth believed that the subpoena for the deposition already allowed the requirement for the file to be produced. Trevor Lee questioned if the language limiting the additional discovery was necessary. Mr. Toth proposed adding that the expert could be subpoenaed under Rule 45 to a deposition, as well as for documents. Mr. Pack proposed adding this to retained experts as well. Ms. Sneddon questioned if the language needed to be more specific to allow for document subpoenas. Mr. Andreason proposed eliminating the no further discovery language so that rule 45 is not excluded. Ms. Sneddon asked if this meant that the same line should be removed from the section on retained experts. Others responded that this restriction was for timing, and should remain.

Ms. Slaugh questioned if the deadlines on lines 71 and 81 should be changed from receipt to service, as most deadlines are not based upon receipt.

Mr. Andreason reported that the remaining changes related to changes to deadlines. Mr. Hunnicutt questioned why some of the deadlines were not extended. Mr. Pack stated that there were some decisions for which one should not need that time to decide. Mr. Hunnicutt believed that the multiple timelines were problematic for solo practitioners as they may not have help keeping track of all deadlines. Mr. Slaugh proposed making the rules all 14 days instead of 7.

Mr. Toth asked if there was no election for a report or deposition, what the deadline would be for an expert's designation. In particular, this may be difficult if the expert was on a different topic, not a rebuttal expert. Mr. Slaugh argued that the deadline would remain 14 days after the election deadline. Mr. Toth agreed. Mr. Pack stated this was 28 days after fact discovery ended. The remaining committee members thought that this issue was clear. No amendments were made.

Ms. DiFrancesco asked, if the party bearing the burden of proof wanted to have a rebuttal expert, but did not disclose an original expert, would that rebuttal expert be barred? Mr. Toth believed that the rule was intended to avoid this. Judge Stone had ruled on similar case that the expert cannot be called in the case in chief, but only on rebuttal. Mr. Hafen pointed out that not all judges rule that way. Mr. Slaugh stated that the judges should make this determination, as some situations would require different rulings. Mr. Hafen questioned if this issue was already addressed. Mr. Pack believed that there should be language clarifying this. Mr. Slaugh believed a rebuttal expert could clearly only be for rebuttal, however others believed this was not so clear. Mr. Slaugh then proposed that under rebuttal experts there be added language stating that an expert disclosed only as a rebuttal expert cannot be used in the case in chief.

The remainder of this rule was tabled.