

## Memorandum

To: Utah Rules of Juvenile Procedure Advisory Committee Members

From: Alan B. Sevison, Utah Assistant Attorney General

Date: December 2, 2011

Re: Changes to Utah Rules of Civil Procedure that might affect the URJP

At the request of Carol Verdoia and Katie Gregory, I have reviewed the recent changes to the Utah Rules of Civil Procedure (URCP) and noted changes that might impact the Utah Rules of Juvenile Procedure (URJP). Accompanying this memorandum is a copy of the redline version of the URCP. Please feel welcome to offer comments, corrections, or additions. Thanks.

A good beginning point for the review of URCP changes is the advisory note to Rule 1:

*A primary purpose of the 2011 amendments is to give effect to the long-standing but often overlooked directive in Rule 1 that the Rules of Civil Procedure should be construed and applied to achieve "the just, speedy, and inexpensive determination of every action." The amendments serve this purpose by limiting parties to discovery that is proportional to the stakes of the litigation, curbing excessive expert discovery, and requiring the early disclosure of documents, witnesses and evidence that a party intends to offer in its case-in-chief. The committee's purpose is to restore balance to the goals of Rule 1, so that a just resolution is not achieved at the expense of speedy and inexpensive resolutions, and greater access to the justice system can be afforded to all members of society.*

Generally, even substantial changes to the URCP do not require substantial changes to the URJP. The URJP often makes general reference to a URCP rule rather than to specific provisions which might have been amended. In the table below I try to specify, summarize, or note all substantial changes to the URCP; however, the vast majority of those changes do not affect the URJP. (Those who practice under the URCP will have to make significant changes to their practice, however, particularly to discovery and disclosure.)

Many URCP changes were simply renumbering of rules or paragraphs.

The most significant changes to the URCP were to the rules regarding discover, URCP 26. Illustrative of the major changes are the ten pages of advisory notes that were added. However, the impact on the URJP was minimal, as shown in the table below.

In addition to language and provision changes, a new rule was implemented, URCP 26.1, which delineates provisions for discovery and disclosure in domestic relations actions. URJP 20 should be further reviewed in light of URCP 26.1 to determine whether a general reference ought to be made as many juvenile court actions might fit under the designation "domestic relations actions." But I am uncertain whether juvenile court actions would be so designated.

I hope committee members find the following table useful. I invite additions, corrects, and changes. I do not pretend to practice discovery and disclosure often enough to discern what other URJP changes might be necessary. So I welcome the sage and august comments of more experienced committee members.

URCP Rule	Fundamental Changes	Impact on URCP
Rule 1: General provisions	<ul style="list-style-type: none"> <li>▶ Language changes with no significant substance change</li> </ul>	None
Rule 8: General rules of pleadings	<ul style="list-style-type: none"> <li>▶ modifies claims for damages</li> <li>▶ simplifies form of denials</li> <li>▶ clarifies general denials for statements in a claim</li> <li>▶ sets forth requirement for affirmative defenses</li> <li>▶ provides additional non-substantive language changes</li> </ul>	None
Rule 9: Pleading special matters	<ul style="list-style-type: none"> <li>▶ deletes some language relating to information that supports allocating fault to a non-party.</li> </ul>	None
Rule 16: Pretrial conferences (formerly "Pretrial conference, scheduling, and management conferences")	<ul style="list-style-type: none"> <li>▶ deletes section entitled</li> <li>▶ "Scheduling and management conferences and orders" and incorporates its provisions into the section entitled "Pretrial conferences" with no substantive changes</li> <li>▶ permits parties and requires plaintiff to certify discovery is complete and mediation/ADR is complete or excused</li> <li>▶ simplifies language regarding final pretrial conference</li> </ul>	▶ None
Rule 26: General provisions governing disclosure and discover (formerly "General provisions regarding discovery")	<ul style="list-style-type: none"> <li>▶ mandates application of rule unless changed or supplemented by specific practice area rules</li> <li>▶ generally, requires disclosures "without waiting for a discovery request"</li> <li>▶ modifies initial disclosure requirements: <ul style="list-style-type: none"> <li>▶ requires disclosing each fact witness and testimony</li> </ul> </li> <li>▶ requires disclosing all documents referenced in pleadings</li> <li>▶ modifies timing language</li> <li>▶ separates exemptions into own section</li> </ul>	<p>URJP 20A(a): No impact. "Scope of discovery. The scope of discovery is governed by Utah R. Civ. P. 26(b)(1). Unless ordered by the court, no discovery obligation may be imposed upon a minor."</p> <p>URJP 20A(i): Protective order language moved to URCP 37. <b>Suggested change:</b> "Protective orders. Any party or person from whom discovery is sought may request a protective order pursuant to Utah R. Civ. P. 26(e) <u>37(b).</u>"</p>

**Rule 26 (continued)**

- ▶ substantially modifies expert witness discovery, including
  - ▶ information about expert
  - ▶ expert report requirements
  - ▶ limits on expert discovery
  - ▶ expert witness costs
  - ▶ timing of expert discovery
  - ▶ experts in multiparty actions
  - ▶ non-retained expert testimony
- ▶ modifies pretrial disclosures
  - ▶ not required to disclose impeachment witnesses
  - ▶ requires disclosures deposition witnesses and transcript of deposition
  - ▶ requires summary of demonstrative exhibits
- ▶ Discovery scope:
  - ▶ Proportionality requirement and standards established
  - ▶ Discovering party has burden of showing proportionality and relevance
  - ▶ Language changes to discovery of electronically stored information
  - ▶ Section on Discovery Limitations deleted
  - ▶ Insubstantial changes to Trial preparation - materials
  - ▶ Insubstantial changes to Statement previously made about the action
- ▶ Substantial changes to Trial preparation - experts
  - ▶ Draft reports or disclosures protected]
  - ▶ Communication between attorneys and experts protected
  - ▶ Trial prep experts not discoverable
  - ▶ Discovery protective orders section moved to Rule 37
- ▶ New section: "Methods, sequence and timing of discovery; tiers; limits on standard discovery; extraordinary discovery"
  - ▶ Discovery methods identified
  - ▶ Sequence and timing modified to "discovery may be used in any sequence."
  - ▶ No party may seek discovery before initial disclosure

URJP 20A(j): Supplemental response language moved from (e) to (d). **Suggested change:** "Supplementation of responses. Parties have a duty to supplement responses and disclosures pursuant to Utah R. Civ. P. 26(e) (d)."

<b>Rule 26 (continued)</b>	<ul style="list-style-type: none"> <li>▶ New section: Tiers for standard discovery defined</li> <li>▶ New section: Damages defined</li> <li>▶ New section: Limits on standard fact discovery</li> <li>▶ New section: Extraordinary discovery</li> <li>▶ New section: Requirements for disclosure/response; by organization; failure to disclose; initial and supplemental disclosures/responses.</li> <li>▶ Section (e)(2) eliminated (duty to amend response)</li> <li>▶ Section (f) eliminated (Discovery and scheduling conference)</li> <li>▶ Significant changes to "Signing discovery requests, responses, and objections"</li> </ul>	
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<b>Rule 26.1: Disclosure and discovery in domestic relations actions (New Rule)</b>	<ul style="list-style-type: none"> <li>▶ "Disclosure and discovery in domestic relations actions"; new sections: <ul style="list-style-type: none"> <li>▶ Scope</li> <li>▶ Time for disclosure</li> <li>▶ Financial declaration</li> <li>▶ Certificate of service</li> <li>▶ Exempted agencies</li> <li>▶ Sanctions</li> <li>▶ Failure to comply</li> <li>▶ Notice of requirements</li> </ul> </li> </ul>	
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<b>Rule 29: Stipulations regarding disclosure and discovery procedure (formerly "Stipulations regarding discovery procedure")</b>	<ul style="list-style-type: none"> <li>▶ Significant changes to Stipulations regarding disclosure and discovery procedure</li> </ul>	None
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<b>Rule 30: Depositions upon oral questions (formerly "Depositions upon oral examination")</b>	<ul style="list-style-type: none"> <li>▶ Significant changes to procedures and requirements for depositions <ul style="list-style-type: none"> <li>▶ No distorting appearance or demeanor of counsel or witnesses</li> <li>▶ Changes to method of recording, including "remote electronic means"</li> <li>▶ Attendance of nonparty may be compelled by subpoena</li> </ul> </li> </ul>	URJP 20A(c): Language and paragraph numbering changes are required. <b>Suggested changes:</b> "Depositions upon oral <u>examination questions</u> . After the filing of the answer, a party may take the testimony of any person, including a party, by deposition upon oral <u>examination question</u> without leave of the court. The attendance of witnesses may be compelled by subpoena as provided
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<b>Rule 30 (continued)</b>	<ul style="list-style-type: none"> <li>▶ Substantial changes to "Examination and cross-examination; objections" to "Limits" to "Submission to witnesses; changes; signing" to "Record of deposition; certification and delivery by officer; exhibits; copies"</li> <li>▶ New section: "Deposition in action pending in another state"</li> <li>▶ New section: "Stipulations regarding deposition procedures"</li> </ul>	<p>in Utah R. Civ. P. 45. Depositions shall be conducted pursuant to Utah R. Civ. P. 30 <del>(b)</del>, <del>(c)</del>, <del>(d)</del>, and <del>(g)</del>. The record of the deposition shall be prepared pursuant to Utah R. Civ. P. 30<del>(e)</del> <u>(f)</u> except the deponent will have seven days to review the transcript or recording under Utah R. Civ. P. 30(e). The use of depositions in court proceedings shall be governed by Utah R. Civ. P. 32."</p>
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<b>Rule 31: Depositions upon written questions</b>	<ul style="list-style-type: none"> <li>▶ Insubstantial language changes</li> <li>▶ Written deposition questions cannot exceed 15 in standard discovery, including subparts, by plaintiffs, defendants, third-party defendants</li> </ul>	None
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<b>Rule 33: Interrogatories to parties</b>	<ul style="list-style-type: none"> <li>▶ Rewritten "Availability; procedure for use"</li> <li>▶ New section: "Answers and objections" including substantial changes to answers and objections</li> <li>▶ Rewritten "Scope; use at trial"</li> </ul>	<p>None</p> <p>(Related Rule: URJP 20A(d): "Interrogatories. After the filing of the answer, interrogatories may be used pursuant to Utah R. Civ. P. 33 except all answers shall be served within 14 days after service of the interrogatories.")</p>
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<b>Rule 34: Production of documents and things and entry upon land for inspection and other purposes</b>	<ul style="list-style-type: none"> <li>▶ No substantial changes</li> </ul>	<p>None</p> <p>(Related rule: URJP 20(e): "Production of documents and things. After the filing of the answer, requests for production of documents may be used pursuant to Utah R. Civ. P. 34 except all responses shall be served within 14 days after service of the requests."</p>
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<b>Rule 35: Physical and mental examination of persons</b>	<ul style="list-style-type: none"> <li>▶ Person being examined may record examination</li> <li>▶ Significant changes to "Report" section</li> <li>▶ Significant changes to "Sanctions" section</li> </ul>	<p>None</p> <p>(Related rule: URJP 20(f): "Physical and mental examination of persons. Physical and mental examinations may be conducted pursuant to Utah R. Civ. P. 35.")</p>
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<b>Rule 36: Request for admission</b>	<ul style="list-style-type: none"> <li>▶ Substantial changes to Request for admission</li> <li>▶ Substantial changes to Answer or objection</li> </ul>	<p>None</p> <p>(Related rule: URJP 20(g): “Requests for admission. Except as modified in this paragraph, requests for admission may be used pursuant to Utah R. Civ. P. 36. The matter shall be deemed admitted unless, within 14 days after service of the request, the party to whom the request is directed serves upon the requesting party a written answer or objection addressed to the matter, signed by the party or by his attorney. Upon a showing of good cause, any matter deemed admitted may be withdrawn or amended upon the court's own motion or the motion of any party. Requests for admission can be served anytime following the filing of the answer.”)</p>
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<b>Rule 37: Discovery and disclosure motions; Sanctions (formerly “Failure to make or cooperate in discovery; sanctions”)</b>	<ul style="list-style-type: none"> <li>▶ Significant changes to Motion for order compelling</li> <li>▶ Significant changes to Motion for protective order</li> <li>▶ Substantial changes to Orders</li> <li>▶ Significant changes to Expense and sanctions for motions</li> <li>▶ Significant changes to Failure to comply with order</li> <li>▶ Significant changes to Expenses on failure to admit</li> <li>▶ Significant changes to Failure of party to attend own deposition</li> </ul>	<p>None</p> <p>(Related rule: URJP 20(k): “Failure to cooperate in discovery. As applicable, failure to cooperate with discovery shall be governed by Utah R. Civ. P. 37.”)</p>
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<b>Rule 54: Judgments; costs</b>	▶ No substantial changes	None
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**Rule 20A. Discovery in non-delinquency proceedings.**

(a) Scope of discovery. The scope of discovery is governed by Utah R. Civ. P. 26(b)(1). Unless ordered by the court, no discovery obligation may be imposed upon a minor.

(b) Disclosures. Within 14 days of the answer, a party shall, without awaiting a discovery request, make reasonable efforts to provide to other parties information necessary to support its claims or defenses, unless solely for impeachment or unless the identity of a person is protected by statute, identifying the subjects of the information. The party shall inform the other party of the existence of such records.

(c) Depositions upon oral ~~examination~~ questions. After the filing of the answer, a party may take the testimony of any person, including a party, by deposition upon oral ~~examination-question~~ without leave of the court. The attendance of witnesses may be compelled by subpoena as provided in Utah R. Civ. P. 45. Depositions shall be conducted pursuant to Utah R. Civ. P. 30(b), (c), (d), and (g). The record of the deposition shall be prepared pursuant to Utah R. Civ. P. 30(e) and (f) except the deponent will have seven days to review the transcript or recording under Utah R. Civ. P. 30(e). The use of depositions in court proceedings shall be governed by Utah R. Civ. P. 32.

(d) Interrogatories. After the filing of the answer, interrogatories may be used pursuant to Utah R. Civ. P. 33 except all answers shall be served within 14 days after service of the interrogatories.

(e) Production of documents and things. After the filing of the answer, requests for production of documents may be used pursuant to Utah R. Civ. P. 34 except all responses shall be served within 14 days after service of the requests.

(f) Physical and mental examination of persons. Physical and mental examinations may be conducted pursuant to Utah R. Civ. P. 35.

(g) Requests for admission. Except as modified in this paragraph, requests for admission may be used pursuant to Utah R. Civ. P. 36. The matter shall be deemed admitted unless, within 14 days after service of the request, the party to whom the request is directed serves upon the requesting party a written answer or objection addressed to the matter, signed by the party or by his attorney. Upon a showing of good cause, any matter deemed admitted may be withdrawn or amended upon the court's own motion or the motion of any party. Requests for admission can be served anytime following the filing of the answer.

(h) Experts.

(h)(1) Adjudication trials. Any person who has been identified as an expert whose opinions may be presented at the adjudication trial must be disclosed by the party intending to present the witness at least ten days prior to the trial or hearing unless

modified by the court. If ordered by the court, a summary of the proposed testimony signed by the party or the party's attorney shall be filed at the same time.

(h)(2) Termination of parental rights trials. Any person who has been identified as an expert whose opinions may be presented at the termination of parental rights trial must be disclosed by the party intending to present the witness at least thirty days prior to the trial or hearing unless modified by the court. Unless an expert report has been provided, a summary of the proposed testimony signed by the party or the party's attorney shall be filed at the same time.

(h)(3) A party may not present the testimony of an expert witness without complying with this paragraph (h) unless the court determines that good cause existed for the failure to disclose or to provide the summary of proposed testimony.

(i) Protective orders. Any party or person from whom discovery is sought may request a protective order pursuant to Utah R. Civ. P. ~~26(e)~~37(b).

(j) Supplementation of responses. Parties have a duty to supplement responses and disclosures pursuant to Utah R. Civ. P. ~~26(e)~~(d).

(k) Failure to cooperate in discovery. As applicable, failure to cooperate with discovery shall be governed by Utah R. Civ. P. 37.

(l) No discovery can be taken that will interfere with the statutorily imposed time frames.