Agenda

Advisory Committee on Rules of Civil Procedure

September 30, 2020

4:00 to 6:00 p.m.

Via Webex

Welcome and approval of minutes.	Tab 1	Jonathan Hafen, Chair
Legislative standing agenda item • Expungements		Jacob Smith, Jojo Liu
Rules amended in response to the pandemic Rule 43: • Review amendments from Supreme Court discussion • Supreme Court has approved committee amendments to Rules 45 and 7 to circulate for comment	Tab 2	Jonathan Hafen, Nancy Sylvester
Rules amended in response to the pandemic Rule 37, 5, 6: • Rule 37: Update preference for phone • Rules 5 and 6: Postal service considerations •	Tab 3	Lauren DiFrancesco, Susan Vogel, Judge Clay Stucki, Judge Laura Scott, Judge Stone, Trevor Lee
Rule 26: • Continue discussion of amendments from previous meetings • New discussion of interplay with CJA Rule 4-206	Tab 4	Rod Andreason, Chris Palmer
Arreguin-Leon v. Hadco Construction, 2020 UT 59 • Discussion of Footnote 5, Rule 50(b), and the advisory committee note.		Jonathan Hafen, Judge James Blanch
Other business		Jonathan Hafen, Chair
Next month's tentative agenda: • Rule 7 and word limits (Trevor) • TBD		---

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

2020 Meeting Schedule: October 28, 2020, November 18, 2020

Tab 1

Approval of minutes
The draft August 2020 minutes are attached for the committee's review and approval.

UTAH SUPREME COURT ADVISORY COMMITTEE
ON RULES OF CIVIL PROCEDURE

Summary Minutes – August 26, 2020

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

Committee members, staff & guests	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	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	X		
Robert Alder	X		
Kimberly Neville	X		
Nancy Sylvester, Staff	X		

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(1) WELCOME AND APPROVAL OF MINUTES

Jonathan Hafen welcomed the committee and called for introductions. James Hunnicutt and Rod Andreason previously proposed changes to the minutes, which were incorporated. Mr. Hafen asked for approval of the minutes: Judge Stucki moved to approve the minutes; Justin Toth seconded. The minutes were approved unanimously.

(2) RULES 7, 43, AND 45.

This item was in response to the Judicial Council's decision to repeal CJA 4-106. Susan Vogel introduced proposed changes to Rules 43 and 45, which are being updated with the goal of improving the efficiency of remote hearings. Ms. Vogel indicated that the proposed rule changes were vetted for sign language, interpreter, and connectivity / technological issues, as well as issues affecting pro se litigants. An additional goal is to provide clarification regarding notices, as there have been some delays in notices transmitted by traditional mail.

Ms. Vogel presented the proposed changes to Rule 43 (Evidence). Mr. Hunnicutt inquired whether the Court would be responsible for maintaining the confidentiality of attorney-client communications. The committee discussed the Court's current capabilities to accommodate attorney-client communications during remote proceedings and appropriate technological safeguards to protect these confidential communications.

The Committee also discussed the delivery of documents to the courtroom and proper notice of exhibits to adverse parties and the Court for use during remote evidentiary proceedings. Judge Stucki proposed that the draft language be amended to include "a means for sharing documents, photos, and other things among remote participants" in order to address the Committee's concerns.

Leslie Slaugh expressed concern that there is potential for witness coaching in a remote environment, and whether language should be included to protect the integrity of the proceedings. Ms. Vogel expressed concerns that pro se litigants often appear from a semi-public environment, and consequently, may have difficulty announcing others in the vicinity. Judge Holmberg expressed similar concerns raised by litigants about potential witness coaching during remote hearings, as well as concerns associated with verifying the identity of witnesses or the circumstances surrounding their testimony for those who appear by phone. Judge Stone proposed a provision to authorize the Court to take any other action the court deems necessary to maintain the integrity of the proceedings. Subsection (a)(7) was added to including "any other measures the court deems necessary to maintain the integrity of the proceedings."

Trystan Smith inquired whether there is an equivalent rule in the criminal context. Several members of the Committee expressed concerns about potential confrontation clause issues. Judge Mettler commented that Criminal Rule of Procedure 17.5 is specific to criminal proceedings, and as

such, the proposed changes to Rule 43 would not apply in the criminal context. Judge Blanch concurred with Judge Mettler's assessment that the change would not be viewed as applying in criminal proceedings and that any such change would be more appropriately referred to the Criminal Rules Committee.

Judge Mettler also expressed concern about the notice provisions and the burdens imposed on Courtroom clerks by the proposed changes. Ms. McKnight indicated that the Court's IT department is working on building language into notices regarding courtroom etiquette and other instructions. The court is also sending out duplicative notices to represented parties in order to provide as much notice of possible to participants.

As a measure to address the earlier discussion regarding witness coaching, Mr. Slaugh proposed that the language be amended to include a provision allowing the court to take additional measures to ensure "that no person is able to improperly influence the testimony of a witness."

Ms. Vogel reported a proposed change suggested by Lauren DiFrancesco to subsection (a)(4) to include access to interpreters. Judge Stone and Ms. Sylvester raised additional concerns regarding access to technology by low-income individuals or those who are disabled. Ms. McKnight reported that the courts are currently exploring ways to offer impacted individuals access to computers at the courthouse.

Mr. Hunnicutt expressed concerns about having the ability to see all parties in order to assess reactions to incoming evidence. Several committee members remarked that they have been asked to turn off cameras during remote proceedings. The proposed concern would potentially be addressed through subsection (a)(8).

Mr. Hafen also proposed that the opening paragraph of the rule be amended to clarify that the rule applies "in civil proceedings."

Judge Stone expressed concern regarding the language of section (a) which indicates a preference for videoconference "whenever possible," indicating that this could be a high standard in application that could hinder courtroom efficiency. Judge Stone also expressed that the rule should not be read to create a preference for video conference, as the audio record serves as the official record. He proposed that section (a) be amended from "the court shall permit testimony via videoconference" to "may." Mr. Andreason expressed a preference for video in order to view witness body language. Judge Holmberg proposed that section (a) be amended to state "[c]ontemporaneous transmission may be conducted via videoconference if reasonable practical." Ms. Vogel also proposed that subject (a) be amended to replace "from a different location" to remote, using the more modern terminology. Additional deletions were proposed to subjection (a) to remove superfluous language.

Additional revisions were proposed to section (a)(4) to include "telephone and assisted device" as additional technologies that may need to be accommodated.

No changes were proposed to the Advisory Committee Notes.

Mr. Hafen proposed that Rule 7(h)(1) be revised to include a reference to Rule 43.

With regard to Rule 45: Ms. Vogel conveyed that the proposed change is to require subpoenaed parties to contact the attorney issuing the subpoena if they experience technical difficulties. Some committee members expressed concerns that this proposal would not work well for an adverse witness. After discussion, the original proposed language was retained.

After discussion concluded, Mr. Hafen called for a motion. Ms. Vogel moved to send the proposed amendments to Rules 43, 45, and 7 to the Supreme Court; Judge Holmberg second. The motion unanimously passed.

The Committee approved the following proposed amendments to send to the Court:

Rule 43. Evidence.
(a) Form. In all trials and evidentiary hearings, the testimony of witnesses shall be taken in open court, unless otherwise provided by these rules, the Utah Rules of Evidence, or a statute of this state. In civil proceedings, the court may, upon request or on its own order, and for good cause and with appropriate safeguards, permit remote testimony in open court. Remote testimony will be conducted via videoconference if reasonably practical, or if not, via telephone or assistive device. Safeguards must include:
(1) notice of the date, time, and method of transmission, including instructions for participation, whom to contact if there are technical difficulties, and the means by which a party and the party's counsel may communicate confidentially;
(2) a means for a party and the party's counsel to communicate confidentially;
(3) a means for sharing documents, photos, and other things among the remote participants;
(4) access to the necessary technology to participate, including telephone or assistive device;
(5) an interpreter or assistive device, if needed;
(6) a verbatim record of the testimony;
(7) assurances that no person is able to improperly influence the testimony of a witness; and
(8) any other measures the court deems necessary to maintain the integrity of the proceedings.
(b) Evidence on motions. When a motion is based on facts not in the record, the court may hear the matter on affidavits, declarations, oral testimony or depositions.

Rule 7. Pleadings allowed; motions, memoranda, hearings, orders.

(h) Hearings.
The court may hold a hearing on any motion. A party may request a hearing in the motion, in a memorandum or in the request to submit for decision. A request for hearing must be separately identified in the caption of the document containing the request. The court must grant a request for a hearing on a motion under Rule 56 or a motion that would dispose of the action or any claim or defense in the action unless the court finds that the motion or opposition to the motion is frivolous or the issue has been authoritatively decided. Such hearing may be held remotely consistent with Rule 43.

Rule 45. Subpoena.
(a) Form; issuance.
(a)(1) Every subpoena shall:
(a)(1)(A) issue from the court in which the action is pending;
(a)(1)(B) state the title and case number of the action, the name of the court from which it is issued, and the name and address of the party or attorney responsible for issuing the subpoena;
(a)(1)(C) command each person to whom it is directed
(a)(1)(C)(i) to appear and give testimony at a trial, hearing or deposition, or
(a)(1)(C)(ii) to appear and produce for inspection, copying, testing or sampling documents, electronically stored information or tangible things in the possession, custody or control of that person, or
(a)(1)(C)(iii) to copy documents or electronically stored information in the possession, custody or control of that person and mail or deliver the copies to the party or attorney responsible for issuing the subpoena before a date certain, or
(a)(1)(C)(iv) to appear and to permit inspection of premises;
(a)(1)(D) if an appearance is required, notice of the date, time and place for the appearance and, if remote transmission is requested, instructions for participation and who to contact if there are technical difficulties; and
(a)(1)(E) include a notice to persons served with a subpoena in a form substantially similar to the approved subpoena form. A subpoena may specify the form or forms in which electronically stored information is to be produced.
(a)(2) The clerk shall issue a subpoena, signed but otherwise in blank, to a party requesting it, who shall complete it before service. An attorney admitted to practice in Utah may issue and sign a subpoena as an officer of the court.

(3) RULE 47

Judge Stone conveyed a request from the Board of District Court Judges regarding empanelment of jurors. A proposal has been made to reduce the number of preemptory challenges in cases with a smaller number of jurors. The Board made the request in anticipation of the difficulty securing an adequate number of jurors during the pandemic, along with the anticipated backlog of cases that will follow. The Committee was asked for input regarding potential Constitutional or practical implications.

Judge Mettler inquired as to whether a corresponding criminal rule has been proposed. Judge Stone was unaware of any such rule but indicated that criminal cases would be most likely be heard first following the pandemic. Mr. Smith inquired about the possibility of allowing the proposed change by stipulation. Several Committee Members expressed concerns that the proposed change would be viewed negatively by practitioners and that the change could substantively affect litigation strategy.

Judge Stone suggested that the proposal be presented to the Supreme Court as a proposal from the Board of District Court Judges. Mr. Andreason proposed that the rule be amended to include language requiring exigent circumstances and as much advance notice as possible. Judge Holmberg suggested that the presiding judge should make the determination.

After discussion, Mr. Hafen called for a motion. Judge Stucki moved that the proposed amendment be sent to the Supreme Court for consideration without a recommendation; Judge Stone seconded. Mr. Andreason proposed a friendly amendment to the language of the proposed revision, consistent with Committee's prior discussion. The motion passed as amended.

The Committee approved the following amendments to send to the Court, without recommendation:

> **Rule 47. Jurors.**
> (e) **Challenges to individual jurors; number of peremptory challenges.** The challenges to individual jurors are either peremptory or for cause. Each party shall be entitled to three peremptory challenges. Several defendants or several plaintiffs shall be considered as a single party for the purposes of making peremptory challenges unless there is a substantial controversy between them, in which case the court shall allow as many additional peremptory challenges as is just. If one or two alternate jurors are called, each party is entitled to one peremptory challenge in addition to those otherwise allowed. In exigent circumstances, and with as much advance notice to the parties as possible, when the jury panel is of a number where a jury cannot be seated if some or all peremptory challenges are exercised, the court may, prior to any side exercising peremptory challenges, equally reduce the number of peremptory challenges to which each side is entitled, to allow a jury to be seated.

(4) ADJOURNMENT

The remaining items were deferred until September 23, 2020. The meeting adjourned at 5:50 p.m.

Tab 2

Rules amended in response to the pandemic
Rule 43:

- Review amendments from Supreme Court discussion
- Supreme Court has approved committee amendments to Rules 45 and 7 (any further discussion on Rule 7?)

Rule 43. Evidence.

(a) Form. In all trials and evidentiary hearings, the testimony of witnesses shall be taken in open court, unless otherwise provided by these rules, the Utah Rules of Evidence, or a statute of this state. In civil proceedings, the court may, upon request or on its own order, and ~~F~~for good cause and with appropriate safeguards, ~~the court may~~ permit remote testimony in open court. Remote testimony will be conducted via videoconference if reasonably practical, or if not, via telephone or assistive device.

(b) Remote testimony safeguards. Remote testimony safeguards must include:

(1) notice of the date, time, and method of transmission, including instructions for participation, whom to contact if there are technical difficulties, and the means by which a party and the party's counsel may communicate confidentially;

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

(3) a means for sharing documents, photos, and other things among the remote participants;

(4) access to the necessary technology to participate, including telephone or assistive device;

(5) an interpreter or assistive device, if needed;

(6) a verbatim record of the testimony;

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

(b) **Post-testimony remote hearing safeguards.** Following remote testimony, the witness and any counsel for the witness must attest that the witness did not improperly communicate with a third party, including a legal professional, during the witness's testimony.

(~~b~~c) Evidence on motions. When a motion is based on facts not in the record, the court may hear the matter on affidavits, declarations, oral testimony, or depositions.

~~**Advisory Committee Note**~~

~~Federal Rule of Civil Procedure 43 has permitted testimony by contemporaneous transmission since 1996. State court judges have been conducting telephone conferences for many decades. These range from simple scheduling conferences to resolution of discovery disputes to status conferences to pretrial conferences. These conferences tend not to involve testimony, although judges sometimes permit testimony by telephone or more recently by video conference with the consent of the parties. The 2016 amendments are part of a coordinated effort by the Supreme Court and the Judicial Council to authorize a convenient practice that is more frequently needed in an increasingly connected society and to bring a level of quality to that practice suitable for a court record. As technology evolves the methods of contemporaneous transmission will change.~~

Tab 3

Rules amended in response to the pandemic
Rules 37, 5, 6:
- Rule 37: Update preference for phone
- Rules 5 and 6: Postal service considerations

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

(a) Statement of discovery issues.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

(a)(6)(B) conduct a hearing, preferrably remotely and if remotely, then consistent with the safeguards in Rule 43(a)~~by telephone conference or other electronic communication~~; or

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

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

…

(b)(3) Methods of service. A paper is served under this rule by:

(b)(3)(A) except in the juvenile court, submitting it for electronic filing, or the court submitting it to the electronic filing service provider, if the person being served has an electronic filing account;

(b)(3)(B) emailing it to

(b)(3)(B)(i) the most recent email address provided by the person to the court and other parties under Rule 10(a)(3), ~~or~~ Rule 76, or other notice, and, if requested in writing, shall be made by this method for all documents other than those automatically served electronically under (b)(3)(A), or

(b)(3)(B)(ii) to the email address on file with the Utah State Bar;

(b)(3)(C) mailing it to the person's last known address;

(b)(3)(D) handing it to the person;

(b)(3)(E) leaving it at the person's office with a person in charge or, if no one is in charge, leaving it in a receptacle intended for receiving deliveries or in a conspicuous place;

(b)(3)(F) leaving it at the person's dwelling house or usual place of abode with a person of suitable age and discretion who resides there; or

(b)(3)(G) any other method agreed to in writing by the parties.

Rule 6. Time.

…

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

Tab 4

We have two tasks on Rule 26:
(1) Finalizing the edits the committee began making last year; and
(2) Coordinating amendments with Rule 4-206.

Regarding (1), I have attached the relevant portions of the February 2019 minutes to these materials, which was the last month we addressed Rule 26.

Regarding (2), Chris Palmer, Court Security Director, heads a work group that is addressing an audit of the courts' evidence storage procedures. The work group amended Code of Judicial Administration Rule 4-206 (repeal and replace). Policy and Planning reviewed the amended rule and noted that it may conflict with the Rules of Civil Procedure. My observation is that paragraph (1)(b) of Rule 4-206 should probably be moved to Rule 26 of the Rules of Civil Procedure, while leaving behind a coordinating reference to Rule 26. That rule is attached.

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.

(a)(1) Initial disclosures. Except in cases exempt under paragraph (a)(3), a party shall, without waiting for a discovery request, serve on the other parties:

(a)(1)(A) the name and, if known, the address and telephone number of:

(a)(1)(A)(i) each individual likely to have discoverable information supporting its claims or defenses, unless solely for impeachment, identifying the subjects of the information; and

(a)(1)(A)(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;

(a)(1)(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);

(a)(1)(C) a computation of any damages claimed and a copy of all discoverable documents or evidentiary material on which such computation is based, including materials about the nature and extent of injuries suffered;

(a)(1)(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

(a)(1)(E) a copy of all documents to which a party refers in its pleadings.

(a)(2) Timing of initial disclosures. The disclosures required by paragraph (a)(1) shall be served on the other parties:

(a)(2)(A) by ~~the~~ a plaintiff within 14 days after the filing of the first answer to ~~the~~ that plaintiff's complaint; and

(a)(2)(B) by ~~the~~ a defendant within 42 days after the filing of ~~the~~ that defendant's first answer to the complaint ~~or within 28 days after that defendant's appearance, whichever is later~~.

(a)(3) Exemptions.

(a)(3)(A) Unless otherwise ordered by the court or agreed to by the parties, the requirements of paragraph (a)(1) do not apply to actions:

(a)(3)(A)(i) for judicial review of adjudicative proceedings or rule making proceedings of an administrative agency;

(a)(3)(A)(ii) governed by Rule 65B or Rule 65C;

(a)(3)(A)(iii) to enforce an arbitration award;

(a)(3)(A)(iv) for water rights general adjudication under Title 73, Chapter 4, Determination of Water Rights.

(a)(3)(B) In an exempt action, the matters subject to disclosure under paragraph (a)(1) are subject to discovery under paragraph (b).

(a)(4) Expert testimony.

(a)(4)(A) Disclosure of retained expert testimony. A party shall, without waiting for a discovery request, serve on the other parties the following information regarding any person who may be used at trial to present evidence under Rule 702 of the Utah Rules of Evidence and who is retained or specially employed to provide expert testimony in the case or whose duties as an employee of the party regularly involve giving expert testimony: (i) the expert's name and

Comment [RNA1]: Reason: There may be multiple plaintiffs, some of who may join the case at a later date.

Comment [RNA2]: Reason: There may be multiple defendants; some of them may seek to file a motion to dismiss or similar motion after appearance that is not an answer, and such should not have to provide initial disclosures before such motion is resolved.

Comment [RNA3]: Reason: Clarity; this paragraph only pertains to this type of expert witness.

qualifications, including a list of all publications authored within the preceding 10 years, and a list of any other cases in which the expert has testified as an expert at trial or by deposition within the preceding four years, (ii) a brief summary of the opinions to which the witness is expected to testify, (iii) ~~all~~ the facts and data and other information specific to the case that will be relied upon by the witness in forming those opinions, and (iv) the compensation to be paid for the witness's study and testimony.

(a)(4)(B) Limits on expert discovery. Further discovery may be obtained from an expert witness either by deposition or by written report. A deposition shall not exceed four hours and the party taking the deposition shall pay the expert's reasonable hourly fees for attendance at the deposition. A report shall be signed by the expert and shall contain a complete statement of all opinions the expert will offer at trial and the basis and reasons for them. Such an expert may not testify in a party's case-in-chief concerning any matter not fairly disclosed in the report. The party offering the expert shall pay the costs for the report.

(a)(4)(C) Timing for expert discovery.

(a)(4)(C)(i) The party who bears the burden of proof on the issue for which expert testimony is offered shall serve on the other parties the information required by paragraph (a)(4)(A) within ~~seven~~ 14 days after the close of fact discovery. Within ~~seven~~ 14 days thereafter, the party opposing the expert may serve notice electing either a deposition of the expert pursuant to paragraph (a)(4)(B) and Rule 30, or a written report pursuant to paragraph (a)(4)(B). The deposition shall occur, or the report shall be served on the other parties, within ~~28~~ 42 days after the election is served on the other parties. If no election is served on the other parties, then no further discovery of the expert shall be permitted.

(a)(4)(C)(ii) The party who does not bear the burden of proof on the issue for which expert testimony is offered shall serve on the other parties the information required by paragraph (a)(4)(A) within 14 ~~seven~~ days after the later of (A) the date on which the ~~election~~ disclosure under paragraph (a)(4)(C)(i) is due, or (B) ~~receipt~~ service of the written report or the taking of the expert's deposition pursuant to paragraph (a)(4)(C)(i). Within ~~seven~~ 14 days thereafter, the party opposing the expert may serve notice electing either a deposition of the expert pursuant to paragraph (a)(4)(B) and Rule 30, or a written report pursuant to paragraph (a)(4)(B). The deposition shall occur, or the report shall be served on the other parties, within ~~28~~ 42 days after the election is served on the other parties. If no election is served on the other parties, then no further discovery of the expert shall be permitted.

(a)(4)(C)(iii) If the party who bears the burden of proof on an issue wants to designate rebuttal expert witnesses, it shall serve on the other parties the information required by paragraph (a)(4)(A) within 14 ~~seven~~ days after the later of (A) the date on which the election under paragraph (a)(4)(C)(ii) is due~~,~~ or (B) ~~receipt~~ service of the written report or the taking of the expert's deposition pursuant to paragraph (a)(4)(C)(ii). Within ~~seven~~ 14 days thereafter, the party opposing the expert may serve notice electing either a deposition of the expert pursuant to paragraph (a)(4)(B) and Rule 30, or a written report pursuant to paragraph (a)(4)(B). The deposition shall occur, or the report shall be served on the other parties, within ~~28~~ 42 days after the election is served on the other parties. If no election is served on the other parties, then no further discovery of the expert shall be permitted. An expert disclosed only as a rebuttal witness cannot be used in the case in chief.

(a)(4)(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.

(a)(4)(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

Comment [RNA4]: Reason: Practitioners reportedly need more time.

Comment [RNA5]: Reason: Practitioners reportedly need more time.

Comment [RNA6]: Reason: Practitioners reportedly need more time.

Comment [RNA7]: Reason: When the party bearing the burden fails to disclose an expert, the party who does not bear the burden currently has no triggering event for providing its expert disclosure.

Comment [RNA8]: Reason: Practitioners reportedly need more time.

Comment [RNA9]: Reason: Practitioners reportedly need more time.

Comment [RNA10]: Reason: Practitioners reportedly need more time.

whose duties as an employee of the party regularly involve giving expert testimony, that party must serve on the other parties a written summary of the facts and opinions to which the witness is expected to testify in accordance with the deadlines set forth in paragraph (a)(4)(C). Such a witness cannot be required to provide a report pursuant to paragraph (a)(4)(B). A deposition of such a witness may not exceed four hours and the party taking the deposition shall pay the expert's reasonable hourly fees for attendance at the deposition..

Comment [NS11]: From HJR023 3/5/2020

(a)(5) Pretrial disclosures.

(a)(5)(A) A party shall, without waiting for a discovery request, serve on the other parties:

(a)(5)(A)(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;

(a)(5)(A)(ii) the name of witnesses whose testimony is expected to be presented by transcript of a deposition and a copy of the transcript with the proposed testimony designated; and

(a)(5)(A)(iii) a copy of each exhibit, including charts, summaries, and demonstrative exhibits, unless solely for impeachment, separately identifying those which the party will offer and those which the party may offer.

(a)(5)(B) Disclosure required by paragraph (a)(5)(A) shall be served on the other parties at least 28 days before trial. Disclosures required by paragraph (a)(5)(A)(i) and (a)(5)(A)(ii) shall also be filed. At least 14 days before trial, a party shall serve and file any counter designations of deposition testimony~~,~~ and any objections and grounds for the objections to the use of any deposition, witness, ~~and~~ or ~~to the admissibility of~~ exhibits~~.~~. Other than objections under Rules 402 and 403 of the Utah Rules of Evidence, objections not listed are waived unless excused by the court for good cause.

Comment [RNA12]: Reason: Judges reportedly want to see these items, although not all of the proposed trial exhibits (need judges' input/confirmation).

Comment [RNA13]: Reason: Need parallel reference to objections to witnesses as well as other disclosures. Although many objections to witnesses, as well as exhibits, must be considered within the scope of their offering at trial, this funnels down the scope of such potential objections. (If this is too demanding as to witnesses, it is likely too demanding for exhibits as well, requiring both to be removed).

(a)(6) Form of disclosure and discovery production. Rule 34 governs the form of producing all documents, data compilations, electronically stored information, tangible things, and evidentiary material pursuant to this Rule.

Comment [RNA14]: Reason: ensure compliance with URCP 34 in initial disclosure document production.

(b) Discovery scope.

(b)(1) In general. Parties may discover any matter, not privileged, which is relevant to the claim or defense of any party if the discovery satisfies the standards of proportionality set forth below. Privileged matters that are not discoverable or admissible in any proceeding of any kind or character include all information in any form provided during and created specifically as part of a request for an investigation, the investigation, findings, or conclusions of peer review, care review, or quality assurance processes of any organization of health care providers as defined in the Utah Health Care Malpractice Act for the purpose of evaluating care provided to reduce morbidity and mortality or to improve the quality of medical care, or for the purpose of peer review of the ethics, competence, or professional conduct of any health care provider.

(b)(2) Proportionality. Discovery and discovery requests are proportional if:

(b)(2)(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)(2)(B) the likely benefits of the proposed discovery outweigh the burden or expense;

(b)(2)(C) the discovery is consistent with the overall case management and will further the just, speedy, and inexpensive determination of the case;

(b)(2)(D) the discovery is not unreasonably cumulative or duplicative;

(b)(2)(E) the information cannot be obtained from another source that is more convenient, less burdensome, or less expensive; and

(b)(2)(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.

(b)(3) Burden. The party seeking discovery always has the burden of showing proportionality and relevance. To ensure proportionality, the court may enter orders under Rule 37.

(b)(4) Electronically stored information. A party claiming that electronically stored information is not reasonably accessible because of undue burden or cost shall describe the source of the electronically stored information, the nature and extent of the burden, the nature of the information not provided, and any other information that will enable other parties to evaluate the claim.

(b)(5) Trial preparation materials. A party may obtain otherwise discoverable documents and tangible things prepared in anticipation of litigation or for trial by or for another party or by or for that other party's representative (including the party's attorney, consultant, surety, indemnitor, insurer, or agent) only upon a showing that the party seeking discovery has substantial need of the materials and that the party is unable without undue hardship to obtain substantially equivalent materials by other means. In ordering discovery of such materials, the court shall protect against disclosure of the mental impressions, conclusions, opinions, or legal theories of an attorney or other representative of a party.

(b)(6) Statement previously made about the action. A party may obtain without the showing required in paragraph (b)(5) a statement concerning the action or its subject matter previously made by that party. Upon request, a person not a party may obtain without the required showing a statement about the action or its subject matter previously made by that person. If the request is refused, the person may move for a court order under Rule 37. A statement previously made is (A) a written statement signed or approved by the person making it, or (B) a stenographic, mechanical, electronic, or other recording, or a transcription thereof, which is a substantially verbatim recital of an oral statement by the person making it and contemporaneously recorded.

(b)(7) Trial preparation; experts.

(b)(7)(A) Trial-preparation protection for draft reports or disclosures. Paragraph (b)(5) protects drafts of any report or disclosure required under paragraph (a)(4), regardless of the form in which the draft is recorded.

(b)(7)(B) Trial-preparation protection for communications between a party's attorney and expert witnesses. Paragraph (b)(5) protects communications between the party's attorney and any witness required to provide disclosures under paragraph (a)(4), regardless of the form of the communications, except to the extent that the communications:

(b)(7)(B)(i) relate to compensation for the expert's study or testimony;

(b)(7)(B)(ii) identify facts or data that the party's attorney provided and that the expert considered in forming the opinions to be expressed; or

(b)(7)(B)(iii) identify assumptions that the party's attorney provided and that the expert relied on in forming the opinions to be expressed.

(b)(7)(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:

(b)(7)(C)(i) as provided in Rule 35(b); or

(b)(7)(C)(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.

(b)(8) Claims of privilege or protection of trial preparation materials.

(b)(8)(A) Information withheld. If a party withholds discoverable information by claiming that it is privileged or prepared in anticipation of litigation or for trial, the party shall make the claim expressly and shall describe the nature of the documents, communications, or things not produced in a manner that, without revealing the information itself, will enable other parties to evaluate the claim.

(b)(8)(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.

(c)(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.

(c)(2) Sequence and timing of discovery. Methods of discovery may be used in any sequence, and the fact that a party is conducting discovery shall not delay any other party's discovery. Except for cases exempt under paragraph (a)(3), a party may not seek discovery from any source before that party's initial disclosure obligations are satisfied.

(c)(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.

(c)(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.

(c)(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

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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

(c)(6) Extraordinary discovery. To obtain discovery beyond the limits established in paragraph (c)(5), a party shall file:

(c)(6)(A) before the close of standard discovery and after reaching the limits of standard discovery imposed by these rules, a stipulated statement that extraordinary discovery is necessary and proportional under paragraph (b)(2) and, for each party represented by an attorney, a statement that the attorney ~~that each party has reviewed and approved a discovery budget~~consulted with the client about the request for extraordinary discovery; or

(c)(6)(B) before the close of standard discovery and after reaching the limits of standard discovery imposed by these rules, a request for extraordinary discovery under Rule 37(a).

Comment [RNA15]: Reason: The current requirement has been universally ignored and may be too onerous and expensive relative to its desired goal: ensuring that parties know that extraordinary discovery will result in additional expense.

(d) Requirements for disclosure or response; disclosure or response by an organization; failure to disclose; initial and supplemental disclosures and responses.

(d)(1) A party shall make disclosures and responses to discovery based on the information then known or reasonably available to the party.

(d)(2) If the party providing disclosure or responding to discovery is a corporation, partnership, association, or governmental agency, the party shall act through one or more officers, directors, managing agents, or other persons, who shall make disclosures and responses to discovery based on the information then known or reasonably available to the party.

(d)(3) A party is not excused from making disclosures or responses because the party has not completed investigating the case, ~~or because~~ the party challenges the sufficiency of another party's disclosures or responses, or ~~because~~ another party has not made disclosures or responses.

(d)(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.

(d)(5) If a party learns that a disclosure or response is incomplete or incorrect in some important way, the party must timely serve on the other parties the additional or correct information if it has not been made known to the other parties. The supplemental disclosure or response must state why the additional or correct information was not previously provided.

(e) Signing discovery requests, responses, and objections. Every disclosure, request for discovery, response to a request for discovery, and objection to a request for discovery shall be in writing and signed by at least one attorney of record or by the party if the party is not represented. The signature of the attorney or party is a certification under Rule 11. If a request or response is not signed, the receiving party does not need to take any action with respect to it. If a certification is made in violation of the rule, the court, upon motion or upon its own initiative, may take any action authorized by Rule 11 or Rule 37(b).

(f) Filing. Except as required by these rules or ordered by the court, a party shall not file with the court a disclosure, a request for discovery, or a response to a request for discovery, but shall file only the

certificate of service stating that the disclosure, request for discovery, or response has been served on the other parties and the date of service.

Advisory Committee Notes

Legislative Note

Rule 4-206. Exhibits.

(1) Prior to Trial.

(1)(A) **Marking Exhibits.** Each party must mark all the exhibits it intends to introduce during trial by utilizing exhibit labels in the format prescribed by the clerk of court. Each party must use a label or tag which shall contain, at a minimum, a case number and exhibit number/letter. Parties may use electronic labels that conform to the minimum standards of case number and exhibit number/letter. Each party must designate the source of the exhibit with an appropriate party designation. The court may prescribe an alternate marking system.

(1)(B) **Preparation for Trial.** After completion of discovery and prior to trial, each party shall (i) prepare and serve on opposing party a list that identifies and briefly describes all marked exhibits the party will offer at trial; and (ii) afford opposing party an opportunity to examine the listed exhibits. Exhibits are part of the public record and personal information shall be redacted in accordance with Rule 4-202.09(10).

Comment [JCP1]: Possible Rule of Civil Procedure conflict? – Please Review

Comment [NS2]: I think this should go in Civil Rule 26 and then this paragraph can contain a reference to Rule 26. I.e. "Exhibit preparation for trial shall be in accordance with Rule 26 of the Utah Rules of Civil Procedure. "

(2) During Trial.

(2b) During Trial.

(2)(A) Custody of the Court. Exhibits that are received into evidence during trial and that are suitable for filing and transmission to the appellate courts, as a part of the record on appeal, must be placed in the custody of the clerk of court or designee. The clerk of court or designee must list exhibits in the exhibit list. The exhibit list means either the court's designated case management system or a form approved by the Judicial Council. The exhibit list shall be made part of the case record.

(2)(B) Custody of the Parties. Exhibits other than those described in paragraph (2)(A), that are received into evidence during trial, will be retained in the custody of the party offering the exhibit. Such exhibits will include, but not be limited to, items requiring law enforcement chain of custody, the following types of bulky or sensitive exhibits or evidence: biohazard, controlled substances, firearms, ammunition, explosive devices, pornographic materials, jewelry, poisonous or dangerous chemicals, intoxicating liquors, money or articles of high monetary value, counterfeit money, original digital storage media and documents or physical exhibits of unusual bulk or weight. With approval of the court, a printed photograph may be offered by the submitting party as a representation of the original exhibit. The clerk of court or designee must list these exhibits in the exhibit list and note that the original exhibit is in the custody of the party.

(2)(C) **Exhibit Custody.** Upon daily adjournment, the clerk of court or designee must compare the exhibit list with the exhibits received that day. The exhibits received, under subsection (2)(A) must be stored in an envelope or container, marked with the case number, and placed into a secured storage location that meets the requirements outlined in subsection (~~2~~3)(~~E~~ii).

The clerk of court or designee may store exhibits in a temporary secured location for recesses lasting less than 72 hours. The temporary location must be sufficient to prevent access by unauthorized persons and secured via key lock, with the clerk of court, judge or designee maintaining sole access. The clerk must note in the record the date and time the exhibit was transferred to or from a temporary location or secured storage.

Comment [JCP3]: The purpose is to allow the judge to store the exhibits in their chambers so long as they have sole access which can be done by judicial order on the door.

(3) After Trial.

(3)(A) **Exhibits in the Custody of the Court.** When the court takes custody of exhibits under subsection (2)(A) of this rule, those exhibits may not be taken from the custody of the clerk of court or designee until final disposition of the matter, except upon order of the court and execution of a receipt that identifies the material taken, which receipt will be filed in the case.

(3)(i) **Exhibit Manager.** The clerk of court shall appoint an exhibit manager with responsibility for the security, maintenance, documentation of chain of custody, and disposition of exhibits. The clerk of court may also appoint a person to act as exhibit manager during periods when the primary exhibit manager is absent. Unaccompanied access to the exhibit storage area by anyone other than the exhibit manager, acting exhibit manager, or the clerk of court is prohibited without a court order.

(3)(ii) **Secured Storage Location.** Each court must provide a secured location within their facility for storing exhibits retained by the court under subsection (2)(A). The secured location must be sufficient to prevent access from unauthorized persons through key, combination lock, or electronic access. The facility must also protect exhibits from theft or damage. The secured storage location shall be certified by the Court Security Director through a written request fully describing the secured storage location, local access procedures, and security controls. Any changes to the location, access procedures, or security controls will require recertification by the Court Security Director.

(3)(B) **Removal of Exhibits.** Parties shall remove all exhibits in the custody of the court after the time for appeal has expired or after all appeals are resolved.

(3)(C) **Exhibits in the Custody of the Parties.** Unless the court orders otherwise, the party offering exhibits of the kind described in subsection (2)(B) of this rule will retain custody of the exhibits and be responsible to the court for preserving them in the same condition as the time of admission, until the time for appeal has expired or after all appeals are resolved. The party is also responsible for retaining exhibits ~~that may be~~ needed for any post-conviction proceedings.

(3)(D) **Access to Exhibits by Parties.** In case of an appeal, the appellate court or any party, may file a written request for access to an exhibit admitted in the trial court. The party with custody of the exhibits, will promptly make available any or all original exhibits in its possession, or true copies of the exhibit.

(3)(E) **Exhibits in Appeals.** Upon request of the appellate court, each party will prepare and submit to the clerk of the appropriate appellate court a list that designates which exhibits are necessary for the determination of the appeal and in whose custody they remain. Parties who have custody of exhibits are charged with the responsibility for their safekeeping and transportation, if required, to the appellate courts. All other exhibits that are not necessary for the determination of the appeal, and are not in the custody of the clerk of the appellate court, will remain in the custody of the respective party.

(3)(F) **Disposal of exhibits.** After sixty days have expired from final disposition, the time for appeal has expired, ~~or~~ after all appeals are resolved, or the statute of limitations for ~~timelensess related to~~ post-conviction relief has expired, the exhibit manager shall dispose of any exhibits in the court's possession as follows:

(3)(F)(i) Property having no monetary value shall be destroyed by the exhibit manager. The exhibit manager shall create a certificate of destruction which includes a description, case number, and exhibit number. The certificate of destruction is to be maintained in the record.

(3)(F)(ii) Property having monetary value shall be returned to its owner or, if unclaimed, shall be given to the sheriff of the county or other law enforcement agency to be sold in accordance with Utah Code Section 24-3-103. The agency receiving the property shall furnish the court with a receipt to be maintained in the record.

Comment [JCP4]: Feedback was given to include any post convition relief. Unsure how to structure the paragraph.

Comment [NS5]: The post-conviction piece is a tricky one because it's such a moving target. See below. It can go on forever, which makes it challenging for the courts to know when to destroy or return exhibits. It may make sense to set a limit, like 5 years. But I'd want to get feedback on this from the Rocky Mountain Innocence Center and the AG's office.

78B-9-107. Statute of limitations for postconviction relief.

(1) A petitioner is entitled to relief only if the petition is filed within one year after the cause of action has accrued.

(2) For purposes of this section, the cause of action accrues on the latest of the following dates:

(a) the last day for filing an appeal from the entry of the final judgment of conviction, if no appeal is taken;

(b) the entry of the decision of the appellate court which has jurisdiction over the case, if an appeal is taken;

(c) the last day for filing a petition for writ of certiorari in the Utah Supreme Court or the United States Supreme Court, if no petition for writ of certiorari is filed;

(d) the entry of the denial of the petition for writ of certiorari or the entry of the decision on the petition for certiorari review, if a petition for writ of certiorari is filed;

(e) the date on which petitioner knew or should have known, in the exercise of reasonable diligence, of evidentiary facts on which the petition is based; or

(f) the date on which the new rule described in Subsection 78B-9-104(1)(f) is established.

(3) The limitations period is tolled for any period during which the petitioner was prevented from filing a petition due to state action in violation of the United States Constitution, due to physical or mental incapacity, or for claims arising under Subsection 78B-9-104(1)(g), due to force, fraud, or coercion as defined in Section 76-5-308. The petitioner has the burden of proving by a preponderance of the evidence that the petitioner is entitled to relief under this Subsection (3).

(4) The statute of limitations is tolled during the pendency of the outcome of a petition asserting:

(a) exoneration through DNA testing under Section 78B-9-303; or

(b) factual innocence under Section 78B-9-401.

(5) Sections 77-19-8, 78B-2-104, and 78B-2-111 do not extend the limitations period established in this section.

UTAH SUPREME COURT ADVISORY COMMITTEE ON RULES OF CIVIL PROCEDURE

Meeting Minutes – February 27, 2019

(4) RULE 26. GENERAL PROVISIONS GOVERNING DISCLOSURE AND DISCOVERY (MULTIPLE REQUESTS FOR RULE AMENDMENTS): CONTINUE PRIOR DISCUSSION AT PARAGRAPH (a)(4)(A)

Rod Andreason noted that the committee was discussing what Rule 26 should say about expert disclosures. The committee was attempting to make this rule narrow enough to allow for the disclosures to be specific to the case, but also broad enough that all items reasonably relied upon were included. Paul Stancil argued it was odd to ask for what was going to be relied upon. Ms. DiFrancesco pointed out that the expert would not yet have relied upon anything.

Judge Scott asked if the rule was intending to limit these disclosures to only those things used for the specific case. Judge Stone agreed that this was the purpose. He said he wondered about the proprietary tools that may not be specific to the case. In such situations the other party should be able to see them, and they must be disclosed since they are not public documents. Judge Stucki questioned where you draw the line; there could be unfair surprise by relying upon an article that is not specific to the case, but might be outside a normal expert's knowledge. Judge Stone argued that most science relies upon knowledge any expert should have. If the information is not available in the literature, it must be disclosed. The Utah standard for experts is a generous standard, and so the disclosures are needed. Mr. Slaugh argued that the report must disclose further documents. Judge Stucki responded that the rule cannot avoid all arguments and judgment calls.

Ms. DiFrancesco proposed moving lines 21 and 22 to paragraph (a)(6) to clarify that the all experts are subject to Rule 34.

Mr. Hafen questioned the language on non-retained experts, which appears to narrow the discovery on this topic. Mr. Andreason answered that the discovery from non-retained experts should be limited to a deposition. Judge Mettler questioned if the fact witness who was also a non-retained expert could be deposed twice. Mr. Andreason answered that the rule was intended to allow an expert deposition. Mr. Sneddon proposed adding that no further expert discovery was allowed, aside from the 4 hour deposition.

Mr. Hunnicutt questioned if this would require any subpoenas of files to occur before fact discovery closed. Mr. Andreason agreed that such a subpoena would be fact discovery. Ms. DiFrancesco asked what additional discovery was possible. Mr. Andreason answered that the rule addressed any discovery beyond the deposition. Mr. Pack noted that the rule does not allow for the subpoena of a retained expert either. Mr. Hunnicutt pointed out that the added line just makes non-retained experts the same as retained experts. Ms. DiFrancesco was troubled by the fact that the parties could not get the file of a non-retained expert, as that may not be practical to get in fact discovery.

Mr. Pack proposed adding a reference to Rule 45 regarding subpoenas. Ms. DiFrancesco and Mr. Toth proposed that retained experts files should also be able to be subpoenaed. Mr. Toth believed that the subpoena for the deposition already allowed the requirement for the file to be produced. Trevor Lee questioned if the language limiting the additional discovery was necessary. Mr. Toth proposed adding that the expert could be subpoenaed under Rule 45 to a deposition, as well as for documents. Mr. Pack proposed adding this to retained experts as well. Ms. Sneddon questioned if the language needed to be more specific to allow for document subpoenas. Mr. Andreason proposed eliminating the no further discovery language so that rule 45 is not excluded. Ms. Sneddon asked if this meant that the same line should be removed from the section on retained experts. Others responded that this restriction was for timing, and should remain.

Ms. Slaugh questioned if the deadlines on lines 71 and 81 should be changed from receipt to service, as most deadlines are not based upon receipt.

Mr. Andreason reported that the remaining changes related to changes to deadlines. Mr. Hunnicutt questioned why some of the deadlines were not extended. Mr. Pack stated that there were some decisions for which one should not need that time to decide. Mr. Hunnicutt believed that the multiple timelines were problematic for solo practitioners as they may not have help keeping track of all deadlines. Mr. Slaugh proposed making the rules all 14 days instead of 7.

Mr. Toth asked if there was no election for a report or deposition, what the deadline would be for an expert's designation. In particular, this may be difficult if the expert was on a different topic, not a rebuttal expert. Mr. Slaugh argued that the deadline would remain 14 days after the election deadline. Mr. Toth agreed. Mr. Pack stated this was 28 days after fact discovery ended. The remaining committee members thought that this issue was clear. No amendments were made.

Ms. DiFrancesco asked, if the party bearing the burden of proof wanted to have a rebuttal expert, but did not disclose an original expert, would that rebuttal expert be barred? Mr. Toth believed that the rule was intended to avoid this. Judge Stone had ruled on similar case that the expert cannot be called in the case in chief, but only on rebuttal. Mr. Hafen pointed out that not all judges rule that way. Mr. Slaugh stated that the judges should make this determination, as some situations would require different rulings. Mr. Hafen questioned if this issue was already addressed. Mr. Pack believed that there should be language clarifying this. Mr. Slaugh believed a rebuttal expert could clearly only be for rebuttal, however others believed this was not so clear. Mr. Slaugh then proposed that under rebuttal experts there be added language stating that an expert disclosed only as a rebuttal expert cannot be used in the case in chief.

The remainder of this rule was tabled.