Agenda

Advisory Committee on Rules of Civil Procedure

February 24, 2021

4:00 to 6:00 p.m.

Via Webex

Welcome and approval of minutes	Tab 1	Jonathan Hafen, Chair
Legislative standing agenda item • Update on Rule 26		Jonathan Hafen, Nancy Sylvester
Rules back from comment • URCP0043. Evidence. • URCP005. Service and filing of pleadings and other documents. • URCP076. Notice of contact information change. • URCP006. Time. • URCP007. Pleadings allowed; motions, memoranda, hearings, orders. • URCP037. Statement of discovery issues; Sanctions; Failure to admit, to attend deposition or to preserve evidence. • URCP045. Subpoena.	Tab 2	Nancy Sylvester
Pandemic amendments • Rule 4 and certified mail • Rule 12 and counterclaims in evictions	Tab 3	Brian Jackson, Susan Vogel
Family law amendments • Rule 108 • Rule 37 • Discussion on trial date setting	Tab 4	Jim Hunnicutt, Judge Holmberg
Other business		Jonathan Hafen, Chair
Tentative items for next month's agenda: • Expungements • Rule 108 • ODR Rules • State v. Billings (possible subcommittee) • Expedited Procedures Rule • Federal Rule 30 amendments		---

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

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

Tab 1

UTAH SUPREME COURT ADVISORY COMMITTEE

ON RULES OF CIVIL PROCEDURE

Summary Minutes – January 27, 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 Adler	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		
Nicole Salazar-Hall, guest	X		

Brent Salazar-Hall, guest	**X**		
Commissioner Joanna Sagers, guest	**X**		
Stewart Ralphs, guest	**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 Hunnicutt moved to adopt the minutes as amended. Susan Vogel seconded the motion. The minutes were approved unanimously.

(2) EXPEDITED PROCEDURES SUBCOMMITTEE

Nancy Sylvester reported that the Supreme Court has asked the committee to prepare a proposed expedited procedures rule. Ms. Sylvester, Leslie Slaugh, and Susan Vogel will form a working group for this issue.

(3) RULE 26

Rod Andreason introduced the proposed amendments to Rule 26 that were prepared by the working group in preparation to send the proposed rule out for public comment. Additional language was proposed with regard to pre-trial objections to trial exhibits and the circumstances under which parties are required to object. The working group proposed that the rule be clarified that objections must be made with 14 days unless the objection depends upon the "manner and context" in which the proposed exhibit would be used. Several committee members reiterated their earlier concerns that boilerplate or blanket pre-trial objections are currently used by litigants to avoid waiving objections, which does not assist the Court in resolving admissibility questions prior to trial. The proposed revision is intended to streamline objections, potentially eliminating the need to call document custodians to authenticate records or lay foundation for admission.

After discussion, the consensus of the committee was to express the concept in the affirmative, by stating that objections should be made if it is "apparent from the document" that the exhibit would be objectionable.

After a full discussion, Mr. Hafen called for the motion. Mr. Andreason moved to send the proposed amendments (**attached as Exhibit A—NS will add these exhibits in the online post)** out for public comment; Judge Stucki seconded. The motion passed unanimously.

(4) FAMILY LAW AMENDMENTS

Brent Salazar-Hall presented the proposed revisions to Rule 10, 12, 26, 26.1, 104, and 106, along with a proposed new Rule 100A with respect to family law matters. Mr. Hall explained that the prior proposed changes to Rule 3 were collapsed into Rule 10. Mr. Hall also noted that Rule 10, 12, 26.1, and 104 were amended to replace the term "defendant" with "other party" in the caption and pleadings, in order to reflect a less adversarial process in family matters.

Judge Holmberg recommended that Rule 104 be revised further to include an affirmation by the petitioning party that any relief sought conforms to any stipulation of the parties, in order to ensure that any findings of fact are consistent with the substantive decree. Susan Vogel commented that this occurs in pro se practice, and suggested that using an "approved as to form" representation on the final decree may be appropriate.

With respect to Rule 26, the working group has proposed a "Tier 4" category of cases for family and domestic matters, with shortened time frames for discovery. Mr. Hall commented that many family law matters can be resolved in much shorter time frames than those envisioned by the standard civil rules. Rule 26.1 was also revised to change the designations of the parties and to provide for initial disclosures within 14 days of the first answer. The working group is anticipating comment from family law practitioners on this particular revision, but expects overall support for moving cases faster.

Mr. Hall also reported on a proposed new rule, Rule 100A. The working group has condensed the prior proposed language to establish tracks for case management, consistent with the legislative audit. The working group has added a "good cause" statement to the standard track, along with a qualifying statement that a failure to mediate should not serve to delay trial. The working group also added a good cause component with respect to temporary orders. Mr. Hall indicated that the Family Law Section has provided feedback on the proposed revisions, and is generally supportive of case management for domestic cases, particularly in light of the legislature's expressed interest in reform.

Mr. Hafen thanked the working group for their service on this issue and hard work in preparing an expedited package, and invited comments from other members of the working group. Commissioner Sagers expressed support for the amendments, which will assist the Court in case management and moving domestic cases efficiently through the judicial process. Stewart Ralphs also expressed support for the proposed amendments as a workable starting point for practitioners. Nicole Salazar-Hall also expressed support for the amendments, which are needed in order to respond to legislative concerns. Judge Holmberg also expressed support for the amendments, noting that average time to resolution has improved by 20 days in the third district case management pilot projects, even during the pandemic. Judge Holmberg also suggested that discovery limits and deadlines be addressed in the initial case management conference for efficiency.

Mr. Andreason recommended that the proposed amendment to Rule 12(b) be renumbered to be included within subsection 12(a) or another subsection, since Rule 12(b) motions are commonly used in civil practice. Mr. Andreason also proposed minor stylistic changes for consistency and clarity, which the working group unanimously supported.

Mr. Slaugh proposed revised language to Rule 10, to include petitions to establish custody and parent-time. Mr. Slaugh also proposed that the language of Rule 12 be revised to state that any counter-petition must be filed concurrent with the answer. Mr. Slaugh also suggested that the proposed exemption in Rule 26.1(e) be removed, or if retained, that the word "file" be changed to "serve." Ms. Hall and Ms. Vogel indicated that these disclosures can be valuable in assessing attorneys' fees or ability to pay in parentage cases and advocated for retention of the language. Mr. Slaugh also suggested that the role of the case manager be defined in in proposed Rule 100A to clarify the case manager's responsibilities.

Judge Stucki suggested that Rule 26(c)(6), pertaining to extraordinary discovery, be revised to reference Rule 100A. The purpose of this change is to clarify that the judge has the ability to modify the discovery schedule at the outset of the case.

Ms. Vogel expressed support for the amendments as helpful to self-represented parties who are attempting to resolve their issues efficiently.

Mr. Hunnicutt expressed concern regarding the proposed changes to 26.1(e), pertaining to exemptions, as many practitioners disfavor mandatory disclosures at the outset of the case. After discussion, the language of 26.1(e) was revised further to clarify that the party need only disclose "any other assets and income relevant to the determination of a child support award" in cases where assets are not at issue.

After a full discussion, Mr. Hafen called for a motion. Judge Stone moved that the proposed amendments (**attached as Exhibit B**) be sent to the Supreme Court with a recommendation that they be sent out for public comment. Justin Toth seconded the motion. The motion passed unanimously.

(5) ONLINE DISPUTE RESOLUTION SUBCOMMITTEE

Ms. Sylvester reported that the Supreme Court has asked the committee to prepare proposed rules for online dispute resolution in small claims matters. Judge McCullagh, Judge Stucki, and Mr. Toth will form a working group for this issue.

(6) CONSENT ITEMS

Ms. Sylvester introduced a proposed amendment to Rule 65C, which was sent out for comment after receiving feedback from the Clerks of Court and Attorney General's post-conviction office. The proposed amendments incorporate that feedback for creation of an appellate record.

After a full discussion, Mr. Hafen called for a motion. Judge Stucki moved that the proposed Rule 65C (**attached as Exhibit C**) be sent on to the Supreme Court with a recommendation for approval. Judge Stone seconded the motion. The motion passed unanimously.

(7) ADJOURNMENT

The meeting adjourned at 5:45 p.m.

Tab 2

Rules back from comment:

RULES OF CIVIL PROCEDURE – COMMENT PERIOD CLOSES FEBRUARY 11, 2021

URCP005. Service and filing of pleadings and other papers. AMEND. The proposed amendments to Rule 5(b)(3) would make email service the default method.

URCP006. Time. AMEND. The proposed amendments to Rule 6(c) acknowledge the timing issues surrounding mail service by expanding the amount of time to act from 3 days to 7.

URCP007. Pleadings allowed; motions, memoranda, hearings, orders. AMEND. The proposed amendments to Rule 7 would provide that motion hearings may be held remotely, consistent with the safeguards in Rule 43(b).

URCP037. Statement of discovery issues; Sanctions; Failure to admit, to attend deposition or to preserve evidence. AMEND. The proposed amendments to Rule 37 would provide that hearings on discovery issues be conducted remotely, consistent with the Rule 43(b) safeguards.

URCP043. Evidence. AMEND. Replaces repealed Code of Judicial Administration Rule 4-106. The proposed amendments would provide appropriate safeguards for the use of remote hearings and bring evidentiary hearings into the rule's purview. The amendments would also adopt an oath to be used for all witness testimony.

URCP045. Subpoena. AMEND. The proposed amendments to Rule 45 would provide that if an appearance is required in response to a subpoena, the subpoena must provide notice of the date, time, and place for the appearance and, if remote transmission is requested, instructions for participation and who to contact if there are technical difficulties.

URCP076. Notice of contact information change. AMEND. The proposed amendments to Rule 76 would coordinate with the Rule 5 amendments by clarifying the purposes for which updated contact information is provided to the court.

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Comments

(1) JEREMY SHORTS

(a) RULE 6

The proposed changes to Rule 6(c) says that when "service is made by mail under Rule 5(b)(3)(C), 7 days are added...". The Subsection 5(b)(3)(C) lists service by mail, personal delivery, substitute service and other methods agreed to by the parties. Does the 7 day extension apply to personal service and substitute service? If the 7 days is only meant to apply to mailing, would it be better to specifically refer to the mailing subsection?

(b) RULE 6 PROPOSAL

This is the proposed language I would suggest – "service is made by mail under Rule 5(b)(3)(C)(i), 7 days are added...". That way it's clear that the 7 days applies to mailing but not the other methods of service (personal, substitute or as agreed).

Nancy's note: Suggests change to Rule 6 language to tie into Rule 5.

(2) JEAN GUSTAFSON

(a) RULE 6

URCP006 amendment adding additional time to reply is an excellent idea and one that is being implemented in other state bars in one way or another. For example, the state bar of Minnesota, of which I am a member as well as in the state bar of Utah, they are considering a personal leave request to the Court to allow bar members a certain amount of time to attend to personal or family matters. I believe the amendment in URCP007 addresses the concerns that Attorneys have facing Covid and Covid related matters. Additionally, Utah is leading the nation in addressing critical issues involving persons ability to find a lawyer in rural areas. By expanding the timeframe for responding to matters, you are addressing the crisis that many clients face in trying to find counsel.

Nancy's note: Supports Rule 6 amendments.

(b) RULE 7

UPRC007 amendment needs some more work. For example, there is no requirement in this proposed amendment that any litigant needs to be present via video and audio for the judge and opposing party and opposing counsel can have a meaningful opportunity

to address their accusers in civil court, such as in protective proceedings or in actions for slander or defamation. There needs to be more guidance regarding rules regarding whether Petitioners are remaining in the virtual courtroom or have left and in that case, there is no provisions set forth for the responding party to request a dismissal of an action for failure of the moving party to prosecute their cases.

Nancy's note: Requests more guidance in Rule 7.

(3) KYLE KAISER

Dear Rules Committee:

Thank you for continuing to modernize civil practice through these amendments. I believe the proposed changes will assist practitioners and help to ensure the just, speedy, and inexpensive determination of civil actions.

The following are a few suggestions I have to improve the clarity and functioning of the proposed rules. (These suggestions and opinions expressed are my own and not those of my employer or any other person.)

(a) * RULE 5 *

Rule 5(b)(3)(B) is written in the plural ("for papers not electronically served..."). The rest of the rule follows Bryan Garner's suggestion to draft in the singular unless the "sense is undeniably plural" (Garner, Guidelines for Drafting and Editing Court Rules R.21 at 3 (5th Printing 2007).)

(b) RULE 5 PROPOSAL:

Therefore, I suggest the rule be rewritten as :

(B) for a paper not electronically served under paragraph (b)(3)(A), emailing it to ....

(c) * RULE 6 *

I appreciate that perhaps U.S. Mail takes longer than it did when the rule was drafted. However, I'm concerned that giving seven days' extension for mailing is simply too long. Many deadlines in the rules are seven days or less. This extension by mail would effectively double that time. (Of course, if the mail does take longer than usual, a party

may always seek an extension of time to act. Slow mail should constitute good cause to do so.)

(d) RULE 6 SUGGESTION 1:

Accordingly, if the Committee and the Court believes an extension is warranted, I suggest a shorter extension of the mail deadline– at most 4 or 5 days.

Second, a number of practitioners still serve documents via e-mail and U.S. mail, in a belt-and-suspenders practice to ensure the other party received the document. The rule as currently written does not specify whether the additional days are automatically applied if someone serves by mail, or if the document is only served by mail. A receiving party should not get the benefit of all of the additional time for mail service if it had already received the document by email.

(e) RULE 6 SUGGESTION 2:

Accordingly, I suggest the proposed Rule 6(c) be modified as follows
"... service is made exclusively by mail under Rule 5(b)(3)(C), 5 days are added after the period would otherwise expire...."

(f) * RULE 7 SUGGESTION*

Consistent with my comment above, and to maintain consistency with the rest of the rule, the proposed sentence in Rule 7(h) should be rewritten in the singular, rather than plural:
"A motion hearing may be held remotely...."

(g) * RULE 37 *

The reference to Rule 43(b) safeguards seems unnecessary here, as discovery hearings are rarely evidentiary, requiring private room consultations, a court-provided record of the testimony, and specialized oath. This cross-reference also seems superfluous. In the circumstance where there might be evidence taken during a telephone conference, Rule 43(b) should apply regardless. Finally, The phraseology also appears to include two "hidden" requirements in the rule — a preference for remote hearings and a

requirement of safeguard. Because the previous rule already appeared to require a telephonic hearing, the expression of a preference seems out of place.

(h) RULE 37 SUGGESTION

I would therefore suggest that 37(a)(6)(B) be rewritten as follows:
(B) conduct a remote hearing; or

(i) * RULE 43 *

I appreciate the committee's work to provide easier hearing access through remote means while ensuring the validity of the process. I generally support the rule, but have a few suggestions to the rule's language and structure. I begin with my suggestions and conclude with a draft of proposed Rule 43(a) and (b). (I omit (c).)

(i) RULE 43(A) SUGGESTIONS:

In (a): It appears that the Committee has abandoned the use of the word "shall" in its rules, consistent with Bryan Garner's suggestion, to replace it with a "more appropriate term" (Garner R4.2.B, at 29). Because you are amending Rule 43(a), I would replace "shall" with "must". The rule is also written in plural rather than singular. The rule should be written (and may also be rewritten to be more consistent with the Federal Rule equivalent language).

Also in (a): There are many conditions buried within the second sentence of (a). I suggest breaking out the good cause and appropriate safeguards requirement into a second sentence for clarity.

Also in (a): I believe that rather than "practical" (meaning, useful), the committee probably intends the word "practicable" (meaning doable or feasible).

(ii) RULE 43 GENERAL SUGGESTIONS

Throughout: The rule uses two different adjectives to describe the safeguards enumerated in subsection (b)–"appropriate" and "necessary"– as well as referring to them as "remote testimony safeguards" with no characterizing adjective. To avoid

confusion, I would avoid the adjective in all circumstances except in (b)(4) "necessary to maintain the integrity..."

(iii) RULE 43(B) SUGGESTIONS

Subsection (b): repeated references to "court-provided" or "party-provided" appear redundant in light of the requirement that the hearing may not proceed unless safeguards are provided "by the court or by the parties." I would suggest removing them.

Subsection (b)(1): This subsection includes four different requirements rolled into one subsection. And of those four requirements, there are two separate classes of requirements — one related to a recording, and three related to the notice. I believe these requirements should be separated into subparts to avoid hidden requirements. (Garner R.3.3, at 21.)

Subsection (b)(3): The rule is ambiguous about whether the "confidentially" requirement applies to the "sharing" clause or not. It looks, again, as if there are two separate requirements bunched into one rule without subparts. I would suggest making them two subparts. Additionally, "other things" is strange phraseology. At its most literal, the rule would require some digital technology to be able to share physical evidence. I don't think that's the requirement of the rule. I think "electronic files" would probably suffice to cover all the circumstances contemplated by the drafters.

Subsection (b): This contains a "dangling section" which Garner suggests is inappropriate. (Garner R. 3.3.E at 24.) The dangling section appears to be the main requirement of the rule, which should be at the beginning of the subsection before providing the detailed list of the requirements.

(iv) RULE 43(C) SUGGESTIONS

Subsection (c): I am unaware of the inclusion of any oath in a rule of civil procedure. I would be concerned that this oath might conflict with other portions of federal or Utah law. I am also concerned of the subsequent use and validity of testimony if the oath is not provided, even when there was no concern over the testimony's veracity. As such, I suggest placing a more general requirement of assurance into subsection (b), rather

than a specifically written oath, in subsection (c). Not only would it streamline the rule, it would ensure that if a party did not object to a witness being specifically instructed, or promising, not to communicate with anyone else, then the objection is waived and the testimony can be utilized later.

(v) SUGGESTED RULE 43 LANGUAGE

(a) Form. At trial and during an evidentiary hearing, the witnesses' testimony must be taken in open court unless a otherwise provided by these rules, the Utah Rules of Evidence, or a statute of this state. In a civil proceeding, the court may, upon request or on its own order, permit remote testimony in open court. Remote testimony may be permitted on a showing of good cause and with the safeguards described in subsection (b). Remote testimony will be presented via videoconference if reasonably practicable, or if not, via telephone or assistive device.

(b) Remote testimony safeguards. The court must ensure that remote testimony safeguards are provided, by the court or by the parties before conducting the hearing. An objection to a lack of safeguards is waived unless timely made. The safeguards include:

(1) a notice of (i) the date, time, and method of transmission; (ii) instructions for participation, and (iii) contact information for technical assistance;

(2) a verbatim record of the testimony;

(3) upon request to the court, access to the necessary technology and resources to participate, including an interpreter, telephone, or assistive device;

(4) a means for a party and the party's counsel to communicate confidentially;

(5) a means for the party and the party's counsel to share electronic files among remote participants;

(6) assurances, including a witness's oath, that any witnesses giving testimony will not communicate with or receive communications from any person during the witness's testimony, unless authorized by the court, and

(7) any other measures the court deems necessary to maintain the integrity of the proceedings.

Thank you for the opportunity to comment on these important changes to the rules.
Kyle Kaiser
Senior Trial Attorney, Litigation Division, Utah Attorney General's Office

(4) **JASON BARNES**

(a) RE: RULE 5. SERVICE AND FILING OF PLEADINGS AND OTHER PAPERS

COMMENT:
(1) To be clear, the Rule should also discuss what happens when an email is returned, at which point sending it via mail should be an option. Right now, as it is written, that course of action is just assumed.
(2) The Rule should also advise the bar that SPAM filters should not be used and if they are, the attorney has a duty to regularly check their SPAM folder and that an argument that an email went to their SPAM folder and therefore they did not see it is not a sufficient excuse.

(5) **JASON BARNES**

(a) RE: URCP006. TIME.

COMMENT:
The Utah Court Notices email that was sent out stated that "The proposed amendments to Rule 6(c) acknowledge the timing issues surrounding mail service by expanding the amount of time to act from 3 days to 7."

This is not a very good explanation on why 3 days is not good enough. What "timing issues surround mail service" are being "acknowledged"? Three days covers a weekend and Monday. Without much more than the scant explanation, I cannot see how seven days is the correct number and honestly it adds too much time, especially when added to Rule 7's 14-day response time. Moreover, said increase in time may unfairly place one party who has email (ex. the client who is represented by an attorney) at a disadvantage when the other side (ex. pro se party) does not have an email address.

(6) **DENVER C. SNUFFER**

(a) RULE 43

Rule 43 changes are ill-advised. I do not believe the remote testimony option will contribute to the search for credible, believable and reliable testimony from witnesses. Without the ability to view body language in real time, while a witness is under oath, it is impossible to pick up the demeanor of a witness. Demeanor reveals truthfulness and credibility, and will be omitted from the attorney's view during remote testimony. It may be more convenient for the courts, but that ought not be the determinant of how proceedings should be conducted. It may be more cumbersome to require live testimony, but it will always provide a much more sound basis for assessing the weight to give any witness.

(7) **WILLIAM JENNINGS**

(a) RULE 43

I believe the changes to Rule 43 will severely impact an attorney's and a judge's ability to judge the credibility of a witness. It will further impair an attorney's ability to assess whether a witness is being dishonest because the attorney will not be able to judge many visual cues that will be shrouded by the video and because there are many non-verbal clues that a witness is not being honest that are difficult to assess over video.. Further, there is no guarantee a witness is not being coached by someone just off camera. The process of cross examination is also slower via video and gives a witness more time to think and get the story straight. There is a dynamic that is built into the way court rooms are constructed that causes most people to be intimidated and may cause them to more likely be honest with the court. There is also some research that indicates it is easier to not be truthful over a remote connection rather than being there in person. I believe the change will negatively impact an attorney's ability to represent his or her client.

Tab 3

Rule 4 service through certified mail (email from attorney Brian Jackson):
Apparently, due to COVID, USPS has been authorized to sign all certified mail instead of the recipient. I would recommend a modification to the rule. For better context, I sent a summons and complaint certified and restricted and the signature came back "Covid 19" but the agent box was checked. I don't know what to make of that. The rule indicates it must be signed by the recipient so I am now just assuming that certified mail is essentially obsolete at this point with the USPS procedures. It is my understanding that several states such as the State of Missouri, made modifications to their rules to indicate that signature from the USPS is sufficient. However, it still doesn't address my "Covid-19" signature.

Rule 12 counterclaims and evictins (email from committee member Susan Vogel):
Recommendation to shorten the time the landlord has to respond to a tenant counterclaim. Under Rule 12, it's 21 days. But the tenant has had just 3 business days to respond to the landlord's complaint (78B-6-807(3)(a)). A 21 day period for the landlord to respond to the tenant's counterclaim will mess with the occupancy hearing,which needs to be 10 days after the tenant files an answer. 78B-6-810(2)(a)

(From Marcus Degan) "ULS believes the proposed change to URCP 12 would benefit ULS's clients as well as the judicial process surrounding unlawful detainer actions. The rule change would improve judicial efficiency, and would give the Courts presiding over Immediate Occupancy Hearings opportunity to address all claims present that may affect rights of possession at such hearings (the latter of which is rendered a legal impossibility under the current structure of Rule 12 and 78-6-807(3))."

(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. However, the plaintiff in an unlawful detainer action shall serve a reply to a counterclaim within three business days after service of the counterclaim. 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:

Tab 4

Rule 108 (from Jim Hunnicutt):
URCP 108 sets forth the process for someone in a family law case who wants to appeal a domestic commissioner's decision to the district court judge. This process is called an "objection."

Rule 108 does not clearly state a standard of review for objections. Different judges approached them differently, but generally there was some measure of deference given to the domestic commissioners.

In Day v. Barnes, 2018 UT App 143, the Court of Appeals interpreted the plain language of Rule 108 to hold that the standard of review is de novo. (The Court of Appeals reiterated that holding in Somer v. Somer,2020 UT App 93).

Judge Holmberg has canvassed judges around the state, who have noted a sharp increase in the number and frequency of objections. When he asked judges about the idea of amending the language of Rule 108 to impose a standard of review other than de novo, he received unanimous support.

The Family Law Procedures Subcommittee unanimously agrees that Rule 108 should be amended to specify that the standard of review is "abuse of discretion." That should reduce the amount of pretrial litigation in divorces and other family law cases, ensure that genuine errors by domestic commissioners are addressed, and give everyone clearer guidance on how objections should be handled.

Rule 37 (from Jim Hunnicutt):
At the November meeting of the Family Law Procedures Subcommittee, the attached amendment to URCP 37 was unanimously approved. I was tasked to move this up the line to the Rules Committee.

The proposal is to delete the requirement that when filing a statement of discovery issues (SODI) one must also file a proposed order. Commissioners and judges get annoyed by all the proposed orders clogging up their queues. They typically get rejected immediately. That means litigants are paying their lawyers to prepare unnecessary and superfluous filings. After looking at this carefully, it was agreed that to carry out this goal, all we need to do is delete subpart (a)(5) of Rule 37, as shown on the attached.

Discussion on setting trial dates (from Judge Holmberg):
I would like to open up for discussion evaluating whether we consider setting trial dates when a case is filed (like they do in Idaho). With all the effort to shorten the litigation cycle, it seems like a tool we should at least discuss.

UTAH STATE COURTS

[redacted]

Rule 108 standard of review

5 messages

Leslie Slaugh [redacted]

I'm just getting around to reviewing the agenda for our meeting today.

The agenda indicates that the Family Law Procedures Subcommittee suggests that Rule 108 adopt an "abuse of discretion" standard of review. I think that may create constitutional problems and suggest it might be better to have the standard of review tied to the foundation for decision, much like with appeals. If the commissioner made a decision based on proffers, then the parties ought to have a de novo hearing before a judge, with no deference to the commissioner's decision. If the commissioner's ruling was based on undisputed facts and was merely a judgment call as to the appropriate remedy, then an abuse of discretion standard is appropriate.

The problem stems from the use of proffers. I don't know the practice elsewhere, but in the Fourth District the commissioners almost never hear evidence. Everything is based on proffers. In *Kawamoto v. Fratto*, 2000 UT 6, ¶ 8, 994 P.2d 187, 189, the court held that the "mandatory use of proffers over the objections of a party should not be allowed in small claims courts." I see no reason why that would not also apply in a divorce case. *Montano v. Third Dist. Court for Cty. of Salt Lake*, 934 P.2d 1156, 1158 (Utah Ct. App. 1997), similarly held: "we reiterate that the use of proffers as a basis for child custody determinations, whether permanent or temporary, is discouraged." If a commissioner makes a decision based on proffers, that decision should not receive any deference on a Rule 108 objection proceeding. Parties are entitled to have their cases determined based on admissible evidence, not mere proffers.

One of my former partners often lamented that domestic cases are among the most important cases that come before the courts but some judges fail to give the cases the attention they deserve. It seems that it is relatively easy to get a multi-day trial in a personal injury case but is sometimes akin to pulling teeth to get a judge to agree to a multi-day divorce trial. Fortunately, I have had no problem getting adequate court time for the very few domestic cases I've handled, but I've heard that others have not been so fortunate.

The commissioner system serves the very important purpose of getting cases decided quickly, but speed and efficiency should not trump the right to have a case heard by a judge, with a decision based on the evidence, not just proffers.

Mr. Leslie W. Slaugh

[redacted]

[redacted]

[redacted]

Judge Andrew Stone [redacted]

[redacted]

I agree with Leslie with a few minor points:

I think part of the problem with an abuse of discretion review is more about the judicial power than just proffers. After all, you can theoretically have full evidentiary proceedings or proffers before either commissioners or judges. Decisions that are effectively final or could ultimately be outcome-determinative need to have an opportunity to be heard by a judicial officer, not a commissioner. And that should be de novo.

Commissioners are very busy. They hear cases on proffer by necessity. I recognize that's not the same as a full hearing. I also recognize that my role is to give more attention to the issue than a commissioner is able to. I am very much opposed to an abuse of discretion standard; I think it is unfair, probably unconstitutional, and would tie my hands after a formal hearing. These cases are important, as Leslie points out. I think they deserve de novo review on request regardless of whether a judicial officer is constitutionally required. If you want to cut down on objections, provide for automatic attorney fees if the objecting party doesn't substantially prevail on the objection.

As to Leslie's point that domestic cases don't get enough attention, I have to disagree. I will say that my 3 longest trials, including jury or bench, have been domestic bench trials. Not sure it isn't more than the top 3, but I know it's at least that. I can also confidently say that there has never been a year when the majority of my trial days weren't domestic matters. So I think if there's a perception that personal injury trials are having an easier time getting trial days, it's wrong. And right now we're trying domestic cases but haven't tried any jury trials in a year.

As to the draft rule itself, there's a lot I like about it, but I very much oppose subsection 7. This essentially is looking for a partial ruling on the merits on every submitted objection prior to hearing. That puts an unnecessary burden on judges and will lead to lower quality results. It would be unfair for me to determine the sufficiency of an objection or whether to issue a stay without a hearing. The parties can determine what sort of hearing is required by the rule without my help by reading the rule. And as indicated above, I think review should always be de novo. Section 3(d) gives notice as to what kind of hearing is being requested and that's enough for notice to the other side. The notice of hearing issued by the judicial assistant can specify whether the hearing will be evidentiary or not based on the filing and discussion with the parties when scheduling it; that is at least my current practice. If you want to make this part read the court "may" issue a minute entry or hold a conference, that's fine; I'll ignore it. But that is unnecessary in any event because I can issue a minute entry anytime I want.

[redacted]

[Quoted text hidden]

Judge Kent Holmberg [redacted]

Thanks Leslie and Judge Stone. I plan to attend the meeting today but I may have to leave before we get to the bottom of the agenda on Rule 108.

The proposed Rule 108 which is attached to the agenda ***has been shelved*** for the time being. Commissioner T.R. Morgan is working on a draft which the Family Law Procedures Subcommittee will be addressing next week (March 5).

Commissioner Morgan's draft will include a proposal to modify the standards for the District Court Judge in handling an Objection to a Commissioner's recommendation. Jim Hunnicutt outlines the procedure under Rule 108 at the beginning of Tab 4 in today's meeting materials. The standard which is being proposed changes the process but permitting the district court to review the commissioner decision under an abuse of discretion standard rather than requiring a de novo review with independent findings by the district court.

Leslie and Judge Stone raise a number of excellent points. Here are some items to consider (and feel free to disagree with my characterizations):

The family law issues heard by a commissioner are, by nature, typically temporary matters. They involve orders that are in place during the pendency of the case which are subject to modification at trial. This typically involves possession of the marital home, use of marital assets (including cash), spousal support, child support, custody and parent-time. Sometimes the commissioner gets involved with jurisdiction and nuptial contract issues but these are legal issues. So keep in mind that the facts being determined by the commissioner are those facts bearing on temporary orders - which will be readdressed at trial or other final resolution. When readdressed at trial, the district court judge may make retroactive adjustments to the matters decided in the temporary orders. In other words, there will be an evidentiary hearing (trial) in which retroactive adjustments (such as child support) are made. In fact, by Rule, UT R J ADMIN Rule 6-401(4)(A), a commissioner: "shall not make final adjudications."

Next, the proposed Rule 108 changes will not modify the right to an evidentiary hearing *before the district court* in the following cases: "Utah Code Title 62A, Chapter 15, Part 6, Utah State Hospital and Other Mental Health Facilities, Utah Code Title 78B, Chapter 7, Protective Orders, or on an order to show cause for the enforcement of a judgment" (Utah R. Civ. P. 108(d)(2)) or when there are "genuine issues of material fact relevant to custody" (Utah R. Civ. P. 108(d)(3)(A)) which includes any orders for temporary custody or parent-time. In all other cases, unless the district court orders otherwise, the district court is currently hearing these matters by proffer. There will be no change on this.

In other words, there will be no change in the parties' access to an evidentiary hearing. The change will be that rather than the court making independent findings based on a de novo standard *at the objection stage*, the court will be making an abuse of discretion review at the objection stage of the case - and then reviewing it again at trial. At trial, the court will have to support its orders with findings of fact from the evidence submitted at trial.

Leslie's comments on getting time on the judge's trial calendar is a valid point but beyond these changes. My calendar is similar to Judge Stone and I would echo his comments on this point. My practice is to give the parties the time they request and then hold them to what they asked for.

It is probably premature to discuss Rule 108 until after the Family Law Procedures Subcommittee forwards the proposed rule change to the URCP committee. I would hope we would have it next month (March meeting).

[redacted]

[Quoted text hidden]

Susan Vogel [redacted]

[redacted]

[redacted]

Thank you all for these excellent comments.

One thing that many self-represented parties absolutely do not understand is "why the judge let [the other party] lie at the temporary order hearing." This means proffer evidence. The pro se party who is losing their kids, their home, or their access to assets for months or a year or more until trial may have evidence they did not bring to court to refute what the opposing party said because they were not prepared for the proffer.

They call us asking why the court does not care if a party lies in court, how to "get them for perjury," and question why perjury is not prosecuted. They sometimes share the urban myth that "you can say anything" in court in family law cases, and lying is okay (and rewarded). When we try to explain the process to them, they will ask "So basically it's okay to lie in court." The process really shakes people's belief in our justice system.

My vote is for a de novo hearing when a commissioner's recommendation is based on proffer.

Susan Vogel

[Quoted text hidden]

Ahstone [redacted]

To take that a step farther, suppose I hold a hearing and determine that the other spouse is, in fact, lying. Do I have to apply a standard of abuse of discretion and conclude, though I believe it's a lie, that a reasonable person might conclude otherwise? I don't even know what abuse of discretion means in the ordinary circumstance when I'm the only one that actually heard evidence.

Andrew Stone
Third District Judge
[Quoted text hidden]

Rule 108. Objection to ~~court~~ domestic relations commissioner's recommendation.

(1) Definitions.

(1)(a) "De novo review" means an independent consideration of the issues raised before the commissioner to which an objection has been taken, and the judge must make independent findings of fact, conclusions of law, and rulings.

(1)(b) "Formal hearing" means a full evidentiary hearing pursuant to the Utah Rules of Civil Procedure and Utah Rules of Evidence, to include sworn testimony and the introduction of exhibits.

(1)(c) "Informal hearing" means a review of the record, including pleadings, declarations, exhibits, the transcript of proceedings before the commissioner, and a proffer of argument by counsel. An informal hearing may include testimony as determined by the judge.

(2) Effect of recommendation

A recommendation of a court commissioner is the order of the court until modified by the judge. A party may file a written objection to the recommendation within 14 days after the recommendation is made in open court, or if the court commissioner takes the matter under advisement, within 14 days after the minute entry of the recommendation is served. A judge's signature on the commissioner's written recommendation does not affect the review of an objection.

(3) Contents of objection.

(3)(a) An objection must (i) identify the part of the commissioner's recommended

ruling to which the objection is made, (ii) state the applicable facts, law, and arguments that are germane to the issues being reviewed and (iii) identify the relief sought. The objection must contain a list of all documents filed pertaining to the motion before the commissioner including the date each was filed.

(3) (b) The time for filing, length and content of memoranda, reply and request to submit for decision are as stated for motions in Rule 7.

(3)(c) At the time an objection is filed the objecting party must request an audio recording of the proceeding conducted before the commissioner. A written transcript of the audio recording must be filed no later than the filing of the request to submit for decision.

(3)(d) All objections must contain a statement identifying whether the objecting party requests:

i) a review limited to the existing record;

ii) an informal hearing before the judge based on the existing record, together with proffer and argument; or

iii) a formal hearing.

(4) Trial court's standard of review.

(a) The judge must conduct a *de novo* review of each issue presented in the objection.

(b) The judge may accept, reject or modify the commissioner's recommendation in whole or in part.

c) Should the court modify the commissioner's recommendation, it may consider applying the modification retroactively to the date of hearing before the commissioner.

(5) Cases entitled to full evidentiary hearings as a matter of right.

(5)(a) Based upon the finality of adjudication of the following matters, each party is entitled as a matter of right to one formal hearing in the following matters:

(5)(a)(i) all cases brought pursuant to Utah Code Title 62A Chapter 15, Part 6, Utah State Hospital and Other Mental Health Facilities;

(5)(a)(ii) all cases brought pursuant to Utah Code Title 78B, Chapter 7, Protective Orders;

(5)(a)(iii) all orders to show cause seeking contempt or the enforcement of a judgment; or

(5)(a)(iv) all cases brought regarding temporary physical custody or restrictions to parent-time with minor children.

(5)(b) The parties may conduct the formal hearing of right before the commissioner if:

(5)(b)(i) the commissioner advises the parties on the record of their right to a hearing before the judge; and

(5)(b)(ii) the parties and the commissioner agree to the commissioner holding the hearing.

(5)(c) The judge's review of an objection to a commissioner's recommendation following a formal hearing will be limited to the record unless the judge determines otherwise.

(5)(d) The parties may, with the court's consent, elect an informal hearing in lieu of a formal hearing.

(6) All other cases.

(6)(a) In all other matters not identified in Subsection (5)(a) , the court may on filing of an objection:

(6)(a)(i) conduct a *de novo* review of the record;

(6)(a)(ii) conduct an informal hearing based on the record; or

(6)(a)(iii) conduct a formal hearing.

(6)(b) The judge has the discretion to decide the nature of the hearing despite a contrary request from any party.

(7) Procedure prior to de novo review. Upon the filing of a request to submit on the objection, the court shall as soon as practicable issue a minute entry or set a telephone conference addressing any relevant matters which may include the following:

(7)(a) whether the objection and memorandum succinctly state a basis for objection, identifying the issues to be considered.

(7)(b) whether a hearing is required as a matter of right consistent with paragraph (5)(a).

(7) (c) whether the court will hold an informal hearing under paragraph(5)(d).

(7)(d) if the case falls under paragraph (6), the kind of review the court shall engage in;

(7)(e) if applicable, the expected duration of the hearing and the witnesses to be called; and

(7)(f) whether a stay of any part of the commissioner's recommendation is appropriate.

(8) Substantial change of circumstances. If there has been a substantial change of circumstances since the commissioner's recommendation the judge may, in the interest of

judicial economy, consider new evidence. Otherwise, any evidence that was not previously presented to the commissioner, whether by proffer, testimony or exhibit, shall not be admitted.

(9) Continuing authority to consider objection. Notwithstanding the foregoing, the court may vacate, modify or amend the terms of a commissioner's recommendation at the time of trial, and may consider whether retroactive application of any change should be applied retroactively.

(10) Review of informal trials. An objection to the recommendation of a commissioner's findings resulting from an informal trial will be reviewed as identified herein. As an informal trial is strictly voluntary, the normal objection rights are limited. While a judge retains the ultimate authority to enter all orders, the judge will not hold a new trial. Any objection will be reviewed via a transcript of the hearing, and there will be no challenges to the documents or the testimony considered before a commissioner. The Court will review the decision on an abuse of discretion standard.

Rule 37. Statement of discovery issues; Sanctions; Failure to admit, to attend deposition or to preserve evidence.

(a) Statement of discovery issues.

(a)(1) A party or the person from whom discovery is sought may request that the judge enter an order regarding any discovery issue, including:

(a)(1)(A) failure to disclose under Rule 26;

(a)(1)(B) extraordinary discovery under Rule 26;

(a)(1)(C) a subpoena under Rule 45;

(a)(1)(D) protection from discovery; or

(a)(1)(E) compelling discovery from a party who fails to make full and complete discovery.

(a)(2) Statement of discovery issues length and content. The statement of discovery issues must be no more than 4 pages, not including permitted attachments, and must include in the following order:

(a)(2)(A) the relief sought and the grounds for the relief sought stated succinctly and with particularity;

(a)(2)(B) a certification that the requesting party has in good faith conferred or attempted to confer with the other affected parties in person or by telephone in an effort to resolve the dispute without court action;

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

(a)(2)(D) if the statement requests extraordinary discovery, a statement certifying that the party has reviewed and approved a discovery budget.

(a)(3) Objection length and content. No more than 7 days after the statement is filed, any other party may file an objection to the statement of discovery issues. The objection must be no more than 4 pages, not including permitted attachments, and must address the issues raised in the statement.

(a)(4) Permitted attachments. The party filing the statement must attach to the statement only a copy of the disclosure, request for discovery or the response at issue.

~~**(a)(5) Proposed order.** Each party must file a proposed order concurrently with its statement or objection.~~

(a)(6~~5~~) Decision. Upon filing of the objection or expiration of the time to do so, either party may and the party filing the statement must file a Request to Submit for Decision under Rule 7(g). The court will promptly:

(a)(~~6~~5)(A) decide the issues on the pleadings and papers;

(a)(~~6~~5)(B) conduct a hearing by telephone conference or other electronic communication; or

(a)(~~6~~5)(C) order additional briefing and establish a briefing schedule.

(a)(7) Orders. The court may enter orders regarding disclosure or discovery or to protect a party or person from discovery being conducted in bad faith or from annoyance, embarrassment, oppression, or undue burden or expense, or to achieve proportionality under Rule 26(b)(2), including one or more of the following:

(a)(7)(A) that the discovery not be had or that additional discovery be had;

(a)(7)(B) that the discovery may be had only on specified terms and conditions, including a designation of the time or place;

(a)(7)(C) that the discovery may be had only by a method of discovery other than that selected by the party seeking discovery;

(a)(7)(D) that certain matters not be inquired into, or that the scope of the discovery be limited to certain matters;

(a)(7)(E) that discovery be conducted with no one present except persons designated by the court;

(a)(7)(F) that a deposition after being sealed be opened only by order of the court;

(a)(7)(G) that a trade secret or other confidential information not be disclosed or be disclosed only in a designated way;

(a)(7)(H) that the parties simultaneously deliver specified documents or information enclosed in sealed envelopes to be opened as directed by the court;

(a)(7)(I) that a question about a statement or opinion of fact or the application of law to fact not be answered until after designated discovery has been completed or until a pretrial conference or other later time;

(a)(7)(J) that the costs, expenses and attorney fees of discovery be allocated among the parties as justice requires; or

(a)(7)(K) that a party pay the reasonable costs, expenses and attorney fees incurred on account of the statement of discovery issues if the relief requested is granted or denied, or if a party provides discovery or withdraws a discovery request after a statement of discovery issues is filed and if the court finds that the party, witness, or attorney did not act in good faith or asserted a position that was not substantially justified.

(a)(8) Request for sanctions prohibited. A statement of discovery issues or an objection may include a request for costs, expenses and attorney fees but not a request for sanctions.

(a)(9) Statement of discovery issues does not toll discovery time. A statement of discovery issues does not suspend or toll the time to complete standard discovery.

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

(b)(1) deem the matter or any other designated facts to be established in accordance with the claim or defense of the party obtaining the order;

(b)(2) prohibit the disobedient party from supporting or opposing designated claims or defenses or from introducing designated matters into evidence;

(b)(3) stay further proceedings until the order is obeyed;

(b)(4) dismiss all or part of the action, strike all or part of the pleadings, or render judgment by default on all or part of the action;

(b)(5) order the party or the attorney to pay the reasonable costs, expenses, and attorney fees, caused by the failure;

(b)(6) treat the failure to obey an order, other than an order to submit to a physical or mental examination, as contempt of court; and

(b)(7) instruct the jury regarding an adverse inference.

(c) Motion for costs, expenses and attorney fees on failure to admit. If a party fails to admit the genuineness of a document or the truth of a matter as requested under Rule 36, and if the party requesting the admissions proves the genuineness of the document or the truth of the matter, the party requesting the admissions may file a motion for an order requiring the other party to pay the reasonable

costs, expenses and attorney fees incurred in making that proof. The court must enter the order unless it finds that:

(c)(1) the request was held objectionable pursuant to Rule 36(a);

(c)(2) the admission sought was of no substantial importance;

(c)(3) there were reasonable grounds to believe that the party failing to admit might prevail on the matter;

(c)(4) that the request was not proportional under Rule 26(b)(2); or

(c)(5) there were other good reasons for the failure to admit.

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

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

Advisory Committee Notes