

**UTAH SUPREME COURT ADVISORY COMMITTEE
ON RULES OF CIVIL PROCEDURE**

Meeting Minutes – September 25, 2019

Committee members & staff	Present	Excused	Appeared by Phone
Jonathan Hafen, Chair	X		
Rod N. Andreason	X		
Judge James T. Blanch	X		
Lauren DiFrancesco	X		
Judge Kent Holmberg	X		
James Hunnicutt	X		
Larissa Lee	X		
Trevor Lee	X		
Judge Amber M. Mettler	X		
Timothy Pack	X		
Bryan Pattison	X		
Michael Petrogeorge		X	
Judge Clay Stucki	X		
Judge Laura Scott	X		
Leslie W. Slauch	X		
Trystan B. Smith	X		
Heather M. Sneddon		X	
Paul Stancil	X		
Judge Andrew H. Stone	X		
Justin T. Toth	X		
Susan Vogel	X		
Brooke McKnight	X		
Ash McMurray, Recording Secretary		X	
Nancy Sylvester, Staff	X		

(1) WELCOME AND APPROVAL OF MINUTES

Jonathan Hafen welcomed the committee and asked for approval of the minutes. The minutes were approved unanimously.

(2) PROBATE RULE 26.4

The committee discussed each comment to the rule and made several amendments, such as adding in a good cause standard for dealing with timing and a provision addressing respondents who are unable to provide a written objection. Judge Laura Scott, seconded by Judge Andrew Stone, moved to recommend that the Supreme Court take final action on the rule as drafted below. The motion passed unanimously.

The committee also posed a question for the Rule 26 subcommittee: Do disclosure requirements apply to evidentiary hearings?

Rule 26.4. Provisions governing disclosure and discovery in contested proceedings under Title 75 of the Utah Code.

(a) **Scope.** This rule applies to all contested actions arising under Title 75 of the Utah Code.

(b) **Definition.** A probate dispute is a contested action arising under Title 75 of the Utah Code.

(c) **Designation of parties, objections, initial disclosures, and discovery.**

(c)(1) **Designation of Parties.** For purposes of Rule 26, the plaintiff in probate proceedings is presumed to be the petitioner in the matter, and the defendant is presumed to be any party filing an objection. Once a probate dispute arises, and based on the facts and circumstances of the case, the court may designate an interested person as plaintiff, defendant, or non-party for purposes of discovery. Only an interested person who has appeared will be treated as a party for purposes of discovery.

(c)(2) **Objection to the petition.**

(c)(2)(A) Any oral objection ~~must be~~ made at a scheduled hearing on the petition and must then be reduced to writing within 7 days, unless the written objection has been previously filed with the court. The court may for good cause accept an objection using the person's preferred means of communication and document the objection in the court record.

(c)(2)(B) A written objection must set forth the grounds for the objection and any supporting authority, must be filed with the court, and must be mailed to the parties named in the petition and any interested persons, as that term is defined ~~provided~~ in Utah Code § 75-1-201(24), unless the written objection has been previously filed with the court.

(c)(2)(C) If the petitioner and objecting party agree to an extension of time to file the written objection, notice of the agreed upon date must be filed with the court.

(c)(2)(D) The court may modify the timing for making an objection in accordance with Rule 6(b).

(c)(2)(E) In the event no written or other objection under paragraph (c)(2)(A) is timely filed, the court will act on the original petition upon the petitioner's filing of a request to submit pursuant to Rule 7 of the Utah Rules of Civil Procedure.

(c)(3) Initial disclosures in guardianship and conservatorship matters.

(c)(3)(A) In addition to the disclosures required by Rule 26(a), and unless included in the petition, the following documents must be served by the party in possession or control of the documents within 14 days after a written objection has been filed:

(c)(3)(A)(i) any document purporting to nominate a guardian or conservator, including a will, trust, power of attorney, or advance healthcare directive, copies of which must be served upon all interested persons; and

(c)(3)(A)(ii) a list of less restrictive alternatives to guardianship or conservatorship that the petitioner has explored and ways in which a guardianship or conservatorship of the respondent may be limited.

This paragraph supersedes Rule 26(a)(2).

(c)(3)(B) The initial disclosure documents must be served on the parties named in the probate petition and the objection and anyone who has requested notice under Title 75 of the Utah Code:

(c)(3)(C) If there is a dispute regarding the validity of an original document, the proponent of the original document must make it available for inspection by any other ~~the contesting~~ party within 14 days of the date of referral to mediation unless the parties agree to a different date.

(c)(3)(D) The court may for good cause modify the content and timing of the disclosures required in this rule or in Rule 26(a) in accordance with Rule 6(b). ~~for any reason justifying departure from these rules.~~

(c)(4) Initial disclosures in all other probate matters.

(c)(4)(A) In addition to the disclosures required by Rule 26(a), and unless included in the petition, the following documents must be served by the party in possession or control of the documents within 14 days after a written objection has been filed: any other document purporting to nominate a personal representative or trustee after death, including wills, trusts, and any amendments to those documents, copies of which must be served upon all interested persons. This paragraph supersedes Rule 26(a)(2).

(c)(4)(B) The initial disclosure documents must be served on the parties named in the probate petition and the objection and anyone who has requested notice under Title 75 of the Utah Code.

(c)(4)(C) If there is a dispute regarding the validity of an original document, the proponent of the original document must make it available for inspection by the contesting party within 14 days of the date of referral to mediation unless the parties agree to a different date.

(c)(4)(D) The court may for good cause modify the content and timing of the disclosures required in this rule or in Rule 26(a) in accordance with Rule 6(b). ~~for any reason justifying departure from these rules.~~

(c)(5) **Discovery once a probate dispute arises.** Except as provided in this rule or as otherwise ordered by the court, once a probate dispute arises, discovery will proceed pursuant to the Rules of Civil Procedure, including the other provisions of Rule 26.

(d) **Pretrial disclosures under Rule 26(a)(5) objections.** The term “trial” in Rule 26(a)(5)(B) also refers to evidentiary hearings for purposes of this rule. ~~No later than 14 days prior to an evidentiary hearing or trial, the parties must serve the disclosures required by Rule 26(a)(5)(A).~~

(3) LICENSED PARALEGAL PRACTITIONER RULE 86

The committee reviewed proposed Rule 86, which is intended to be a one-stop-shopping rule of sorts for the Civil Rules LPP provisions. The committee has grappled for months with how and what changes to make throughout the rules to address LPPs and ultimately determined that a simpler approach was preferable, especially in the infancy of this new profession. The committee made several edits to the draft rule, discussing in particular how to deal with discovery. The committee ultimately determined that LPPs were limited in the kind of discovery they can do: “Licensed paralegal practitioners are permitted to prepare and serve initial, supplemental, and pretrial disclosures under Rules 26, 26.1, and 26.3.” Brooke McKnight, seconded by Judge Laura Scott, moved to recommend that the Supreme Court take action on the rule. The motion passed unanimously. The committee anticipates that, given the immanency of LPP licensure, the rule will likely be expedited, subject to a comment period.

Forms to discuss with the Forms Committee:

- Form for initial, supplemental, and pretrial disclosures
- Form motion for fees
- Form objection
- Form motion to compel disclosures

Rule 86. Licensed Paralegal Practitioners.

(a) **Application of the Rules of Civil Procedure to licensed paralegal practitioners.** To the extent consistent with their limited license, licensed paralegal practitioners must be treated in the same manner as attorneys for purposes of interpreting and implementing these rules. If a rule permits or requires an attorney to sign or file a document, a licensed paralegal practitioner may do so only if there is an applicable court-approved form available and the practice is consistent with the scope of the licensed paralegal practitioner’s license.

(b) **Terms “attorney” and “counsel.”** Throughout these rules, where the terms “attorney,” “lawyer,” and “counsel” are used, they refer to legal professionals. Legal professionals include licensed paralegal

practitioners in the practice areas for which licensed paralegal practitioners are authorized to practice. Those practice areas are set forth in Utah Special Practice Rule 14-802 unless specifically carved out in this rule.

(c) **Papers served under Rule 5.** If a party is represented by a licensed paralegal practitioner, a paper served under Rule 5 must be served upon both the party and the licensed paralegal practitioner.

(d) **Disclosures under Rules 26, 26.1, and 26.3.** Licensed paralegal practitioners are permitted to prepare and serve initial, supplemental, and pretrial disclosures under Rules 26, 26.1, and 26.3.

(e) **Licensed paralegal fees.** Where these rules refer to attorney fees, they also mean licensed paralegal practitioner fees. Under Rule 73, licensed paralegal practitioners may recover fees with a supporting affidavit. Rule 73(f)(1)-(3) does not apply to licensed paralegal practitioners.

(f) **Limited appearance.** Under Rule 75, a licensed paralegal practitioner whose agreement with a party is limited to the preparation, but not the filing, of a pleading or other paper is not required to enter an appearance.

(4) RULE 65C

The amendments to Rule 65C are the result of discussions between the Attorney General's post-conviction section and the clerks of court about service of post-conviction petitions and the underlying court record. The committee made a minor edit to the amendments, in particular with respect to the kind of storage device that can be sent to the Attorney General's office. The committee also clarified that the underlying record was the court's record (not the parties'). Judge Stone, seconded by Paul Stancil, moved to recommend that the Supreme Court circulate the rule for comment. The motion passed unanimously.

Rule 65C. Post-conviction relief.

(a) **Scope.** This rule governs proceedings in all petitions for post-conviction relief filed under the Post-Conviction Remedies Act, Utah Code [Title 78B, Chapter 9](#). The Act sets forth the manner and extent to which a person may challenge the legality of a criminal conviction and sentence after the conviction and sentence have been affirmed in a direct appeal under [Article I, Section 12](#) of the Utah Constitution, or the time to file such an appeal has expired.

(b) **Procedural defenses and merits review.** Except as provided in paragraph (h), if the court comments on the merits of a post-conviction claim, it shall first clearly and expressly determine whether that claim is independently precluded under [Section 78B-9-106](#).

(c) **Commencement and venue.** The proceeding shall be commenced by filing a petition with the clerk of the district court in the county in which the judgment of conviction was entered. The petition should be filed on forms provided by the court. The court may order a change of venue on its own motion if the petition is filed in the wrong county. The court may order a change of venue on motion of a party for the convenience of the parties or witnesses.

(d) **Contents of the petition.** The petition shall set forth all claims that the petitioner has in relation to the legality of the conviction or sentence. The petition shall state:

(d)(1) whether the petitioner is incarcerated and, if so, the place of incarceration;

(d)(2) the name of the court in which the petitioner was convicted and sentenced and the dates of proceedings in which the conviction was entered, together with the court's case number for those proceedings, if known by the petitioner;

(d)(3) in plain and concise terms, all of the facts that form the basis of the petitioner's claim to relief;

(d)(4) whether the judgment of conviction, the sentence, or the commitment for violation of probation has been reviewed on appeal, and, if so, the number and title of the appellate proceeding, the issues raised on appeal, and the results of the appeal;

(d)(5) whether the legality of the conviction or sentence has been adjudicated in any prior post-conviction or other civil proceeding, and, if so, the case number and title of those proceedings, the issues raised in the petition, and the results of the prior proceeding; and

(d)(6) if the petitioner claims entitlement to relief due to newly discovered evidence, the reasons why the evidence could not have been discovered in time for the claim to be addressed in the trial, the appeal, or any previous post-conviction petition.

(e) Attachments to the petition. If available to the petitioner, the petitioner shall attach to the petition:

(e)(1) affidavits, copies of records and other evidence in support of the allegations;

(e)(2) a copy of or a citation to any opinion issued by an appellate court regarding the direct appeal of the petitioner's case;

(e)(3) a copy of the pleadings filed by the petitioner in any prior post-conviction or other civil proceeding that adjudicated the legality of the conviction or sentence; and

(e)(4) a copy of all relevant orders and memoranda of the court.

(f) Memorandum of authorities. The petitioner shall not set forth argument or citations or discuss authorities in the petition, but these may be set out in a separate memorandum, two copies of which shall be filed with the petition.

(g) Assignment. On the filing of the petition, the clerk shall promptly assign and deliver it to the judge who sentenced the petitioner. If the judge who sentenced the petitioner is not available, the clerk shall assign the case in the normal course.

(h)(1) Summary dismissal of claims. The assigned judge shall review the petition, and, if it is apparent to the court that any claim has been adjudicated in a prior proceeding, or if any claim in the petition appears frivolous on its face, the court shall forthwith issue an order dismissing the claim, stating either that the claim has been adjudicated or that the claim is frivolous on its face. The order shall be sent by mail to the petitioner. Proceedings on the claim shall terminate with the entry of the order of dismissal. The order of dismissal need not recite findings of fact or conclusions of law.

(h)(2) A claim is frivolous on its face when, based solely on the allegations contained in the pleadings and attachments, it appears that:

(h)(2)(A) the facts alleged do not support a claim for relief as a matter of law;

(h)(2)(B) the claim has no arguable basis in fact; or

(h)(2)(C) the claim challenges the sentence only and the sentence has expired prior to the filing of the petition.

(h)(3) If a claim is not frivolous on its face but is deficient due to a pleading error or failure to comply with the requirements of this rule, the court shall return a copy of the petition with leave to amend within 21 days. The court may grant one additional 21-day period to amend for good cause shown.

(h)(4) The court shall not review for summary dismissal the initial post-conviction petition in a case where the petitioner is sentenced to death.

(i) Service of petitions. If, on review of the petition, the court concludes that all or part of the petition should not be summarily dismissed, the court shall designate the portions of the petition that are not dismissed and direct the clerk to serve a copy of the petition, attachments, ~~and~~ memorandum, and the court record of the underlying criminal case being challenged, including all non-public documents, by mail upon the respondent. In lieu of mailing paper copies, the clerk may mail to the respondent a storage medium containing electronic copies of the records enumerated above.

(i)(1) If the petition is a challenge to a felony conviction or sentence, the respondent is the state of Utah represented by the Attorney General. Service on the Attorney General shall be by mail at the following address:

Utah Attorney General's Office
Criminal Appeals
Post-Conviction Section
160 East 300 South, 6th Floor
P.O. Box 140854
Salt Lake City, UT 84114-0854

(i)(2) In all other cases, the respondent is the governmental entity that prosecuted the petitioner.

(j) Appointment of pro bono counsel. If any portion of the petition is not summarily dismissed, the court may, upon the request of an indigent petitioner, appoint counsel on a pro bono basis to represent the petitioner in the post-conviction court or on post-conviction appeal. In determining whether to appoint counsel the court shall consider whether the petition or the appeal contains factual allegations that will require an evidentiary hearing and whether the petition involves complicated issues of law or fact that require the assistance of counsel for proper adjudication.

(k) Answer or other response. Within 30 days after service of a copy of the petition upon the respondent, or within such other period of time as the court may allow, the respondent shall answer or otherwise respond to the portions of the petition that have not been dismissed and shall serve the answer or other response upon the petitioner in accordance with Rule 5(b). Within 30 days (plus time allowed for service by mail) after service of any motion to dismiss or for summary judgment, the petitioner may respond by memorandum to the motion. No further pleadings or amendments will be permitted unless ordered by the court.

(l) Hearings. After pleadings are closed, the court shall promptly set the proceeding for a hearing or otherwise dispose of the case. The court may also order a prehearing conference, but the conference shall not be set so as to delay unreasonably the hearing on the merits of the petition. At the prehearing conference, the court may:

(l)(1) consider the formation and simplification of issues;

(l)(2) require the parties to identify witnesses and documents; and

(l)(3) require the parties to establish the admissibility of evidence expected to be presented at the evidentiary hearing.

(m) Presence of the petitioner at hearings. The petitioner shall be present at the prehearing conference if the petitioner is not represented by counsel. The prehearing conference may be conducted by means of telephone or video conferencing. The petitioner shall be present before the court at hearings on dispositive issues but need not otherwise be present in court during the proceeding. The court may conduct any hearing at the correctional facility where the petitioner is confined.

(n) Discovery; records.

(n)(1) Discovery under Rules [26](#) through [37](#) shall be allowed by the court upon motion of a party and a determination that there is good cause to believe that discovery is necessary to provide a party with evidence that is likely to be admissible at an evidentiary hearing.

(n)(2) The court may order either the petitioner or the respondent to obtain any relevant transcript or court records.

(n)(3) All records in the criminal case under review, including the records in an appeal of that conviction, are deemed part of the trial court record in the petition for post-conviction relief. A record from the criminal case retains the security classification that it had in the criminal case.

(o) Orders; stay.

(o)(1) If the court vacates the original conviction or sentence, it shall enter findings of fact and conclusions of law and an appropriate order. If the petitioner is serving a sentence for a felony conviction, the order shall be stayed for 7 days. Within the stay period, the respondent shall give written notice to the court and the petitioner that the respondent will pursue a new trial, pursue a new sentence, appeal the order, or take no action. Thereafter the stay of the order is governed by these rules and by the [Rules of Appellate Procedure](#).

(o)(2) If the respondent fails to provide notice or gives notice that no action will be taken, the stay shall expire and the court shall deliver forthwith to the custodian of the petitioner the order to release the petitioner.

(o)(3) If the respondent gives notice that the petitioner will be retried or resentenced, the trial court may enter any supplementary orders as to arraignment, trial, sentencing, custody, bail, discharge, or other matters that may be necessary and proper.

(p) Costs. The court may assign the costs of the proceeding, as allowed under Rule [54\(d\)](#), to any party as it deems appropriate. If the petitioner is indigent, the court may direct the costs to be paid by the governmental entity that prosecuted the petitioner. If the petitioner is in the custody of the Department of Corrections, Utah Code [Title 78A, Chapter 2, Part 3](#) governs the manner and procedure by which the trial court shall determine the amount, if any, to charge for fees and costs.

(q) Appeal. Any final judgment or order entered upon the petition may be appealed to and reviewed by the Court of Appeals or the Supreme Court of Utah in accord with the statutes governing appeals to those courts.

[Advisory Committee Notes](#)

(5) RULE 45 SUBPOENAS

In response to a proposal to amend the quality and quantity of forms sent out with a subpoena, the committee elected not to amend the rule and instead left the issue of how to tailor the subpoena form to the Forms Committee.

(6) RULE 68 SUBCOMMITTEE UPDATE

The subcommittee updated the committee on its progress. Judge Stucki said they had one more meeting to go over a proposed compromise draft rule. The committee will take up Rule 68 at its October 16 meeting. The legislators involved in the subcommittee work will be invited to attend as well as Charles Stormont, who has weighed in from an unrepresented party's view, and the Utah Association for Justice, which has concerns from a plaintiff's perspective.

(7) ADVISORY COMMITTEE NOTE GROUP D

The committee began discussing Group D's recommendations to eliminate all of the committee notes it had reviewed. The committee discussed the propriety of keeping some of the historical references and where they may otherwise be found. The committee will continue this discussion at its next meeting.

(8) ADJOURNMENT

The remaining items were deferred until the next meeting. The meeting adjourned at 6:05 p.m. The next meeting will be held October 16, 2019.