Agenda

Supreme Court Advisory Committee
Utah Rules of Civil Procedure
June, 2023
4:00 to 6:00 p.m.
In-Person at the Matheson Courthouse
And via WebEx

Welcome and approval of minutes	Tab 1	Lauren DiFrancesco
Rule 26 – Third Party Litigation Funding	Tab 2	Heather White & Alex Dahl
Rule 83 – Vexatious Litigants and Due Process	Tab 3	Bryson King
Membership update		Lauren DiFrancesco
Return from Public Comment – Rule 6 and Rule 12, No comments	Tab 4	Lauren DiFrancesco
Rule 12(a)	Tab 5	Jim Hunnicutt
Rule 62 and Rothwell v. Rothwell	Tab 6	Jim Hunnicutt
Rule 108 – Statutory Recodification in (d)(2)	Tab 7	Stacy Haacke
Rules 69A, 69B, 69C	Tab 8	Lauren DiFrancesco
Consent agenda - *None*		
Pipeline items: - Rule 74 (Steve Leech) - Rule 3(a)(2) (Trevor & Subcommittee) - Rule 60 (Judge Cornish & Subcommittee) - Rule 104 (Susan & Subcommittee) - Rules 101 & 62 (Jim & Subcommittee) - Eviction Expungements (Lauren & Subcommittee) - Affidavit/Declaration (Ash & Subcommittee)		Lauren DiFrancesco

Next Meeting: September 17 (Virtual)

[No Meetings Scheduled for July and August]

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

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

Tab 1

Tab 2

Proposal for an Amendment to Utah Rule of Civil Procedure 26(a)(1) to Require Disclosure of Non-Party Financial Agreements

An amendment to Rule 26(a)(1) of the Utah Rules of Civil Procedure is needed to provide Utah courts and parties transparency about non-party financial stakes in the outcome of cases, which are commonplace today as a result of third-party litigation funding (TPLF) agreements. A rule requiring disclosure of TPLF agreements would allow judges and parties to understand who controls litigation, determine who should participate in settlement conferences, and understand facts relevant to decisions about the scope of discovery, sanctions, and allocating costs. It would also allow a better understanding of resolution dynamics including settlement prospects. Such a rule would also serve an important policy function because it would allow the public to understand who is using Utah courts and for what purposes—a key question because undisclosed individuals and institutions (including foreign countries' sovereign wealth funds) are funding an increasingly significant amount of litigation in American courts. A proposed amendment is attached.

I. Undisclosed TPLF Arrangements Are Commonplace

In many civil lawsuits, non-parties to the litigation hold legal rights to a portion of any proceeds from the case. These non-party investors include individuals (both U.S. and non-U.S. citizens[1]), investment funds (including family offices[2]), hedge funds, and foreign countries' sovereign wealth funds.[3] Investing in litigation outcomes is a multi-billion-dollar industry in the United States; a recent survey indicates that the value of such investments reached $11 billion in 2021.[4] Although the lack of transparency makes it is impossible to measure the precise annual dollar amount invested in U.S. litigation, one recent article "conservatively estimated this figure around $2.3 billion," while another source says it is $5 billion.[5] And it is growing rapidly. A December 2022 Report by the Government Accountability Office found that the amount of funds provided by commercial litigation funders "more than doubled" between 2017 and 2021.[6] Non-party financial stakes exist at all stages of civil litigation[7] and in cases involving a wide variety of

---

[1] LexShares, *Frequently Asked Questions*, https://www.lexshares.com/faqs [hereinafter LexShares FAQs], ("LexShares supports funding by non U.S. based investors through our online platform.").
[2] *Id.* ("LexShares investors include high net worth individuals and institutional investors, including select family offices, hedge funds and asset managers.").
[3] Burford Capital 2021 Annual Report, at 12, https://www.burfordcapital.com/media/2679/fy-2021-report.pdf [hereinafter Burford 2021 Annual Report].
[4] BLOOMBERG LAW, *Willkie, Longford Reach $50 Million Litigation Funding Pact* (June 23, 2021), https://news.bloomberglaw.com/business-and-practice/willkie-longford-partner-in-50-million-litigation-funding-pact ("[L]itigation funding . . . has attracted more than $11 billion in capital, according to a survey this year.").
[5] Mark Popolizio, *Third-party litigation funding in 2022 – three issues for your radar*, Verisk, Jan. 31, 2022 (citing *Considerations from the ABA's Best Practices for Litigation Funding*, THE NATIONAL LAW REVIEW, Volume XI, Number 151 (Feb. 16, 2021); David H. Levitt & Francis H. Brown III, *Third Party Litigation Funding: Civil Justice and the Need for Transparency*, DRI Center for Law and Public Policy (2018), at 1)).
[6] United States Government Accountability Office, *Third-Party Litigation Financing: Market Characteristics, Data, and Trends* (Dec. 2022) [hereinafter GAO Report] at 11, https://www.gao.gov/assets/gao-23-105210.pdf.
[7] LexShares FAQs, *supra* note 1.

subject matters, including intellectual property, antitrust, asset recovery, fraud, and personal injury.[8]

The nature of such direct financial interests held by non-party litigation investors is well-known: They are entirely dependent on the outcome of the case. Litigation finance "is the practice where a third party unrelated to the lawsuit provides capital to a plaintiff involved in litigation in return for a portion of any financial recovery from the lawsuit."[9] These are not loans. Litigation finance provider LexShares explains:

> Solutions are instead structured as non-recourse investments, which means that the funding recipient owes nothing if the lawsuit does not result in a recovery. If the case reaches a positive outcome, then the funding recipient would owe a predetermined portion of any damages recovered.[10]

Another large litigation financing firm, Burford, similarly observes:

> In return [for our investment], we receive our contractually agreed entitlement from the ultimate settlement or judgment on the claim and, if the claim does not produce any cash proceeds, we generally lose our capital.[11]

As another litigation financer explains to parties: "If you win, we win."[12] In short, there is no dispute that non-party litigation funders hold direct pecuniary interests in the outcome of civil cases—a position that is akin to being a real party in interest. The problem is that these arrangements remain hidden from Utah judges and parties because there is presently no rule requiring TPLF disclosure.

II. A Rule Requiring TPLF Disclosure Would Help Utah Judges and Parties Understand Who Controls Litigation and Whose Presence Is Needed During Settlement Conferences

Utah judges commonly require parties to ensure that a person with settlement authority is available during settlement conferences. This practice—which is consistent with Rule 16 of the Federal Rules of Civil Procedure,[13] federal case law,[14] and the District of Utah local rules[15]—

---

[8] GAO Report, *supra* note 6 at 9, 13.
[9] LexShares, *Litigation Finance 101*, https://www.lexshares.com/litigation-finance-101.
[10] *Id.*
[11] Burford 2021 Annual Report, *supra* note 3 at 13.
[12] Appeal Funding Partners, *Our Solutions*, https://appealfundingpartners.com/our-solutions/.
[13] FED. R. CIV. P. 16 advisory committee's note to 1993 amendment (judges are authorized "to direct that, in appropriate cases, a responsible representative of the parties be present or available by telephone during a conference in order to discuss possible settlement of the case"). The note clarifies that courts have discretion to include non-parties as well: "Whether this would be the individual party, an officer of a corporate party, a representative from an insurance carrier, or someone else would depend on the circumstances." The note further explains that "[t]he explicit authorization in the rule to require personal participation in the manner stated is not intended to limit the reasonable exercise of the court's inherent powers," or "its power to require party participation under the Civil Justice Reform Act of 1990," quoting 28 U.S.C. § 473(b)(5) for the proposition that "civil justice expense and delay reduction plans adopted by district courts may include [a] requirement that representatives 'with authority to bind [parties] in settlement discussions' be available during settlement conferences."

reflects the importance of knowing who has control or significant influence over litigation decisions including settlement.

The few instances in which TPLF agreements have been disclosed provide compelling reason to suspect that litigation funders are being vested with authority to influence or control litigation decisions, including with regard to settlement. Specifically:

- In *Boling v. Prospect Funding Holdings, LLC*, [16] the U.S. Court of Appeals for the Sixth Circuit concluded that the terms of the funding agreements involved in that matter "effectively give [the non-party investor] substantial control over the litigation," including terms that "may interfere with or discourage settlement" and otherwise "raise quite reasonable concerns about whether a plaintiff can truly operate independently in litigation."

- In *White Lilly, LLC v. Balestriere PLLC*,[17] a non-party investor with a financial interest in a lawsuit asserted that it had the right to exercise control over the litigation. In its complaint, the non-party investor alleged that it had a contractual right to assign a particular lawyer to serve as one of the plaintiff's counsel in the lawsuit and alleged that its counsel breached her obligation to serve as its "ombudsman" to oversee the cases it had invested in. The funding agreement required that "[d]efendants obtain prior approval for expenses in excess of $5,000.00."[18]

- A 2017 "best practices" guide by IMF Bentham (now Omni Bridgeway) for non-party financial interests in litigation highlights the importance of giving the investor the authority to: "'[r]eceive notice of and provide input on any settlement demand and/or offer, and any response'; and participate in settlement decisions."[19]

- In the putative class action *Gbarabe v. Chevron Corp.*,[20] the funding agreement required that counsel "give reasonable notice of and permit [the non-party investor] where reasonably practicable, to . . . send an observer to any mediation or hearing relating to the Claim."[21] The funding agreement "provide[d] control to the Funders" through the

---

[14] *See, e.g.*, *In re Stone*, 986 F.2d 898, 903 (5th Cir. 1993) ("[S]ubject to the abuse-of-discretion standard, district courts have the general inherent power to require a party to have a representative with full settlement authority present—or at least reasonably and promptly accessible—at pretrial conferences.").
[15] DUCIVR 16-3 (counsel for each party in a settlement conference has the responsibility to "ensure that a person or representative with settlement authority or otherwise authorized to make decisions regarding settlement is available in-person for the full duration of the settlement conference").
[16] 771 F. App'x 562, 579-80 (6th Cir. 2019).
[17] Compl. ¶ 35, No. 1:18-cv-12404-ALC, ECF No. 1 (S.D.N.Y. Dec. 31, 2018).
[18] *Id.* ¶ 124.
[19] John H. Beisner, Jessica Davidson Miller and Jordan M. Schwartz, *Selling More Lawsuits, Buying More Trouble: Third Party Litigation Funding A Decade Later*, U.S. Chamber Institute for Legal Reform (Jan. 2020), at 19, https://instituteforlegalreform.com/wp-content/uploads/2020/10/Still_Selling_Lawsuits_-_Third_Party_Litigation_Funding_A_Decade_Later.pdf (quoting Bentham IMF, *Code of Best Practices* (Jan. 2017)).
[20] No. 14-cv-00173-SI, 2016 U.S. Dist. LEXIS 103594, at *6 (N.D. Cal. Aug. 5, 2016).
[21] Litigation Funding Agreement § 10.2.4 (dated Mar. 29, 2016) (attached to Decl. of Caroline N. Mitchell in Supp. of Chevron Corp.'s Mem. in Opp'n to Mot. for Class Certification & Mots. to Exclude the Reports & Test. of

> "installment of 'Nominated Lawyers'"—lawyers "selected by the Claimants with the *Funder's approval*."[22]

A currently pending legal dispute further confirms why courts and parties should know whether litigation funding agreements give significant control to the funders. Sysco Corporation, a plaintiff in several antitrust suits, filed a petition in mid-March 2023 to vacate an injunction issued by an arbitration panel at the request of Burford preventing Sysco from executing settlement deals with multiple antitrust defendants.[23] According to the petition, Sysco and Burford entered into a litigation funding agreement under which Burford provided Sysco non-recourse capital for the antitrust lawsuits in exchange for a share of the proceeds of any future settlements or judgments in those actions.[24] When Sysco agreed to give its customers a piece of the antitrust claims in 2022, Burford allegedly objected and required that the funding agreement be changed to give Burford the right to review and reject settlement offers, provided that Burford's consent is not "unreasonably withheld."[25] But when Sysco received settlement offers it found to be reasonable, Burford allegedly instituted proceedings to enjoin Sysco from finalizing settlements, and an arbitration panel granted an *ex parte* temporary restraining order in Burford's favor.[26] As a recent editorial by the *Wall Street Journal* puts it, the allegations in this matter are "a cautionary tale" illustrating how TPLF agreements can put businesses at odds with "their lawyers and funders whose priority is big paydays that may not be in the best outcomes for clients."[27] These allegations, if true, would also contradict Burford's repeated public statements that it does not exercise any control or influence over the lawsuits it finances.[28]

Onyoma Research & Jasper Abowei as Ex. 13), *Gbarabe v. Chevron Corp.*, No. 3:14-cv-00173-SI, ECF No. 186 (N.D. Cal. Sept. 16, 2016).

[22] Maya Steinitz, *The Litigation Finance Contract*, 54 Wm. & Mary L. Rev. 455, 472 (2012) (emphasis added) (footnote omitted).

[23] *See* Petition to Vacate Arbitration Award, *Sysco Corp. v. Glaz LLC, et al*, No. 1:23-cv-01451 (N.D. Ill. filed Mar. 8, 2023), ECF No. 1.

[24] *See id.* ¶ 20.

[25] *See* Am. Petition to Vacate Arbitration Award, ¶ 40, *Sysco Corp. v. Glaz LLC, et al.*, No. 1:23-cv-01451 (N.D. Ill. Filed Mar. 20, 2023), ECF No. 18.

[26] *See id.* ¶¶ 41-58.

[27] *See* https://www.wsj.com/articles/burford-capital-litigation-financing-sysco-lawsuit-boies-schiller-a4b593fb?mod=article_inline.

[28] *See, e.g.*, https://www.burfordcapital.com/insights/insights-container/common-sense-vs-false-narratives-about-litigation-finance-disclosure/ ("Insurers set limits upon settlement outcomes and thus often control litigation-related decision-making for the defendants they insure, something that providers of commercial litigation finance do not do. ***In litigation finance as it is practiced in the U.S., control remains with the client***.") (emphasis added); https://www.burfordcapital.com/how-we-work/with-law-firms/ ("We act as passive investors ***and do not control strategy or settlement decision-making***, and our capital is almost always provided as a non-recourse investment, shifting risk from the firm to Burford.") (emphasis added); https://www.burfordcapital.com/insights/insights-container/byline-pli-legal-finance-post-covid/ ("If the matter wins, they can expect a meaningful share of the remaining damages, and if it loses, they keep any capital advanced, locking in a minimum outcome. In both scenarios, ***the company maintains control of its litigation***—and considerably more control over its finances.") (emphasis added); https://www.burfordcapital.com/insights/legal-finance-101/ ("Reported use of legal finance—also called litigation finance or litigation funding—has doubled in recent years, as companies and law firms increasingly recognize the benefits of gaining better control over legal budgets and risk ***without ceding control of litigation decision-making or settlement***") (emphasis added); https://www.burfordcapital.com/insights/insights-container/how-do-law-firms-use-portfolio-finance/ ("the use of legal finance generally does not alter control of decision-making or attorney-client relationships. Burford makes a portfolio deal directly with the firm, but Burford's role is that of a passive investor. Therefore, ***Burford does not control the litigation or settlement strategy and***

Amending Utah Rule 26(a)(1) as proposed in the appendix to require disclosure of TPLF agreements would inform judges and parties when a non-party investor has authority over settlement decisions (in whole or in part) and allow the court to determine whose participation to require in settlement conferences.

III. A Rule Requiring TPLF Disclosure Would Inform Decisions Relating to the Scope of Discovery, Protective Orders, and Sanctions

Utah Rule of Civil Procedure 26(b)(3)(a) defines proportionality in discovery to include consideration of "the parties' resources."[29] A judge considering a scope-of-discovery question therefore should consider TPLF agreements, which would be plainly relevant to the parties' resources. Similarly, a judge fashioning a protective order—particularly one that allocates expenses pursuant to Utah R. Civ. P. 37(a)(7)(J)—might want to consider whether a non-party holds a direct stake in any proceeds from the case, and whether the investor is making or influencing litigation decisions. Because TPLF arrangements can mean that an investor is essentially a real party in interest, a court might find that an investor should bear responsibility in the event there is wrongdoing and a corresponding imposition of sanctions or costs. There are other case-specific reasons for judges to know about TPLF.[30]

IV. Disclosure of TPLF Agreements Benefits Litigants and the Public

Litigants should know who is bringing them into court and making the decisions about prosecuting and potentially resolving the litigation against them. Knowing whether there is a multi-billion dollar hedge fund on the other side of the "v" can significantly affect litigation and resolution decisions.

TPLF disclosure also has an important policy function by allowing the public to understand who is using Utah courts and for what purposes. Wealthy individuals and powerful institutions—both in the United States and abroad—increasingly devote considerable resources to litigation of specific cases, placing wagers on the outcome and, in the process, may be placing a heavy thumb on the scales of justice. Members of the bar as well as the public at large should be able to learn

---

decision-making, except when agreed to by our client") (emphasis added); https://www.sec.gov/Archives/edgar/data/1714174/000110465920081137/filename1.htm ("Unlike in our legal finance business, where we are ***financing a client who retains decision-making authority in the litigation*** . . ."") (emphasis added).

[29] UTAH R. CIV. P. 26(b)(3)(a).

[30] Recently filed complaints in the ongoing bankruptcy proceeding involving recently disbarred plaintiffs' attorney Thomas Girardi and his law firm, Girardi Keese, highlight some additional reasons why a judge may want to inquire about TPLF in particular cases. According to the first complaint, the orphans and widows of the victims of the Lion Air Flight 610 plane crash allege that certain litigation funders improperly took money that belonged to Girardi's clients. *See generally* Compl., *Ruigomez v. Miller (In re Girardi Keese)*, No. 2:20-bk-21022-BR, ECF No. 1329 (Bankr. C.D. Cal. filed Aug. 30, 2022). And the second complaint – filed by the Trustee appointed to manage the Girardi bankruptcy estate – alleges that Girardi and his law firm not only siphoned money from their clients, but also did so with the knowledge of litigation funders, improperly shared fees with those entities in contravention of Rule 5.4, and were essentially "implied in fact" partners or "insiders" of Girardi Keese. *See* Compl. ¶ 11, *Miller v. Counsel Fin. Servs., LLC (In re Girardi Keese)*, No. 2:20-bk-21022-BR, ECF No. 1333 (Bankr. C.D. Cal. filed Aug. 31, 2022).

about this influx of money, some of which comes from foreign countries' sovereign wealth funds, that may have strategic purposes in opposing U.S. economic and security interests. Recent research shows "[t]here is growing concern that a large volume of foreign-sourced money may be pouring into U.S. civil litigation against U.S. companies and industries (including those in defense and other highly sensitive sectors) through third party litigation funding (TPLF), raising significant national and economic security risks."[31]

V. A TPLF Disclosure Rule Would Help Judges Avoid Conflicts of Interest

Utah judges are bound by the Utah Code of Judicial Conduct to disqualify themselves when they know that they or their spouses, partners, or family members have a financial interest that could be substantially affected by the outcome of the proceeding. [32] A related responsibility includes avoiding the appearance of impropriety.[33] Because judges do not learn of TPLF in their cases via any civil rule requiring disclosure, they are unlikely to become aware of conflicts generated by it unless they make their own inquiries. But many judges do not think to ask, and it is therefore likely that some are today presiding over lawsuits in which a non-party investor has a direct, contingent financial interest in the proceeds produced by any judgment or settlement. Absent a rule, most judges lack sufficient information to determine whether they or their spouses, partners, or family members have financial interests in the litigation they are overseeing.

VI. Other States Are Adopting TPLF Disclosure Rules

Three states have adopted rules requiring disclosure of TPLF agreements, demonstrating the growing need for disclosure and providing possible models for a Utah rule. The West Virginia code states:

> Except as otherwise stipulated or ordered by the court, a party shall, without awaiting a discovery request, provide to the other parties any agreement under which any litigation financier, other than an attorney permitted to charge a contingent fee representing a party, has a right to receive compensation that is contingent on and sourced from any proceeds of the civil action, by settlement, judgment, or otherwise.

W.V. Code § 46A-6N-6 (2022)**.**[34] Similarly, Wisconsin law provides:

> (bg) *Third party agreements.* Except as otherwise stipulated or ordered by the court, a party shall, without awaiting a discovery request, provide to the other parties any agreement under which any person, other than an attorney permitted to charge a contingent fee representing a party, has a right to receive compensation that is contingent on and sourced from any proceeds of the civil action, by settlement, judgment, or otherwise.

---

[31] *See* U.S. Chamber Institute for Legal Reform, *A New Threat: The National Security Risk of Third Party Litigation Funding* (Nov. 2022), https://instituteforlegalreform.com/wp-content/uploads/2022/11/TPLF-Briefly-Oct-2022-RBG-FINAL-1.pdf.

[32] Utah Code of Judicial Conduct, Canon 2, Rule 2.11.

[33] Utah Code of Judicial Conduct, Canon 1, Rule 1.2.

[34] Available at: https://code.wvlegislature.gov/46A-6N-6/.

Wis. Stat. Ann. § 804.01.[35] Most recently, on May 2, 2023, Montana Governor Greg Gianforte signed SB 269, which includes the following statutory language to take effect January 1, 2024:[36]

> **Disclosure and discovery of litigation financing contracts.**
> (1) Except as otherwise stipulated or ordered by a court of competent jurisdiction, a consumer or the consumer's legal representative shall, without awaiting a discovery request, disclose and deliver to the following persons the litigation financing contract:
> (a) each party to the civil action, administrative proceeding, claim, or cause of action, or to each party's legal representative;
> (b) the court, agency, or tribunal in which the civil action, administrative proceeding, claim, or cause of action may be pending; and
> (c) any known person, including an insurer, with a preexisting contractual obligation to indemnify or defend a party to the civil action, administrative proceeding, claim, or cause of action.
> (2) The disclosure obligation under subsection (1) exists regardless of whether a civil action or an administrative proceeding has commenced.
> (3) The disclosure obligation under subsection (1) is a continuing obligation, and within 30 days of entering into a litigation financing contract or amending an existing litigation financing contract, the consumer or the consumer's legal representative shall disclose and deliver any new or amended litigation financing contracts.
> (4) The existence of the litigation financing contract and all participants or parties to a litigation financing contract are permissible subjects of discovery in any civil action, administrative proceeding, claim, or cause of action to which litigation financing is provided under the litigation financing contract, regardless of whether a civil action or an administrative proceeding has commenced.

Conclusion

The Utah Rules of Civil Procedure should be amended as proposed in the appendix to provide Utah judges and parties transparency about non-party stakes in the outcome of cases. Without such an amendment, judges and litigants in Utah courts will remain largely in the dark about the existence of non-party investments in the outcome of their cases, which are commonplace today. A disclosure rule would help judges determine who should participate in settlement conferences, understand the facts relevant to rulings on the scope of discovery, sanctions, and allocating costs, and would help prevent conflicts of interest. Promulgating such a rule would be consistent with Utah's well-deserved reputation as a leader in procedural rule innovations.

For parties, a TPLF disclosure rule would identify who is driving (or even controlling) the litigation and allow for better understanding of resolution options including settlement prospects. TPLF disclosure would also allow the public to know who is using Utah's courts and for what purposes—a key question because foreign individuals and sovereign wealth funds are increasingly a source of undisclosed litigation funding.

[35] Available at https://docs.legis.wisconsin.gov/statutes/statutes/804.pdf#page=1.
[36] Available at: https://leg.mt.gov/bills/2023/BillPdf/SB0269.pdf.

Appendix: Proposed Amendment to Utah Rule 26(a)(1)

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 must, without waiting for a discovery request, serve on the other parties:

* * *

(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 any agreement under which any person, other than an attorney permitted to charge a contingent fee representing a party, has a right to receive compensation that is contingent on, and sourced from, any proceeds of the civil action, by settlement, judgment or otherwise; and

* * *

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 must, 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 economic 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) must be served on the other parties:

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

(B) by a defendant within 42 days after the filing of that defendant's first answer to the complaint.

(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 must, 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) the facts,

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 must not exceed four hours and the party taking the deposition must pay the expert's reasonable hourly fees for attendance at the deposition. A report must be signed by the expert and must 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 must 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 must serve on the other parties the information required by paragraph (a)(4)(A) within 14 days after the close of fact discovery. Within 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 must occur, or the report must be served on the other parties, within 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 must be permitted.

(ii) The party who does not bear the burden of proof on the issue for which expert testimony is offered must serve on the other parties the information required by paragraph (a)(4)(A) within 14 days after the later of (A) the date on which the disclosure under paragraph (a)(4)(C)(i) is due, or (B) service of the written report or the taking of the expert's deposition pursuant to paragraph (a)(4)(C)(i). Within 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 must occur, or the report must be served on the other parties, within 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 must be permitted.

(iii) If the party who bears the burden of proof on an issue wants to designate rebuttal expert witnesses, it must serve on the other parties the information required by paragraph (a)(4)(A) within 14 days after the later of (A) the date on which the election under paragraph (a)(4)(C)(ii) is due or (B) service of the written report or the taking of the expert's deposition pursuant to paragraph (a)(4)(C)(ii). Within 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 must occur, or the report must be served on the other parties, within 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 must be permitted. The court may preclude an expert disclosed only as a rebuttal expert from testifying 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 hoursand, unless manifest injustice would result, the party taking the deposition must pay the expert's reasonable hourly fees for attendance at the deposition.

(5) Pretrial disclosures.

(A) A party must, 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;

(iii) designations of the proposed deposition testimony; and

(iv) 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) must 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) must also be filed on the date that they are served. At least 14 days before trial, a party must serve any counter designations of deposition testimony and any objections and grounds for the objections to the use of any deposition, witness, or exhibit 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.

(2) Privileged matters.

(A) Privileged matters that are not discoverable or admissible in any proceeding of any kind or character include:

(i) 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 Utah Code Title 78B, Chapter 3, Part 4, 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; and

(ii) except as provided in paragraph (b)(2)(C), (D), or (E), all communications, materials, and information in any form specifically created for or during a medical candor process under Utah Code Title 78B, Chapter 3, Part 4a, Utah Medical Candor Act, including any findings or conclusions from the investigation and any offer of compensation.

(B) Disclosure or use in a medical candor process of any communication, material, or information in any form that contains any information described in paragraph (b)(2)(A)(i) does not waive any privilege or protection against admissibility or discovery of the information under paragraph (b)(2)(A)(i).

(C) Any communication, material, or information in any form that is made or provided in the ordinary course of business, including a medical record or a business record, that is otherwise discoverable or admissible and is not created for or during a medical candor process is not privileged by the use or disclosure of the communication, material or information during a medical candor process.

(D) (i) Any information that is required to be documented in a patient's medical record under state or federal law is not privileged by the use or disclosure of the information during a medical candor process.

(ii) Information described in paragraph (b)(2)(D)(i) does not include an individual's mental impressions, conclusions, or opinions that are formed outside the course and scope of the patient's care and treatment and are used or disclosed in a medial candor process.

(E) (i) Any communication, material or information in any form that is provided to an affected party before the affected party's written agreement to participate in a medical candor process is not privileged by the use or disclosure of the communication, material, or information during a medical candor process.

(ii) Any communication, material, or information described in paragraph (b)(2)(E)(i) does not include a written notice described in Utah Code section 78B-3-452.

(F) The terms defined in Utah Code section 78B-3-450 apply to paragraphs (b)(2)(A)(ii), (B), (C), (D), and (E).

(G) Nothing in this paragraph (b)(2) shall prevent a party from raising any other privileges provided by law or rule as to the admissibility or discovery of any communication, information, or material described in paragraph (b)(2)(A), (B), (C), (D), or (E).

(3) 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.

(4) 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.

(5) Electronically stored information. A party claiming that electronically stored information is not reasonably accessible because of undue burden or cost must 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.

(6) 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 must protect against disclosure of the mental impressions, conclusions, opinions, or legal theories of an attorney or other representative of a party.

(7) 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.

(8) Trial preparation; experts.

(A) Trial-preparation protection for draft reports or disclosures. Paragraph (b)(6) 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)(6) 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.

(9) 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 must make the claim expressly and must 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 must 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 must:

(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 consulted with the client about the request for extraordinary discovery;

(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 must 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 must act through one or more officers, directors, managing agents, or other persons, who must 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, the party challenges the sufficiency of another party's disclosures or responses, or 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 must 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 must not file with the court a disclosure, a request for discovery, or a response to a request for discovery, but must 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.

(g) Standard protective order for civil discovery.

(1) **Applicability.** Except in cases exempt under paragraph (a)(3) of this rule, cases to which Rules 26.1, 26.3, or 26.4 apply, or cases filed as debt collection matters, a party may elect to invoke the Standard Protective Order for Civil Discovery, available on the court's website. The Standard Protective Order for Civil Discovery is effective at the time a party files a Notice of Election and serves a copy of the order on the opposing party. The order need not be entered by the court to be effective.

(2) **Improper withholding and discovery objections.** Except as the court may otherwise order, if a Notice of Election has been filed and service of the order has occurred it is improper to withhold disclosures or object to a discovery request because the court has not entered a protective order.

(3) **Relief from the standard protective order.** A party may move for relief from the Standard Protective Order for Civil Discovery.

Formatted: Indent: Left: 0.25"

Formatted: Font: Bold

Formatted: Font: Bold

Formatted: Font: Bold

Effective: 5/4/2022

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)(4~~3~~). Disclosure of the identity and subjects of expert opinions and testimony is automatic under Rule 26(a)(4~~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)~~(5)(iv) 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~~3).

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~~3) 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

Legislative Note adopted 2012

[As Amended by the Advisory Committee --- 2022 to conform to current rule]

S.J.R. 15

(1) The ~~amended~~ language in paragraph (b)(~~1~~2)(A)(i) 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, which protections were placed in part (b) pursuant to Senate Joint Resolution 15 upon approval by a constitutional two-thirds vote of all members elected to each house on March 6, 2012. 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]~~

Tab 3

Memorandum
Vexatious Litigants and URCP Rule 83
Bryson King, Associate General Counsel

Several years ago, an attorney was named as the defendant in an attorney discipline case. After years of litigating more than two dozen unmeritorious motions filed by the defendant, and a few attempts to disqualify the judge, the court entered an order sua sponte finding that the defendant's conduct rises to the level of a vexatious litigant. The court specifically found the defendant filed unmeritorious pleadings, the pleadings were redundant and immaterial, and the pleadings amounted to tactics that were frivolous or solely for the purpose of harassment or delay. The record, on its face, supports these findings, and for sake of the argument, let's assume the court's findings were accurate and the defendant is, indeed, a vexatious litigant.

In the court's sua sponte order, the judge not only found that the defendant was a vexatious litigant, but imposed a pre-filing restriction on the defendant, requiring the defendant to seek leave of the presiding judge of the judicial district before filing any future pleadings. As you've already guessed, the judge made the vexatious litigant findings and entered the order on pre-filing restrictions with no notice and without giving the defendant an opportunity to respond.

In my personal opinion, the phrase "The court may, on its own motion…enter an order," may have been misinterpreted in this scenario. I think the judge may have assumed they could act without the normal procedural precautions because the vexatious litigant conduct had no subjective element to it and was readily apparent from the record. For example, the defendant did in fact file well over three "unmeritorious pleadings" (a factor provided in the rule), so it would be futile to dispute this fact. But, even though the court rightly found the defendant was a vexatious litigant, and the fact the court relied on in making that finding was indisputable, the court could not impose pre-filing restrictions on the defendant unless and until it found by clear and convincing evidence that there was no reasonable probability the defendant would prevail on the claim (the case). And the court did not give an opportunity for the defendant to speak to that element of Rule 83.

So, here's my dilemma: Does the due process clause/open courts clause require a court to provide procedural safeguards (notice + opportunity to respond) **before** it moves sua sponte finding a litigant vexatious and imposing pre-filing restrictions? Or, similar to our direct contempt statute (78B-6-302), may a court summarily find a litigant vexatious based on indisputable behavior or conduct, and impose restrictions on the litigant without due process considerations? *See U.S. v. Peterson*, 456 F.2d 1135 (10th Cir., 1972).

Rule 83. Vexatious litigants.

(a) Definitions.

(1) The court may find a person to be a "vexatious litigant" if the person, with or without legal representation, including an attorney acting pro se, does any of the following:

(A) In the immediately preceding seven years, the person has filed at least five claims for relief, other than small claims actions, that have been finally determined against the person, and the person does not have within that time at least two claims, other than small claims actions, that have been finally determined in that person's favor.

(B) After a claim for relief or an issue of fact or law in the claim has been finally determined, the person two or more additional times re-litigates or attempts to re-litigate the claim, the issue of fact or law, or the validity of the determination against the same party in whose favor the claim or issue was determined.

(C) In any action, the person three or more times does any one or any combination of the following:

(i) files unmeritorious pleadings or other papers,

(ii) files pleadings or other papers that contain redundant, immaterial, impertinent or scandalous matter,

(iii) conducts unnecessary discovery or discovery that is not proportional to what is at stake in the litigation, or

(iv) engages in tactics that are frivolous or solely for the purpose of harassment or delay.

(D) The person purports to represent or to use the procedures of a court other than a court of the United States, a court created by the Constitution of the United States or by Congress under the authority of the Constitution of the United States, a tribal court recognized by the United States, a court created by a state or territory of the United States, or a court created by a foreign nation recognized by the United States.

(2) "Claim" and "claim for relief" mean a petition, complaint, counterclaim, cross claim or third-party complaint.

(b) Vexatious litigant orders. The court may, on its own motion or on the motion of any party, enter an order requiring a vexatious litigant to:

(1) furnish security to assure payment of the moving party's reasonable expenses, costs and, if authorized, attorney fees incurred in a pending action;

(2) obtain legal counsel before proceeding in a pending action;

(3) obtain legal counsel before filing any future claim for relief;

(4) abide by a prefiling order requiring the vexatious litigant to obtain the court's ~~leave~~ permission~~of the court~~ before filing any paper, pleading, or motion, in a pending action~~;~~, except that the court may not require a vexatious litigant to obtain the court's permission before filing a notice of appeal;

(5) abide by a prefiling order requiring the vexatious litigant to obtain the court's ~~leave~~ permission ~~of the court~~ before filing any future claim for relief in any court; or

(6) take any other action reasonably necessary to curb the vexatious litigant's abusive conduct.

(c) Necessary findings and security.

(1) Before entering an order under subparagraph (b), the court must find by clear and convincing evidence that:

(A) the party subject to the order is a vexatious litigant; and

(B) there is no reasonable probability that the vexatious litigant will prevail on the claim.

(2) A preliminary finding that there is no reasonable probability that the vexatious litigant will prevail is not a decision on the ultimate merits of the vexatious litigant's claim.

(3) The court shall identify the amount of the security and the time within which it is to be furnished. If the security is not furnished as ordered, the court shall dismiss the vexatious litigant's claim with prejudice.

(d) Prefiling orders in a pending action.

(1) If a vexatious litigant is subject to a prefiling order in a pending action requiring ~~leave~~ the court's permission~~of the court~~ to file any paper, pleading, or motion, the vexatious litigant shall submit any proposed paper, pleading, or motion, except for a notice of appeal, to the judge assigned to the case and must:

(A) demonstrate that the paper, pleading, or motion is based on a good faith dispute of the facts;

Formatted: Indent: Left: 0.25", Space After: 6 pt, Line spacing: Multiple 1.15 li

(B) demonstrate that the paper, pleading, or motion is warranted under existing law or a good faith argument for the extension, modification, or reversal of existing law;

(C) include an oath, affirmation or declaration under criminal penalty that the proposed paper, pleading or motion is not filed for the purpose of harassment or delay and contains no redundant, immaterial, impertinent or scandalous matter;

(2) A prefiling order in a pending action shall be effective until a final determination of the action on appeal, unless otherwise ordered by the court.

(3) After a prefiling order has been effective in a pending action for one year, the person subject to the prefiling order may move to have the order vacated. The motion shall be decided by the judge to whom the pending action is assigned. In granting the motion, the judge may impose any other vexatious litigant orders permitted in paragraph (b).

(4) All papers, pleadings, and motions filed by a vexatious litigant subject to a prefiling order under this paragraph (d) shall include a judicial order authorizing the filing and any required security. If the order or security is not included, the clerk or court shall reject the paper, pleading, or motion.

(e) Prefiling orders as to future claims.

(1) A vexatious litigant subject to a prefiling order restricting the filing of future claims shall submit an application seeking an order before filing. The presiding judge of the judicial district in which the claim is to be filed shall decide the application. The presiding judge may consult with the judge who entered the vexatious litigant order in deciding the application. In granting an application, the presiding judge may impose in the pending action any of the vexatious litigant orders permitted under paragraph (b).

(2) To obtain an order under paragraph (e)(1), the vexatious litigant's application must:

(A) demonstrate that the claim is based on a good faith dispute of the facts;

(B) demonstrate that the claim is warranted under existing law or a good faith argument for the extension, modification, or reversal of existing law;

(C) include an oath, affirmation, or declaration under criminal penalty that the proposed claim is not filed for the purpose of harassment or delay and contains no redundant, immaterial, impertinent or scandalous matter;

(D) include a copy of the proposed petition, complaint, counterclaim, cross-claim, or third party complaint; and

(E) include the court name and case number of all claims that the applicant has filed against each party within the preceding seven years and the disposition of each claim.

(3) A prefiling order limiting the filing of future claims is effective indefinitely unless the court orders a shorter period.

(4) After five years a person subject to a pre-filing order limiting the filing of future claims may file a motion to vacate the order. The motion shall be filed in the same judicial district from which the order entered and be decided by the presiding judge of that district.

(5) A claim filed by a vexatious litigant subject to a prefiling order under this paragraph (e) shall include an order authorizing the filing and any required security. If the order or security is not included, the clerk of court shall reject the filing.

(f) Notice of vexatious litigant orders.

(1) The clerks of court shall notify the Administrative Office of the Courts that a pre-filing order has been entered or vacated.

(2) The Administrative Office of the Courts shall disseminate to the clerks of court a list of vexatious litigants subject to a prefiling order.

(g) Statute of limitations or time for filing tolled. Any applicable statute of limitations or time in which the person is required to take any action is tolled until 7 days after notice of the decision on the motion or application for authorization to file.

(h) Contempt sanctions. Disobedience by a vexatious litigant of a pre-filing order may be punished as contempt of court.

(i) Other authority. This rule does not affect the authority of the court under other statutes and rules or the inherent authority of the court.

(j) Applicability of vexatious litigant order to other courts. After a court has issued a vexatious litigant order, any other court may rely upon that court's findings and order its own restrictions against the litigant as provided in paragraph (b).

Effective: May/Nov. 1, 202_.

Tab 4

Rule 6. Time.

Effective: ~~***5/1/2021***~~

(a) Computing time. The following rules apply in computing any time period specified in these rules, any local rule or court order, or in any statute that does not specify a method of computing time.

(1) When the period is stated in days or a longer unit of time:

(A) exclude the day of the event that triggers the period;

(B) count every day, including intermediate Saturdays, Sundays, and legal holidays; and

(C) include the last day of the period, but if the last day is a Saturday, Sunday, or legal holiday, the period continues to run until the end of the next day that is not a Saturday, Sunday or legal holiday.

(2) When the period is stated in hours:

(A) begin counting immediately on the occurrence of the event that triggers the period;

(B) count every hour, including hours during intermediate Saturdays, Sundays, and legal holidays; and

(C) if the period would end on a Saturday, Sunday, or legal holiday, the period continues to run until the same time on the next day that is not a Saturday, Sunday, or legal holiday.

(3) Unless the court orders otherwise, if the clerk's office is inaccessible:

(A) on the last day for filing under Rule 6(a)(1), then the time for filing is extended to the first accessible day that is not a Saturday, Sunday or legal holiday; or

(B) during the last hour for filing under Rule 6(a)(2), then the time for filing is extended to the same time on the first accessible day that is not a Saturday, Sunday, or legal holiday.

(4) Unless a different time is set by a statute or court order, filing on the last day means:

(A) for electronic filing, before midnight; and

(B) for filing by other means, the filing must be made before the clerk's office is scheduled to close.

(5) The "next day" is determined by continuing to count forward when the period is measured after an event and backward when measured before an event.

(6) "Legal holiday" means the day for observing:

(A) New Year's Day;

(B) Dr. Martin Luther King, Jr. Day;

(C) Washington and Lincoln Day;

(D) Memorial Day;

(E) Juneteenth National Freedom Day (as recognized by the Utah Legislature as the third Monday of June);

(F)~~(E)~~ Independence Day;

(G)~~(F)~~ Pioneer Day;

(H)~~(G)~~ Labor Day;

(I)~~(H)~~ Columbus Day;

(J)~~(I)~~ Veterans' Day;

(K)~~(J)~~ Thanksgiving Day;

(L)~~(K)~~ Christmas; and

(M)~~(L)~~ any day designated by the Governor or Legislature as a ~~state~~ legal holiday.

(b) Extending time.

(1) When an act may or must be done within a specified time, the court may, for good cause, extend the time:

(A) with or without motion or notice if the court acts, or if a request is made, before the original time or its extension expires; or

(B) on motion made after the time has expired if the party failed to act because of excusable neglect.

(2) A court must not extend the time to act under Rules 50(b) and (d), 52(b), 59(b), (d) and (e), and 60(c).

Formatted: Space After: 12 pt

(c) Additional time after service by mail. When a party may or must act within a specified time after service and service is made exclusively by mail under Rule 5(b)(3)(C)(i), 7 days are added after the period would otherwise expire under paragraph (a).

(d) Response time for an unrepresented party. When a party is not represented by an attorney, does not have an electronic filing account, and may or must act within a specified time after the filing of a paper, the period of time within which the party may or must act is counted from the service date and not the filing date of the paper.

(e) Filing or service by inmate.

(1) For purposes of Rule 45(i) and this paragraph (e), an inmate is a person confined to an institution or committed to a place of legal confinement.

(2) Papers filed or served by an inmate are timely filed or served if they are deposited in the institution's internal mail system on or before the last day for filing or service. Timely filing or service may be shown by a contemporaneously filed notarized statement or written declaration setting forth the date of deposit and stating that first-class postage has been, or is being, prepaid, or that the inmate has complied with any applicable requirements for legal mail set by the institution. Response time will be calculated from the date the papers are received by the court, or for papers served on parties that do not need to be filed with the court, the postmark date the papers were deposited in U.S. mail.

(3) The provisions of paragraph (e)(2) do not apply to service of process, which is governed by Rule 4.

Formatted: Space After: 12 pt

Rule 12. Defenses and objections.

Effective: ~~11/1/2021~~

(a) When presented.

(1) In actions other than domestic relations. Unless otherwise provided by statute or order of the court, a defendant must file and 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 must file and serve an answer ~~there~~to the crossclaim within 21 days after ~~the~~ service. The plaintiff must file and serve an answer to a counterclaim ~~in the answer~~ within 21 days after service of the counterclaim~~answer or, if a reply is ordered by the court, within 21 days after service of the order~~, unless the court orders otherwise ~~directs~~. The service of a motion under this rule alters these periods of time as follows, unless a different time is ~~fixed by~~ ordered by ~~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:

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

(B) If the court grants a motion for a more definite statement, the responsive pleading must 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 must file and 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 and served with the answer. A party served with a counterpetition must file and serve an answer to the counterpetition 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, must 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 must 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 must be treated as one for summary judgment and disposed of as provided in Rule 56, and all parties must 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 must be treated as one for summary judgment and disposed of as provided in Rule 56, and all parties must 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 must 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 must 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 must 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 must dismiss the action. The objection or defense, if made at the trial, must 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 must 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 must 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 must 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 must, upon motion of the defendant, enter an order dismissing the action.

Tab 5

Memorandum
Rule 12(a) Amendments
From: Jim Hunnicutt

By way of explanation:

In 2021, there were several changes made to multiple rules generally aimed at, among other things, updating and trying to make consistent some of the nomenclature in the rules respecting family law cases. Apparently, a practitioner recently was trying to exploit the amended Rule 12(a) in an effort to default a responding party who filed a 12(b)(6) motion rather than an answer in response to a petition to modify a divorce decree. The newer version of 12(a) arguably can be read to imply that an answer is required even if one files a 12(b)(6) motion in a domestic relations matter. There is language in 12(b) to the contrary, but even so, in hopes of restoring clarity to the rule these proposed changes seem prudent, and consistent with the overall goals of the 2021 amendments.

Thank you.

[Since Rule 12 just came back from public comment, the new amendments are noted with comments in the rule with the prior changes. Subparagraph (a)(2) is duplicated, first with the prior amendments, second with the new proposed amendments.]

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 must file and 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 must file and serve an answer ~~there~~to the crossclaim within 21 days after ~~the~~ service. The plaintiff must file and serve an answer to a counterclaim ~~in the answer~~ within 21 days after service of the counterclaim~~answer or, if a reply is ordered by the court, within 21 days after service of the order~~, unless the court orders otherwise ~~directs~~. The service of a motion under this rule alters these periods of time as follows, unless a different time is ~~fixed by~~ ordered by ~~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:

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

(B) If the court grants a motion for a more definite statement, the responsive pleading must 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 must file and 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 and served with the answer. A party served with a counterpetition must file and serve an answer to the counterpetition within 21 days after service of the counterpetition.

Comment [SH1]: New Amendment

(2) In domestic relations actions. ~~A party served with~~References above to a ~~domestic relations action must serve an answer within 21 days after service of~~ "complaint" apply in the ~~summons and~~ same manner to a petition~~, is complete within~~ references above to a "counterclaim" apply in the ~~state and within 30 days after service of the summons and petition is complete outside the state. Any~~ same manner to a counterpetition~~, must be filed with the answer. A party served with a counterpetition must serve an answer within 21 days after service of the counterpetition.~~references above to a "plaintiff" apply in the same manner to a petitioner, and references above to a "defendant" apply in the same manner to a respondent.

Comment [SH2]: New Amendment

(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, must 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 must 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 must be treated as one for summary judgment and disposed of as provided in Rule 56, and all parties must 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 must be treated as one for summary judgment and disposed of as provided in Rule 56, and all parties must 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 must 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 must 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 must 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 must dismiss the action. The objection or defense, if made at the trial, must 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 must 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 must 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 must 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 must, upon motion of the defendant, enter an order dismissing the action.

Effective: 11/1/2021

Tab 6

THE UTAH COURT OF APPEALS

SHAUN ROBERT ROTHWELL,
Appellee,
v.
JENEA ROTHWELL,
Appellant.

Opinion
No. 20210863-CA
Filed May 11, 2023

Fourth District Court, Provo Department
The Honorable Sean M. Petersen
No. 184401412

Julie J. Nelson, Mitchell J. Olsen Sr., and Mitchell J. Olsen Jr., Attorneys for Appellant

Aaron R. Harris, Thomas J. Burns, and Lacee M. Whimpey, Attorneys for Appellee

JUDGE MICHELE M. CHRISTIANSEN FORSTER authored this Opinion, in which JUDGES RYAN D. TENNEY and JOHN D. LUTHY concurred.

CHRISTIANSEN FORSTER, Judge:

¶1 This case arises from the same facts and circumstances outlined in *Rothwell v. Rothwell*, 2023 UT App 50, which also issues today. The sole question for our consideration in this case is whether the district court exceeded its discretion by staying the property distribution in Shaun and Jenea Rothwell's divorce case pending an appeal. We conclude that the district court did not and, accordingly, affirm the stay.

BACKGROUND

¶2 The district court entered the parties' Decree of Divorce on June 17, 2021. The court found that the marital estate had a value of approximately $28.5 million and divided it equally. Jenea was awarded cash and assets with a total value of $14,226,979. Shaun was awarded the parties' marital businesses and other assets and investments. Following the district court's ruling in the parties' divorce case, Shaun filed a notice of appeal and moved the district court to stay the distribution of the marital estate pending the appeal. The court granted the stay. Because the parties' marital businesses, which were awarded to Shaun, comprised the majority of the estate's value, he has retained the bulk of the parties' assets while his appeal has been pending. To protect Jenea's interest in the marital assets, the district court ordered that "no assets, liquid or non-liquid, may be disposed of or otherwise encumbered pending the appeal." It also required Shaun to deposit a total of $3.8 million cash with the court—$2.1 million at the time the stay was entered and additional amounts at the end of 2021, 2022, and 2023—to account for equalization payments he was required to make to Jenea.

ISSUE AND STANDARD OF REVIEW

¶3 "The decision to stay enforcement of a judgment is within the discretion of the reviewing court," and we accordingly review its decision "for an abuse of discretion." *Utah Res. Int'l, Inc. v. Mark Techs. Corp.*, 2014 UT 60, ¶ 11, 342 P.3d 779 (quotation simplified).

ANALYSIS

¶4 Rule 62 of the Utah Rules of Civil Procedure allows a court to stay enforcement of an order while an appeal is pending if the appellant gives a "bond or other security," Utah R. Civ. P. 62(b), "in an amount that adequately protects the adverse party against

loss or damage occasioned by the stay and assures payment after the stay ends," *id.* R. 62(h)(1). The purpose of such security is to "preserve the status quo pending the outcome of the case." *See Hunsaker v. Kersh*, 1999 UT 106, ¶ 8, 991 P.2d 67 (quotation simplified) (addressing the purpose of injunctions); *see also Diversified Holdings, LC v. Turner*, 2002 UT 129, ¶ 39, 63 P.3d 686 (addressing the purpose of supersedeas bonds). Jenea asserts that the terms of the security the court ordered Shaun to post do not adequately ensure payment and distribution of her half of the marital estate after the stay ends or protect her from loss or damage resulting from the appeal.[1]

---

1. Jenea also argues that a stay of property distribution is inappropriate in a divorce action because a divorce judgment differs from an ordinary judgment. She explains that unlike a typical judgment for compensatory damages addressed by rule 62, a divorce judgment awards assets that already belonged to the party before the divorce. She argues that because the "status quo" during marriage was that "each party already legally owned half the assets and could use them as they wished," staying a property distribution where one party has possession of the majority of the marital assets does not maintain the "status quo" because it "puts at least one party in a worse position than they would otherwise have been" in.

While we acknowledge that the impact of staying a divorce decree is somewhat different from the impact of staying a judgment for compensatory damages and recognize the unfortunate impact that a stay in this situation has in delaying at least one of the parties from moving on from the divorce with no—or at least reduced—financial ties to their ex-spouse, there is nothing in the plain language of rule 62 that limits its application to matters involving compensatory damages. In fact, the language suggests that a judgment for compensatory damages is only one of any number of judgments that may be subject to a stay. *See* Utah

(continued…)

¶5 With the exception of one unpreserved argument,[2] none of the arguments Jenea has raised indicate that the terms of the security were inadequate to ensure she would be paid after the stay ends. The court's injunction prohibited Shaun from disposing of or encumbering any of the marital assets. Given the parties' large estate, this injunction, coupled with the supersedeas bond, was adequate to ensure that the assets Jenea was awarded would be available to her after the stay.

¶6 Jenea suggests that the court's injunction was inadequate to protect her interests because the value of the assets could change over time. But that is always true of assets subject to an

---

R. Civ. P. 62(h) (outlining a presumptive formula for determining the amount of a bond for compensatory damages as an exception to the general rule that security should be "in an amount that adequately protects the adverse party against loss or damage occasioned by the stay and assures payment after the stay ends"). Nevertheless, we observe that it may be desirable for the Supreme Court's Advisory Committee on the Rules of Civil Procedure to consider amending rule 62 to address the unique circumstance of staying a divorce distribution pending appeal and attempt to at least mitigate the potential inequity of such a stay.

2. Jenea points out that the stay order did not include a provision addressing what would happen if Shaun were to die while the appeal is pending. However, Jenea does not appear to have raised this argument below, and even if she had, she does not develop this argument on appeal. We observe that, had Jenea asked for security to protect her against Shaun's death, the court could have, and likely should have, taken steps to secure Jenea's interest in the marital estate, such as a lien on the assets that would be enforceable against Shaun's heirs. *See Wadsworth v. Wadsworth*, 2022 UT App 28, ¶¶ 86–90, 507 P.3d 385, *cert. denied*, 525 P.3d 1259 (Utah 2022). However, Jenea did not ask for such security, and we therefore do not consider this issue further.

injunction, and Jenea has failed to persuade us that the mere possibility that assets may depreciate precludes a court from entering an injunction to secure a party's interest in an asset pending an appeal. She also argues that it was unfair that Shaun had a disproportionate ability to use and enjoy his share of the marital estate. While we are sympathetic to Jenea's situation, we are ultimately not convinced that one party's access to assets during a stay translates to a conclusion that the security provided for the stay is inadequate to protect the other party. Again, that will be the situation any time a stay is granted.

¶7 As to the question of whether the bond and injunction adequately protected Jenea from loss or damage that could result from an appeal, Jenea points to several "losses" she believes the stay has failed to prevent: loss of ability to go forward with her separate life, loss of ownership of assets and monies she was awarded in the divorce, loss of liquidity, loss of enjoyment, and loss of value.

¶8 While one of the goals of a divorce decree should be to allow the parties to go forward with their separate lives, *see Wadsworth v. Wadsworth*, 2022 UT App 28, ¶ 79, 507 P.3d 385, *cert. denied*, 525 P.3d 1259 (Utah 2022), that point does not impact the validity of the stay and the adequacy of the security to protect against loss. As a practical reality, neither party can move forward with their separate life until this matter is fully resolved.

¶9 As to Jenea's alleged loss of ownership, loss of liquidity, and loss of enjoyment, we do not agree that under rule 62, as written, those are losses against which a stay must guard. Any stay will prevent at least one party, and likely both parties, from using or enjoying their property in the way that they would like. Like Jenea, Shaun is unable to sell or encumber the property. And if the court had denied Shaun's request for a stay and required him to transfer property to Jenea pursuant to the terms of the divorce decree, this could have permanently deprived him of

property to which he would be entitled if he prevailed on appeal. This outcome would have been no more equitable than the short-term limitation on Jenea's ability to sell, invest, encumber, or otherwise use the assets she was awarded. And the losses Jenea identifies are not permanent—to the extent she prevails on appeal, she will eventually regain her ownership, use, and enjoyment of her property. While the value of those assets may be somewhat affected by the passage of time, it is just as likely that they will have appreciated as that they will have depreciated.

¶10 Finally, while a loss of value would certainly indicate that the stay did not adequately protect Jenea, she did not ask the court to include terms in the stay that would protect against such losses. On appeal, Jenea suggests that the district court should have included provisions in its injunction requiring Shaun to protect and maintain her assets and to refrain from "using" them in a manner that accelerates their depreciation. She points out, for example, that there is no requirement that Shaun continue to insure her real property. She also observes that Shaun has been able to use her property in a manner that may damage it or cause wear and tear—for example, by driving the vehicles she was awarded and letting their son and his friends live in a townhouse she owns. However, Jenea has pointed us to nothing indicating that she asked the district court to include restrictions on use either before or after the stay was entered. So while we observe that such provisions would have certainly helped to guard Jenea from losses or damage relating to her property, we cannot say that the district court exceeded its discretion in failing to include them.

CONCLUSION

¶11 Having reviewed Jenea's arguments, we are not convinced that the district court exceeded its discretion in granting the stay on the terms that it did. Accordingly, we affirm.

Rule 62. Stay of proceedings to enforce a judgment or order.

(a) **Delay in execution.** No execution or other writ to enforce a judgment or an order to pay money under Rule 7(j)(8) may issue until the expiration of 28 days after entry of the judgment or order, unless the court in its discretion otherwise directs.

(b) **Stay by bond or other security; duration of stay.** A party may obtain a stay of the enforcement of a judgment or order to pay money by providing a bond or other security, unless a stay is otherwise prohibited by law or these rules.

(1) The stay takes affect when the court approves the bond or other security and remains in effect for the time specified in the order that approves the bond or other security.

(2) In its discretion and on such conditions for the security of the adverse party as are proper, the court may stay:

(A) an order that is certified as final under Rule 54(b) until the entry of a final judgment under Rule 58A;

(B) an order to pay money under Rule 7(j)(8) until the entry of a judgment under Rule 58A;

(C) a judgment until resolution of any motion made pursuant to Rule 50(b), Rule 52(b), Rule 59, Rule 60, or Rule 73; and

(D) a judgment until resolution of a motion made under this rule.

(c) Injunction pending appeal. When a party seeks an appeal from an interlocutory order, or takes an appeal from a judgment, granting, dissolving, or denying an injunction, the court in its discretion may suspend, modify, restore, or grant an injunction during the pendency of appellate proceedings upon such conditions for the security of the rights of the adverse party as are just.

(d) Stay in favor of the United States, the State of Utah, or political subdivision. When an appeal is taken by the United States, the State of Utah, a political subdivision, or an

officer of agency of any of those entities, or by direction of any department of any of those entities, and the operation or enforcement of the judgment is stayed, no bond, obligation, or other security is required from the appellant.

(e) Stay in quo warranto proceedings. Where the defendant is adjudged guilty of usurping, intruding into or unlawfully holding public office, civil or military, within this state, the execution of the judgment shall not be stayed on an appeal.

(f) Power of appellate court not limited. The provisions in this rule do not limit any power of an appellate court or of a judge or justice of an appellate court.

(g) Form of bond; deposit in lieu of bond; stipulation on security; jurisdiction over sureties to be set forth in undertaking.

(1) A bond given under Subdivision (b) may be either a commercial bond having a surety authorized to transact insurance business under Title 31A, or a personal bond having one or more sureties who are residents of Utah having a collective net worth of at least twice the amount of the bond, exclusive of property exempt form execution. Sureties on personal bonds shall make and file a declaration setting forth in reasonable detail the assets and liabilities of the surety.

(2) The court may permit a deposit of money in court or other security to be given in lieu of giving a bond.

(3) The parties may by written stipulation agree to the form and amount of security.

(4) A bond shall provide that each surety submits to the jurisdiction of the court and irrevocably appoints the clerk of the court as the surety's agent upon whom any papers affecting the surety's liability on the bond may be served, and that the surety's liability may be enforced on motion and upon such notice as the court may require without the necessity of an independent action.

(h) **Amount of bond or other security.**

(1) Except as provided in subsection (h)(2), a court shall set the bond or other security in an amount that adequately protects the adverse party against loss or damage occasioned by the stay and assures payment after the stay ends. In setting the amount, the court may consider any relevant factor including:

(A) the debtor's ability to pay the judgment or order to pay money;

(B) the existence and value of other security;

(C) the debtor's opportunity to dissipate assets;

(D) the debtor's likelihood of success on appeal; and

(E) the respective harm to the parties from setting a higher or lower amount.

(2) Notwithstanding subsection (h)(1):

(A) the presumptive amount of a bond or other security for compensatory damages is the amount of the compensatory damages plus costs and attorney fees; as applicable, plus 3 years of interest at the applicable interest rate;

(B) the bond or other security for compensatory damages shall not exceed $25 million in an action by the plaintiffs certified as a class under Rule 23 or in an action by multiple plaintiffs in which compensatory damages are not proved for each plaintiff individually; and

(C) no bond or other security shall be required for punitive damages.

(3) If the court permits a bond or other security that is less than the presumptive amount in subsection (h)(2)(A), the court may enter such orders as are necessary to protect the adverse party during the stay.

(4) If the court finds that the party seeking the stay has violated an order or has otherwise dissipated assets, the court may set the amount of the bond or other security without regard to the presumptive amount under subsection (h)(1) and limits in subsection (h)(2).

(i) **Objecting to sufficiency or amount of security**. Any party whose judgment or order to pay money is stayed or sought to be stayed pursuant to Subdivision (b) may object to the sufficiency of the sureties on a bond or the amount thereof, or to the sufficiency of amount of other security given to stay the judgment by filing and giving notice of such objection. Either party shall be entitled to a hearing on the objection upon five days notice or such shorter time as the court may order. The burden of justifying the sufficiency of the sureties or other security and the amount of the bond of other security, shall be borne by the party seeking the stay, unless the objecting party seeks a bond or other security in an amount greater than the presumed amount in subsection (h)(2)(A). The fact that a bond, its surety or other security is generally permitted under this rule shall not be conclusive as to its sufficiency or amount.

Effective: 11/1/2021

Tab 7

Rule 108. Objection to court commissioner's recommendation.

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

(b) The objection must identify succinctly and with particularity the findings of fact, the conclusions of law, or the part of the recommendation to which the objection is made and state the relief sought. The memorandum in support of the objection must explain succinctly and with particularity why the findings, conclusions, or recommendation are incorrect. The time for filing, length and content of memoranda, affidavits, and request to submit for decision are as stated for motions in Rule 7.

(c) If there has been a substantial change of circumstances since the commissioner's recommendation, the judge may, in the interests of judicial economy, consider new evidence. Otherwise, any evidence, whether by proffer, testimony or exhibit, not presented to the commissioner shall not be presented to the judge.

(d)(1) The judge may hold a hearing on any objection.

(d)(2) If the hearing before the commissioner was held under Utah Code ~~Title 62A, Chapter 15, Part 6~~Title 26B, Chapter 5, Part3, Utah State Hospital and Other Mental Health Facilities, Utah Code Title 78B, Chapter 7, Protective Orders, or on an order to show cause for the enforcement of a judgment, any party has the right, upon request, to present testimony and other evidence on genuine issues of material fact.

(d)(3) If the hearing before the commissioner was in a domestic relations matter other than a cohabitant abuse protective order, any party has the right, upon request:

(d)(3)(A) to present testimony and other evidence on genuine issues of material fact relevant to custody; and

(d)(3)(B) to a hearing at which the judge may require testimony or proffers of testimony on genuine issues of material fact relevant to issues other than custody.

(e) If a party does not request a hearing, the judge may hold a hearing or review the record of evidence, whether by proffer, testimony or exhibit, before the commissioner.

(f) The judge will make independent findings of fact and conclusions of law based on the evidence, whether by proffer, testimony or exhibit, presented to the judge, or, if there was no hearing before the judge, based on the evidence presented to the commissioner.

Effective:

Tab 8

From: Olsen,Jill <jpolsen@webercountyutah.gov> **On Behalf Of** records,civil
Sent: Thursday, June 8, 2023 11:53 AM
To: DiFrancesco, Lauren E. (Shld-SLC-LT) <Lauren.DiFrancesco@gtlaw.com>
Subject: RE: Proposed Changes to Utah Rules of Civil Procedure

We did send this input in earlier, but I have attached it again. This is coming from our Chief of Support Services and our Attorney with Weber county.

Thanks,

Jill Olsen
Weber County Sheriff's Office
Civil Division Lead
801-778-6664

From: Baron,Bryan <bbaron@webercountyutah.gov>
Sent: Thursday, June 1, 2023 11:30 AM
To: Perry,Aaron <aperry@webercountyutah.gov>
Cc: Olsen,Jill <jpolsen@webercountyutah.gov>; Strong, Tanya <tstrong@webercountyutah.gov>
Subject: RE: Proposed Changes to Utah Rules of Civil Procedure

Aaron,

I agree that the verb "file" isn't the best word to describe the act of recording a document with the recorder's office, but I don't understand why the committee is proposing to replace "file" with "submit for recording." It seems to me that "submit for recording" is problematic because documents get submitted to the Recorder's Office and rejected (and therefore not recorded) all the time.

Wouldn't it be better to replace "file" with "record" (e.g. "Real property shall be seized by ~~filing~~ recording the writ and a description of the property with the county recorder")?

Bryan R. Baron
Deputy County Attorney
WEBER COUNTY ATTORNEY'S OFFICE
2380 Washington Blvd., Suite 230, Ogden, UT 84401
Office: 801.399.8471
Fax: 801.399.8304
Email: bbaron@co.weber.ut.us

Bryan,

We received the attached letter concerning some proposed changes to the Utah rules of civil procedure. It looks like the changes wouldn't change the content except for maybe the last one. When you have a minute would you mind reviewing and providing any concerns.

Thanks,

Aaron

To: Stacy Haacke (stachyh@utcourts.gov)

From: Chad Rasmussen (chad@alpinalegal.com; 801-747-9529)

Date: Feb. 6, 2023

RE: Suggested amendments to Rules 69A, 69B, and 69C Utah R. Civ. P.

Issue

I am an attorney licensed in Utah. I do a good amount of collections and have obtained writs of execution and sent to constables and sheriffs for service. This actually implicates issues I have personally experienced as a purchaser of real property at a sheriff's sale. It has happened twice now in dealing with the Utah County Sheriff.

On both occasions I purchased real property at a sheriff's sale that was sold pursuant to either a writ of execution issued under Rule 64E or a judgment that simply ordered the sheriff to sell the property. After the sale the sheriff issued a certificate of sale but refused to record the certificate with the county recorder unless I, the purchaser, paid the $40 filing fee that the county recorder charges. The sheriff's office claimed that they complied with the rule, which requires them to "file" a copy, by emailing a copy of the certificate to a generic email address of the county recorder and that filing is different than recording for purposes of Rule 69B.

Relevant and Related Rules

Rule 64(a)(7) states: " 'Officer' means any person designated by the court to whom the writ is issued, including a sheriff, constable, deputy thereof or any person appointed by the officer to hold the property."

Rule 69A(b) states: "Unless otherwise directed by the writ, the **officer** shall seize property as follows: …Real property shall be seized by **filing** the writ and a description of the property with the county recorder and leaving the writ and description with an occupant of the property. If there is no occupant of the property, the officer shall post the writ and description in a conspicuous place on the property. If another person claims an interest in the real property, the officer shall serve the writ and description on the other person." (Bold emphasis added).

Rule 69B(i) states, in part: "Real property. Upon payment of the amount bid, the officer shall deliver to the purchaser of real property a certificate of sale for each parcel containing: …The officer **shall file** a duplicate of the certificate in the office of the county recorder." (Bold emphasis added).

Rule 69C(e) states: "Redemption price. The price to redeem is the sale price plus six percent. The price for a subsequent redemption is the redemption price plus three percent. If the purchaser or redemptioner **files** with the county recorder notice of the amounts paid for taxes, assessments, insurance, maintenance, repair or any lien other than the lien on which the redemption was

based, the price to redeem includes such amounts plus six percent for an initial redemption or three percent for a subsequent redemption. Failure to **file** notice of the amounts with the county recorder waives the right to claim such amounts." (Bold emphasis added).

Utah Code § 78B-5-504(1) states: "An individual may select and claim a homestead by complying with the following requirements: (1) **Filing** a signed and acknowledged declaration of homestead with the recorder of the county or counties in which the homestead claimant's property is located or serving a signed and acknowledged declaration of homestead upon the sheriff or other officer conducting an execution prior to the time stated in the notice of execution." (Bold emphasis added).

Suggested Amendment

I am unaware of a way to simply "file" a document with a county recorder in this state that does not constitute recording. Utah Code § 17-21-1 et seq is devoid of any language regarding "filing" anything with a county recorder. The issue identified above exists because of the somewhat vague and ambiguous language used in the rules, which allows the sheriff to try to weasel its way out of its duties under the rules. However, I think the courts and most people understand that when something is "filed" with the county recorder it is actually recorded, not merely delivered. In particular, if a homestead declaration as required by Utah Code § 78B-5-504(1) is not actually recorded, then the person will not be entitled to the exemption. Furthermore, it appears that Rules 69A, 69B, and 69C require the filing with the county recorder so that the public is put on notice, and no public notice is given unless recorded. Thus some mere "filing" of sorts (that apparently the Utah County sheriff does by emailing to a generic email address of the county recorder) is not what is contemplated or required by the rule.

Thus, I suggest amendments to the following rules as follows (strikethrough are deletions; underline are additions)(a couple of rules do not directly implicate my issue identified, but I am including them for consistency):

Utah R. Civ. P. Rule 64(f)(5)

> Copy filed with county recorder. If an order discharges a writ upon property seized by filing <u>for record</u> with the county recorder, the officer or a party shall file <u>for record</u> a certified copy of the order with the county recorder.

Utah R. Civ. P. Rule 66(g)

> Real property. Before a receiver is vested with real property, the receiver shall file <u>for record</u> a certified copy of the appointment order in the office of the county recorder of the county in which the real property is located.

Utah R. Civ. P. Rule 69A(b)

> "Real property. Real property shall be seized by filing <u>for record</u> the writ and a description of the property with the county recorder and leaving the writ and description

with an occupant of the property. If there is no occupant of the property, the officer shall post the writ and description in a conspicuous place on the property. If another person claims an interest in the real property, the officer shall serve the writ and description on the other person.

Utah R. Civ. P. Rule 69B(i)

(i) Real property. Upon payment of the amount bid, the officer shall deliver to the purchaser of real property a certificate of sale for each parcel containing:

(i)(1) a description of the real property;

(i)(2) the price paid;

(i)(3) a statement that all right, title, interest of the defendant in the property is conveyed to the purchaser; and

(i)(4) a statement whether the sale is subject to redemption.

The officer shall file for record a duplicate of the certificate in the office of the county recorder.

Utah R. Civ P. Rule 69C(e)

Redemption price. The price to redeem is the sale price plus six percent. The price for a subsequent redemption is the redemption price plus three percent. If the purchaser or redemptioner files for record with the county recorder notice of the amounts paid for taxes, assessments, insurance, maintenance, repair or any lien other than the lien on which the redemption was based, the price to redeem includes such amounts plus six percent for an initial redemption or three percent for a subsequent redemption. Failure to file for record notice of the amounts with the county recorder waives the right to claim such amounts.

Utah R. Civ P. Rule 69C(g)

(g) Certificate of redemption. The purchaser shall promptly execute and deliver to the redemptioner, or the redemptioner to a subsequent redemptioner, a certificate of redemption containing:

(g)(1) a detailed description of the real property;

(g)(2) the price paid;

(g)(3) a statement that all right, title, interest of the purchaser in the property is conveyed to the redemptioner; and

(g)(4) if known, whether the sale is subject to redemption.

The redemptioner or subsequent redemptioner shall file for record a duplicate of the certificate with the county recorder.

Utah R. Civ P. Rule 72(b)

The bond is not effective until ~~recorded~~ filed for record with the county recorder of the county in which the property is located. Proof of recording shall be filed with the court.