Agenda

Advisory Committee on Rules of Civil Procedure

January 27, 2021

4:00 to 5:30 p.m.

Via Webex

Welcome and approval of minutes.	Tab 1	Jonathan Hafen, Chair
Legislative standing agenda item • Rule 26 • Expedited Procedures Rule		Jonathan Hafen, Nancy Sylvester
Rule 26 • Finalize amendments	Tab 2	Rod Andreason, Tim Pack, Bob Adler
Family law amendments • Amended Rules: 10, 12, 26, 26.1, 104, 106 • New Rule: 100A	Tab 3	Jim Hunnicutt, Judge Holmberg, Brent Hall, Commissioner Joanna Sagers, Stewart Ralphs
Other business *Subcommittee assignments* • ODR Rules	Tab 4	Jonathan Hafen, Chair
Consent item: • Rule 65C	Tab 5	Nancy Sylvester, Brooke McKnight
Tentative items for next month's agenda: • Family law items: Rule 108, Rule 37, discussion on trial date setting • Expungements • Rule 108 • ODR Rules • State v. Billings (possible subcommittee)		---

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

2021 Meeting Schedule: 4th Wednesday at 4pm unless otherwise scheduled

Tab 1

Draft December Minutes:

The draft December minutes are attached and ready for review and approval.

UTAH SUPREME COURT ADVISORY COMMITTEE
ON RULES OF CIVIL PROCEDURE

Summary Minutes – December 2, 2020

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

Committee members & staff	Present	Excused	Appeared by Phone
Jonathan Hafen, Chair	X		
Robert Alder		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		
Brooke McKnight	X		
Ash McMurray	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		
Nancy Sylvester, Staff	X		
Kim Neville, Recording Secretary		X	

(1) WELCOME AND APPROVAL OF MINUTES

Jonathan Hafen welcomed the committee and asked for approval of the minutes as amended by comments of the committee. Jim Hunnicut moved to adopt the minutes as amended. Rod Andreason seconded the motion. The minutes were approved unanimously.

(2) RULES BACK FROM COMMENT

Rule 83. Vexatious litigant amendments.

Nancy Sylvester introduced comments concerning proposed amendments to Rule 83 and how the rule would apply if a U.S. district court entered a vexatious litigant order. Lauren DiFrancesco noted that because the proposed language in paragraph (b) would permit a court to enter an order requiring a vexatious litigant to 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," the rule may raise concerns about infringing on the jurisdiction of federal courts. The committee discussed whether to modify the word "court" to appropriately limit its scope. Because the Utah Rules of Civil Procedure apply only to state courts, the committee ultimately decided against adding additional modifiers.

The committee then turned to a proposed change to paragraph (e), which would have required a presiding judge to consult with the judge who entered the vexatious litigant order prior to deciding whether to allow a new claim to be filed. Trevor Lee inquired whether the intent was to require consultation. Judge Andrew Stone commented that, from an efficiency and workload perspective, the judge who entered the order, rather than the presiding judge, would be better suited to decide based on their existing knowledge of the litigant's file. Brooke McKnight noted that presiding judges face a high burden when faced with becoming familiar with the sometimes lengthy files of vexatious litigants.

Leslie Slaugh cautioned that, despite possible efficiencies, there may be concerns about requiring a judge to decide what occurs in another judge's court. Judge Laura Scott observed that judges are often reluctant to enter vexatious litigant orders, and she expressed concern that a judge who enters a vexatious litigant order will be required to review every filing from that individual thereafter. Judge Amber Mettler raised a concern that requiring consultation may have problematic consequences when applied across different court levels. Mr. Lee suggested that the rule could be amended to give a presiding judge discretion to pass the decision to the judge who entered the order. Judge James Blanch commented that a judge would be unlikely to permit a vexatious litigant to file without scrutiny and that the easiest course of action would be to contact the judge who entered the order.

After further discussion, the majority of the judges on the committee expressed a preference to permit, but not require, the presiding judge to consult with the ordering judge regarding a vexatious litigant's new claim.

Rules 4, 7, 8, 36, 101. Notice amendments.

Ms. Sylvester introduced comments regarding the proposed notice requirements in Rules 4, 7, 8, 36, and 101, including comments expressing concern that the requirements to provide notices regarding consequences and resources would be overly burdensome, and that the requirements should apply only in cases where there is an unrepresented party. After considering the comments, the committee determined that requiring more notice would be a better policy because it is not always clear when a party is represented, noting that in some cases a limited scope attorney or licensed paralegal practitioner may be involved for only a part of the case.

Other comments.

With the remaining time the Committee reviewed the few comments made regarding proposed amendments to Rules 42 and 64. After some discussion, the committee agreed that comments to Rule 64 would benefit from additional review during the next committee meeting.

The committee voted unanimously to request the Supreme Court to publish as final Rule 42, 5, 109, 4, 7, 8, 36, 101, 7A, 7B, and 83.

(3) ADJOURNMENT

The remaining items were deferred until January 27, 2021. The meeting adjourned at 5:04 p.m.

Tab 2

Rule 26:

Rule 26 is ready to be finalized and recommended to the Supreme Court. Below are the minutes from our October meeting, which discuss where we left off on the rule.

October minutes:
Rod Andreason presented the proposed changes to Rule 26 that were carried over from prior meetings, noting that most changes reflected on the redline had been discussed and debated previously. Ms. Sylvester raised an issue regarding lines 98-99 concerning payment of an opposing expert's fees, which was included in response to a legislator's proposal. Mr. Slaugh referenced a recent Court of Appeals case that would potentially conflict with the proposal. Judge Stone raised concern about fees charged by treating physicians, which can vary depending upon which party has requested the testimony and places the trial court in a difficult position of setting a reasonable fee. Ms. Sylvester suggested that we invite the representative to raise this issue in a later meeting.

Ms. Vogel commented that there are certain aspects of the rule that are confusing to pro se litigants. Specifically: (i) the Court's notice of event due dates can be confusing to pro se litigants, particularly with regard to initial disclosure obligations; and (ii) self-represented parties would benefit from direction on how to file exhibits through email. Judge Stone commented that the notice of event due dates is issued as a service to the parties, reflecting the default deadlines, and a preference that the notice be recognized as an order of the court unless otherwise stipulated or amended by the court. Judge Holmberg commented that he does not consider the notice of event due dates to be an order, because the parties can stipulate regarding certain dates without court approval.

Judge Stone expressed support for submission of a witness list, which would assist trial judges in efficiently managing pre-trial matters. Judge Stone also suggested that the rule be revised to require the party who objects to an exhibit to file a courtesy copy to give the judge context regarding the nature of the objection. Mr. Pack commented that in practice, most attorneys will raise comprehensive objections in conjunction with pre-trial disclosures. Mr. Slaugh suggested that the Committee adopt a procedure similar to the Rule 7 procedure for objecting to proposed orders. Mr. Andreason proposed that the language state that copies of trial exhibits be provided to the court, but not filed.

Judge Holmberg suggested that the language of the rule be revised to address objections to authenticity or lack of disclosure, without waiving other categories. Mr. Pack expressed support for the proposal to allow for certain objections to be reserved at the time of the trial. Mr. Andreason suggested that objections be addressed in conjunction with subjection (a)(5)(b). Judge Stone commented regarding the purpose of the rule, which was to minimize the need to call custodians or other witnesses to authenticate exhibits. Mr. Hunnicutt commented that in most family law trials, the practitioners do not object to every single exhibit as is seen in some civil litigation. The existing rule provides that untimely objections are waived unless excused for good cause, and in his experience, judges are adept at finding good cause when an offered exhibit should be rejected. Mr. Hunnicutt commented that the existing rules provide that the objections are waived, unless excused by the court for good cause, which is frequently invoked in family law proceedings. Professor Adler commented regarding the possibility of revising the rule to allow for additional objections to raised based upon the context in which the document is offered at trial. The working group will prepare language to address this issue and make a proposal to the Committee

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 [NS1]: To add? **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 [RNA2]: Reason: There may be multiple plaintiffs, some of who may join the case at a later date.

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

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

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

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

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

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

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

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

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

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, unless manifest injustice would result, the party taking the deposition shall pay the expert's reasonable hourly fees for attendance at the deposition.

Comment [NS12]: From HJR023 3/5/2020 and SJR004 1/2021

(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 [RNA13]: Reason: Judges reportedly want to see these items, although not all of the proposed trial exhibits (need judges' input/confirmation).

Comment [RNA14]: 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 [RNA15]: 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

4832-1426-2649

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).

(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

Comment [RNA16]: 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.

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

4832-1426-2649

Tab 3

Family Law Rules:

The Civil Rules Advisory Committee looked at the proposed family law rules amendments (URCP3 (now 10), 12, 26, 26.1, 104, and 106) at our November 18, 2020 meeting. We also discussed at that meeting proposed new Rule 100.5, which since has been relabeled as 100A. This package of rule changes is aimed at speeding up family law cases and altering some of the nomenclature to facilitate collaborative resolutions.

Prior to our November meeting, these proposed amendments had been vetted and approved by the Utah State Bar Family Law Executive Committee (FLEC), following input from the Domestic Case Process Improvement Subcommittee (chaired by retired Judge Doug Thomas). The subcommittee emphasized a mechanism (case management conferences, or CMCs) to quicken the pace of family law matters. That mechanism came out of the Judicial Council approved "Report and Recommendations to the Standing Committee on Children and Family Law" prepared in 2017.

Since our November meeting, this package of rule changes has been reviewed twice by the Divorce Procedures Subcommittee, which voted to recommend that the time frames set forth in these proposed rule amendments are too short and could invite more petitions to modify if divorces move to completion too quickly.

The majority of the Divorce Procedures Subcommittee (which includes a Second and a Fourth District commissioner) asked for more data as to whether CMCs really speed up cases, and suggested adding a new mechanism allowing litigants to stipulate to stay discovery in their divorces.

At its January meeting, the FLEC (which includes two Third District commissioners) again voiced overwhelming support for this package of amendments as is, without loosening the tighter timeframes, and without elaborating on litigants' ability to seek stays of discovery under Rules 16 and 26. It was pointed out that the CMC process was already approved by the Judicial Council, in part to address the concerns raised in a 2019 legislative audit that was critical of the pace of family law matters in Utah's courts.

A separate, but related amendment, is also included in this packet of rules. Rule 26.1(e) is recommended by the Family Law Procedures Subcommittee. In divorce modification actions, the need for initial disclosures is much reduced. Even so, some lawyers engage in gamesmanship, e.g., insisting on proof of assets when a modification action is only about child custody, because the rules for initial disclosures presently require such full disclosures. The paragraph (e) amendments would address those situations.

Rule 10. Form of pleadings and other papers.

(a) Caption; names of parties; other necessary information.

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

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

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

(4) A party filing a claim for relief, whether by original claim, counterclaim, cross-claim or third-party claim, must also file a completed cover sheet substantially

similar in form and content to the cover sheet approved by the Judicial Council. The clerk may destroy the coversheet after recording the information it contains.

(5) Domestic relations actions, as defined in Rule 26.1, must be captioned as follows:

(i) In petitions for divorce, annulment, separate maintenance, and temporary separation: "In the marriage of [Party A and Party B]."

(ii) In petitions to establish parentage: "In the matter of the parentage of [Child(ren)'s Initials], a child."

(iii) In petitions to establish custody and parent-time: "In the matter of [Child(ren)'s Initials], a child."

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

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

(d) Paper format. All pleadings and other papers, other than exhibits and court-approved forms, must be 8½ inches wide x 11 inches long, on white background, with a

top margin of not less than 1½ inches and a right, left and bottom margin of not less than 1 inch . All text or images must be clearly legible, must be double spaced, except for matters customarily single spaced, must be on one side only and must not be smaller than 12-point size.

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

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

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

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

(i) Electronic papers.

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

(2) A paper electronically signed and filed is the original.

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

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

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

Rule 12. Defenses and objections.

(a) When presented. Unless otherwise provided by statute or order of the court, a defendant shall serve an answer within 21 days after the service of the summons and complaint is complete within the state and within 30 days after service of the summons and complaint is complete outside the state. A party served with a pleading stating a cross-claim shall serve an answer thereto within 21 days after the service. The plaintiff shall serve a reply to a counterclaim in the answer within 21 days after service of the answer or, if a reply is ordered by the court, within 21 days after service of the order, unless the order otherwise directs. The service of a motion under this rule alters these periods of time as follows, unless a different time is fixed by order of the court, but a motion directed to fewer than all of the claims in a pleading does not affect the time for responding to the remaining claims:

(1) If the court denies the motion or postpones its disposition until the trial on the merits, the responsive pleading shall be served within 14 days after notice of the court's action;

(2) If the court grants a motion for a more definite statement, the responsive pleading shall be served within 14 days after the service of the more definite statement.

(b) When presented in domestic relations actions. A party served with a domestic relations action shall serve an answer within 21 days after service of the summons and petition is complete within the state and within 30 days after service of the summons and petition is complete outside the state. A counterpetition must be filed concurrent with an answer. A party served with a counterpetition shall serve an answer within 21 days after service of the answer and counterpetition.

(b) How presented. Every defense, in law or fact, to claim for relief in any pleading, whether a claim, counterclaim, cross-claim, or third-party claim, shall be asserted in the responsive pleading thereto if one is required, except that the following defenses may at

the option of the pleader be made by motion: (1) lack of jurisdiction over the subject matter, (2) lack of jurisdiction over the person, (3) improper venue, (4) insufficiency of process, (5) insufficiency of service of process, (6) failure to state a claim upon which relief can be granted, (7) failure to join an indispensable party. A motion making any of these defenses shall be made before pleading if a further pleading is permitted. No defense or objection is waived by being joined with one or more other defenses or objections in a responsive pleading or motion or by further pleading after the denial of such motion or objection. If a pleading sets forth a claim for relief to which the adverse party is not required to serve a responsive pleading, the adverse party may assert at the trial any defense in law or fact to that claim for relief. If, on a motion asserting the defense numbered (6) to dismiss for failure of the pleading to state a claim upon which relief can be granted, matters outside the pleading are presented to and not excluded by the court, the motion shall be treated as one for summary judgment and disposed of as provided in Rule 56, and all parties shall be given reasonable opportunity to present all material made pertinent to such a motion by Rule 56.

(c) Motion for judgment on the pleadings. After the pleadings are closed, but within such time as not to delay the trial, any party may move for judgment on the pleadings. If, on a motion for judgment on the pleadings, matters outside the pleadings are presented to and not excluded by the court, the motion shall be treated as one for summary judgment and disposed of as provided in Rule 56, and all parties shall be given reasonable opportunity to present all material made pertinent to such a motion by Rule 56.

(d) Preliminary hearings. The defenses specifically enumerated (1) - (7) in subdivision (b) of this rule, whether made in a pleading or by motion, and the motion for judgment mentioned in subdivision (c) of this rule shall be heard and determined before trial on application of any party, unless the court orders that the hearings and determination thereof be deferred until the trial.

(e) Motion for more definite statement. If a pleading to which a responsive pleading is permitted is so vague or ambiguous that a party cannot reasonably be required to frame a responsive pleading, the party may move for a more definite statement before interposing a responsive pleading. The motion shall point out the defects complained of and the details desired. If the motion is granted and the order of the court is not obeyed within 14 days after notice of the order or within such other time as the court may fix, the court may strike the pleading to which the motion was directed or make such order as it deems just.

(f) Motion to strike. Upon motion made by a party before responding to a pleading or, if no responsive pleading is permitted by these rules, upon motion made by a party within 21 days after the service of the pleading, the court may order stricken from any pleading any insufficient defense or any redundant, immaterial, impertinent, or scandalous matter.

(g) Consolidation of defenses. A party who makes a motion under this rule may join with it the other motions herein provided for and then available. If a party makes a motion under this rule and does not include therein all defenses and objections then available which this rule permits to be raised by motion, the party shall not thereafter make a motion based on any of the defenses or objections so omitted, except as provided in subdivision (h) of this rule.

(h) Waiver of defenses. A party waives all defenses and objections not presented either by motion or by answer or reply, except (1) that the defense of failure to state a claim upon which relief can be granted, the defense of failure to join an indispensable party, and the objection of failure to state a legal defense to a claim may also be made by a later pleading, if one is permitted, or by motion for judgment on the pleadings or at the trial on the merits, and except (2) that, whenever it appears by suggestion of the parties or otherwise that the court lacks jurisdiction of the subject matter, the court shall dismiss the action. The objection or defense, if made at the trial, shall be disposed of as provided in Rule 15(b) in the light of any evidence that may have been received.

(i) Pleading after denial of a motion. The filing of a responsive pleading after the denial of any motion made pursuant to these rules shall not be deemed a waiver of such motion.

(j) Security for costs of a nonresident plaintiff. When the plaintiff in an action resides out of this state, or is a foreign corporation, the defendant may file a motion to require the plaintiff to furnish security for costs and charges which may be awarded against such plaintiff. Upon hearing and determination by the court of the reasonable necessity therefor, the court shall order the plaintiff to file a $300.00 undertaking with sufficient sureties as security for payment of such costs and charges as may be awarded against such plaintiff. No security shall be required of any officer, instrumentality, or agency of the United States.

(k) Effect of failure to file undertaking. If the plaintiff fails to file the undertaking as ordered within 30 days of the service of the order, the court shall, upon motion of the defendant, enter an order dismissing the action.

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.

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

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

(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;

(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);

(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;

(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

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

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

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

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

(3) Exemptions.

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

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

(ii) governed by Rule 65B or Rule 65C;

(iii) to enforce an arbitration award;

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

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

(4) Expert testimony.

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

summary of the opinions to which the witness is expected to testify, (iii) all data and other information that will be relied upon by the witness in forming those opinions, and (iv) the compensation to be paid for the witness's study and testimony.

(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.

(C) Timing for expert discovery.

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

(ii) The party who does not bear the burden of proof on the issue for which expert testimony is offered shall serve on the other parties the information required by paragraph (a)(4)(A) within seven days after the later of (A) the date on which the election under paragraph (a)(4)(C)(i) is due, or (B) receipt of the written report or the taking of the expert's deposition pursuant to

paragraph (a)(4)(C)(i). Within seven days thereafter, the party opposing the expert may serve notice electing either a deposition of the expert pursuant to paragraph (a)(4)(B) and Rule 30, or a written report pursuant to paragraph (a)(4)(B). The deposition shall occur, or the report shall be served on the other parties, within 28 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.

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

(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.

(E) Summary of non-retained expert testimony. If a party intends to present evidence at trial under Rule 702 of the Utah Rules of Evidence from any person other than an expert witness who is retained or specially employed to provide testimony in the case or a person whose duties as an employee of the party regularly involve giving expert testimony, that party must serve on the other

parties a written summary of the facts and opinions to which the witness is expected to testify in accordance with the deadlines set forth in paragraph (a)(4)(C). A deposition of such a witness may not exceed four hours.

(5) Pretrial disclosures.

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

(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;

(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

(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.

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

(b) Discovery scope.

(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.

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

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

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

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

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

(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.

(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.

(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.

(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.

(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.

(7) Trial preparation; experts.

(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) 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:

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

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

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

(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:

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

(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.

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

(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) 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.

(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.

(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.

(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. Domestic relations actions are permitted standard discovery as described for Tier 4.

(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.

(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	$300,000 or more	30	20	20	20	210
4	Domestic relations actions	4	10	10	10	90

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

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

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

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

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

(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.

(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.

(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.

(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.

Rule 26.1. Disclosure and discovery in domestic relations actions.

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

(b) Time for disclosure. In addition to the ~~disclosures~~ Initial Disclosures required in Rule 26, in all domestic relations actions, the documents required in this rule must be served on the other parties within 14 days after filing of the first answer to the complaint.~~:~~

~~(b)(1) by the plaintiff within 14 days after filing of the first answer to the complaint; and~~

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

(c) Financial declaration. Each party must ~~disclose to all~~serve on all other parties a fully completed ~~court approved~~ Financial Declaration, using the court-approved form, and attachments. Each party must attach to the Financial Declaration the following:

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

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

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

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

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

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

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

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

(e) ~~Exempted agencies~~. Exemptions.

(1) Agencies of the State of Utah are not subject to these disclosure requirements.

(2) In cases where assets are inapplicable, such as paternity, modification, and grandparents rights, a party must file:

(A) the party's last three current paystubs and the previous year tax return; or

(B) six months of bank and profit and loss statements if the party is self-employed.

Comment [NS1]: The committee should consider whether there is a better term for what's intended here. I'm not sure that "inapplicable" captures the nuance of these situations.

The court may require the parties to complete a full financial declaration for purposes of determining an attorney fee award or for any other reason. Any party may by motion or through the discovery process also request completion of a full financial declaration.

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

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

(h) Notice of requirements. Notice of the requirements of this rule must be served on the ~~Respondent~~ other party and all joined parties with the initial petition.

Rule 104. Divorce decree upon affidavit.

A party in a divorce case may apply for entry of a decree without a hearing in cases in which the ~~opposing~~ other party fails to make a timely appearance after service of process or other appropriate notice, waives notice, stipulates to the withdrawal of the answer, or stipulates to the entry of the decree or entry of default. An affidavit in support of the decree shall accompany the application. The affidavit shall contain evidence sufficient to support necessary findings of fact and a final judgment.

Rule 106. Modification of final domestic relations order.

(a) Commencement; service; answer. Except as provided in Utah Code Section 30-3-37, proceedings to modify a divorce decree or other final domestic relations order shall be commenced by filing a petition to modify. Service of the petition, or motion under Section 30-3-37, and summons upon the ~~opposing~~ other party shall be in accordance with Rule 4. The responding party shall serve the answer within the time permitted by Rule 12.

(b) Temporary orders.

(1) The judgment, order or decree sought to be modified remains in effect during the pendency of the petition. The court may make the modification retroactive to the date on which the petition was served. During the pendency of a petition to modify, the court:

(A) may order a temporary modification of child support as part of a temporary modification of custody or parent-time; and

(B) may order a temporary modification of custody or parent-time to address an immediate and irreparable harm or to ratify changes made by the parties, provided that the modification serves the best interests of the child.

(2) Nothing in this rule limits the court's authority to enter temporary orders under Utah Code Section 30-3-3.

Rule 100A. Case Management of Domestic Relations Actions.

(a) All domestic relations actions, as defined in Rule 26.1, will be set for a case management conference before the court, or a case manager assigned by the court, after an answer to the action is filed. At the case management conference, the court shall determine to which of the following tracks the case will be placed:

(1) Track 1: Standard Track. This category includes all cases that do not require expert witnesses or complex discovery. The court will certify a Track 1 case directly for trial. If the parties have not yet mediated, the court will order the parties to participate in good faith mediation before the trial takes place. However, failure to mediate shall not be a basis to delay trial without good cause.

(2) Track 2: Complex Discovery Track. This category includes cases with complex issues that require extraordinary discovery, such as valuation of a business. For a Track 2 case, at the case management conference the court will set a discovery schedule with input from the parties and schedule the case for a pretrial hearing.

(3) Track 3: Significant Custody Dispute Track. This category includes cases with significant custody disputes, including custody disputes involving allegations of child abuse or domestic violence. For a Track 3 case, at the case management conference the court and parties will address: 1) whether a custody evaluation is necessary, and, if so, the form of the evaluation and appointment considerations; and 2) whether appointment of a private guardian ad litem is necessary, and if so, the scope of the appointment and apportionment of costs. The court will prepare and issue any resulting orders appointing a custody evaluator or guardian ad litem and schedule the case for either a pretrial hearing or a custody evaluation settlement conference.

(b) Scheduling of Motions for Temporary Orders. At the case management conference, the parties must indicate whether a hearing is necessary for any motions for temporary orders during the pendency of the case. The court will schedule a motion hearing date

as necessary. A court may preclude setting a hearing on a motion for temporary orders, upon a finding of good cause, if a party does not request such a hearing at the case management conference

(c) The court may set additional hearings as necessary under Rule 16. Nothing in this rule prohibits a court from assigning a case to more than one track, at the court's discretion, or otherwise managing a case differently from the above guidelines for good cause.

Tab 4

Subcommittee:

During a recent Supreme Court Conference, the Court discussed formalizing the Online Dispute Resolution (ODR) Standing Order No. 13 as procedure in the Utah Rules of Small Claims Procedure. Since there is no advisory committee for this set of rules, the Court asked the Civil Rules Committee to begin the process of rewriting the rules to incorporate ODR procedures. Judge Brendan McCullagh, whose justice court has been an ODR pilot site, will chair a subcommittee for this purpose. He is in need of a few other members to assist in the effort.

Tab 5

CONSENT ITEM: Rule 65C (final action)

Sometime last year, Rule 65C circulated for comment. The Attorney General's postconviction office had requested that Rule 65C be modified to clarify that the underlying criminal case records must be served on that office when a postconviction petition is also served. In the past, judges have assumed that the AG's office had access to the underlying criminal case via Xchange. But the AG's office only has access to the public documents, so they proposed amendments to the rule. The clerks of court reviewed the amendments and approved them. The solution involved the clerks mailing a CD or thumb drive of the underlying case to the AG's office.

Following the comment period, one of our committee members raised concerns about clerk work load, so I revisited this issue with the AG's office and the clerks of court. The AG's office and Lisa Collins, Court of Appeals clerk of court, noted that the creation of the appellate record requires essentially the same process contemplated by the rule amendments. I have now captured that in the attached amendments, which have been reviewed by the AG's office and committee member Brooke McKnight on behalf of the clerks of court.

Since this is a consent item, the amendments will be recommended to the Supreme Court in their current state unless modified during the meeting. The recommendation will be for final action.

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 upon the respondent a copy of the petition, attachments, ~~and~~ memorandum, and an electronic court record of the underlying criminal case being challenged, including all non-public documents. ~~, by mail upon the respondent.~~ If an electronic appellate record of the underlying case has not already been created, the clerk will create the record.

(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.

Comment [NS1]: My idea is this assumes that the record, including any old files, will be scanned in.

Comment [NS2]: We already say here that service will be by mail on the AG. Because the paragraph above is more broad, it gives the clerk the ability to work with the other entities on their preferred form of service.

(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