Agenda

Advisory Committee on Rules of Civil Procedure

April 28, 2021

4:00 to 6:00 p.m.

Via Webex

Welcome and approval of minutes	Tab 1	Jonathan Hafen, Chair
Legislative standing agenda item --		Jonathan Hafen, Nancy Sylvester
ICWA and Rule 24 • Bringing congruence to juvenile court and district court practice	Tab 2	Bridget Koza, Nancy Sylvester
Family law rules and Rules 26 • Review comments	Tab 3	Brent Hall, Nicole Salazar-Hall, Jim Hunnicutt, Anne Cameron, Judge Kent Holmberg, Nancy Sylvester
Rule 37 • Proposal from Family Law Procedures Subcommittee to delete order requirement	Tab 4	Jim Hunnicutt, Judge Kent Holmberg
Rule 5 • Certificates of service	Tab 5	Trevor Lee
Consent agenda --		
Pipeline items: • Rule 62 updates (Troy Booher): May • Small Claims Rules (Judge McCullagh): May • Criminal restitution and *State v. Billings* (subcommittee assignment) • Rule 12 and counterclaims in evictions (Susan Vogel, Judge Parker) • Expungements (Salt Lake County): Criminal Rules Committee? • Rule 108, trial date setting (family law-Judge Holmberg, Jim Hunnicutt) • Expedited Procedures Rule (Nancy Sylvester, Susan Vogel, Leslie Slaugh) • Federal Rule 30 amendments (Judge Holmberg) • Federal Rule 41 amendments (Judge Mettler and Judge Jones)		---

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 – March 24, 2021

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

Committee members, staff, and guests	Present	Excused	Appeared by Phone
Jonathan Hafen, Chair	X		
Robert Alder		X	
Rod N. Andreason	X		
Paul Barron	X		
Judge James T. Blanch	X		
Jacqueline Carlton	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	
Nick Stiles		X	
Judge Andrew H. Stone		X	
Justin T. Toth	X		
Susan Vogel	X		
Nancy Sylvester, Staff	X		
Kim Neville, Recording		X	

Secretary			
Judge Brendan McCulla, Guest	**X**		

(1) ODR / SMALL CLAIMS RULES

Judge Brendan McCulla presented a summary of the proposed Rules of Small Claims Procedure and Online Dispute Resolution Program. Under the proposed rules, the parties may opt for online resolution program using a facilitator provided by the Administrative Office of the Courts. Judge McCulla noted that approximately 50-60% of cases that utilize the ODR process resolve prior to court involvement. Judge McCulla noted that all courts are expected to join the ODR program by the end of the year. Judge McCulla also noted that the proposed rules are intentionally simplified as they are frequently utilized by unrepresented parties.

Leslie Slaugh inquired as to the use of certain capitalized terms within the proposed rules. Nancy Sylvester and Judge Clay Stucki commented that the use of capitalized terms is intentional, to reflect that a form is likely available from the court. Ms. Vogel commented that capitalized terms coincide with the forms available on the court's website. Judge McCulla also noted that the draft rules provide that motions should be in "substantially the same form" as those approved by forms committee, and that the court would anticipate providing links to the forms.

Judge Stucki suggested that the proposed language be revised to clarify that parties are expected to arrange for service, as opposed to being served by the court. Additional discussion was raised regarding the consistent use of "must" versus "shall" within the proposed rules. Judge McCulla further noted that the use of the term "affidavit" has been eliminated throughout, as parties now utilize unsworn declarations to state a claim.

Judge McCulla also noted that very few parties are requesting an exemption to the process. The overwhelming majority of small claims parties have been able to utilize the online processes.

Additional provisions have been included within Rule 4 that provide for removal to the district court if the amount at issue exceeds the jurisdictional limits of the small claims court. Judge McCulla noted that the use of the term "removal" is intentional, and coincides with the federal court practice with regard to jurisdictional issues.

Mr. Slaugh proposed additional language with respect to proposed Rule 6A to address suspension or deferral of judgments if a settlement agreement is reached and the money owed is timely paid. After further discussion, Rule 6A(b) was revised to remove the word "confessed judgment" and replace the term with "entered judgment." Rule 11 also contains corresponding language with respect to collection of judgments.

(2) APPROVAL OF MINUTES

Jonathan Hafen asked for approval of the minutes as amended with comments from the minutes sub-committee. Susan Vogel moved to adopt the minutes as amended; Jim Hunnicutt seconded. The minutes were approved unanimously.

(3) LEGISLATIVE UPDATE

Ms. Sylvester reported that a bill regarding the costs of experts did not make it through legislative committee.

(4) PANDEMIC AMENDMENTS

Ms. Sylvester reported on the recent use of Covid-19 signatures by mail delivery services, which allows delivery personnel to sign for recipients upon delivery. Brooke McKnight reported that the clerk's office is often reluctant to enter a default certificate based upon a Covid-19 signature, as the signature has not been uniformly accepted by district judges. Ms. Sylvester suggested that the issue may be best addressed informally through the pandemic response working group, as the issue is likely to resolve as pandemic-related issues subside.

(5) STATE V. BILLINGS

Mr. Hafen and Ms. Sylvester suggested that the committee form a working group to evaluate the impact of a recent appellate decision, *State v. Billings*, which addresses criminal restitution. Judge Stucki, Ms. McKnight, and Michael Petrogeorge volunteered to serve on the working group.

(5) RULE 12 CONFORMING AMENDMENT

Mr. Slaugh presented a proposed technical amendment to Rule 12, which allows a plaintiff to file a reply to a counterclaim, which is inconsistent with Rule 7, which refers to an answer to a counterclaim. Justin Toth moved to amend the language of Rule 12 for consistency; Judge Clay Stucki seconded. The motion passed unanimously.

(6) ADJOURNMENT

The meeting adjourned at 4:57 p.m.

Tab 2

Rule 24. Intervention and Indian Child Welfare Proceedings.

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

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

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

(b) **Permissive intervention.**

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

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

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

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

(A) a statute or executive order administered by the governmental entity; or

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

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

(c) **Notice and motion required.** A motion to intervene must be served on the parties as provided in Rule 5. The motion must state the grounds for intervention and set out the claim or defense for which intervention is sought.

(d) **Constitutionality of Utah statutes, ordinances, rules, and other administrative or legislative enactments.**

(1) **Challenges to a statute.** If a party challenges the constitutionality of a statute in an action in which the Attorney General has not appeared, the party raising the question of constitutionality shall notify the Attorney General of such fact by serving the notice on the Attorney General by email or, if circumstances prevent service by email, by mail at the address below. The party shall then file proof of service with the court.

Email: notices@agutah.gov

Mail:

Office of the Utah Attorney General

Attn: Utah Solicitor General

350 North State Street, Suite 230

P.O. Box 142320

Salt Lake City, Utah 84114-2320

(2) **Challenges to an ordinance or other governmental enactment.** If a party challenges the constitutionality of a governmental entity's ordinance, rule, or other administrative or legislative enactment in an action in which the governmental entity has not appeared, the party raising the question of constitutionality shall notify the governmental entity of such fact by serving the person identified in Rule 4(d)(1) of the Utah Rules of Civil Procedure. The party shall then file proof of service with the court.

(3) **Notification procedures.**

(A) **Form and content**. The notice shall (i) be in writing, (ii) be titled "Notice of Constitutional Challenge Under URCP 24(d)," (iii) concisely describe the

nature of the challenge, and (iv) include, as an attachment, the pleading, motion, or other paper challenging constitutionality as set forth above.

(B) **Timing**. The party shall serve the notice on the Attorney General or other governmental entity on or before the date the party files the paper challenging constitutionality as set forth above.

(4) **Attorney General's or other governmental entity's response to notice.**

(A) Within 14 days after the deadline for the parties to file all papers in response to the constitutional challenge, the Attorney General or other governmental entity ("responding entity") shall file a notice of intent to respond unless the responding entity determines that a response is unnecessary. The responding entity may seek up to an additional 7 days' extension of time to file a notice of intent to respond.

(B) If the responding entity files a notice of intent to respond within the time permitted by this rule, the court will allow the responding entity to file a response to the constitutional challenge and participate at oral argument when it is heard.

(C) Unless the parties stipulate to or the court grants additional time, the responding entity's response to the constitutional challenge shall be filed within 14 days after filing the notice of intent to respond.

(D) The responding entity's right to respond to a constitutional challenge under Rule 25A of the Utah Rules of Appellate Procedure is unaffected by the responding entity's decision not to respond under this rule.

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

(e) **Indian Child Welfare Act Proceedings.** In proceedings subject to the Indian Child Welfare Act of 1978, 25 U.S.C. sections 1901–63:

(1) The Indian child's tribe is not required to formally intervene in the proceeding unless the tribe seeks affirmative relief from the court.

(2) If an Indian child's tribe does not formally intervene in the proceeding, official tribal representatives from the Indian child's tribe have the right to participate in any court proceeding. Participating in a court proceeding includes being able to:

(A) be present at the hearing;

(B) address the court;

(C) request and receive notice of hearings;

(D) present information to the court that is relevant to the proceeding;

(E) submit written reports and recommendations to the court; and

(F) perform other duties and responsibilities as requested or approved by the court.

(3) The designated representative must provide the representative's contact information in writing to the court.

(4) As provided in Rule 14-802 of the Supreme Court Rules of Professional Practice, before a nonlawyer may represent a tribe in the proceeding, the tribe must designate the nonlawyer representative by filing a written authorization. If the tribe changes its designated representative or if the representative withdraws, the tribe must file a written substitution of representation or withdrawal.

Effective May 1, 2021

A Seat at the Table: Tribal Legal Representation in Out-of-State Indian Child Welfare Act Cases

APRIL OLSON

They made me stand. The small courtroom was packed with the usual parties in an Indian Child Welfare Act (ICWA) case: attorneys and social workers and a few observers who took up all the remaining seats. I stood against a wall while we waited for the judge to begin oral argument on my motion. After the judge called on me, I expected someone would offer me a seat or at least a small patch of table for my files, but no one did. Instead, I balanced my notebook and other materials on the edge of a low wall while I argued the tribe's motion. As an ICWA attorney, I am used to not having a seat at the table (literally) or sitting off to the side in a courtroom. Juvenile courtrooms are small, and tribes are often the odd man out. Ironically, I was in the courtroom precisely because my client, an out-of-state tribe, was denied a seat in this court proceeding. The tribe's attorney, an attorney with over 20 years of experience, had filed a motion to intervene and transfer jurisdiction to the tribal court, and the court refused to consider the motion because she was not an Arizona-licensed attorney. This begs the question, what is a right without the means to enforce it?

ICWA is a federal law that sets minimum standards for state court "child custody proceedings" involving Indian children.[1] A child custody proceeding includes a foster care placement, a termination of parental rights proceeding, a pre-adoptive placement, or an adoptive placement.[2] An Indian child is one who is a member of a federally recognized Indian tribe or eligible for membership.[3] A common ICWA case involves a state court dependency matter in which Indian children were removed from the custody of their parents by social services.

ICWA was passed in response to many years of federal and state policies that involved removing Indian children from their homes, often for no reason, and placing them in non-Indian foster or adoptive homes or boarding schools in a deliberate campaign to assimilate Indians into Western culture.[4] ICWA attempts to prevent these practices by setting minimum standards that govern state child custody proceedings and adoptions involving Indian children. These standards include, among others, preferences that support placement with extended family members and heightened burdens of proof for placing Indian children in foster care and terminating parental rights. ICWA has often been called the "gold standard" in child welfare practice, because it advocates for only removing a child when there is no other safe alternative, it lessens the trauma of removal by promoting placement with family and community, and it requires that families receive "active efforts" and intensive services to prevent the breakup of the family, all while centering cultural connections for the child.

An important aspect of the ICWA is that it recognizes the inherent authority of Indian tribes over their children and families and provides Indian tribes with an absolute right to intervene in state child custody proceedings involving tribal members.[5] This unconditional right to intervene allows tribes to become parties to such proceedings, take

positions on matters such as where children are placed, and ensure the requirements of ICWA are followed. Therefore, tribes must have legal representation in such cases to enforce ICWA. Legal representation in ICWA cases gives tribes a seat at the table. Many tribes are represented in ICWA proceedings by tribal attorneys employed through tribal attorneys general or other in-house counsel.

Although ICWA is a federal law, its provisions are implemented in state courts wherever Indian families and children are located. As a result, many tribes, especially large ones, have ICWA cases in multiple states across the country. The Navajo Nation, whose lands span three states, currently has ICWA cases in about 25 states. The Gila River Indian Community has ICWA cases in 20 states. In most years, the Cherokee Nation participates in ICWA child custody proceedings in all 50 states.[6] Providing legal representation in all these jurisdictions is an overwhelming challenge. Most tribes have in-house attorneys who are licensed in a few states. How then does a tribe intervene and participate in an ICWA case in a state other than its home state?[7]

Over time, tribes have employed numerous strategies to ensure tribal participation in out-of-state ICWA cases. Tribes often participate in out-of-state cases through a social worker who appears by phone. This can be problematic if a tribe needs to file pleadings or take legal positions, particularly ones adverse to other parties in the case. Appearing by phone also has disadvantages that include not being able to fully hear or see parties or communicate tribal positions.

In other situations, tribal attorneys appear as the tribal "ICWA representative" in states where the tribal attorney is not licensed. In such cases, tribal attorneys can assist the court with locating extended family for placement and advise the court on other tribal matters of culture and custom but generally cannot file legal pleadings or take other actions that may be considered the unauthorized practice of law. Tribal attorneys can also apply to appear pro hac vice in out-of-state cases. However, pro hac vice fees are often high and are usually assessed per case. Even then, a tribal attorney must associate with local counsel, which can be cost prohibitive. Separately hiring local counsel to represent a tribe in an ICWA case also comes at a cost that is unaffordable to many tribes.

In addition, some state courts will refuse to allow an out-of-state tribal representative to appear by phone, give testimony, or file documents. As discussed below, a tribe may challenge these actions, arguing that ICWA provides an absolute right to intervene under federal law, but often the state court case will continue without tribal participation during an appeal. Refusing to permit tribes to participate in ICWA cases unless they have local legal counsel defeats the very purpose of the act.

Although ICWA was passed in 1978, the first reported decision to discuss the legal right to intervene and participate was not issued until 15 years later.[8] In *State ex rel. Juvenile Dept. of Lane County v. Shuey*, the Confederated Tribes of the Grande Ronde Community of Oregon ("Grande Ronde") filed a motion to intervene in a case where the Oregon Children's Services Division (CSD) removed a child from her mother's custody. The trial court denied the motion because it was not signed by an attorney. Under Oregon law, all pleadings must be signed by an attorney. Grande Ronde retained legal counsel and filed a motion to reconsider the ruling. After briefing and oral argument, the trial court upheld the denial of the original motion to intervene because it was not signed by an attorney, as required by Oregon law.

On appeal, the Oregon Court of Appeals saw the issue as one of federal preemption:

> "When a state law 'interferes or is incompatible with federal and tribal interests,' the Supreme Court requires balancing tribal and state interests. ... Here, we must first determine whether the requirement that a tribe be represented by an attorney in an ICWA proceeding 'interferes with or is incompatible with' the tribe's right to intervene and its interest in its children. If we find an interference or incompatibility, then we must balance the competing state and tribal interests."[9]

Balancing the interests at stake, the court of appeals reversed and remanded with instructions to grant the motion to intervene. The court held that ICWA preempted state statutes requiring groups and associations to be represented by an attorney when applied to an Indian tribe's attempt to intervene in child custody proceeding under ICWA. The court explained:

> "[t]ribal participation in state custody proceedings involving tribal children is essential to effecting the purposes of the ICWA. The state interests represented by ORS 9.160 and ORS 9.320 are outweighed by those purposes and the tribal interests that they represent. With the applicable preemption test weighted in favor of tribal interests, the state requirement of representation by an attorney is preempted in the narrow context of these ICWA proceedings."[10]

The next case to explore this issue in depth arose nearly 15 years later in Iowa.[11] In that case, an Indian mother wanted to terminate her parental rights and place her child with a non-Indian family. After presenting the mother and the mother's consent to terminate directly to the district court in June, an adoption attorney mailed notice to the tribe advising them of a July 27 hearing. Shortly thereafter, the tribe filed a motion to intervene and requested a continuance. The court granted the motion to intervene and continued the hearing so that the tribe could investigate the adoptive placement.

On the day before the rescheduled hearing, the tribe faxed a resolution to the court that stated the child's eligibility for membership in the tribe, the belief that ICWA had been violated because a child custody proceeding had occurred without notice to the tribe, the tribe's intent to ask for preferred placement if the mother relinquished her rights, and the tribe's appointment of their ICWA director as the tribal representative in the case. The court again continued the case until Nov. 1 so that all parties could consider the tribe's resolution. On Nov. 1, the court held a termination hearing. The adoption attorney and the mother's attorney objected to the tribe appearing by phone. The guardian ad litem argued that the tribe's ICWA director should not be able to present evidence because she was not a lawyer. The tribe asked for a continuance to appear in person. The court denied the continuance and allowed the tribe to remain on the phone but prohibited the ICWA director from presenting any evidence. The court then proceeded to terminate parental rights.

The tribe filed an appeal arguing, inter alia, that the court erred by refusing to allow the ICWA director to act as a representative of the tribe at the November 1 hearing. The Iowa Supreme Court agreed and held that an Indian tribe should be permitted to represent itself in ICWA proceedings. Citing *State ex rel. Juvenile Dept. of*

Lane County v. Shuey, the court stated, "[t]ribal participation in state custody proceedings involving tribal children is essential to effectuating the purposes of the ICWA" and "the state's interest in adequate representation and compliance with procedure and protocol in general cannot compare with a tribe's interest in its children and its own future existence."[12] The court was also sensitive to the economic hardships faced by tribes and noted that many tribes lack the resources for legal representation. This fact remains true today.

One year later, the Nebraska Supreme Court came to a similar conclusion in *In re Interest of Elias*. In that case, the trial court denied the Ponca Tribe of Nebraska's motion to intervene because it was not signed by an attorney. The court reversed, holding "the Tribe's right to intervene under the federal Indian Child Welfare Act (ICWA) preempts Nebraska's laws regulating the unauthorized practice of law."[13] The court concluded that "tribal participation in state custody proceedings involving Indian children is essential to achieving the goals of ICWA," and that the tribal interests represented by ICWA outweigh the state interests expressed in the unauthorized practice of law statute.[14]

The three cases above, combined with the federal preemption doctrine, provide support for any tribe asserting its rights in an ICWA proceeding outside their home state. Litigation, of course, takes time and is costly. Litigating the issue of tribal representation in ICWA cases also requires hiring local counsel to litigate the issue in the non-home state. Meanwhile, the child custody proceeding will continue without the input of the tribe, and valuable time is lost. In the case I described at the beginning of this article, after the court denied the out-of-state tribal attorney's motion, the tribe hired me because a motion to terminate parental rights was also pending. Had they not hired local counsel, they would not have had legal representation in the termination of parental rights proceedings. In the end, this was crucial because the juvenile court denied the motion to terminate parental rights and returned the children to their home. Had the tribe not intervened and actively participated with legal representation, the result may have been different.

More recently, states have begun adopting rules or laws that expressly permit out-of-state tribal attorneys to appear in ICWA cases or that relax the pro hac vice rules so that tribal attorneys may appear without the financial burdens of fees and retaining local counsel. As of November 2020, at least nine states recognize the unique issues faced by tribes trying to obtain effective legal representation in ICWA cases in non-home states.[15] These states have passed laws or rules that either relax the pro hac vice requirements or hold that tribal attorneys in ICWA cases are not subject to the laws governing practice-of-law.

The first state to pass such a law was Nebraska, in 2015. Under the Nebraska Indian Child Welfare Act, as under the federal ICWA, a tribe can intervene at any point in the proceeding and "[t]he Indian child's tribe or tribes and their counsel are not required to associate with local counsel or pay a fee to appear pro hac vice in a child custody proceeding" under the Nebraska ICWA.[16] In 2018, California amended its pro hac vice rule to provide that the requirement to associate with local counsel "does not apply to an applicant seeking to appear in a California court to represent an Indian tribe in a child custody proceeding governed by the Indian Child Welfare Act."[17]

Minnesota amended its General Rules of Practice for Courts in 2019 to provide that the general rules of practice do not apply to attorneys who represent Indian tribes in juvenile protection matters.[18] Wisconsin also amended its Supreme Court Rules in 2019 to provide that a nonresident attorney who seeks to appear for the limited purpose of representing a tribe in an ICWA proceeding does not have to pay pro hac vice fees or associate with local counsel.[19] And this year, Utah amended its practice rule to exempt non-Utah licensed attorneys from the requirements of its pro hac vice rule if such attorneys are in good standing in another U.S. jurisdiction and will appear for the limited purpose of participating in a child custody proceeding under ICWA.[20]

Other states have amended their pro hac rules to relax the financial and local counsel requirements if certain conditions are met. The states of Oregon, Michigan, Washington, and Arizona have all amended their pro hac vice rules to allow tribal attorneys to represent their clients in ICWA cases without associating with local counsel or paying the pro hac vice fee if they are representing a tribe in a child custody proceeding under ICWA and they submit a pleading to intervene affirming eligibility of the child.[21] Oregon also relaxes its pro hac requirements if an attorney represents an Indian parent or custodian.[22] A state may also have additional requirements to apply for special pro hac status, such as submitting a certificate of good standing from the attorney's home state. It is important to review all of the rules carefully.

The efforts to allow tribal attorneys to appear and practice in out-of-state ICWA cases were led by tribes themselves or tribal, state, federal court forums. In California, Arizona, and Michigan, tribal, state, and federal court forums lead the efforts to amend the pro hac vice rules. In Wisconsin, the rule change was proposed by the Menominee Indian Tribe of Wisconsin.[23] As mentioned earlier, only nine states have adopted rules that allow out-of-state tribal attorneys to participate in ICWA cases, but more states are likely to follow suit.

Under ICWA, tribes have the absolute right to intervene in state child custody proceedings involving Indian children. That right is severely undermined if tribes cannot have a seat at the table by being represented by tribal attorneys in these matters. While tribes can argue in each case that the federal preemption doctrine requires state courts to allow them to intervene and fully participate in out-of-state cases, pursuing that course on a case-by-case basis could be costly and time consuming, and could lead to inconsistent results. A more effective way to facilitate tribal representation in ICWA cases would be for each state to waive or relax pro hac vice rules, waive pro hac fees, and waive the requirement to associate with local counsel, for a licensed out-of-state tribal attorney who seeks to represent a tribe in an ICWA case in state court. Under either approach, tribes deserve a seat at the table by having legal representation in ICWA cases. ⊙

April Olson is a partner at Rothstein Donatelli LLP in Tempe, Ariz. Her practice focuses exclusively on tribal law and federal Indian law, and a significant part of her work involves Indian Child Welfare Act cases.

Endnotes

[1]25 U.S.C. §§ 1901-1963.
[2]*Id*. at § 1903(1).
[3]*Id*. at § 1903(4).

[4]*See* Cohen's Handbook of Federal Indian Law § 1.04, at 81-82 (2005 ed.).
[5]25 U.S.C. § 1911(c).
[6]Data regarding number of cases for Navajo Nation, Gila River Indian Community, and Cherokee Nation on file with author.
[7]For purposes of this article only, I use "home state" to describe the state in which a tribe has attorneys licensed. I use "non-home state" or "out-of-state" to refer to states where a tribe does not have attorneys licensed. This term in no way suggest that a tribe's ancestral lands are limited to their home states. I recognize and acknowledge that many tribes have ancestral lands in multiple states and many tribes were forcefully relocated against their will.
[8]*State ex rel. Juvenile Dept. of Lane County v. Shuey*, 850 P.2d 378 (Or. Ct. App. 1993).
[9]*Id*. at 188 (internal citations omitted).
[10]*Id*. at 191.
[11]*In re N.N.E.*, 752 N.W.2d 1 (Iowa 2008).
[12]*Id*. at 12.
[13]*In re Elias*, 767 N.W.2d 98, 100 (Neb. 2009).
[14]*Id*. at 1031.
[15]Neb. Rev. Stat. § 43-1504(3); Or. R. Unif. Trial Ct., R. 3.170(9); Mich. Ct. R. 8.126(B); Wash. R. Adm. & Prac., R. 8(b)(6); Cal. R. Ct., R. 9.40(g); Minn. R. Juv. Proc., R. 3.06; Wis. R. Sup. Ct., R. 10.03(cm); Utah R. Sup. Ct. Prof. Prac., R. 14-802(r); Ariz. R. Sup. Ct., R. 39 (a)(13).
[16]Neb. Rev. Stat. § 43-1504(3)).
[17]Cal. R. Ct., R. 9.40(g).
[18]Minn. R. Juv. Proc., R. 3.06.
[19]Wis. R. Sup. Ct., R. 10.03(cm).
[20]Utah R. Sup. Ct. Prof. Prac., R. 14-802(r).
[21]Or. R. Unif. Trial Ct., R. 3.170(9); Mich. Ct., R. 8.126(B); Wash. R. Adm. & Prac., R. 8(b)(6); Ariz. R. Sup. Ct., R. 39 (a)(13).
[22]Or. R. Unif. Trial Ct., R. 3.170(9).
[23]*See In the Matter of the Petition to Amend Supreme Court Rule (SCR) 10.03(4), Regarding Pro Hac Vice admission for Nonresident Counsel Appearing in Matters Involving the Indian Child Welfare Act*, No. 18-04 (Feb. 12, 2019), https://www.wicourts.gov/sc/rulhear/DisplayDocument.pdf?content=pdf&seqNo=234887.

Administrative Office of the Courts

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

April 9, 2021

Hon. Mary T. Noonan
State Court Administrator
Catherine J. Dupont
Deputy Court Administrator

M E M O R A N D U M

TO: Board of District Court Judges

FROM: Bridget Koza, Court Improvement Program Director

RE: Indian Child Welfare Act (ICWA) & Tribal Participation

This memorandum is a fifty state survey of statutes, regulations, and court rules that allow tribes to participate in ICWA child-custody proceedings outside of formal intervention under 25 U.S.C. §1911(c). It also includes case law, statutes, or court rules that allow tribes to have non-attorneys represent them in an ICWA child-custody proceeding. Finally, it includes court rules that allow for out-of-state attorneys representing tribes, parents, or an Indian custodian to practice without having to associate with local attorneys and pay a fee as part of an application for *pro hac vice*.

I. States that specifically allow for tribal participation in hearings and there is no requirement for formal intervention

California:

Cal. R. Ct. 5.530(b): "The following persons are entitled to be present: . . . (3) Counsel representing the child or the parent, de facto parent, guardian, adult relatives, or Indian custodian or the tribe of the Indian child; . . . (7) In a proceeding described in rule 5.480 [ICWA child custody proceeding], a representative of the Indian child's tribe."

Michigan:

Mich. Comp. Laws. § 712B.7(7) – "Official tribal representatives have the right to participate in any proceeding that is subject to the Indian child welfare act and this chapter."[1]

Minnesota:

Minn. 260C.163(2)(a): "Official tribal representatives have the right to participate in any proceeding that is subject to the Indian Child Welfare Act of 1978, United States Code, title 25, sections 1901 to 1963."

Minn. R. Juv. P 21.02: "Parties to a juvenile protection matter shall include: . . . (c) in the case of an Indian child, the child's parents as defined in Rule 2.01(19), the child's Indian custodian, and the Indian child's tribe through the tribal representative . . . ."

"A party shall have the right to: . . . be present at all hearings unless excluded pursuant to Rule 27 . . . ."[2]

Idaho:

Idaho Admin. Code. r. 16.06.01.250: "The permanency hearing includes, at a minimum, the child's parent(s) or legal guardian(s), foster parent(s) of a child, and any preadoptive parent(s) or relative(s) providing care for the child. In the case of an Indian child, the child's tribe and Indian custodian must also be encouraged to participate in the permanency hearing. Parties will be provided, by the court, with written notice of the hearing and of their right to be heard."

New Mexico:

Rule 10-324 NMRA: "(A)(1) *General public:* A member of the general public who is not a party, the attorney for a parent, or the representative of the child's Indian tribe or tribes when the court knows or has reason to know that the child is an Indian child under the Indian Child Welfare Act;"

"(B) **Hearings closed to the general public**. All abuse and neglect hearing shall be closed to the general public. . . ."

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[1] Michigan has its own state ICWA law known as the "Michigan Indian Family Preservation Act."

[2] Minn. R. Juv. P 27.04: "The court may exclude from any hearing any party or participant, other than a guardian ad litem or counsel for any party or participant, only if it is in the best interests of the child to do so or the person engages in conduct that disrupts the court. The exclusion of any party or participant from a hearing shall be noted on the record and the reason for the exclusion given. The exclusion of any party or participant shall not prevent the court from proceeding with the hearing or issuing a decision. An order excluding a party or participant from a hearing shall be accessible to the public."

"Committee Commentary: In addition to parties and their attorneys, Subparagraph (A)(1) excludes a representative of the child's Indian tribe or tribes from the definition of "general public" in a case in which the Indian Child Welfare Act may apply. Therefore, that tribal representative shall be permitted under Paragraph B to attend all hearings in an abuse and neglect proceeding unless it is determined that the Indian Child Welfare Act does not apply. The tribal representative also should be permitted to monitor the proceedings in order to keep the tribe informed of the progress of the case, to participate in the proceedings to the extent reasonably necessary to inform the court of the tribe's concerns, and to provide additional resources, including, for example, services, placement options, financial support, and cultural connections. A tribe should not be required to formally intervene in the case unless the tribe seeks affirmative relief from the court."

Utah:

Utah R. Juv. P. R 50: "(f) In proceedings subject to the Indian Child Welfare Act of 1978, 25 U.S.C. sections 1901-63:

(1) The Indian child's tribe is not required to formally intervene in the proceeding unless the tribe seeks affirmative relief from the court.

(2) If an Indian child's tribe does not formally intervene in the proceeding, official tribal representatives from the Indian child's tribe have the right to participate in any court proceeding. Participating in a court proceeding includes being able to:

(A) be present at the hearing;

(B) address the court;

(C) request and receive notice of hearings;

(D) present information to the court that is relevant to the proceeding;

(E) submit written reports and recommendations to the court; and

(F) perform other duties and responsibilities as requested or approved by the court.

(3) The designated representative must provide the representative's contact information in writing to the court.

(4) As provided in Rule 14-802 of the Supreme Court Rules of Professional Practice, before a nonlawyer may represent a tribe in the proceeding, the tribe must designate the nonlawyer representative by filing a written authorization. If the tribe changes its designated representative or if the representative withdraws, the tribe must file a written substitution of representation or withdrawal."

There are also many state statutes or court rules[3] that can be interpreted to allow for tribal participation in court hearings without formal intervention, because either these state have hearings that are open to the public or they have closed hearings that allow for relevant people to attend.

[3] Alaska R. CINA 3(f)(1); Ariz. R. Juv. Ct. 37, 41; Colo. Rev. Stat. § 19-1-106; Conn. R. Super. Ct. Juv. § 26-2(b); D.C. Code § 16-2316(e); D.C. Super. Ct. Negl. & Abuse R. 45; Fla. Stat. § 39.01(57); Fla. R. Juv. P. 8.120(b); Haw. Rev. Stat. § 587A-4; Haw. Fam. Ct. R 121(6); Idaho Code Ann. § 16-1613(1); La. Child Code Ann. art. § 407; Me. Rev. Stat. tit. 22, § 4005-D; Md. R. Juv. 11-110(b); Mo. Sup. Ct. R. 122.01(a); Nev. Rev. Stat. § 432B.430(a); N.H. Rev. Stat.

II. States that allow tribal participation through a non-attorney representative

The Department of Interior, Bureau of Indian Affairs encourages state courts to "permit Tribal representatives to present before the court in ICWA proceedings regardless of whether they are attorneys or attorneys licensed in that State" because a tribe may not have an attorney licensed to practice law in the state where the Indian child custody proceeding is being held and many tribes have limited funds to hire local counsel. Indian Child Welfare Act Proceedings, 81 Fed. Reg. 38,778, 38,798-799 (June 14, 2016); U.S. Dep't of Interior, Bureau of Indian Affairs, Guidelines for Implementing the Indian Child Welfare Act, 8 (2016).

Alaska

Alaska R. Child in Need of Aid 3(i): "Unless the court for good cause requires representation by an attorney, an Indian tribe that has intervened may be represented by a non-attorney designated by the Indian tribe. The tribe must file a written authorization for representation by the designated non-attorney before the non-attorney may represent the tribe. If the tribe changes its designated representative or if the representative withdraws, the tribe must file a written substitution of representation or withdrawal."

"Alaska R. Adoption 11(g): "Unless the court for good cause requires representation by an attorney, an Indian tribe that has intervened may be represented by a non-attorney designated by the Indian tribe. The tribe must file a written authorization for representation by the designated non-attorney before the non-attorney may represent the tribe. If the tribe changes its designated representative or if the representative withdraws, the tribe must file a written substitution of representation or withdrawal."

California:

Cal. R. Ct. 5.534(e)(1): tribe may appear by counsel or representative designated by the tribe; "When the tribe appears as a party by a representative of the tribe, the name of the representative and a statement of authorization for that individual or agency to appear as the tribe must be submitted to the court in the form of a tribal resolution or other document evidencing an official act of the tribe."

Ann. § 169-C:14; N.H. Abuse & Negl. Protocol 4; N.Y. Fam. Ct. § 1043; N.Y. Fam. Ct. R. 205.4; N.C. Gen. Stat. Ann. § 7B-801; Ohio Rev. Code. Ann. § 2151.35(A)(1); Ohio R. Juv. P 27; Okla. Stat. tit. 10A, § 1-4-503(A)(1); 41 Pa. Cons. Stat. Ann. § 6336(e); S.C. Code. Ann. § 63-3-590; Tenn. R. Juv. P. 114(a); Vt. Stat. Ann. tit. 33 §§ 5102(22)(F), 5110(b); Va. Code. Ann. § 16.1-302(C); W. Va. Child Abuse & Negl. Proceedings R. 6a(a); and Wyo. R. P. Juv. Ct. 2(d).

Florida:

J.P.H. v. Fla. Dep't of Children & Families, 39 So.3d 560, 560 (Fla. Dist. Ct. App. 2010) (per curiam) ("[W]e agree with appellees that the trial court erred when it denied the affected tribe's petition to intervene because it was not represented by a Florida attorney. The tribe had a clear right to intervene pursuant to section 1911(c) of the Act, and is not required to be represented by a member of the state bar, since enforcement of state prohibitions on the unauthorized practice of law interfere with and are thus preempted in the narrow context of state court proceedings subject to the Indian Child Welfare Act.").

Iowa:

In re N.N.E., 752 N.W.2d 1, 12 (Iowa 2008) ("[W]e hold that a non-lawyer tribal member may represent the tribe in ICWA proceedings as long as the representative can demonstrate he or she is authorized to speak on behalf of the tribe.").

Michigan:

Mich. Comp. Laws. § 712B.7(7): "Official tribal representatives have the right to participate in any proceeding that is subject to the Indian child welfare act and this chapter."

Minnesota:

Minn. R. Juv. P 21.01(1): "Parties to juvenile protection matter shall include: . . .the Indian child's tribe through the tribal representative. . . ."

Nebraska:

In re Elias L., 767 N.W.2d 98, 104 (Neb. 2009) ("We conclude that tribal participation in state custody proceedings involving Indian children is essential to achieving the goals of ICWA. . . . Thus, we determine that federal law preempts the requirement of § 7-101 that the Tribe be represented by a Nebraska licensed attorney in the ICWA proceedings.").

Neb. Rev. Stat. § 43-1504(3): "Representatives from the Indian child's tribe or tribes have the right to fully participate in every court proceeding held under the act."

North Dakota:

N.D.R. Juv. P. 4: persons who may participate in a juvenile matter include "in the case of an Indian child, the child's Indian custodian and Indian tribe through the tribal representative."

Oregon:

Juvenile Dep't of Lane Cty. v. Shuey, 850 P.2d 378, 381 (Or. Ct. App. 1993) ("Tribal participation in state custody proceedings involving tribal children is essential to effecting the purposes of

ICWA. The state interests represented by ORS 9.160 and ORS 9.320 are outweighed by those purposes and the tribal interests that they represent. With the applicable preemption test weighted in favor of tribal interests, the state requirement of representation by an attorney is preempted in the narrow context of ICWA proceedings.").

South Dakota:

S.D. Codified Laws § 26-8A-33: tribe may appear by counsel or representative designated by the tribe; "When the tribe appears as a party by a representative of the tribe, the name of the representative and a statement of authorization for that individual or agency to appear as the tribe must be submitted to the court in the form of a tribal resolution or other document evidencing an official act of the tribe."

Utah:

Utah Sup. Ct. R 14-802(13): "Representing an Indian tribe that has formally intervened in a proceeding subject to the Indian Child Welfare Act of 1978, 25 U.S.C. sections 1901-63. Before a nonlawyer may represent a tribe, the tribe must designate the nonlawyer representative by filing a written authorization. If the tribe changes its designated representative or if the representative withdraws, the tribe must file a written substitution of representation or withdrawal."

III. States that waive *pro hac vice* requirements in ICWA child-custody proceedings

For background information, there are eight federally recognized tribes[4] in Utah out of 573 federally recognized tribes in the United States. About sixty percent of Utah's ICWA cases in juvenile court (from January 2016 to December 2018) are Indian children who are Navajo. About thirty percent of Utah's ICWA cases in juvenile court involve tribes outside of Utah.[5] Also, tribes receive federal grants for child and family services; however, these funds cannot be used for the tribe's legal representation or legal fees for litigation. *See* 25 U.S.C. §§ 1931, 1932. Other federal

[4] Confederated Tribes of the Goshute Reservation, Nevada and Utah; Navajo Nation, Arizona, New Mexico & Utah; Northwestern Band of the Shoshone Nation; Paiute Indian Tribe of Utah (Cedar Band of Paiutes, Kanosh Band of Paiutes, Koosharem Band of Paiutes, Indian Peaks Band of Paiutes, and Shivwits Band of Paiutes); San Juan Southern Paiute Tribe of Arizona; Skull Valley Band of Goshute Indians of Utah; Ute Indian Tribe of the Uintah & Ouray Reservation, Utah; and Ute Mountain Ute Tribe.

[5] These tribes are located in the following states: Alaska, Arizona, Colorado, Idaho, Montana, Nebraska, Nevada, New Mexico, North Dakota, Oklahoma, Washington, Wisconsin, and Wyoming

moneys for social services are similarly restricted and cannot be used to pay for legal services for litigation. 25 U.S.C. §§ 5301 to 5423.

Arizona:

Ariz. R. Sup. Ct. 39(13): "Exception for Indian Child Welfare Cases. A non-member attorney is not required to associate with local counsel under this rule or pay the fees established by this rule if the applicant establishes to the satisfaction of the State Bar of Arizona that:

> (A) the non-member attorney seeks to appear in an Arizona court for the limited purpose of participating in a child custody proceeding as defined by 25 U.S.C. § 1903, pursuant to the Indian Child Welfare Act of 1978, 25 U.S.C. § 1901 et seq.;
> (B) the non-member attorney represents a federally recognized Indian tribe as defined by 25 U.S.C. § 1903(8) of the Rules of Procedure for Juvenile Court; and
> (C) the Indian child's tribe has submitted a pleading to the court seeking to intervene and participate in the state court proceeding and affirming the child's membership or eligibility for membership under tribal law.

The non-member attorney shall file a motion to appear pro hac vice with the court in which the proceeding is pending and shall perform the duties required to be performed by associate counsel under this rule. Appearance in child welfare proceedings under this paragraph constitutes a special circumstance for the purposes of the restriction in paragraph (6) that a motion may be denied because of repeated appearances."

California:

Cal. R. Ct. 9.40(g): " Representation in cases governed by the Indian Child Welfare Act (25 U.S.C. § 1903 et seq.) (1) The requirement in (a) that the applicant associate with an active license of the State Bar of California does not apply to an applicant seeking to appear in a California court to represent an Indian tribe in a child custody proceeding governed by the Indian Child Welfare Act; and (2) An applicant seeking to appear in a California court to represent an Indian tribe in a child custody proceeding governed by the Indian Child Welfare Act constitutes a special circumstances for the purposes of the restriction in (b) that an application may be denied because of repeated appearances."

Kansas:

Kan. Sup. Ct. R. 116(i): "(i) Exemption for Out-of-State Attorney in Qualifying Indian Child Welfare Act Proceeding.

> (1) Association With Kansas Attorney and Fee Not Required; Other Inapplicable Provisions. If a court determines that an out-of-state attorney has met the requirements under paragraph (2):
> > (A) the out-of-state attorney is not required to associate with a Kansas attorney of record under subsections (a)(3);
> > (B) the out-of-state attorney is not required to pay the fee established under subsection (f); and
> > (C) subsections (b), (c), and (d)(1)(A) are inapplicable.

(2) Exemption Requirements. To qualify for the exemptions under paragraph (1), the out-of-state attorney must establish:

(A) that the attorney seeks to appear in a Kansas court for the limited purpose of participating in a child custody proceeding as defined by 25 U.S.C. § 1903, under the Indian Child Welfare Act of 1978, 25 U.S.C. § 1901 et seq.;

(B) that the attorney represents an Indian tribe, parent, or Indian custodian, as each of those terms is defined by 25 U.S.C. § 1903; and

(C) one of the following:

(i) if the attorney represents an Indian tribe, the tribe has asserted the tribe's intent to intervene and participate in the state court proceeding and affirming the child's membership or eligibility for membership under tribal law or

(ii) if the attorney represents a parent or Indian custodian, the tribe has affirmed the child's membership or eligibility for membership under tribal law."

Michigan:

Mich. Ct. R. 8.126 "An applicant is not required to associate with local counsel, limited to the number of appearances to practice, or required to pay the fee to the State Bar of Michigan, if the applicant establishes to the satisfaction of the court in which the attorney seeks to appear that:

(1) the applicant appears for the limited purpose of participating in a child custody proceeding as defined by MCL 712B.3(b) in a Michigan court pursuant to the Michigan Indian Family Preservation Act, MCL 712B.1 et seq.; and

(2) the applicant represents an Indian tribe as defined by MCL 712B.3; and

(3) the applicant presents an affidavit from the Indian child's tribe asserting the tribe's intent to intervene and participate in the state court proceeding, and averring the child's membership or eligibility for membership under tribal law; and

(4) the applicant presents an affidavit that verifies:

(a) the jurisdictions in which the attorney is or has been licensed or has sought licensure;

(b) the jurisdiction where the attorney is presently eligible to practice;

(c) that the attorney is not disbarred, or suspended in any jurisdiction, is not the subject of any pending disciplinary action, and that the attorney is licensed and is in good standing in all jurisdictions where licensed; and

(d) that he or she is familiar with the Michigan Rules of Professional Conduct, Michigan Court Rules, and the Michigan Rules of Evidence.

(5) If the court in which the attorney seeks to appear is satisfied that the out of state attorney has met the requirements in this subrule, the court shall enter an order authorizing the out of state attorney's temporary admission."

Minnesota:

Minn. R. Juv. P 3.06: "Rule 5 of the General Rules of Practice for the District Courts does not apply to attorneys who represent Indian tribes in juvenile protection matters."[6]

"2015 Advisory Committee Comment: Rule 5 of the General Rules of Practice provides, in part: "Lawyers who are admitted to practice in the trial courts of any other jurisdiction may appear in any of the courts of this state provided (a) the pleadings are also signed by a lawyer duly admitted to practice in the State of Minnesota, and (b) such lawyer admitted in Minnesota is also present before the court, in chambers or in the courtroom or participates by telephone in any hearing conducted by telephone." General Rule 5 is amended in 2015 to provide an "out-of-state lawyer is subject to all rules that apply to lawyers admitted in Minnesota, including rules related to e-filing." Consistent with the letter and spirit of the Indian Child Welfare Act, the Juvenile Protection Rules Committee does not want to place any barriers to participation by Indian tribes in juvenile protection matters. For that reason, Rule 3.06 is amended to provide that the requirements of Rule 5 dealing with pro hac vice and electronic filing are not applicable to attorneys who represent Indian tribes."

Nebraska:

Neb. Rev. Stat. § 43-1504(3): "The Indian child's tribe or tribes and their counsel are not required to associate with local counsel or pay a fee to appear pro hac vice in a child custody proceeding under the Nebraska Indian Child Welfare Act."

Neb. Sup. Ct. R. § 3-122(F): "Counsel representing an Indian child's tribe or tribes in a child custody proceeding under the Nebraska Indian Child Welfare Act, Neb. Rev. Stat. § 43-1501 et seq., shall be exempt from all requirements of § 3-122 [pro hac vice rules]."

Oregon:

Or. Unif. Trial Ct. R. 3.170(9): "(a)The applicant seeks to appear in an Oregon court for the limited purpose of participating in a child custody proceeding as defined by 25 USC § 1903, pursuant to the Indian Child Welfare Act of 1978, 25 USC § 1901 et seq.;
(b) The applicant represents an Indian tribe, parent, or Indian custodian, as defined by 25 USC § 1903; and
(c) One of the following:

> (i) If the applicant represents an Indian tribe, the Indian child's tribe has executed an affidavit asserting the tribe's intent to intervene and participate in the state court proceeding and affirming the child's membership or eligibility of membership under tribal law; or
> (ii) If the applicant represents a parent or Indian custodian, the tribe has affirmed the child's membership or eligibility of membership under tribal law."

[6] Same language for Minn. R. Adoption P 3.09: "Rule 5 of the General Rules of Practice for the District Courts does not apply to attorneys who represent Indian tribes in adoption matters."

Washington:

Washington Admission and Practice Rules 8(b)(6): " Exception for Indian Child Welfare Cases. A member in good standing of, and permitted to practice law in, the bar of any other state or territory of the United States or of the District of Columbia may appear as a lawyer in an action or proceeding, and shall not be required to comply with the association of counsel and fee and assessment requirements of subsection (b) of this rule, if the applicant establishes to the satisfaction of the Court that:

> (A) The applicant seeks to appear in a Washington Court for the limited purpose of participating in a "child custody proceeding" as defined by RCW 13.38.040(3), pursuant to the Washington State Indian Child Welfare Act, ch.13.38 RCW, or by 25 U.S.C. § 1903(1), pursuant to the Indian Child Welfare Act of 1978, 25 U.S.C. §§ 1901-1963;
> (B) The applicant represents an "Indian tribe" as defined by RCW 13.38.040 or 25 U.S.C. § 1903;
> (C) The Indian child's tribe has executed an affidavit asserting the tribe's intent to intervene and participate in the state court proceeding and affirming that under tribal law (i) the child is a member or (ii) the child is eligible for membership and the biological parent of the child is a member; and,
> (D) The applicant has provided, or will provide within seven days of appearing on the case, written notice to the Washington State Bar of their appearance in the case. Such written notice shall be by providing in writing the following information: the cause number and name of the case; the attorney's name, employer, and contact information; and the bar number and jurisdiction of the applicant's license to practice law."

Wisconsin:

Wis. Sup. Ct. R 10.03(4): "[A]llow a nonresident attorney who seeks to appear for limited purpose of participate in a child custody proceeding pursuant to the Indian Child Welfare Act of 1978, 25 U.S.C. § 1901, et seq., while representing a tribe, without being in association with an active member of the state bar of Wisconsin and without being subject to the any application fees required by this rule."

Non-resident attorney has to submit a modified version of the Application for Admission Pro Hac Vice.

Utah:

Utah Sup. Ct. R 14-806(r): "Tribal Representation. A Utah tribunal may allow a non-Utah licensed attorney who is admitted and in good standing in another United States jurisdiction to appear for the limited purpose of participating in a child custody proceeding under the Indian Child Welfare Act of 1978, while representing a tribe, without being subject to the requirements of this rule."

IV. States that do not waive *pro hac vice* requirements in ICWA child-custody proceedings

Wyoming:

Wyo. R. P. Juv. Ct. 5(b): "In proceedings subject to the Indian Child Welfare Act, out-of-state attorneys must comply with Rule 5(A).[7] However, in proceedings subject to the exclusive jurisdiction of the tribe pursuant to 25 U.S.C. § 1919, the tribe's attorney may appear for the limited purpose of requesting transfer of the matter to tribal court, without showing compliance with Rule 5(A). If necessary in all other cases, the tribe shall obtain local counsel."

[7] Wyo. R. P. Juv. Ct. 5(a): "An out-of-state attorney may enter his appearance and participate in a case only after having been admitted in accordance with Rule 8 of the Rules Governing the Wyoming State Bar and the Authorized Practice of Law, and Rule 104 of the Uniform Rules for the District Courts of the State of Wyoming (admission Pro Hac Vice). Once so admitted, his appearance and participation is limited by the restrictions of those rules."

Tab 3

Rules back from comment:

RULES OF CIVIL PROCEDURE – COMMENT PERIOD CLOSES MARCH 22, 2021

DISCLOSURE AND DISCOVERY AMENDMENTS

URCP026. General provisions governing disclosure and discovery. Amend. The proposed amendments to Rule 26 extend several discovery timelines and clarify multiple provisions. The amendments also include the language currently proposed in **SJR004** (2021), which addresses a party's duty to pay an expert witness's hourly fee for attendance at a deposition (lines 113-114).

FAMILY LAW AMENDMENTS

As a whole, the family law amendments below are intended to

- make case names more neutral and less antagonistic;
- shorten the presumptive discovery period for domestic cases;
- implement the case management recommendations of the "**Report and Recommendations to the Standing Committee on Children and Family Law**;" and
- address issues raised in a recent legislative audit.

URCP010. Form of pleadings and other papers. Amend.

URCP012. Defenses and objections. Amend.

URCP026. General provisions governing disclosure and discovery. Amend.

URCP026.01. Disclosure and discovery in domestic relations actions. Amend.

URCP100A. Case Management of Domestic Relations Actions. NEW.

URCP104. Divorce decree upon affidavit. Amend.

URCP106. Modification of final domestic relations order. Amend.

Table of Contents

COMMENTS

WAINE RICHES

RULE 10:

The Rule 10(a)(2)(B) proposed caption changes for domestic relations cases are long overdue. Thanks to whoever is finally proposing them. I respond daily to emails from the many thousands of people using OCAP and among those emails are ones asking why one of them must be designated petitioner and the other respondent. Even worse is the feeling that it's one of them versus the other. They take "Jane Doe, Petitioner v. John Doe, Respondent" to mean something other than one person is filing and the other responding. For them, it means one person is at fault and the other is not, or one person is breaking up the marriage and the other is not, or one person is bad and the other is not, things like that. By and large, they want equality in the entire process, beginning with the caption of their documents. The proposed language should resolve their concerns nicely and I believe will help reduce animosity. For OCAP it will mean reviewing every screen in each of the programs impacted by the change, and then every document generated in each program and switching the words Petitioner and Respondent for the names of the parties. The changes will not only be in the captions, but throughout the entire content of each document as well, which will be a lot of work. But OCAP has been moving in the direction of names instead of titles for years. Implementation of this rule will be a good reason to complete the process.

Subcommittee's response: This was the intent with the proposed Rule change.

JIM MCINTYRE

RULES 100A, 26.1, 26

I am old enough to remember case management conferences (attorney only) and orders. That process worked well and the addition of a mediator can simply help that old practice. I'm not sure why it was abandoned, but the return is welcome. Proposed new **RULE 100A** addresses a need that old case management conferences and orders served. The addition of tracks is also well taken.

Now the but, I would suggest that the **RULE 26.1** requirement that financial declarations be filed within 14 days by both parties does not account for Track 2 cases and the conferences associated with them. I see an opportunity for abuse if non-disclosure within the 14 days acts as a bar to the future introduction of evidence based on non-disclosure under Rule 26(d4).

Subcommittee's response:

Subcommittee's response: Shifting back to case management orders has been endorsed by the Judicial Council. Regarding initial disclosures, Rule 26(d)(4) always has included room for supplementation of disclosures and an opportunity for the court to forgive late disclosures for good cause.

Comment [JKH1]: How would "non-disclosure within the 14 days act[s] as bar to the future introduction of evidence"? I do not see this as a bar to the evidence so long as the initial disclosures are made. The only practical effect is that the late or non-disclosing party cannot serve any other discovery until the party's initial disclosure obligations are satisfied under Rule 26(e)(2).

ALEX LEEMAN

RULE 26

Excellent changes to Rule 26, particularly in regards to scheduling of expert discovery and clarifying the scope of material that must be disclosed regarding what the expert relied upon. I also appreciate the explicit statement that a rebuttal expert may not be used in a party's case in chief. I have seen a few times where a party tried to slip in a "forgotten" expert by designating them as a rebuttal expert.

Committee's response: This comment supports the change.

TAMARA J HAUGE

RULE 26

I'm concerned about the proposed changes to Rule 26 where the proposed subsection (a)(5)(B) requires that pretrial disclosures of deposition transcripts under (a)(5)(A)(ii) have to be be filed with court. This potentially involves an invasion of privacy for any party whose physical or mental condition or whose criminal background is discussed in the deposition. In most personal injury cases, the court file is public and anyone has access to it. I don't believe that deposition transcripts should be filed with court as routine pre-trial disclosures where anyone can read the depositions. A doctor's deposition may contain private and personal details about a party which then become public. This has a chilling effect on a plaintiff's willingness to bring a case to court and inadvertently punishes the party by making his or her personal details public through a deposition filed with court.

Committee's response:

KELLY PETERSON

RULE 26

I agree completely

JOHN LOWRANCE

RULE 26

Thank you for clarifying, what has long been industry standard, that the party requesting a "non-retained" expert's deposition must pay the reasonable hourly fee for that expert. This is consistent with the FRCP.

It is only right to require the party who is requesting a "non-retained" expert's time to give a deposition, to pay the reasonable hourly fee of that "non-retained" expert. It would be unfair to allow a party to demand multiple depositions of another party's

"non-retained" experts and either not pay the reasonable hourly fee of that "non-retained" expert OR attempt to force the costs associated therewith upon the non-requesting party.

This clarification to URCP 26 will do away with a lot of unnecessary motions and URCP 37 Statement of Discovery Issues.

Committee's response: This comment supports the amendments.

SCOTT LYTHGOE

RULE 26

John Lowrance has articulated well why the rule change is necessary. Fairness is at the heart of the issue. If you want to depose a non-retained expert then you should have to pay for that person's time at a reasonable rate. This will also clarify how this issue should be handled in the courts and avoid confusion with the judiciary, which will further judicial economy.

DAVID HOLMAN

RULE 26 (DOMESTIC)

Reduce the days in which to complete discovery to 90 days in a domestic relations action?! We're lucky just to get a hearing on temporary orders within 90 days these days. This change would eliminate the chance of avoiding the cost of discovery in the event a temporary order is needed but settlement could be reached soon thereafter because you'd have to issue discovery requests as soon as possible. I'm not even going to try to address the complications that a custody evaluation would pose.

Subcommittee's response: : 90 days is intended as the new baseline, as a large majority of cases are reported to not require extensive discovery. Proposed Rule 100A allows for complex discovery in Tier 2 and Tier 3 through court management, specifically in cases of a custody evaluation.

Comment [JKH2]: Rule 29 gives the parties flexibility in extending or suspending the dates: "Stipulations extending the time for or limits of disclosure or discovery require court approval only if the extension would interfere with a court order for completion of discovery or with the date of the hearing or trial." And the commissioner can address this issue in the Rule 100A case management conference. I think we discussed having the 90 days start at the case management conference, unless otherwise adjusted at the case management conference? But opted not to go this route.

AXEL TRUMBO

RULE 26

My comment is on the timing-for-expert-discovery provision in rule 26(a)(4)(C).

I like the change to the triggering event for non-burden expert disclosures. Instead of working off of the date of election, we work off of to the date of disclosure. This is great because it clarifies when a defendant should disclose an expert even when a plaintiff has not. Please keep it.

I don't like the provision saying that an expert disclosed only in rebuttal cannot be used in the case in chief. This gets into the order of the presentation of evidence at trial when rule 26 should be dealing with the timing of disclosures and discovery. For expert

Comment [JKH3]: This is a good point.

discovery, we have a burden disclosure, response, and rebuttal–reminiscent of a trial–but it shouldn't be treated as establishing the trial's structure. The point of rule 26 is to flesh out the expert issues in a fair way. Once the expert issues are fleshed out pre-trial, I can see no reason why we should create an artificial structure on the order in which the expert testimony will be presented at trial. The parties have been fully notified of the proposed expert testimony, and it should be presented in an order that makes the most sense. It's strange to have everyone pretend like we don't know what the responsive expert is going to say and require an otherwise unnecessary "rebuttal" phase of trial.

The problem is exacerbated when you consider that in many civil cases there's a mix among the parties of who has the burden on any given issue. The reality is that both sides are making burden, responsive, and rebuttal disclosures of various experts on various topics. Sometimes on the same topics because it's unclear who has the burden. This mess shouldn't determine the structure of the trial.

AXEL TRUMBO

RULE 26

To be clear, in my view, the way you deal with an improper rebuttal disclosure is to exclude it or to give the other side an opportunity to respond. Is it testimony that could have and reasonable should have been disclosed in the initial round of expert disclosures? If so, it's not proper rebuttal testimony and should be dealt with appropriately under the circumstances of the case.

Committee's response:

ERIC K. JOHNSON

URCP010. Form of pleadings and other papers:

not a necessary change, but not a burdensome of otherwise harmful change.

URCP012. Defenses and objections:

not a necessary change, but not a burdensome of otherwise harmful change.

URCP026. General provisions governing disclosure and discovery:

is the proposed amendment of rule 26 intended to permit a strict and exclusive 4-hour limit on any and all depositions, including the deposition of the expert witness? Or is the proposed amendment of rule 26 intended to permit a 4-hour limit on the deposition of each expert witness AND limit all other deposition hours regarding any other witnesses?

URCP026.01. DISCLOSURE AND DISCOVERY IN DOMESTIC RELATIONS ACTIONS:

This proposed amendment appears to me to be a step in the right direction when it comes to reducing the time and money spent needlessly on a domestic relations action.

URCP100A. CASE MANAGEMENT OF DOMESTIC RELATIONS ACTIONS:

– If proposed rule 100A is created, will Utah Code § 30-3-39 need to be amended as well to provide that mediation is waived per URCP rule 100A(1)?

Comment [JKH4]: I don't see how Rule 100A waives or prohibits mediation?

– shouldn't there be a way to object to an order placing a case into a track to which a party may object? For example, if the court certifies a complex case a "Track 1 Standard Track" case when it's really a "Track 2 Complex Track" or vice versa?

– it appears that requiring the parties to discuss whether there will need to be a hearing for any motions for temporary orders will have the unintended effect of causing motions for temporary orders to skyrocket, i.e., because the rule provides for discussing whether there will need to be a motion for temporary orders hearing that will have the effect of spurring parties to file opposing motions for temporary orders.

– I'll believe this will be followed consistently by the court when I see it followed consistently by the court.

Comment [JKH5]: Not sure what this means

URCP104. DIVORCE DECREE UPON AFFIDAVIT:

not a necessary change, but not a burdensome of otherwise harmful change.

URCP106. MODIFICATION OF FINAL DOMESTIC RELATIONS ORDER:

not a necessary change, but not a burdensome of otherwise harmful change.

Subcommittee's response: Regarding URCP026 comment: The table in URCP 26(c)(5) includes text clarifying it applies to fact discovery, which is treated separately from expert discovery under URCP 26(a)(4)(B).

Regarding URCP100A(a)(1) comment: Comment is well-taken and the clarification will be incorporated.

Regarding URCP100A(a) track objection comment: Issues with case management are addressable through proposed URCP 100A(c).

Regarding URCP100A(b) temporary order motions comment: Comment is well-taken and that language will be removed.

THOMAS R. MORGAN

URCP100A.

IS A BAD PROPOSED RULE

The "Report and Recommendations to the Standing Committee on Children and Family Law" was presented in June of 2017. The Report came by way of research and study. The domestic case management "track system" was implemented as a pilot program in the 4th and 7th judicial districts. Then approximately a year and a half ago the 3rd judicial district also started following the case management track system.

The Court's own statistics show that on average, 80% of domestic cases are resolved within a year and 15% are resolved within a year and a half. Only 5% of cases are taking longer than 18 months.

To date, there has not been any follow-up or similar research and study to determine if the case management system as proposed and implemented has actually accomplished what its drafters believed it would. In fact, the only real data that could be gleaned is that on average in the 3rd district the life span of a domestic case with or without a custody evaluation has only been shortened by 30 days. Why should we change the rules without research and study to determine if the pilot program actually worked. Just because back in 2017 the judicial council approved the pilot program, doesn't mean that it still should. Relying on old data is unhelpful and unethical.

It is clear that all the hype about cases taking too long to complete (see the report) was really a distraction from what the drafters really wanted to do which was to take away a party and/or their counsel's agency and ability to prosecute their case as the individual needs demanded. Instead of an attorney or party driving their own case, the drafters want the court to babysit every litigant that comes before the court. Parties should have the option to not have to follow a track but proceed in a manner which best fits their respective situation and needs.

Comment [JKH6]: This option is not taken away- see Rule 29.

This proposed rule is a solution to a problem that is non-existent. If a party, attorney, commissioner, or judge believes a case is taking too long, then Rule 16 already allows for a status/pretrial hearing at any time.

There is an additional argument that the courts should better provide help for the self-represented. And yes, while the Courts should provide aid to those self-represented litigants that are unable to afford legal counsel, the LSC Survey relied upon by the The Utah Workgroup on Regulatory Reform clearly stated that self-represented parties were overwhelmingly self-represented by choice, not for lack of funds. If a litigant chooses to be self-represented that choice has consequences, many of which can be mitigated by a Rule 16 status conference after some time to allow the parties to try to work out the various issues.

In reality, whether there are self-represented parties or attorneys involved, the realities of life need to be felt/experienced and there are many times when a case needs to simmer on the stove. The parties and the children need to have a chance to start living a new normal before they decide if they need to have a custody evaluation or argue about parent-time issues. That new normal begins after an agreement by the parties or a temporary orders hearing. Presently the time it takes a case to get to a case management

"track" hearing or a temporary order hearing are virtually identical, about 5-7 weeks. Hire a few more commissioners and staff and the time would be reduced.

Another big problem with this proposed rule is the requirement that the parties "must" identify at the outset if they need or will need a temporary orders hearing. If they don't know and don't say anything or with optimism believe the other parent's representations and say they don't need one, then they may be precluded from asking for one later. This goes against every "best interest of the child" tenet that family law should espouse.

Many times in domestic cases, one party has been planning on filing for divorce for some time and while the other party wouldn't disagree that the couple is having problems, when they are served with the complaint their whole world comes crashing down on them. It makes little sense to expect the surprised party to be content with immediately being pushed down a route toward settlement when nothing is certain and the parties don't know how their actions will actually affect the parties' children.

I should say however, that while I don't like or necessarily agree with the track system noting that it will actually push more parties to fight at trial because they have been rushed to it without time to live a new norm, perhaps this proposed rule could be modified to allow for a 6 month time period to allow parties the opportunity to get their cases done on their own terms in a collaborative sense. Then at the 6 month mark, if the case is still outstanding there could be the hearing with the judge who would then assign the case to a track to start the babysitting.

Subcommittee's response: Regarding URCP100A(b) temporary order motions comment: Comment is well-taken and that language will be removed.

Regarding the additional concerns raised: The proposed URCP 100A addresses the concerns and recommendations of the 2019 Legislative Performance Audit of Child Welfare During Divorce Proceedings and Domestic Case Process Improvement Subcommittee's Report and Recommendations to the Standing Committee on Children and Family Law.

Comment [JKH7]: I agree.

Comment [JKH8]: Should "must" be changed to "should"?

Comment [JKH9]: Perhaps there could be a form Rule 29 stipulation to extend deadlines? For those who are proceeding pro se or otherwise are not aware of this option?

ROBERT FROERER

URCP100A.

I agree with Commissioner Morgan's comments. It feels like an effort to require the court to micro manage cases and attorneys. Sometimes delay results in good things, e.g., the parties decide to get back together; counseling may have a positive effect on one or both parties, or the kids. I also agree, however, that an occasional reminder from the court – a 6 month review could be a good thing for cases that are dragging.

Subcommittee's response: The proposed URCP 100A addresses the concerns and recommendations of the 2019 Legislative Performance Audit of Child Welfare During

Divorce Proceedings and Domestic Case Process Improvement Subcommittee's Report and Recommendations to the Standing Committee on Children and Family Law.

SCOTT WISER

URCP100A.

I concur with everything Commissioner Morgan says. While well-intentioned, this is an example of a cure becoming worse than the disease.

Subcommittee's response: Subcommittee's response: The proposed URCP 100A addresses the concerns and recommendations of the 2019 Legislative Performance Audit of Child Welfare During Divorce Proceedings and Domestic Case Process Improvement Subcommittee's Report and Recommendations to the Standing Committee on Children and Family Law.

THOMAS R. MORGAN

URCP010

This amendment is unnecessary and potentially unhelpful. Instead of "in the matter of the marriage of" or "in the matter of the parentage of (child's name)" Perhaps it should just be, "in the matter of (name 1) and (name 2)" The case number already should have a designation of DA, CS, or PA. Identifying individuals with open cases may be more difficult for the juvenile court, the public, etc.

I appreciate the hopefulness that led to this proposal, however I don't believe in the slightest that changing the caption will somehow magically reduce the animosity or conflict between the parties. By the time a case gets filed, many Parties have likely already been using terms with each other that are much more offensive than Petitioner versus Respondent.

Subcommittee's response: Comment is well-taken and the clarification will be incorporated.

ROBERT FROERER

URCP010

I again agree with Commissioner Morgan. Why are we spending time/resources to change status quo that has existed for decades. Seems to be a symptom of the new woke/snow flake generation.

KARLA BLOCK

URCP010

I agree with Commissioner Morgan. I also have my own concerns about the unintended consequences of the proposed changes to Rule 10.

First, the rule applies to "domestic relations actions, as defined in Rule 26.1". Rule 26.1 includes as "domestic relations actions" child support and modifications. A child support action may be initiated in its own right without being tied to a divorce action or a parentage case. As the rule is currently written it does not provide for a caption where the action is solely regarding child support.

Comment [JKH10]: I realize these are very rare, but should the be addressed in the rule by way of specifiying the caption?

Second, in order to represent my client's interests, my office must frequently search in Courts Xchange to see if an action already exists that may require intervention. If there is no existing action, my client may proceed administratively. However, in order to determine whether to proceed judicially or administratively there must be an avenue to see if a case exists. To locate judicial actions my office must search by the parties' (parent, alleged parent) names. My understanding is that the search is driven by the names in the caption. If the parties' names are no longer located in the caption it will be impossible to conduct the necessary searches.

Comment [JKH11]: This is a valid point which was raised earlier. What does the name search do?

Third, many families have children with the same initials. If only the child's initials are included in the caption it will cause confusion regarding which children are involved in the pending case. In the juvenile court, the cases also contain birth dates. I know that this may run afoul of the privacy protections in the district court but maybe it could at least contain month and year of birth.

In my opinion, if changes to the captions are being made there should be an option that captures child support cases and all captions should contain the parties' names so that cases may be located by those that have the proper access. If the intent of the caption change is to make the action appear less adversarial, the parties' names may still be included while removing the designation of "petitioner" or "respondent". Some examples of how that may be accomplished are:

Rule 10(2)(B)(i) – Divorce, annulment, etc. – "In the matter of the marriage of [Party A and Party B]."

Rule 10(2)(B)(ii) – Parentage – "In the matter of the parentage of [Child(ren)'s Initial(s) – month and year of birth], a child. [Party A and Party B], Interested Parties."

Rule 10(2)(B)(iii) – Custody/parent-time/child support – "In the matter of [Child(ren)'s Initial(s) – month and year of birth], a child. [Party A and Party B], Interested Parties."

There may be other "interested parties" that may join or intervene but those situations don't need to be captured in the mandatory caption language. They would still be adequately provided for by intervention or joinder.

Finally, the Utah Code has several references to "petitioner" and "respondent". Since this proposed change eliminates those designations, what significance do those

statutory provisions have? Is consideration being given as to how to amend those designations in the various statutes? Also, there are numerous references to "petitioner" and "respondent" on the court's website when searching for information on divorce and parentage. Are there plans to change all those references as well?

Comment [JKH12]: ?

Thank you for your time and consideration of my concerns.

Subcommittee's response: Comment is well-taken and the suggested changes will be incorporated.

KELLY PETERSON

URCP026 (DOMESTIC)

Regarding the below proposed changes to the Rules, most of them I am either neutral (or at least can live with them) or I support them.

I have a big problem with the proposed change to Rule 26(c) – only 90 days to to complete fact discovery, and ESPECIALLY only 4 hours for deposition (shortening it from 15).

Many of my cases involve many complex issues, that require at least a 7 hour deposition of the opposing side, and sometimes 1 or 2 additional depositions. (e.g., self-employment/business issues, hidden incomes/assets, alienation/interference issues, custody factors, relocation factors, etc. – sometimes all in the same case).

This takes time to get to the bottom to. 90 days is insufficient. And ESPECIALLY only 4 hours of deposition is just plain inadequate. It gives short-shrift to domestic litigations, giving them sort of "less due process" than, say, a contract or real property case. I realize kids need resolution as quickly as reasonably possible, and I also realize courts can get sick of domestic cases. But these changed would often prevent a domestic party from being able to adequately discovery and develop the evidence they will need. Especially when children's best interests are at issue.

Moreover, these changes will give a significant advantage to whichever domestic litigant who enjoys the greatest advantages in the beginning of the case (e.g., the high-earning spouse who has separated from the disabled spouse who cannot work; the alienating parent who has custody, etc.), with fewer opportunities for the disadvantaged party to develop the necessary evidence.

I think the current Rule (defaulting to Tier 2) is the appropriate balance.

Subcommittee's response: Subcommittee's response: 90 days is intended as the new baseline, as a large majority of cases are reported to not require extensive discovery. Proposed Rule 100A allows for complex discovery in Tier 2 and Tier 3 through court management, specifically in cases of a custody evaluation.

VICTORIA KATZ

URCP026

As proposed, RCP 26(a)(5)(B) begins, "Disclosure required by paragraph (a)(5)(A) shall be served on the other parties at least 28 days before trial." It then continues with a new sentence, "Disclosures required by paragraph (a)(5)(A)(i) and (a)(5)(A)(ii) shall also be filed." The Rule does not state *when* the disclosures must be filed.

Must the disclosures also be filed 28 days before trial, as with the service deadline? Any time before trial? Whichever the case, we request that the Court state the filing deadline specifically.

Committee's response:

LAUREN BARROS

URCP026

This is from accountant Brad Townsend and myself: The advisory committee notes dictate that all materials relied upon and all computer models have to be produced with the expert designation, instead of with the expert report or deposition. That timeline doesn't make sense, given that the final collection of materials relied upon and final computer models are usually not complete until the report is issued or the deposition is given. Having these items provided with the designation is putting the cart before the horse.

Committee's response:

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 children of ~~[Child(ren)'s Initials], a child~~[Party A and Party B]."

(iii) In petitions to otherwise establish custody ~~and~~, parent-time, or child support: "In the matter of the children of ~~[Child(ren)'s Initials], a child~~[Party A and Party B]."

(iv) If a domestic relations action includes additional interested parties, such as the Office of Recovery Services, they must be listed in the case caption after the text described above.

(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 100A. Case Management of Domestic Relations Actions.

(a) **Case management tracks.** 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 or a case manager assigned by the court shall determine into which of the following tracks the case will be placed:

Comment [NS1]: What is the role of the case manager?

(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, a delay in mediating shall not be a basis to delay setting a trial date without good cause. ~~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~~b) The court may set additional hearings as necessary under Rule~~s~~ -16 or 101. 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.

Rule 12. Defenses and objections.

(a) When presented.

(1) In actions other than domestic relations. 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~~A) 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~~B) 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.

(2) 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. Any counterpetition must be filed with the answer. A party served with a counterpetition shall serve an answer within 21 days after service of the 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~~ a plaintiff within 14 days after the filing of the first answer to ~~the~~ that plaintiff's complaint; and

(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~~.

(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 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 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.

(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~~ 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.

(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.

(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.

(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). 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.

(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)(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~~ exhibit~~s~~ if the grounds for the objection are apparent before trial. Other than objections under Rules 402 and 403 of the Utah

Rules of Evidence, other objections not listed are waived unless excused by the court for good cause.

(6) Form of disclosure and discovery production. Rule 34 governs the form in which all documents, data compilations, electronically stored information, tangible things, and evidentiary material should be produced under this Rule.

(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	$300,00 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, file 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~~

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

(C) obtain an expanded discovery schedule under Rule 100A.

(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.

Advisory Committee Notes

Note Adopted 2011

Disclosure requirements and timing. Rule 26(a)(1).

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

Subject to the foregoing qualifications, the summary of the witness's expected testimony should be just that– a summary. The rule does not require prefiled testimony or detailed descriptions of everything a witness might say at trial. On the other hand, it requires more than the broad, conclusory statements that often were made under the prior version of Rule 26(a)(1)(e.g., "The witness will testify about the events in question" or "The witness will testify on causation."). The intent of this requirement is to give the other side basic information concerning the subjects about which the witness is expected to testify at trial, so that the other side may determine the witness's relative

importance in the case, whether the witness should be interviewed or deposed, and whether additional documents or information concerning the witness should be sought. *See RJW Media Inc. v. Heath*, 2017 UT App 34, ¶¶ 23-25, 392 P.3d 956. This information is important because of the other discovery limits contained in Rule 26.

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

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

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

The purpose of early disclosure is to have all parties present the evidence they expect to use to prove their claims or defenses, thereby giving the opposing party the ability to better evaluate the case and determine what additional discovery is necessary and proportional.

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

Experts frequently will prepare demonstrative exhibits or other aids to illustrate the expert's testimony at trial, and the costs for preparing these materials can be substantial. For that reason, these types of demonstrative aids may be prepared and disclosed later, as part of the Rule 26(a)(4) pretrial disclosures when trial is imminent.

If a party elects a written report, the expert must provide a signed report containing a complete statement of all opinions the expert will express and the basis and reasons for them. The intent is not to require a verbatim transcript of exactly what the expert will say at trial; instead the expert must fairly disclose the substance of and basis for each opinion the expert will offer. The expert may not testify in a party's case in chief concerning any matter that is not fairly disclosed in the report. To achieve the goal of making reports a reliable substitute for depositions, courts are expected to enforce this requirement. If a party elects a deposition, rather than a report, it is up to the party to ask the necessary questions to "lock in" the expert's testimony. But the expert is expected to be fully prepared on all aspects of his/her trial testimony at the time of the deposition and may not leave the door open for additional testimony by qualifying answers to deposition questions.

There are a number of difficulties inherent in disclosing expert testimony that may be offered from fact witnesses. First, there is often not a clear line between fact and expert testimony. Many fact witnesses have scientific, technical or other specialized knowledge, and their testimony about the events in question often will cross into the area of expert testimony. The rules are not intended to erect artificial barriers to the admissibility of such testimony. Second, many of these fact witnesses will not be within the control of the party who plans to call them at trial. These witnesses may not be cooperative, and may not be willing to discuss opinions they have with counsel. Where

this is the case, disclosures will necessarily be more limited. On the other hand, consistent with the overall purpose of the 2011 amendments, a party should receive advance notice if their opponent will solicit expert opinions from a particular witness so they can plan their case accordingly. In an effort to strike an appropriate balance, the rules require that such witnesses be identified and the information about their anticipated testimony should include that which is required under Rule 26(a)(1)(A)(ii), which should include any opinion testimony that a party expects to elicit from them at trial. If a party has disclosed possible opinion testimony in its Rule 26(a)(1)(A)(ii) disclosures, that party is not required to prepare a separate Rule 26 (a)(4)(E) disclosure for the witness. And if that disclosure is made in advance of the witness's deposition, those opinions should be explored in the deposition and not in a separate expert deposition. Otherwise, the timing for disclosure of non-retained expert opinions is the same as that for retained experts under Rule 26(a)(4)(C) and depends on whether the party has the burden of proof or is responding to another expert.

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

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

The concept of proportionality is not new. The prior rule permitted the Court to limit discovery methods if it determined that "the discovery was unduly burdensome or expensive, taking into account the needs of the case, the amount in controversy, limitations on the parties' resources, and the importance of the issues at stake in the

litigation." The Federal Rules of Civil Procedure contains a similar provision. See Fed. R. Civ. P. 26(b)(2) (C).

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

Standard and extraordinary discovery. Rule 26(c). As a counterpart to requiring more detailed disclosures under Rule 26(a), the 2011 amendments place new limitations on additional discovery the parties may conduct. Because the committee expects the enhanced disclosure requirements will automatically permit each party to learn the witnesses and evidence the opposing side will offer in its case-in-chief, additional discovery should serve the more limited function of permitting parties to find witnesses, documents, and other evidentiary materials that are harmful, rather than helpful, to the opponent's case.

Parties are expected to be reasonable and accomplish as much as they can during standard discovery. A statement of discovery issues may result in additional discovery and sanctions at the expense of a party who unreasonably fails to respond or otherwise frustrates discovery. After the expiration of the applicable time limitation, a case is presumed to be ready for trial. Actions for nonmonetary relief, such as injunctive relief, are subject to the standard discovery limitations of Tier 2, absent an accompanying monetary claim of $300,000 or more, in which case Tier 3 applies.

Consequences of failure to disclose. Rule 26(d). If a party fails to disclose or to supplement timely its discovery responses, that party cannot use the undisclosed witness, document, or material at any hearing or trial, absent proof that non-disclosure was harmless or justified by good cause. More complete disclosures increase the likelihood that the case will be resolved justly, speedily, and inexpensively. Not being

able to use evidence that a party fails properly to disclose provides a powerful incentive to make complete disclosures. This is true only if trial courts hold parties to this standard. Accordingly, although a trial court retains discretion to determine how properly to address this issue in a given case, the usual and expected result should be exclusion of the evidence.

Legislative Note

Note adopted 2012

S.J.R. 15

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

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

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

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

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 not at issue, such as paternity, modification, and grandparents' rights, a party must only serve:

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

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

(C) proof of any other assets or income relevant to the determination of a child support award.

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.

Tab 4

UTAH STATE COURTS

Nancy Sylvester

URCP 37 | amendment proposal from Family Law Procedures Subcommittee

Jim Hunnicutt Sun, Nov 22, 2020 at 8:32 AM

Dear Jon & Nancy,

At the most recent 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.

Thank you.

Sincerely,

Jim

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URCP 37 proposed amendment deleting order requirement.docx
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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

Tab 5

Certificates of Service in Rule 5

From Trevor:

We may want to keep on our radar this provision of Rule 5 below that deals with certificates of service. I may be misremembering, but I thought the purpose of this provision was to make clear that certificates of service are not required if service is made via electronic filing to all parties (i.e. all parties are e-filers). The current text seems to suggest that the only exempt documents are those "required to be served under paragraph (b)(5)(b)" (which states "an order or judgment prepared by the court will be served by the court) when service is made under (b)(3)(A) (which is electronic service). I'm not exactly sure what this means, but it seems to mean everything needs a certificate of service except orders/judgments served by the court when everyone is an e-filer. If the intent of the rule is to exempt all electronic filings from the certificate of service requirement when everyone is an e-filer, we should update the text. If the intent of the rule is not to exempt all electronic filings when everyone is an e-filer, I think we should revisit the rule to make that substantive change- -a change that was adopted recently in the federal rules. Here's the text of the current rule:

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

From Nancy:

I suspect this is a bit of a loaded question and may require some vetting. At this point, everyone who is an electronic filer is an attorney, but sometime soon (hopefully), electronic filing will expand to pro se parties. I suppose that won't really change the calculation, though. I personally think certificates of service are redundant when everyone is already getting notice via efiling anyway. I usually just put something at the end of my pleadings that says something to the effect that all parties have been served via the electronic filing system. The federal language implies that even that isn't necessary:

> (B) Certificate of Service. No certificate of service is required when a paper is served by filing it with the court's electronic-filing system. When a paper that is required to be served is served by other means:
>
> (i) if the paper is filed, a certificate of service must be filed with it or within a reasonable time after service; and
>
> (ii) if the paper is not filed, a certificate of service need not be filed unless filing is required by court order or by local rule.

Since we still kind of in the middle of Rule 5 (it will be effective November 1 on email service), I think we could put this on the agenda for this month and address it and potentially have it ready to go by November, too.

From Trevor:

Agree--I think courts are moving away from requiring certificates when everyone is a e-filer. They serve no purpose in that instance, as there is a docket record of service.

If people are in agreement as to that substantive outcome, we may be able to tweak the language by adding the word "or" below (in red). I think the provision's language in general could be cleaned up, but if we wanted to keep any changes minimal, the change below would probably suffice.

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

From Nancy:

I like that change. It's simple. I will say that the federal rule has made this way more plain. Perhaps we could use language similar to the federal rule?

From Trevor:

Yes, I think all else being equal the federal language is better. I will think on this some before the meeting and let you know if I come up with anything different.

Rule 5. Service and filing of pleadings and other papers.

(a) When service is required.

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

(A) a judgment;

(B) an order that states it must be served;

(C) a pleading after the original complaint;

(D) a paper relating to disclosure or discovery;

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

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

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

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

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

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

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

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

(3) Service in actions begun by seizing property. If an action is begun by seizing property and no person is or need be named as defendant, any service required

before the filing of an answer, claim or appearance must be made upon the person who had custody or possession of the property when it was seized.

(b) How service is made.

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

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

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

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

(3) Methods of service.

(A) A paper is served under this rule by:

(~~A~~i) except in the juvenile court, submitting it for electronic filing, or the court submitting it to the electronic filing service provider, if the person being served has an electronic filing account;

(~~B~~ii) for a paper not electronically served under paragraph (b)(3)(A), emailing it to ~~(i)~~ the most recent email address provided by the person to the court and other parties under Rule 10(a)(3) or Rule 76, or by other notice, or ~~(ii)~~ to the email address on file with the Utah State Bar.

(B) If email service to the email address is returned as undeliverable, service must then be made by regular mail if the person to be served has provided a

mailing address. Service is complete upon the attempted email service for purposes of the sender meeting any time period;

(C) if the person's email address has not been provided to the court and other parties, or if the person required to serve the document does not have the ability to email, a paper may be served under this rule by:

(i) mailing it to the ~~person's~~ last known mailing address provided by the person to the court and other parties under Rule 10(a)(3) or Rule 76;

~~(D)~~(ii) handing it to the person;

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

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

~~(G)~~(v) any other method agreed to in writing by the parties.

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

(5) Who serves. Unless otherwise directed by the court or these rules:

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

(B) every paper prepared by the court will be served by the court.

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

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

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

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

(4) a copy of the order must be served upon the parties.

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

Comment [NS1]: Proposal to not require certificates of serve when all are e-filers.

(e) Filing. Except as provided in Rule 7(j) and Rule 26(f), all papers after the complaint that are required to be served must be filed with the court. Parties with an electronic filing account must file a paper electronically. A party without an electronic filing account may file a paper by delivering it to the clerk of the court or to a judge of the court. Filing is complete upon the earliest of acceptance by the electronic filing system, the clerk of court or the judge.

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

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

(2) electronically file a scanned image of the affidavit or declaration;

(3) electronically file the affidavit or declaration with a conformed signature; or

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

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

Advisory Committee Notes

Note adopted 2015

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

Although electronic filing in the juvenile court presents to the parties the documents that have been filed, the juvenile court e-filing application (CARE), unlike that in the district court, does not deliver an email alerting the party to that fact. The Board of Juvenile Court Judges and the Advisory Committee on the Rules of Juvenile Procedure believe this difference renders electronic filing alone insufficient notice of a document having been filed. So in the juvenile court, a party electronically filing a document must serve that document by one of the other permitted methods.