

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

Meeting Minutes – November 20, 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. Slaugh	X		
Trystan B. Smith	X		
Heather M. Sneddon		X	
Paul Stancil	X		
Judge Andrew H. Stone	X		
Justin T. Toth			X
Susan Vogel	X		
Brooke McKnight		X	
Ash McMurray, Recording Secretary	X		
Nancy Sylvester, Staff			X
Katie Gregory, Staff	X		

(1) WELCOME AND APPROVAL OF MINUTES

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

(2) FORMATION OF TECHNOLOGY SUBCOMMITTEE

Trevor Lee introduced the topic of forming a standing technology subcommittee. The committee discussed the subcommittee's potential goals and composition, noting that additional members or support staff may be needed in the future as IT or clerical resources. Judge Kent Holmberg moved to form the technology subcommittee as a standing committee with Trevor Lee as chair and Judge Andrew Stone, Susan Vogel, and Paul Stancil as members. Judge Amber Mettler seconded the motion. The motion passed unanimously.

(3) RULE 26.4 DISCUSSION

The committee discussed whether additional language regarding auxiliary aids and services is necessary or whether it is sufficiently covered by Rule 10(f). Judge Stone moved to add the following proposed language to the end of paragraph (c)(2)(A): "The court may for good cause waive the requirement of a writing and document the objection in the court record." Judge Stone further moved to delete in its entirety the proposed paragraph (c)(2)(C), which read:

An objection made using auxiliary aids and services the person's preferred means of communication under paragraph (c)(2)(A) must also set forth the grounds for the objection and any supporting authority to the extent possible. The court will provide notice of the objection to the parties named in the petition and any interested persons, as that term is defined in Utah Code § 75-1-201.

James Hunnicutt seconded the motion. The motion passed unanimously. Jonathan Hafen and Nancy Sylvester will seek guidance from the Supreme Court and discuss whether the rule may move forward without an additional comment period.

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 who has~~ made 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 on the record 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 put into writing and filed with the court within 7 days, unless the written objection has been previously filed with the court. ~~The court may for good cause in a guardianship or conservatorship case accept an objection made using the person's preferred means of communication and document the objection in the court record.~~ The court may for good cause waive the requirement of a writing 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)(~~D~~E) In the event no written objection 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).~~

(4) RULE 7A AND RULE 7B DISCUSSION

The committee discussed the final drafts for the new proposed Rules 7A and 7B, and unanimously approved three amendments. First, the committee approved the deletion of an extra “(d)” on line 25 of Rule 7A. Second, the committee approved the deletion of hyphens in the word

“ex-parte” on line 3 of both Rules 7A and 7B. Third, the committee approved the addition of the phrase “and has not withdrawn” to line 32 of both Rules 7A and 7B, which currently reads: “For purposes of this rule, a party is represented by counsel, within the last 120 days, counsel for that party has served or filed any documents in the case.” The three changes will be sent to the Supreme Court for consideration with the Committee’s recommendation that the rules be sent out for comment because the original Rule 7 has been split into two rules.

1 **Rule 7A. Motion to enforce order and for sanctions.**

2 **(a) Motion.** To enforce a court order or to obtain a sanctions order for violation of an order, a party
3 must file an ex-parte motion to enforce order and for sanctions (if requested), pursuant to this rule
4 and [Rule 7](#). The motion must be filed in the same case in which that order was entered. The timeframes
5 set forth in this rule, rather than those set forth in [Rule 7](#), govern motions to enforce orders and for
6 sanctions.

7 **(b) Affidavit.** The motion must state the title and date of entry of the order that the moving party
8 seeks to enforce. The motion must be verified, or must be accompanied by at least one supporting
9 affidavit that is based on personal knowledge and shows that the affiant is competent to testify on the
10 matters set forth. The verified motion or affidavit must set forth facts that would be admissible in evidence
11 and that would support a finding that the party has violated the order.

12 **(c) Proposed order.** The motion must be accompanied by a request to submit for decision and a
13 proposed order to attend hearing, which must:

14 (c)(1) state the title and date of entry of the order that the motion seeks to enforce;

15 (c)(2) state the relief sought in the motion;

16 (c)(3) state whether the motion is requesting that the other party be held in contempt and, if so,
17 state that the penalties for contempt may include, but are not limited to, a fine of up to \$1000 and
18 confinement in jail for up to 30 days;

19 (c)(4) order the other party to appear personally or through counsel at a specific place (the court’s
20 address) and date and time (left blank for the court clerk to fill in) to explain whether the nonmoving
21 party has violated the order; and

22 (c)(5) state that no written response to the motion is required but is permitted if filed within 14
23 days of service of the order, unless the court sets a different time, and that any written response must
24 follow the requirements of [Rule 7](#).

25 ~~(d)~~

26 **(d) Service of the order.** If the court issues an order to attend a hearing, the moving party must have
27 the order, motion, and all supporting affidavits served on the nonmoving party at least 28 days before the
28 hearing. Service must be in a manner provided in Rule 4 if the nonmoving party is not represented by
29 counsel in the case. If the nonmoving party is represented by counsel in the case, service must be made
30 on the nonmoving party's counsel of record in a manner provided in [Rule 5](#). For purposes of this rule, a
31 party is represented by counsel if, within the last 120 days, counsel for that party has served or filed any
32 documents in the case and has not withdrawn. The court may shorten the 28 day period if:

33 (d)(1) the motion requests an earlier date; and

34 (d)(2) it clearly appears from specific facts shown by affidavit that immediate and irreparable
35 injury, loss, or damage will result to the moving party if the hearing is not held sooner.

36 **(e) Opposition.** A written opposition is not required, but if filed, must be filed within 14 days of service
37 of the order, unless the court sets a different time, and must follow the requirements of Rule 7.

38 **(f) Reply.** If the nonmoving party files a written opposition, the moving party may file a reply within 7
39 days of the filing of the opposition to the motion, unless the court sets a different time. Any reply must
40 follow the requirements of [Rule 7](#).

41 **(g) Hearing.** At the hearing the court may receive evidence, hear argument, and rule upon the
42 motion, or may request additional briefing or hearings. The moving party bears the burden of proof on all
43 claims made in the motion. At the court's discretion, the court may convene a telephone conference
44 before the hearing to preliminarily address any issues related to the motion, including whether the court
45 would like to order a briefing schedule other than as set forth in this rule.

46 **(h) Limitations.** This rule does not apply to an order that is issued by the court on its own initiative.
47 This rule does not apply in criminal cases or motions filed under [Rule 37](#). Nothing in this rule is intended
48 to limit or alter the inherent power of the court to initiate order to show cause proceedings to assess
49 whether cases should be dismissed for failure to prosecute or to otherwise manage the court's docket, or
50 to limit the authority of the court to hold a party in contempt for failure to appear pursuant to a court order.

51 **(i) Orders to show cause.** The process set forth in this rule replaces and supersedes the prior order
52 to show cause procedure. An order to attend hearing serves as an order to show cause as that term is
53 used in Utah law.

1 **Rule 7B. Motion to enforce order and for sanctions in domestic law matters.**

2 **(a) Motion.** To enforce a court order or to obtain a sanctions order for violation of an order, a party
3 must file an ex_parte motion to enforce order and for sanctions (if requested), pursuant to this rule
4 and [Rule 7](#). The motion must be filed in the same case in which that order was entered. The timeframes
5 set forth in this rule, rather than those set forth in [Rule 7](#), govern motions to enforce orders and for
6 sanctions. If the motion is to be heard by a commissioner, the motion must also follow the procedures
7 of [Rule 101](#). For purpose of this rule, an order includes a decree.

8 **(b) Affidavit.** The motion must state the title and date of entry of the order that the moving party
9 seeks to enforce. The motion must be verified, or must be accompanied by at least one supporting
10 affidavit that is based on personal knowledge and shows that the affiant is competent to testify on the
11 matters set forth. The verified motion or affidavit must set forth facts that would be admissible in evidence
12 and that would support a finding that the party has violated the order.

13 **(c) Proposed order.** The motion must be accompanied by a request to submit for decision and a
14 proposed order to attend hearing, which must:

15 (c)(1) state the title and date of entry of the order that the motion seeks to enforce;

16 (c)(2) state the relief sought in the motion;

17 (c)(3) state whether the motion is requesting that the other party be held in contempt and, if so,
18 state that the penalties for contempt may include, but are not limited to, a fine of up to \$1000 and
19 confinement in jail for up to 30 days;

20 (c)(4) order the other party to appear personally or through counsel at a specific place (the court's
21 address) and date and time (left blank for the court clerk to fill in) to explain whether the nonmoving
22 party has violated the order; and

23 (c)(5) state that no written response to the motion is required, but is permitted if filed at least 14
24 days before the hearing, unless the court sets a different time, and that any written response must
25 follow the requirements of [Rule 7](#), and [Rule 101](#) if the hearing will be before a commissioner.

26 **(d) Service of the order.** If the court issues an order to attend a hearing, the moving party must
27 have the order, motion, and all supporting affidavits served on the nonmoving party at least 28 days
28 before the hearing. Service must be in a manner provided in [Rule 4](#) if the nonmoving party is not
29 represented by counsel in the case. If the nonmoving party is represented by counsel in the case, service
30 must be made on the nonmoving party's counsel of record in a manner provided in [Rule 5](#). For purposes
31 of this rule, a party is represented by counsel if, within the last 120 days, counsel for that party has served
32 or filed any documents in the case and has not withdrawn. The court may shorten the 28 day period if:

33 (d)(1) the motion requests an earlier date; and
34 (d)(2) it clearly appears from specific facts shown by affidavit that immediate and irreparable
35 injury, loss, or damage will result to the moving party if the hearing is not held sooner.

36 **(e) Opposition.** A written opposition is not required, but if filed, must be filed at least 14 days before
37 the hearing, unless the court sets a different time, and must follow the requirements of Rule 7, and Rule
38 101 if the hearing will be before a commissioner.

39 **(f) Reply.** If the nonmoving party files a written opposition, the moving party may file a reply at least 7
40 days before the hearing, unless the court sets a different time. Any reply must follow the requirements of
41 Rule 7, and Rule 101 if the hearing will be before a commissioner.

42 **(g) Hearing.** At the hearing the court may receive evidence, hear argument, and rule upon the
43 motion, or may request additional briefing or hearings. The moving party bears the burden of proof on all
44 claims made in the motion. At the court's discretion, the court may convene a telephone conference
45 before the hearing to preliminarily address any issues related to the motion, including whether the court
46 would like to order a briefing schedule other than as set forth in this rule.

47 **(h) Counter Motions.** A responding party may request affirmative relief only by filing a counter
48 motion, to be heard at the same hearing. A counter motion need not be limited to the subject matter of the
49 original motion. All of the provisions of this rule apply to counter motions except that a counter motion
50 must be filed and served with the opposition. Any opposition to the counter motion must be filed and
51 served no later than the reply to the motion. Any reply to the opposition to the counter motion must be
52 filed and served at least 3 business days before the hearing in a manner that will cause the reply to be
53 actually received by the party responding to the counter motion (i.e. hand-delivery, fax or other electronic
54 delivery as allowed by rule or agreed by the parties). The party who filed the counter motion bears the
55 burden of proof on all claims made in the counter motion. A separate proposed order is required only for
56 counter motions to enforce a court order or to obtain a sanctions order for violation of an order, in which
57 case the proposed order for the counter motion must:

58 (h)(1) state the title and date of entry of the order that the counter motion seeks to enforce;

59 (h)(2) state the relief sought in the counter motion;

60 (h)(3) state whether the counter motion is requesting that the other party be held in contempt and,
61 if so, state that the penalties for contempt may include, but are not limited to, a fine of up to \$1000
62 and confinement in jail for up to 30 days;

63 (h)(4) order the other party to appear personally or through counsel at the scheduled hearing to
64 explain whether that party has violated the order; and

65 (h)(5) state that no written response to the countermotion is required, but that a written response
66 is permitted if filed at least 7 days before the hearing, unless the court sets a different time, and that
67 any written response must follow the requirements of [Rule 7](#), and [Rule 101](#) if the hearing will be
68 before a commissioner.

69 **(i) Limitations.** This rule does not apply to an order that is issued by the court on its own initiative.
70 This rule applies only to domestic relations actions, including divorce; temporary separation; separate
71 maintenance; parentage; custody; child support; adoptions; cohabitant abuse protective orders; child
72 protective orders; civil stalking injunctions; grandparent visitation; and modification actions. Nothing in this
73 rule is intended to limit or alter the inherent power of the court to initiate order to show cause proceedings
74 to assess whether cases should be dismissed for failure to prosecute or to otherwise manage the court's
75 docket, or to limit the authority of the court to hold a party in contempt for failure to appear pursuant to a
76 court order.

77 **(j) Orders to show cause.** The process set forth in this rule replaces and supersedes the prior order
78 to show cause procedure. An order to attend hearing serves as an order to show cause as that term is
79 used in Utah law.

(5) ADVISORY COMMITTEE NOTES REVIEW

(a) Group C – Review of Advisory Committee Note to Rule 26.

Tim Pack introduced proposed edits to the Advisory Committee Note to Rule 26. During discussion, the committee proposed additional revisions to the note as follows:

- Sixth paragraph: The committee recommended that the phrase “enforce them” be deleted and replaced with the phrase “exclude the evidence.” The proposed amended paragraph would read as follows:

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~~ exclude the evidence unless

the failure is harmless or the party shows good cause for the failure.

- Seventh paragraph: The committee recommended that the word “present” be deleted and replaced with the word “disclose.” The proposed amended paragraph would read as follows:

~~The 2011 amendments also change the time for making these required disclosures. Because the plaintiff controls when it brings the action, plaintiffs must make their disclosures within 14 days after service of the first answer. A defendant is required to make its disclosures within 28 days after the plaintiff’s first disclosure or after that defendant’s appearance, whichever is later. The purpose of early disclosure is to have all parties present disclose 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.~~

- Eighth paragraph: The committee recommended that the stricken portion of the eighth paragraph be retained so that it reads as follows:

The time periods for making Rule 26(a)(1) disclosures, and the presumptive deadlines for completing fact discovery, are keyed to the filing of an answer. If a defendant files a motion to dismiss or other Rule 12(b) motion in lieu of an answer, these time periods normally would not begin to run until that motion is resolved.

The committee further recommended that the entire eighth paragraph be discussed with the Utah Supreme Court as an example of a provision that may be better inserted into the rule itself rather than in an advisory note.

Overall the committee recommended taking the note to Rule 26 back to the Supreme Court for further guidance.

(b) *Group D – Review of Advisory Committee Notes to Rules 41, 42, 43, 45, 47, 50, and 52.*

The committee discussed Advisory Committee Notes in Group D. After the discussion concluded, Jim Hunnicutt moved to delete the Advisory Committee Notes in their entirety to all rules in Group D, including notes to Rules 41, 42, 43, 45, 47, 50, and 52. Judge Scott seconded the motion. The motion passed unanimously.

(c) *Group C – Review of Advisory Committee Notes to Rules 26.1, 26.2, 27, 32, 34, 35, and 37.*

The committee returned to discuss additional Advisory Committee Notes in Group C. Throughout the discussion, the following recommendations were made:

- **Rule 26.1:** The committee recommended deleting the note to Rule 26.1.
- **Rule 26.2:** The committee recommended deleting the entire note with the exception of the final sentence, which reads as follows: “This includes wrongful death action, in which case the disclosure will usually be of the decedent’s records rather than of the plaintiff’s, and emotional distress accompanied by physical injury or physical sickness.” The committee also recommended that the retained language be further discussed as another example of a note that may be better placed into the rule itself because of its substantive nature.
- **Rules 27 and 32:** The committee recommended deleting the notes to Rules 27 and 32 because they are outdated.
- **Rule 34:** The committee recommended retaining the note to Rule 34 because it is current.
- **Rule 35:** The committee recommended deleting the note to Rule 35.
- **Rule 37:** The committee recommended deleting the note to Rule 37 except for those portions that were not stricken in the copy attached to the November 20 meeting packet.

Judge Mettler moved to send the Advisory Committee Notes on Rules 26.1, 26.2, 27, 32, 34, 35, and 37 to the Supreme Court for further discussion. Paul Stancil seconded the motion. The motion passed unanimously.

(6) ADJOURNMENT

The remaining items were deferred until the next meeting. The meeting adjourned at 5:53 p.m. The next meeting will be held January 22, 2020.