Agenda
Advisory Committee
on Rules of Civil Procedure

September 27, 2006
4:00 to 6:00 p.m.

Administrative Office of the Courts
Scott M. Matheson Courthouse
450 South State Street
Council Room, Suite N31

Approval of minutes.	Fran Wikstrom
Code v. DOH. Finality of judgments	Tim Shea
Rule 45. Subpoena.	Tim Shea
Spoliation; Sanctions. Rules 16, 35 and 37.	Tim Shea
E-discovery	Judge David Nuffer
Rule 23.1. Derivative actions by shareholders.	Anthony Schofield
Rule 17. Filings by emancipated minors.	Tim Shea

Meeting Schedule

October 25, 2006
November 29, 2006 (5th Wednesday)
January 24, 2007
February 28, 2007
March 28, 2007
April 25, 2007
May 23, 2007
June 27, 2007
September 26, 2007
October 24, 2007
November 21, 2007 (3d Wednesday)

Committee Web Page: http://www.utcourts.gov/committees/civproc/

MINUTES

UTAH SUPREME COURT ADVISORY COMMITTEE ON THE RULES OF CIVIL PROCEDURE

Wednesday, August 23, 2006
Administrative Office of the Courts

Tim Shea, Presiding

PRESENT: Francis J. Carney, Terrie T. McIntosh, Leslie W. Slaugh, Honorable Lyle R. Anderson, Jonathan Hafen, Thomas R. Lee, Judge R. Scott Waterfall, James T. Blanch, Cullen Battle, Barbara Townsend, Steven Marsden, Honorable Anthony B. Quinn, Honorable Anthony W. Schofield, Debora Threedy, Lori Woffinden

EXCUSED: Francis M. Wikstrom, Todd M. Shaughnessy, David W. Scofield, Honorable David O. Nuffer, Janet H. Smith

STAFF: Matty Branch, Trystan B. Smith

I. APPROVAL OF MINUTES.

Mr. Shea called the meeting to order at 4:05 p.m. Judge Waterfall moved to approve the May 24, 2006 minutes as submitted. The committee unanimously approved the minutes.

II. CERTIFICATES OF APPRECIATION. Ginger Smith and Tom Karrenberg.

Mr. Shea presented certificates of appreciation to Ginger Smith and Tom Karrenberg. The committee members also expressed their appreciation to Ms. Smith and Mr. Karrenberg for their service.

III. WELCOME NEW MEMBERS. Barbara Townsend and Milo Marsden.

Mr. Shea welcomed Ms. Townsend and Mr. Marsden to the committee.

IV. REVIEW COMMENTS TO DRAFT RULES. FINAL ACTION.

Mr. Shea brought the public comments to the proposed changes to Rules 45, 63, 74, and Form 40 to the committee. The committee received three comments from the public relating to Rule 45, but no comments regarding Rules 63 & 74, or Form 40.

The committee initially addressed Rule 63. Judge Anderson expressed concern that if an assigned judge could take no further action after filing of a Motion to Disqualify, a scenario could result where there would be no judge available to take emergency action in the case. Mr. Slaugh indicated the parties could address the emergency action with the presiding judge. Mr.

Marsden indicated subsection (a) addresses the concern because it allows any other judge in the district to hear the matter.

The committee had no further comment regarding Rule 74 or Form 40. Mr. Shea indicated he would prepare Rules 63 & 74 and Form 40 for final action.

As to Rule 45, Snell & Wilmer's Salt Lake office expressed concern the seven day advance notice requirement would complicate a parties' ability to obtain discovery until twenty-one days after notice was given.

Mr. Shea indicated to the committee Mr. Wikstrom's suggestion that the committee may want to consider further discussion of the proposed amendments to Rule 45. Mr. Battle suggested limiting the scope of the seven day advance notice to subpoenas to request documents and not all subpoenas. The committee generally expressed concern the advance notice requirement provided an excessive time period to receive discovery. Several committee members expressed interest in an advance notice requirement, but were unsure of the appropriate time period. Mr. Marsden suggested the committee incorporate the language in Rule 5 that requires delivery of the subpoena or actual notice. Mr. Carney agreed to circulate the proposed changes regarding delivery and actual notice to the plaintiff and defense personal injury bars.

Finally, the committee addressed the comment that the phrase "in advance" in subsection (c)(2)(B) was ambiguous in that it did not state "in advance" of what — producing, copying, or gathering the documents. Mr. Battle moved to delete the sentence in lines 82 & 83 from the subsection. After some discussion, the committee voted to remove the requirement allowing the subpoenaed party to receive, in advance, the reasonable costs of production or copying.

The committee agreed to revisit Rule 45 with the above revisions at the next meeting.

V. SANCTIONS. RULES 16, 35 AND 37.

Mr. Shea and Mr. Lee brought Rules 16, 35, and 37 back to the committee.

Mr. Lee analyzed why Rule 37 carved out an exception for Rule 35 physical examinations. His research indicated Rule 35 physical examinations had been excepted to protect a party's privacy interest and bodily integrity. The committee agreed Rule 37 should continue to exclude the contempt sanction for a party's failure to follow an order to undergo a Rule 35 physical examination.

Mr. Battle questioned what the term "violation of a duty" under Rule 37 (g) meant. Mr. Blanch indicated the committee initially included the word "duty" to reinforce the Court's inherent power to sanction. Mr. Blanch suggested a committee note indicating subsection (g) was not intended to create a substantive right. Ms. McIntosh suggested recasting subsection (g) in the negative to state, "Nothing in this rule shall preclude the Court's inherent power to sanction a party." The committee expressed their approval of Ms. McIntosh's suggestion. Mr. Shea indicated he would revise subsection (g) for further discussion at the next meeting.

VI. FINALITY OF JUDGMENTS. RULE 7.

The committee briefly discussed the Supreme Court's decision to grant a petition for writ of certiorari in the *Code v. Utah Dept. of Health* case. The committee agreed to discuss the proposed changes to Rule 7 at the next meeting.

VII. ADJOURNMENT.

The meeting adjourned at 5:50 p.m. The next committee meeting will be held at 4:00 p.m. on Wednesday, September 27, 2006, at the Administrative Office of the Courts.

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Administrative Office of the Courts

Chief Justice Christine M. Durham
Utah Supreme Court
Chair, Utah Judicial Council

Daniel J. Becker
State Court Administrator
Myron K. March
Deputy Court Administrator

MEMORANDUM

To: Civil Procedures Committee
From: Tim Shea
Date: September 20, 2006
Re: Code v. DOH, Finality of judgments

We have been struggling with potential amendments to URCP 7 to try to bring more clarity to when a judgment is final for the purposes of appeal. A petition for certiorari in the case that started us on this quest, Code v. Department of Health, has been granted. The appellee's brief is due September 20. Although it may be some time before the Supreme Court decides the case, I recommend that we wait until then before trying to amend Rule 7.

Anyone wants to keep an eye on the case, go to http://www.utcourts.gov/courts/appell/appellatesearch.htm and enter the docket number, 20060372.

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 of the action, the name of the court from which it is issued, the name and address of the party or attorney ~~serving~~ issuing the subpoena, and its civil action number;

(a)(1)(C) command each person to whom it is directed

(a)(1)(C)(i) to appear ~~to~~ and give testimony at a trial, ~~or at~~ hearing~~,~~ or ~~at~~ deposition, or

(a)(1)(C)(ii) to appear and produce ~~or to permit~~ for inspection and copying ~~of~~ documents or tangible things in the possession, custody or control of that person, or

(a)(1)(C)(iii) to copy documents in the possession, custody or control of that person and mail or deliver the copies to the party or attorney issuing the subpoena before a date certain, or

(a)(1)(C)(iv) to appear and to permit inspection of premises~~, at a time and place therein specified~~;

(a)(1)(D) if an appearance is required, specify the date, time and place for the appearance; and

~~(a)(1)(D)~~ (a)(1)(E) set forth the ~~text of~~ Notice to Persons Served with a Subpoena~~,~~ in a form substantially similar ~~form~~ to the subpoena form appended to these rules.

~~(a)(2) A command to produce or to permit inspection and copying of documents or tangible things, or to permit inspection of premises, may be joined with a command to appear at trial, or at hearing, or at deposition, or may be issued separately.~~

~~(a)(3)~~ (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 ~~the court in which the action is pending~~ Utah may ~~also~~ issue and sign a subpoena as an officer of the court.

(b) Service; ~~scope~~ fees; prior notice.

(b)(1) ~~Generally.~~

~~(b)(1)(A)~~ A subpoena may be served by any person who is at least 18 years of age and not a party ~~and is not less than 18 years of age~~ to the case. Service of a subpoena upon ~~a~~ the person ~~named therein~~ to whom it is directed shall be made as provided in Rule 4(d) ~~for the service of process and, if the~~.

(b)(2) If the subpoena commands a person's appearance, ~~is commanded, by tendering to that person~~ the party or attorney issuing the subpoena shall tender with the subpoena the fees for one day's attendance and the mileage allowed by law. When the subpoena is issued on behalf of the United States, or this state, or any officer or agency of either, fees and mileage need not be tendered.

(b)(3) ~~Prior notice of any commanded production or inspection of documents or tangible things or inspection of premises before trial shall be served oneach party in the manner prescribed by Rule 5(b).~~ If the subpoena commands a person to copy and mail or deliver documents, to produce documents or tangible things for inspection and copying, or to permit inspection of premises, the party or attorney issuing the subpoena shall serve each party with notice of the subpoena by delivery or other method of actual notice prior to or contemporaneously with service of the subpoena.

~~(b)(1)(B) Proof of service when necessary shall be made by filing with the clerk of the court from which the subpoena is issued a statement of the date and manner of service and of the names of the persons served, certified by the person who made the service.~~

~~(b)(1)(C) Service of a subpoena outside of this state, for the taking of a deposition or production or inspection of documents or tangible things or inspection of premises outside this state, shall be made in accordance with the requirements of the jurisdiction in which such service is made.~~

~~(b)(2) Subpoena for appearance at trial or hearing. A subpoena commanding a witness to appear at a trial or at a hearing pending in this state may be served at any place within the state.~~

~~(b)(3) Subpoena for taking deposition.~~ (c) Appearance; resident; non-resident.

~~(b)(3)(A)~~ (c)(1) A person who resides in this state may be required to appear:

(c)(1)(A) at a trial or hearing in the county in which the case is pending; and

(c)(1)(B) at a deposition, or to produce documents or things, or to permit inspection of premises only in the county ~~where~~ in which the person resides, ~~or~~ is employed, or transacts business in person, or at such other place as the court may order.

(c)(2) A person who does not reside in this state but who is served within this state may be required to appear:

(c)(2)(A) at a trial or hearing in the county in which the case is pending; and

(c)(2)(B) at a deposition, or to produce documents or things, or to permit inspection of premises only in the county ~~in this state where~~ in which the person is served ~~with a subpoena,~~ or at such other place as the court may order.

~~(b)(3)(B) A subpoena commanding the appearance of a witness at a deposition may also command the person to whom it is directed to produce or to permit inspection and copying of documents or tangible things relating to any of the matters within the scope of the examination permitted by Rule 26(b), but in that event the subpoena will be subject to the provisions of Rule 30(b) and paragraph (c) of this rule.~~

~~(b)(4) Subpoena for production or inspection of documents or tangible things or inspection of premises. A subpoena to command a person who is not a party to produce or to permit inspection and copying of documents or tangible things or to permit inspection of premises may be served at any time after commencement of the action. The scope and procedure shall comply with Rule 34, except that the person must be allowed at least 14 days to comply as stated in subparagraph (c)(2)(A) of this rule.~~ (d) Payment of production or copying costs. The party ~~serving~~ or attorney issuing the subpoena shall pay the reasonable cost of producing or copying ~~the~~ documents or tangible things. Upon the request of any other party and the payment of reasonable costs, the party ~~serving~~ or attorney issuing the subpoena shall provide to the requesting party copies of all documents or tangible things obtained in response to the subpoena or shall make the tangible things available for inspection.

~~(c)~~ (e) Protection of persons subject to subpoenas; objection.

~~(c)(1) A~~ (e)(1) The party or ~~an~~ attorney ~~responsible for the issuance and service of~~ issuing a subpoena shall take reasonable steps to avoid imposing an undue burden or expense on ~~a~~ the person subject to ~~that~~ the subpoena. The court ~~from which the subpoena was issued~~ shall enforce this duty and impose upon the party or attorney in

breach of this duty an appropriate sanction, which may include, but is not limited to, lost earnings and a reasonable ~~attorney's~~ attorney fee.

~~(c)(2)(A)~~ (e)(2) A subpoena ~~served upon a person who is not a party~~ to copy and mail or deliver documents, to produce ~~or to permit inspection and copying of~~ documents or tangible things for any purpose, or to permit inspection of premises~~, whether or not joined with a command to appear at trial, or at hearing, or at deposition, must allow the person at least 14 days after service to comply, unless a shorter time has been ordered by the court for good cause shown~~ shall comply with Rule 34(a) and (b)(1), except that the person subject to the subpoena must be allowed at least 14 days after service to comply.

~~(c)(2)(B) A person commanded to produce or to permit inspection and copying of documents or tangible things or to permit inspection of premises need not appear in person at the place of production or inspection unless also commanded to appear at trial, at hearing, or at deposition.~~

~~(c)(2)(C) A person commanded to produce or to permit inspection and copying of documents or tangible things or inspection of premises may, before the time specified for compliance with the subpoena, serve upon the party or attorney designated in the subpoena written objection to inspection or copying of any or all of the documents or tangible things or inspection of the premises.~~ (e)(3) The person subject to the subpoena may object if the subpoena:

(e)(3)(A) fails to allow reasonable time for compliance;

(e)(3)(B) requires a resident of this state to appear at other than a trial or hearing in a county in which the person does not reside, is not employed, or does not transact business in person;

(e)(3)(C) requires a non-resident of this state to appear at other than a trial or hearing in a county other than the county in which the person was served;

(e)(3)(D) requires the person to disclose privileged or other protected matter and no exception or waiver applies;

(e)(3)(E) requires the person to disclose a trade secret or other confidential research, development, or commercial information;

(e)(3)(F) subjects the person to an undue burden; or

(e)(3)(G) requires the person to disclose an unretained expert's opinion or information not describing specific events or occurrences in dispute and resulting from the expert's study that was not made at the request of a party.

(e)(4)(A) If the person subject to the subpoena objects, the objection must be made before the date for compliance.

(e)(4)(B) The person subject to the subpoena shall state the objection in a concise, non-conclusory manner. If the objection is that the information commanded by the subpoena is privileged or protected and no exception or waiver applies, or requires the person to disclose a trade secret or other confidential research, development, or commercial information, the objection shall sufficiently describe the nature of the documents, communications, or things not produced to enable the party or attorney issuing the subpoena to contest the objection.

(e)(4)(C) The person shall serve the objection on the party or attorney issuing the subpoena. The party or attorney issuing the subpoena shall serve a copy of the objection on the other parties.

(e)(5) If objection is made, the party ~~serving~~ or attorney issuing the subpoena ~~shall~~ is not ~~be~~ entitled to ~~inspect and copy the materials or inspect the premises except pursuant to an order of the court. If objection has been made, the party serving the subpoena may, upon notice to the person commanded to produce,~~ compliance but may move ~~at any time~~ for an order to compel ~~the production~~ compliance. The motion shall be served on the other parties and on the person subject to the subpoena. ~~Such an~~ An order to compel ~~production~~ compliance shall protect ~~any~~ the person ~~who is not a party or an officer of a party~~ subject to the subpoena from significant expense ~~resulting from the inspection and copying commanded~~ or harm. The court may quash or modify the subpoena. If the party or attorney issuing the subpoena shows a substantial need for the information that cannot be met without undue hardship, the court may order compliance upon specified conditions.

~~(c)(3)(A) On timely motion, the court from which a subpoena was issued shall quash or modify the subpoena if it:~~

~~(c)(3)(A)(i) fails to allow reasonable time for compliance;~~

~~(c)(3)(A)(ii) requires a resident of this state who is not a party to appear at deposition in a county in which the resident does not reside, or is not employed, or does not transact business in person; or requires a non-resident of this state to appear at deposition in a county other than the county in which the person was served;~~

~~(c)(3)(A)(iii) requires disclosure of privileged or other protected matter and no exception or waiver applies;~~

~~(c)(3)(A)(iv) subjects a person to undue burden.~~

~~(c)(3)(B) If a subpoena:~~

~~(c)(3)(B)(i) requires disclosure of a trade secret or other confidential research, development, or commercial information;~~

~~(c)(3)(B)(ii) requires disclosure of an unretained expert's opinion or information not describing specific events or occurrences in dispute and resulting from the expert's study made not at the request of any party;~~

~~(c)(3)(B)(iii) requires a resident of this state who is not a party to appear at deposition in a county in which the resident does not reside, or is not employed, or does not transact business in person; or~~

~~(c)(3)(B)(iv) requires a non-resident of this state who is not a party to appear at deposition in a county other than the county in which the person was served;~~

~~the court may, to protect a person subject to or affected by the subpoena, quash or modify the subpoena or, if the party serving the subpoena shows a substantial need for the testimony or material that cannot otherwise be met without undue hardship and assures that the person to whom the subpoena is addressed will be reasonably compensated, the court may order appearance or production only upon specified conditions.~~

~~(d)~~ (f) Duties in responding to subpoena.

(f)(1) A person commanded to copy and mail or deliver documents or to produce documents or tangible things for inspection and copying shall serve on the party or attorney issuing the subpoena a declaration under penalty of perjury stating in substance:

(f)(1)(A) that the declarant has knowledge of the facts contained in the declaration;

(f)(1)(B) that the documents or tangible things copied or produced are a full and complete response to the subpoena;

(f)(1)(C) that the documents are the originals or that a copy is a true copy of the original; and

(f)(1)(D) the reasonable cost of copying or producing the documents or tangible things.

~~(d)(1)~~ (f)(2) A person ~~responding to a subpoena~~ commanded to copy and mail or deliver documents or to produce documents or tangible things for inspection and copying shall copy or produce them as they are kept in the usual course of business or shall organize and label them to correspond with the categories in the ~~demand~~ subpoena.

~~(d)(2) When information subject to a subpoena is withheld on a claim that it is privileged or subject to protection as trial preparation materials, the claim shall be made expressly and shall be supported by a description of the nature of the documents, communications, or things not produced that is sufficient to enable the demanding party to contest the claim.~~

~~(e)~~ (g) Contempt. Failure by any person without adequate excuse to obey a subpoena served upon that person ~~may be deemed a~~ is punishable as contempt of ~~the~~ court ~~from which the subpoena issued. An adequate cause for failure to obey exists when a subpoena purports to require a nonparty to appear or produce at a place not within the limits provided by subparagraph (c)(3)(A)(ii).~~

~~(f)~~ (h) Procedure ~~where~~ when witness ~~conceals himself~~ evades service or fails to attend. If a witness evades service of a subpoena~~,~~ or fails to attend after service of a subpoena, the court may issue a warrant to the sheriff of the county to arrest the witness and bring the witness before the court.

~~(g)~~ (i) Procedure when witness is confined in jail. If the witness is a prisoner ~~confined in a jail or prison within the state~~, a party may move for an order ~~for examination~~ to examine the witness in the jail or prison ~~upon deposition or, in the discretion of the court, for temporary removal and production~~ or to produce the witness before the court or officer for the purpose of being orally examined~~, may be made upon motion, with or~~

~~without notice, by a justice of the Supreme Court, or by the district court of the county in which the action is pending~~.

~~(h)~~ (j) Subpoena unnecessary~~; when~~. A person present in court~~,~~ or before a judicial officer~~,~~ may be required to testify in the same manner as if the person were in attendance upon a subpoena.

~~Advisory Committee Notes~~

~~Purposes of Amendment. The 1994 amendments represent a substantial change from prior practice. Patterned on the 1991 amendments to Fed. R. Civ. P. 45, these amendments expedite and facilitate procedures for serving subpoenas, modify procedures relating to persons who are not parties to correspond to procedures relating to parties under Utah R. Civ. P. 34, and specify the rights and obligations of persons served with a subpoena.~~

~~Paragraph (a). This paragraph amends former Rule 45 in the following important respects:~~

~~First, subparagraph (a)(6)(3) authorizes an attorney to issue and sign a subpoena as an officer of the court. The subparagraph eliminates the requirement that an attorney obtain a subpoena from the clerk of the court, and the requirement that a subpoena be issued under seal of the court. An attorney who is not a member of the Utah State Bar but who has been admitted to practice pro hac vice in the court in which the action is pending is authorized to issue a subpoena. Consistent with the authority of an attorney to issue a subpoena, subparagraph (a)(1)(B) requires every subpoena to identify the attorney serving it. Subparagraph (a)(1)(A) requires every subpoena to issue from the court in which the action is pending, amending former Rule 45(d)(1), which authorized a deposition to be issued from the court where the deposition is to take place, as well as the court where the action is pending.~~

~~Second, subparagraph (a)(2) authorizes a party to serve upon a person who is not a party a subpoena to produce or to permit inspection and copying of documents or tangible things, or to permit inspection of premises. A party no longer must serve a subpoena duces tecum to discover documents or tangible things from a person who is not a party, although the amended rule preserves that option, and no longer must bring an independent action for entry onto land. Subparagraph (a)(2) also requires a person~~

~~who is not a party to produce materials within that person's control, which subjects that person to the same scope of discovery as if that person were a party served with a discovery request under Rule 34.~~

~~Third, subparagraph (a)(1)(D) requires every subpoena to state the rights and duties of a person served in a form substantially similar to the form in the Appendix to these rules.~~

~~Paragraph (b) also amends former Rule 45 in several important respects. Subparagraph (b)(1)(A) requires prior notice of each commanded production or inspection of documents or tangible things, or inspection of premises, to be served as prescribed by Rule 5(b). This subparagraph ensures that other parties will have notice enabling them to object to or participate in discovery, or to serve a demand for additional materials. No similar provision is included for depositions, because depositions are governed by Rule 30 or 31. Subparagraph (b)(1)(A) specifies that the subpoena may be served as required by Rule 4(e), amending paragraph (c) of the former rule.~~

~~Subparagraph (b)(4) authorizes a subpoena for production or inspection of documents or tangible things or inspection of premises to be served upon a person who is not a party at any time after commencement of the action. A subpoena served upon a person who is not a party has the same scope specified in Rule 34(a) for a request served upon a party, and is subject to the same procedures specified in Rule 34(b). A person who is not a party is not required to file a written response to the subpoena, unless the party objects to the subpoena pursuant to subparagraph (c)(2)(D).~~

~~Subparagraph (b)(4) also requires each party serving a subpoena for the production of documents to provide to other parties copies of documents obtained in response to the subpoena. No comparable provision appears in the federal rule, but the Committee determined that such a provision would alleviate some of the burden imposed upon persons who are not parties and shift it to parties.~~

~~Other subparagraphs make minor amendments to the former Rule 45. Subparagraph (b)(1)(C) amends former paragraph (d)(3) to include a subpoena for document production or inspection, as well as a deposition subpoena. Subparagraph (b)(2) is the former paragraph (e) with minor modifications. Subparagraph (b)(3)(A)~~

~~requires a nonresident to attend deposition only in the county where the nonresident is served, amending former paragraph (d)(2) to eliminate the requirement that a nonresident attend a deposition within forty miles of the place of service.~~

~~Paragraph (c). Paragraph (c) states the rights of witnesses or other persons served with subpoenas. The paragraph does not diminish rights conferred by any other rule or any other authority. Subparagraph (c)(1) states the duty of an attorney to minimize the burden on a witness who is not a party, and specifies that such a witness may recover lost earnings that result from the misuse of a subpoena. Subparagraph (c)(1) expands the responsibility of an attorney stated in Rule 26(g); this responsibility is correlative to the expanded power of an attorney to issue a subpoena.~~

~~Subparagraph (c)(2)(A) specifies that a person who is not a party served with a subpoena for the production or inspection of documents or tangible things or inspection of premises must have at least 14 days to respond. A subpoena to appear at trial, at hearing, or at deposition must be served within a reasonable time, unless it also requires the production of documents.~~

~~Subparagraph (c)(2)(C) states that a person who is not a party has no obligation to make copies or to advance costs, and has no counterpart in either the federal rule or the former state rule. The Committee included this statement in the rule so that it would become part of the notice provided to each person served with a subpoena.~~

~~Subparagraph (c)(2)(D) specifies that a person served with a subpoena for the production or inspection of documents or tangible things or inspection of premises may serve written objection upon the party serving the subpoena. The party serving the subpoena bears the burden to obtain an order to compel production, and must provide prior notice to the person served of the motion to compel. A person served with a subpoena to appear at trial, at hearing, or at deposition, must appear unless the person obtains a court order to quash or modify the subpoena; a written objection to the serving party is insufficient. A person served with a subpoena duces tecum may object to providing documents by notifying the party serving the subpoena, but still must appear to testify at trial, at hearing, or at deposition, unless the person obtains an order to quash or modify the subpoena.~~

~~Subparagraph (c)(3) identifies the circumstances in which a subpoena may be modified or quashed. It follows paragraph (c)(3) of the 1991 amendments to Fed. R. Civ. P. 45, but is modified to specify the locations where residents or nonresidents of the State may be compelled to attend deposition.~~

~~Paragraph (d). This paragraph follows the 1991 amendments to Fed R. Civ. P. 45. Subparagraph (d)(2)(D) applies to privileged attorney-client communications, and to all attorney work product protected under the doctrine of Hickman v. Taylor, 329 U.S. 495, 67 S. Ct. 385, 91 L. Ed. 451 (1947), and progeny.~~

~~Paragraph (e). This paragraph specifies that an adequate cause for failure to obey exists when a subpoena purports to require a party to respond at a place beyond the geographic boundaries imposed by the rule, amending former paragraph (f).~~

~~Paragraph (f). This is the former paragraph (g), amended to eliminate references to the masculine pronoun.~~

~~Paragraph (g). This is the former paragraph (h).~~

~~Paragraph (h). This is the former paragraph (i), amended to eliminate references to the masculine pronoun.~~

Attorney Name
Address
Email Address
Telephone Number
Bar Number

In the District Court of the State of Utah
_____ Judicial District
_____ County
_____
(Address)

_____, Plaintiff, v. _____, Defendant.	Subpoena Case Number: _____ Judge : _____

To _____:

(1) [ ] You are commanded to appear at:
_____(date)
_____(time)
_____(place)

[ ] to testify at a trial or hearing
[ ] to testify at a deposition
[ ] to permit inspection of the premises
[ ] to produce the following documents or tangible things:

_____
_____
_____

(2) [ ] You are commanded to copy the following documents and to mail or deliver the copies to the person at the address at the top of this page. You must comply no later than _____(date).

(3) A form entitled “Notice to Persons Served with a Subpoena” must be served with this subpoena. The form explains your rights and obligations. If you are commanded to appear at a trial, hearing or deposition, a one-day witness fee must be served with this subpoena. A one-day witness fee is $18.50 plus $1.00 for each 4 miles you have to travel over 50 miles (one direction).

(4) You may object to this subpoena for one of the reasons listed in paragraph 6 of the Notice by serving a written objection upon the attorney listed at the top of this subpoena. You must comply with any part of the subpoena to which you do not object.

Date

Signature
[ ] Court clerk
[ ] Attorney for the plaintiff
[ ] Attorney for the defendant

NOTICE TO PERSONS SERVED WITH A SUBPOENA

(1) Rights and responsibilities in general. A subpoena is a court order whether it is issued by the court clerk or by an attorney as an officer of the court. You must comply or file an objection, or you may face penalties for contempt of court. If you are commanded to produce documents or tangible things, the subpoena must be served on you at least 14 days before the date designated for compliance. If you are commanded to appear at a trial, hearing, deposition, or other place, a one-day witness fee must be served with this subpoena. A one-day witness fee is $18.50 plus $1.00 for each 4 miles you have to travel over 50 miles (one direction). When the subpoena is issued on behalf of the United States or Utah, fees and mileage need not be tendered in advance. The witness fee for each subsequent day is $49.00 plus $1.00 for each 4 miles you have to travel over 50 miles (one direction).

(2) Subpoena to copy and mail documents. If the subpoena commands you to copy documents and mail the copies to the attorney or party issuing the subpoena, you must organize the copies as you keep them in the ordinary course of business or organize and label them to correspond with the categories in the subpoena. The party issuing the subpoena must pay the reasonable cost of copying the documents. You must mail with the copies a declaration under penalty of perjury stating in substance:

(A) that you have knowledge of the facts contained in the declaration;
(B) that the documents produced are a full and complete response to the subpoena;
(C) that originals or true copies of the original documents have been produced; and
(D) the reasonable cost of copying the documents.

A declaration form is part of this Notice; you may need to modify it to fit your circumstances.

(3) Subpoena to appear. If the subpoena commands you to appear at a trial, hearing, deposition, or for inspection of premises, you must appear at the date, time, and place designated in the subpoena. The trial or hearing will be at the courthouse in which the case is pending. For a deposition or inspection of premises, you can be commanded to appear in only the following counties:

(A) If you are a resident of Utah, the subpoena may command you to appear in the county:
in which you reside;
in which you are employed;

in which you transact business in person; or
in which the court orders.

(B) If you are not a resident of Utah, the subpoena may command you to appear in the county in Utah:
in which you are served with the subpoena; or
in which the court orders.

(4) Subpoena to permit inspection of premises. If the subpoena commands you to appear and to permit the inspection of premises, you must appear at the date, time, and place designated in the subpoena and do what is necessary to permit the premises to be inspected.

(5) Subpoena to produce documents or tangible things. If the subpoena commands you to produce designated documents or tangible things, you must produce the documents or tangible things as you keep them in the ordinary course of business or organize and label them to correspond with the categories in the subpoena. The subpoena may require you to produce the documents at the trial, hearing, or deposition or to mail them to the issuing party or attorney. You need not make copies. The party issuing the subpoena must pay the reasonable cost of copying and producing the documents or tangible things. You must produce with the documents or tangible things a declaration under penalty of perjury stating in substance:

(A) that you have knowledge of the facts contained in the declaration;
(B) that the documents or tangible things produced are a full and complete response to the subpoena;
(C) that the documents are the originals or that a copy is a true copy of the original; and
(D) the reasonable cost of copying or producing the documents or tangible things.

A declaration form is part of this Notice; you may need to modify it to fit your circumstances.

(6) Objection to a subpoena. You must comply with those parts of the subpoena to which you do not object. You may object to all or part of the subpoena if it:

(A) fails to allow you a reasonable time for compliance (If you are commanded to produce documents or tangible things, the subpoena must be served on you at least 14 days before the date designated for compliance.);

(B) requires you, as a resident of Utah, to appear at a deposition in a county in which you do not reside, are not employed, or do not transact business in person;
(C) requires you, as a non-resident of Utah, to appear at a deposition in a county other than the county in which you were served, unless the judge orders otherwise;
(D) requires you to disclose privileged or other protected matter and no exception or waiver applies;
(E) requires you to disclose a trade secret or other confidential research, development, or commercial information;
(F) subjects you to an undue burden; or
(G) requires you to disclose an unretained expert's opinion or information not describing specific events or occurrences in dispute and resulting from the expert's study that was not made at the request of a party.

(7) How to object. To object to the subpoena, serve the objection upon the party or attorney issuing the subpoena. The name and address of that person should appear in the upper left corner of the subpoena. You must do this before the date for compliance. A form objection is part of this Notice; you may need to modify it to fit your circumstances. Once you have filed the objection, do not comply with the subpoena unless ordered to do so by the court.

(8) Motion to compel. After you make a timely written objection, the party or attorney issuing the subpoena might serve you with a motion for an order to compel you to comply and notice of a court hearing. That motion will be reviewed by a judge. You have the right to file a response to the motion, to attend the hearing, and to be heard. You may be represented by a lawyer. If the judge grants the motion, you may ask the judge to impose conditions to protect you.

(9) Organizations. An organization that is not a party to the suit and is subpoenaed to appear at a deposition must designate one or more persons to testify on its behalf. The organization may set forth the matters on which each person will testify. Utah Rule of Civil Procedure 30(b)(6).

In the District Court of the State of Utah
_____ Judicial District
_____ County
_____
(Address)

_____, Plaintiff, v. _____, Defendant.	Objection to subpoena Case Number: _____ Judge : _____

Instructions: URCP 45 limits the grounds for an objection. For each of the grounds other than (2) or (3) please provide a full explanation. Attach additional sheets as necessary.

I have been served with a subpoena in this case and I object because the subpoena:

[ ] (1) Fails to allow me a reasonable time in which to comply.

_____

_____

_____

[ ] (2) Requires me, as a resident of Utah, to appear at a deposition in a county in which I do not reside, am not employed, and do not transact business in person.

[ ] (3) Requires me, as a non-resident of Utah, to appear at a deposition in a county other than the county in which I was served.

[ ] (4) Requires me to disclose privileged or other protected matter and no exception or waiver applies.

_____

_____

_____

Instructions for (4): If you object to the subpoena for these grounds, you must describe the nature of the document or thing with sufficient specificity to enable the party or attorney to contest your objection.

[ ] (5) Requires me to disclose a trade secret or other confidential research, development, or commercial information.

_____

_____

_____

Instructions for (5): If you object to the subpoena for these grounds, you must describe the nature of the document or thing with sufficient specificity to enable the party or attorney to contest your objection.

[ ] (6) Subjects me to an undue burden.

_____

_____

_____

[ ] (7) Requires me to disclose an unretained expert's opinion or information not describing specific events or occurrences in dispute and resulting from the expert's study that was not made at the request of a party.

_____

_____

_____

[ ] (8) Other.

_____

_____

_____

On _____(date) I mailed this objection to the party or attorney issuing the subpoena at the following address:

_____

_____

_____

_____ _____

Date

Signature
[ ] Person subject to subpoena
[ ] Attorney for person subject to subpoena

In the District Court of the State of Utah
_____ Judicial District
_____ County
_____
(Address)

_____, Plaintiff, v. _____, Defendant.	Declaration of compliance with subpoena Case Number: _____ Judge : _____

Under penalty of perjury, I declare as follows:

(1) I have knowledge of the facts contained in this declaration.

(2) The documents or tangible things copied or produced are a full and complete response to the subpoena.

(3) The documents or tangible things are
[ ] the originals.
[ ] copies that are true copies of the originals.

(4) The reasonable cost of copying or producing the documents or tangible things is $_____.

Date

Signature
[ ] Custodian of the records
[ ] Attorney for the custodian of the records

From: Edward B. Havas
To: Frank Carney

Frank,

On quick perusal of the proposed new R. 45 it looks like quite an improvement. My only thought for consideration (it was a very quick review, so this is hardly an exhaustive analysis) is that the proposed rule requires the subpoena to produce/allow inspection to be served on the opponent at the same time as the service on the witness. That could lead to the disclosure of the requested materials before the opponent has an opportunity to get a protective order to prevent disclosure. Was any thought given to requiring prior notice to an opponent to give some reaction time before it gets in the hands of a witness?

I'm envisioning UMIA issuing a subpoena for records we would contend are privileged or sensitive, and the doc responding by producing the records to his carrier by return mail, before plaintiff's counsel can do anything about it, e.g. I'm sure it will add a burden to plaintiffs in some cases, but it's possibly a worthwhile trade-off.

What are your thoughts?

Thanks
Ed

From: Robert H. Wilde
To: Frank Carney

Frank;

I would make the production of documents provisions of Rule 45 require a covering document which complies with Rule 902(11) URE or Rule 902(12) URE so that when the documents show up they have adequate authentication to get them admitted.

Bob Wilde

From: Frank Carney
To: Robert H. Wilde

Yeah, we had that same thought in one of our earlier iterations, and I think we dropped it because under state law a notary public would be required in order to make a declaration under penalty of perjury. Unlike the federal statute. And we could not create that power by rule. I think that was our thinking. Your thoughts?

FJC

From: Robert H. Wilde
To: Frank Carney

That is the reason Rule 902(11)(D) and 902 (12)(D) are worded the way they are. The intent was to provide for liability under the Utah false official statements act even if perjury wouldn't apply. What we really need is a sworn declaration statute similar to the federal statute. Maybe the UTLA board can get that through the legislature next year.

RHW

From: Frank Carney
To: Robert H. Wilde

We looked at it at length and decided the same thing--- we needed a sworn declaration statute. we were not sure that the false official statements applied. Maybe you should attend when we discuss this again.

FJC

Rule 16. Pretrial conferences, scheduling, and management conferences.

(a) Pretrial conferences. In any action, the court in its discretion or upon motion of a party, may direct the attorneys for the parties and any unrepresented parties to appear before it for a conference or conferences before trial for such purposes as:

(a)(1) expediting the disposition of the action;

(a)(2) establishing early and continuing control so that the case will not be protracted for lack of management;

(a)(3) discouraging wasteful pretrial activities;

(a)(4) improving the quality of the trial through more thorough preparation;

(a)(5) facilitating the settlement of the case; and

(a)(6) considering all matters as may aid in the disposition of the case.

(b) Scheduling and management conference and orders. In any action, in addition to any other pretrial conferences that may be scheduled, the court, upon its own motion or upon the motion of a party, may conduct a scheduling and management conference. The attorneys and unrepresented parties shall appear at the scheduling and management conference in person or by remote electronic means. Regardless whether a scheduling and management conference is held, on motion of a party the court shall enter a scheduling order that governs the time:

(b)(1) to join other parties and to amend the pleadings;

(b)(2) to file motions; and

(b)(3) to complete discovery.

The scheduling order may also include:

(b)(4) modifications of the times for disclosures under Rules 26(a) and 26(e)(1) and of the extent of discovery to be permitted;

(b)(5) the date or dates for conferences before trial, a final pretrial conference, and trial; and

(b)(6) any other matters appropriate in the circumstances of the case.

Unless the order sets the date of trial, any party may and the plaintiff shall, at the close of all discovery, certify to the court that the case is ready for trial. The court shall schedule the trial as soon as mutually convenient to the court and parties. The court shall notify parties of the date of trial and of any pretrial conference.

(c) Final pretrial or settlement conferences. In any action where a final pretrial conference has been ordered, it shall be held as close to the time of trial as reasonable under the circumstances. The conference shall be attended by at least one of the attorneys who will conduct the trial for each of the parties, and the attorneys attending the pretrial, unless waived by the court, shall have available, either in person or by telephone, the appropriate parties who have authority to make binding decisions regarding settlement.

(d) Sanctions. If a party or a party's attorney fails to obey a scheduling or pretrial order, if no appearance is made on behalf of a party at a scheduling or pretrial conference, if a party or a party's attorney is substantially unprepared to participate in the conference, or if a party or a party's attorney fails to participate in good faith, the court, upon motion or its own initiative, ~~may make such orders with regard thereto as are just, and among others, any of the orders provided in Rule 37(b)(2)(B), (C), (D). In lieu of or in addition to any other sanctions, the court shall require the party or the attorney representing the party or both to pay the reasonable expenses incurred because of any noncompliance with this rule, including attorney fees, unless the court finds that the noncompliance was substantially justified or that other circumstances make an award of expenses unjust~~ may take any action authorized by Rule 37(b)(2).

Rule 35. Physical and mental examination of persons.

(a) Order for examination. When the mental or physical condition (including the blood group) of a party or of a person in the custody or under the legal control of a party is in controversy, the court in which the action is pending may order the party or person to submit to a physical or mental examination by a suitably licensed or certified examiner or to produce for examination the person in the party's custody or legal control, unless the party is unable to produce the person for examination. The order may be made only on motion for good cause shown and upon notice to the person to be examined and to all parties and shall specify the time, place, manner, conditions, and scope of the examination and the person or persons by whom it is to be made.

(b) Report of examining physician.

(b)(1) If requested by a party against whom an order is made under Rule 35(a) or the person examined, the party causing the examination to be made shall deliver to the person examined and/or the other party a copy of a detailed written report of the examiner setting out the examiner's findings, including results of all tests made, diagnosis and conclusions, together with like reports of all earlier examinations of the same condition. After delivery the party causing the examination shall be entitled upon request to receive from the party against whom the order is made a like report of any examination, previously or thereafter made, of the same condition, unless, in the case of a report of examination of a person not a party, the party shows that the report cannot be obtained. The court on motion may order delivery of a report on such terms as are just~~, and if~~. If an examiner fails or refuses to make a report, the court ~~may exclude the examiner's testimony if offered at the trial~~ on motion may take any action authorized by Rule 37(b)(2).

(b)(2) By requesting and obtaining a report of the examination so ordered or by taking the deposition of the examiner, the party examined waives any privilege the party may have in that action or any other involving the same controversy, regarding the testimony of every other person who has examined or may thereafter examine the party in respect of the same mental or physical condition.

(b)(3) This subdivision applies to examinations made by agreement of the parties, unless the agreement expressly provides otherwise. This subdivision does not preclude

discovery of a report of any other examiner or the taking of a deposition of an examiner in accordance with the provisions of any other rule.

(c) Right of party examined to other medical reports. At the time of making an order to submit to an examination under Subdivision (a) ~~of this rule~~, the court shall, upon motion of the party to be examined, order the party seeking such examination to furnish to the party to be examined a report of any examination previously made or medical treatment previously given by any examiner employed directly or indirectly by the party seeking the order for a physical or mental examination, or at whose instance or request such medical examination or treatment has previously been conducted. ~~If the party seeking the examination refuses to deliver such report, the court on motion and notice may make an order requiring delivery on such terms as are just; and if an examiner fails or refuses to make such a report the court may exclude the examiner's testimony if offered at the trial, or may make such other order as is authorized under Rule 37.~~

(d) Sanctions.

(d)(1) If a party fails to obey an order entered under Subdivision (c), the court on motion may take any action authorized by Rule 37(b)(2).

(d)(2) If a party or a person in the custody or under the legal control of a party fails to obey an order entered under Subdivision (a), the court on motion may take any action authorized by Rule 37(b)(2), except that the failure cannot be treated as contempt of court.

Rule 37. Failure to make or cooperate in discovery; sanctions.

(a) Motion for order compelling discovery. A party, upon reasonable notice to other parties and all persons affected thereby, may apply for an order compelling discovery as follows:

(a)(1) Appropriate court. An application for an order to a party may be made to the court in which the action is pending, or, on matters relating to a deposition, to the court in the district where the deposition is being taken. An application for an order to a deponent who is not a party shall be made to the court in the district where the deposition is being taken.

(a)(2) Motion.

(a)(2)(A) If a party fails to make a disclosure required by Rule 26(a), any other party may move to compel disclosure and for appropriate sanctions. The motion must include a certification that the movant has in good faith conferred or attempted to confer with the party not making the disclosure in an effort to secure the disclosure without court action.

(a)(2)(B) If a deponent fails to answer a question propounded or submitted under Rule 30 or 31, or a corporation or other entity fails to make a designation under Rule 30(b)(6) or 31(a), or a party fails to answer an interrogatory submitted under Rule 33, or if a party, in response to a request for inspection submitted under Rule 34, fails to respond that inspection will be permitted as requested or fails to permit inspection as requested, the discovering party may move for an order compelling an answer, or a designation, or an order compelling inspection in accordance with the request. The motion must include a certification that the movant has in good faith conferred or attempted to confer with the person or party failing to make the discovery in an effort to secure the information or material without court action. When taking a deposition on oral examination, the proponent of the question may complete or adjourn the examination before applying for an order.

(a)(3) Evasive or incomplete disclosure, answer, or response. For purposes of this subdivision an evasive or incomplete disclosure, answer, or response is to be treated as a failure to disclose, answer, or respond.

(a)(4) Expenses and sanctions.

(a)(4)(A) If the motion is granted, or if the disclosure or requested discovery is provided after the motion was filed, the court shall, after opportunity for hearing, require the party or deponent whose conduct necessitated the motion or the party or attorney advising such conduct or both of them to pay to the moving party the reasonable expenses incurred in obtaining the order, including attorney fees, unless the court finds that the motion was filed without the movant's first making a good faith effort to obtain the disclosure or discovery without court action, or that the opposing party's nondisclosure, response, or objection was substantially justified, or that other circumstances make an award of expenses unjust.

(a)(4)(B) If the motion is denied, the court may enter any protective order authorized under Rule 26(c) and shall, after opportunity for hearing, require the moving party or the attorney or both of them to pay to the party or deponent who opposed the motion the reasonable expenses incurred in opposing the motion, including attorney fees, unless the court finds that the making of the motion was substantially justified or that other circumstances make an award of expenses unjust.

(a)(4)(C) If the motion is granted in part and denied in part, the court may enter any protective order authorized under Rule 26(c) and may, after opportunity for hearing, apportion the reasonable expenses incurred in relation to the motion among the parties and persons in a just manner.

(b) Failure to comply with order.

(b)(1) Sanctions by court in district where deposition is taken. If a deponent fails to be sworn or to answer a question after being directed to do so by the court in the district in which the deposition is being taken, the failure may be considered a contempt of that court.

(b)(2) Sanctions by court in which action is pending. If a party fails to obey an order entered under Rule 16(b) or if a party or an officer, director, or managing agent of a party or a person designated under Rule 30(b)(6) or 31(a) to testify on behalf of a party fails to obey an order to provide or permit discovery, including an order made under Subdivision (a) of this rule or Rule 35, ~~or if a party fails to obey an order entered under Rule 16(b)~~, unless the court finds that the failure was substantially justified, the court in

which the action is pending may ~~make such orders~~ take such action in regard to the failure as are just, ~~and among others~~ including the following:

(b)(2)(A) ~~an order that the matters regarding which the order was made or any other designated facts shall be taken~~ deem the matter or any other designated facts to be established for the purposes of the action in accordance with the claim of the party obtaining the order;

(b)(2)(B) ~~an order refusing to allow~~ prohibit the disobedient party ~~to support or oppose~~ from supporting or opposing designated claims or defenses~~,~~ or ~~prohibiting him~~ from introducing designated matters in evidence;

(b)(2)(C) ~~an order striking out~~ strike pleadings or parts thereof, stay~~ing~~ further proceedings until the order is obeyed, dismiss~~ing~~ the action or proceeding or any part thereof, or render~~ing a~~ judgment by default against the disobedient party;

~~(b)(2)(D) in lieu of any of the foregoing orders or in addition thereto, an order treating as a contempt of court the failure to obey any orders except an order to submit to a physical or mental examination;~~

~~(b)(2)(E) where a party has failed to comply with an order under Rule 35(a), such orders as are listed in Paragraphs (A), (B), and (C) of this subdivision, unless the party failing to comply is unable to produce such person for examination.~~

~~In lieu of any of the foregoing orders or in addition thereto, the court shall require the party failing to obey the order or the attorney or both of them to pay the reasonable expenses, including attorney fees, caused by the failure, unless the court finds that the failure was substantially justified or that other circumstances make an award of expenses unjust.~~

(b)(2)(D) order the party or the attorney or both of them to pay the reasonable expenses, including attorney fees, caused by the failure;

(b)(2)(E) treat the failure to obey an order, other than an order to submit to a physical or mental examination, as contempt of court; and

(b)(2)(F) instruct the jury regarding an adverse inference or effect of what the evidence would have shown.

(c) Expenses on failure to admit. If a party fails to admit the genuineness of any document or the truth of any matter as requested under Rule 36, and if the party

requesting the admissions thereafter proves the genuineness of the document or the truth of the matter, the party requesting the admissions may apply to the court for an order requiring the other party to pay the reasonable expenses incurred in making that proof, including reasonable attorney fees. The court shall make the order unless it finds that (1) the request was held objectionable pursuant to Rule 36(a), or (2) the admission sought was of no substantial importance, or (3) the party failing to admit had reasonable ground to believe that he might prevail on the matter, or (4) there was other good reason for the failure to admit.

(d) Failure of party to attend at own deposition or serve answers to interrogatories or respond to request for inspection. If a party or an officer, director, or managing agent of a party or a person designated under Rule 30(b)(6) or 31(a) to testify on behalf of a party fails (1) to appear before the officer who is to take the deposition, after being served with a proper notice, or (2) to serve answers or objections to interrogatories submitted under Rule 33, after proper service of the interrogatories, or (3) to serve a written response to a request for inspection submitted under Rule 34, after proper service of the request, the court ~~in which the action is pending on motion may make such orders in regard to the failure as are just, and among others it may take any action authorized under Paragraphs (A), (B), and (C) of Subdivision (b)(2) of this rule~~. ~~In lieu of any order or in addition thereto, the court shall require the party failing to act or the party's attorney or both to pay the reasonable expenses, including attorney's fees, caused by the failure, unless the court finds that the failure was substantially justified or that other circumstances make an award of expenses unjust~~ on motion may take any action authorized by Subdivision (b)(2).

The failure to act described in this subdivision may not be excused on the ground that the discovery sought is objectionable unless the party failing to act has applied for a protective order as provided by Rule 26(c).

(e) Failure to participate in the framing of a discovery plan. If a party or attorney fails to participate in good faith in the framing of a discovery plan by agreement as is required by Rule 26(f), the court ~~may, after opportunity for hearing, require such party or attorney to pay to any other party the reasonable expenses, including attorney fees, caused by the failure~~ on motion may take any action authorized by Subdivision (b)(2).

(f) Failure to disclose. If a party fails to disclose a witness, document or other material as required by Rule 26(a) or Rule 26(e)(1), or to amend a prior response to discovery as required by Rule 26(e)(2), that party shall not be permitted to use the witness, document or other material at any hearing unless the failure to disclose is harmless or the party shows good cause for the failure to disclose. In addition to or in lieu of this sanction, the court ~~may order any other sanction, including payment of reasonable costs and attorney fees, any order permitted under subpart (b)(2)(A), (B) or (C) and informing the jury of the failure to disclose~~ on motion may take any action authorized by Subdivision (b)(2).

(g) Failure to preserve evidence. Nothing in this rule limits the inherent power of the court to take any action authorized by Subdivision (b)(2) if a party destroys, conceals, alters, tampers with or fails to preserve a document, tangible item, electronic data or other evidence in violation of a duty.

Text of Federal Civil Rules Amendments Effective December 1, 2006

Rule 16
Rule 26
Rule 33
Rule 34
Rule 37
Rule 45

Rule 16

PROPOSED AMENDMENT OF SUBDIVISION (B)

Effective December 1, 2006, absent contrary Congressional action, subdivision (b) of this rule is amended to read as follows:

(b) Scheduling and Planning. Except in categories of actions exempted by district court rule as inappropriate, the district judge, or a magistrate judge when authorized by district court rule, shall, after receiving the report from the parties under Rule 26(f) or after consulting with the attorneys for the parties and any unrepresented parties by a scheduling conference, telephone, mail, or other suitable means, enter a scheduling order that limits the time

(1) to join other parties and to amend the pleadings;

(2) to file motions; and

(3) to complete discovery.

The scheduling order also may include

(4) modifications of the times for disclosures under Rules 26(a) and 26(e)(1) and of the extent of discovery to be permitted;

(5) provisions for disclosure or discovery of electronically stored information;

(6) any agreements the parties reach for asserting claims of privilege or of protection as trial-preparation material after production;

(7) the date or dates for conferences before trial, a final pretrial conference, and trial; and

(8) any other matters appropriate in the circumstances of the case.

The order shall issue as soon as practicable but in any event within 90 days after the appearance of a defendant and within 120days after the complaint has been served on a defendant. A schedule shall not be modified except upon a showing of good cause and by leave of the district judge or, when authorized by local rule, by a magistrate judge.

Rule 26

PROPOSED AMENDMENT OF SUBDIVISION (A)(1)(B)

Effective December 1, 2006, absent contrary Congressional action, subdivision (a)(1)(B) of this rule is amended to read as follows:

(B) a copy of, or a description by category and location of, all documents, electronically stored information, and tangible things that are in the possession, custody, or control of the party and that the disclosing party may use to support its claims or defenses, unless solely for impeachment;

PROPOSED AMENDMENT OF SUBDIVISION (A)(1)(E)

Effective December 1, 2006, absent contrary Congressional action, subdivision (a)(1)(E) of this rule is amended to read as follows:

(E) The following categories of proceedings are exempt from initial disclosure under Rule 26(a)(1):

(i) an action for review on an administrative record;

(ii) a forfeiture action in rem arising from a federal statute;

(iii) a petition for habeas corpus or other proceeding to challenge a criminal conviction or sentence;

(iv) an action brought without counsel by a person in custody of the United States, a state, or a state subdivision;

(v) an action to enforce or quash an administrative summons or subpoena;

(vi) an action by the United States to recover benefit payments;

(vii) an action by the United States to collect on a student loan guaranteed by the United States;

(viii) a proceeding ancillary to proceedings in other courts; and

(ix) an action to enforce an arbitration award.

These disclosures must be made at or within 14 days after the Rule 26(f) conference unless a different time is set by stipulation or court order, or unless a party objects during the conference that initial disclosures are not appropriate in the circumstances of the action and states the objection in the Rule 26(f) discovery plan. In ruling on the objection, the court must determine what disclosures--if any--are to be made, and set the time for disclosure. Any party first served or otherwise joined after the Rule 26(f) conference must make these disclosures within 30 days after being served or joined unless a different time is set by stipulation or court order. A party must make its initial disclosures based on the information then reasonably available to it and is not excused from making its disclosures because it has not fully completed its investigation of the case or because it challenges the sufficiency of another party's disclosures or because another party has not made its disclosures.

PROPOSED AMENDMENT OF SUBDIVISION (B)(2)

Effective December 1, 2006, absent contrary Congressional action, subdivision (b)(2) of this rule is amended to read as follows:

(2) Limitations.

(A) By order, the court may alter the limits in these rules on the number of depositions and interrogatories or the length of depositions under Rule 30. By order or local rule, the court may also limit the number of requests under Rule 36.

(B) A party need not provide discovery of electronically stored information from sources that the party identifies as not reasonably accessible because of undue burden or cost. On motion to compel discovery or for a protective order, the party from whom discovery is sought must show that the information is not reasonably accessible because of undue burden or cost. If that showing is made, the court may nonetheless order discovery from such sources if the requesting party shows good cause, considering the limitations of Rule 26(b)(2)(C). The court may specify conditions for the discovery.

(C) The frequency or extent of use of the discovery methods otherwise permitted under these rules and by any local rule shall be limited by the court if it determines that: (i) the discovery sought is unreasonably cumulative or duplicative, or is obtainable from some other source that is more convenient, less burdensome, or less expensive; (ii) the party seeking discovery has had ample opportunity by discovery in the action to obtain the information sought; or (iii) the burden or expense of the proposed discovery outweighs its likely benefit, taking into account the needs of the case, the amount in controversy, the parties' resources, the importance of the issues at stake in the litigation, and the importance of the proposed discovery in resolving the issues. The court may act upon its own initiative after reasonable notice or pursuant to a motion under Rule 26(c).

PROPOSED AMENDMENT OF SUBDIVISION (B)(5)

Effective December 1, 2006, absent contrary Congressional action, subdivision (b)(5) of this rule is amended to read as follows:

(5) Claims of Privilege or Protection of Trial-Preparation Materials.

(A) Information Withheld. When a party withholds information otherwise discoverable under these rules by claiming that it is privileged or subject to protection as trial-preparation material, the party shall make the claim expressly and shall describe the nature of the documents, communications, or things not produced or disclosed in a manner that, without revealing information itself privileged or protected, will enable other parties to assess the applicability of the privilege or protection.

(B) Information Produced. If information is produced in discovery that is subject to a claim of privilege or of protection as trial-preparation material, the party making the claim may notify any party that received the information of the claim and the basis for it. After being notified, a 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.

PROPOSED AMENDMENT OF SUBDIVISION (F)

Effective December 1, 2006, absent contrary Congressional action, subdivision (f) of this rule is amended to read as follows:

(f) Conference of Parties; Planning for Discovery. Except in categories of proceedings exempted from initial disclosure under Rule 26(a)(1)(E) or when otherwise ordered, the parties must, as soon as practicable and in any event at least 21 days before a scheduling conference is held or a scheduling order is due under Rule 16(b), confer to consider the nature and basis of their claims and defenses and the possibilities for a prompt settlement or resolution of the case, to make or arrange for the disclosures required by Rule 26(a)(1), to discuss any issues relating to preserving discoverable information, and to develop a proposed discovery plan that indicates the parties' views and proposals concerning:

(1) what changes should be made in the timing, form, or requirement for disclosures under Rule 26(a), including a statement as to when disclosures under Rule 26(a)(1) were made or will be made;

(2) the subjects on which discovery may be needed, when discovery should be completed, and whether discovery should be conducted in phases or be limited to or focused upon particular issues;

(3) any issues relating to disclosure or discovery of electronically stored information, including the form or forms in which it should be produced;

(4) any issues relating to claims of privilege or of protection as trial-preparation material, including -- if the parties agree on a procedure to assert such claims after production -- whether to ask the court to include their agreement in an order;

(5) what changes should be made in the limitations on discovery imposed under these rules or by local rule, and what other limitations should be imposed; and

(6) any other orders that should be entered by the court under Rule 26(c) or under Rule 16(b) and (c).

The attorneys of record and all unrepresented parties that have appeared in the case are jointly responsible for arranging the conference, for attempting in good faith to agree on the proposed discovery plan, and for submitting to the court within 14 days after the conference a written report outlining the plan. A court may order that the parties or attorneys attend the conference in person. If necessary to comply with its expedited schedule for Rule 16(b) conferences, a court may by local rule (i) require that the conference between the parties occur fewer than 21 days before the scheduling conference is held or a scheduling order is due under Rule 16(b), and (ii) require that the written report outlining the discovery plan be filed fewer than 14 days after the conference between the parties, or excuse the parties from submitting a written report and permit them to report orally on their discovery plan at the Rule 16(b) conference.

Rule 33

PROPOSED AMENDMENT OF SUBDIVISION (D)

Effective December 1, 2006, absent contrary Congressional action, subdivision (d) of this rule is amended to read as follows:

(d) Option to Produce Business Records. Where the answer to an interrogatory may be derived or ascertained from the business records, including electronically stored information, of the party upon whom the interrogatory has been served or from an examination, audit or inspection of such business records, including a compilation, abstract or summary thereof, and the burden of deriving or ascertaining the answer is substantially the same for the party serving the interrogatory as for the party served, it is a sufficient answer to such interrogatory to specify the records from which the answer may be derived or ascertained and to afford to the party serving the interrogatory reasonable opportunity to examine, audit or inspect such records and to make copies, compilations, abstracts, or summaries. A specification shall be in sufficient detail to permit the interrogating party to locate and to identify, as readily as can the party served, the records from which the answer may be ascertained.

Rule 34

Effective December 1, 2006, absent contrary Congressional action, the heading of this rule is amended to read as follows:

Rule 34. Production of Documents, Electronically Stored Information, and Things and Entry Upon Land for Inspection and Other Purposes

PROPOSED AMENDMENT OF SUBDIVISIONS (A) AND (B)

Effective December 1, 2006, absent contrary Congressional action, subdivisions (a) and (b) of this rule are amended to read as follows:

(a) Scope. Any party may serve on any other party a request (1) to produce and permit the party making the request, or someone acting on the requestor's behalf, to inspect, copy, test, or sample any designated documents or electronically stored information -- including writings, drawings, graphs, charts, photographs, sound recordings, images, and other data or data compilations stored in any medium from which information can be obtained -- translated, if necessary, by the respondent into reasonably usable form, or to inspect, copy, test, or sample any designated tangible things which constitute or contain matters within the scope of Rule 26(b) and which are in the possession, custody or control of the party upon whom the request is served; or (2) to permit entry upon designated land or other property in the possession or control of the party upon whom the request is served for the purpose of inspection and measuring, surveying, photographing, testing, or sampling the property or any designated object or operation thereon, within the scope of Rule 26(b).

(b) Procedure. The request shall set forth, either by individual item or by category, the items to be inspected, and describe each with reasonable particularity. The request shall specify a reasonable time, place, and manner of making the inspection and performing the related acts. The request may specify the form or forms in which electronically stored information is to be produced. Without leave of court or written stipulation, a request may not be served before the time specified in Rule 26(d).

The party upon whom the request is served shall serve a written response within 30 days after the service of the request. A shorter or longer time may be directed by the court or, in the absence of such an order, agreed to in writing by the parties, subject to Rule 29. The response shall state, with respect to each item or category, that inspection and related activities will be permitted as requested, unless the request is objected to, including an objection to the requested form or forms for producing electronically stored information, stating the reasons for the objection. If objection is made to part of an item or category, the part shall be specified and inspection permitted of the remaining parts. If objection is made to the requested form or forms for producing electronically stored information -- or if no form was specified in the request -- the responding party must state the form or forms it intends to use. The party submitting the request may move for an order under Rule 37(a) with respect to any objection to or other failure to respond to the request or any part thereof, or any failure to permit inspection as requested.

Unless the parties otherwise agree, or the court otherwise orders:

(i) a party who produces documents for inspection shall produce them as they are kept in the usual course of business or shall organize and label them to correspond with the categories in the request;

(ii) if a request does not specify the form or forms for producing electronically stored information, a responding party must produce the information in a form or forms in which it is ordinarily maintained or in a form or forms that are reasonably usable; and

(iii) a party need not produce the same electronically stored information in more than one form.

Rule 37

PROPOSED ADDITION OF SUBDIVISION (F)

Effective December 1, 2006, absent contrary Congressional action, subdivision (f) of this rule is added to read as follows:

(f) Electronically Stored Information. Absent exceptional circumstances, a court may not impose sanctions under these rules on a party for failing to provide electronically stored information lost as a result of the routine, good-faith operation of an electronic information system.

Rule 45

PROPOSED AMENDMENT OF RULE

Effective December 1, 2006, absent contrary Congressional action, this rule is amended to read as follows:

(a) Form; Issuance.

(1) Every subpoena shall

(A) state the name of the court from which it is issued; and

(B) state the title of the action, the name of the court in which it is pending, and its civil action number; and

(C) command each person to whom it is directed to attend and give testimony or to produce and permit inspection, copying, testing, or sampling of designated books, documents, electronically stored information, or tangible things in the possession, custody or control of that person, or to permit inspection of premises, at a time and place therein specified; and

(D) set forth the text of subdivisions (c) and (d) of this rule.

A command to produce evidence or to permit inspection, copying, testing, or sampling may be joined with a command to appear at trial or hearing or at deposition, or may be issued separately. A subpoena may specify the form or forms in which electronically stored information is to be produced.

(2) A subpoena must issue as follows:

(A) for attendance at a trial or hearing, from the court for the district where the trial or hearing is to be held;

(B) for attendance at a deposition, from the court for the district where the deposition is to be taken, stating the method for recording the testimony; and

(C) for production, inspection, copying, testing, or sampling, if separate from a subpoena commanding a person's attendance, from the court for the district where the production or inspection is to be made.

(3) The clerk shall issue a subpoena, signed but otherwise in blank, to a party requesting it, who shall complete it before service. An attorney as officer of the court may also issue and sign a subpoena on behalf of

(A) a court in which the attorney is authorized to practice; or

(B) a court for a district in which a deposition or production is compelled by the subpoena, if the deposition or production pertains to an action pending in a court in which the attorney is authorized to practice.

(b) Service.

(1) A subpoena may be served by any person who is not a party and is not less than 18 years of age. Service of a subpoena upon a person named therein shall be made by delivering a copy thereof to such person and, if the person's attendance is commanded, by tendering to that

person the fees for one day's attendance and the mileage allowed by law. When the subpoena is issued on behalf of the United States or an officer or agency thereof, fees and mileage need not be tendered. Prior notice of any commanded production of documents and things or inspection of premises before trial shall be served on each party in the manner prescribed by Rule 5(b).

(2) Subject to the provisions of clause (ii) of subparagraph (c)(3)(A) of this rule, a subpoena may be served at any place within the district of the court by which it is issued, or at any place without the district that is within 100 miles of the place of the deposition, hearing, trial, production, inspection, copying, testing, or sampling specified in the subpoena or at any place within the state where a state statute or rule of court permits service of a subpoena issued by a state court of general jurisdiction sitting in the place of the deposition, hearing, trial, production, inspection, copying, testing, or sampling specified in the subpoena. When a statute of the United States provides therefor, the court upon proper application and cause shown may authorize the service of a subpoena at any other place. A subpoena directed to a witness in a foreign country who is a national or resident of the United States shall issue under the circumstances and in the manner and be served as provided in Title 28, U. S.C. § 1783.

(3) Proof of service when necessary shall be made by filing with the clerk of the court by which the subpoena is issued a statement of the date and manner of service and of the names of the persons served, certified by the person who made the service.

(c) Protection of Persons Subject to Subpoenas.

(1) A party or an attorney responsible for the issuance and service of a subpoena shall take reasonable steps to avoid imposing undue burden or expense on a person subject to that subpoena. The court on behalf of which the subpoena was issued shall enforce this duty and impose upon the party or attorney in breach of this duty an appropriate sanction, which may include, but is not limited to, lost earnings and a reasonable attorney's fee.

(2) (A) A person commanded to produce and permit inspection, copying, testing, or sampling of designated electronically stored information, books, papers, documents or tangible things, or inspection of premises need not appear in person at the place of production or inspection unless commanded to appear for deposition, hearing or trial.

(B) Subject to paragraph (d)(2) of this rule, a person commanded to produce and permit inspection, copying, testing, or sampling may, within 14 days after service of the subpoena or before the time specified for compliance if such time is less than 14 days after service, serve upon the party or attorney designated in the subpoena written objection to producing any or all of the designated materials or inspection of the premises -- or to producing electronically stored information in the form or forms requested. If objection is made, the party serving the subpoena shall not be entitled to inspect, copy, test, or sample the materials or inspect the premises except pursuant to an order of the court by which the subpoena was issued. If objection has been made, the party serving the subpoena may, upon notice to the person commanded to produce, move at any time for an order to compel the production, inspection, copying, testing, or sampling. Such an order to compel shall protect any person who is not a party or an officer of a party from significant expense resulting from the inspection, copying, testing, or sampling commanded.

(3)(A) On timely motion, the court by which a subpoena was issued shall quash or modify the subpoena if it

(i) fails to allow reasonable time for compliance;

(ii) requires a person who is not a party or an officer of a party to travel to a place more than 100 miles from the place where that person resides, is employed or regularly transacts business in person, except that, subject to the provisions of clause (c)(3)(B)(iii) of this rule, such a person

may in order to attend trial be commanded to travel from any such place within the state in which the trial is held;

(iii) requires disclosure of privileged or other protected matter and no exception or waiver applies; or

(iv) subjects a person to undue burden.

(B) If a subpoena

(i) requires disclosure of a trade secret or other confidential research, development, or commercial information, or

(ii) requires disclosure of an unretained expert's opinion or information not describing specific events or occurrences in dispute and resulting from the expert's study made not at the request of any party, or

(iii) requires a person who is not a party or an officer of a party to incur substantial expense to travel more than 100 miles to attend trial, the court may, to protect a person subject to or affected by the subpoena, quash or modify the subpoena or, if the party in whose behalf the subpoena is issued shows a substantial need for the testimony or material that cannot be otherwise met without undue hardship and assures that the person to whom the subpoena is addressed will be reasonably compensated, the court may order appearance or production only upon specified conditions.

(d) Duties in Responding to Subpoena.

(1)(A) A person responding to a subpoena to produce documents shall produce them as they are kept in the usual course of business or shall organize and label them to correspond with the categories in the demand.

(B) If a subpoena does not specify the form or forms for producing electronically stored information, a person responding to a subpoena must produce the information in a form or forms in which the person ordinarily maintains it or in a form or forms that are reasonably usable.

(C) A person responding to a subpoena need not produce the same electronically stored information in more than one form.

(D) A person responding to a subpoena need not provide discovery of electronically stored information from sources that the person identifies as not reasonably accessible because of undue burden or cost. On motion to compel discovery or to quash, the person from whom discovery is sought must show that the information sought is not reasonably accessible because of undue burden or cost. If that showing is made, the court may nonetheless order discovery from such sources if the requesting party shows good cause, considering the limitations of Rule 26(b)(2)(C). The court may specify conditions for the discovery.

(2)(A) When information subject to a subpoena is withheld on a claim that it is privileged or subject to protection as trial-preparation materials, the claim shall be made expressly and shall be supported by a description of the nature of the documents, communications, or things not produced that is sufficient to enable the demanding party to contest the claim.

(B) If information is produced in response to a subpoena that is subject to a claim of privilege or of protection as trial-preparation material, the person making the claim may notify any party that received the information of the claim and the basis for it. After being notified, a 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 person who produced the information must preserve the information until the claim is resolved.

(e) Contempt. Failure of any person without adequate excuse to obey a subpoena served upon that person may be deemed a contempt of the court from which the subpoena issued. An adequate cause for failure to obey exists when a subpoena purports to require a nonparty to attend or produce at a place not within the limits provided by clause (ii) of subparagraph (c)(3)(A).

The 2006 Discovery Amendments to the Federal Rules of Civil Procedure

by Carl G. Roberts

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Proposed amendments to the Federal Rules of Civil Procedure were approved by the Supreme Court on April 12, 2006 and, barring the unlikely event of an intervention by Congress, will become effective on December 1, 2006. The amendments introduce a new category of discoverable information – electronically stored information, sometimes referred to by the acronym "ESI."

The amendments also provide subtle support for several trends in the management of discovery that have been developing over at least the last decade, including greater involvement by courts in the planning and oversight of routine discovery processes and additional early disclosure and discussion requirements among counsel.

The amendments provide some shelter from the storm for parties fearful of sanctions for truly inadvertent spoliation, and they also provide a limited margin of safety against inadvertent waivers of privilege.

Much of the impact of the amendments will not be realized until courts begin to issue opinions. One thing is certain, however – the amendments do not, in any way, shape, or form, return parties and counsel to the halcyon days of pre-computer era discovery.

Rule 34

Electronically stored information [Amended Rule 34(a)]

The starting point for the changes in the discovery rules is Rule 34. When it was originally adopted, Rule 34(a) covered discovery of "documents" and "things." The term "data compilations" was added with the 1970 amendments, in anticipation of increased use of computerized information. However, developments in computer technology have led to forms of information that defy easy characterization as documents or data compilations. Courts, counsel and parties so far have closed any gaps on an ad hoc basis, typically by expansive custom definitions or references to the "intended" scope of the discovery rules. The Rules Committee believed that such impromptu approaches were not sufficient for the long term. The introduction of the category of "electronically stored information" should permit the discovery rules to keep pace with developments in information technology for many years into the future. Parenthetically, the term "data compilations" is being dropped, as all forms of information are believed to be subsumed within either documents or electronically stored information.

The newly introduced category of electronically stored information does not require that we discard all of our document request templates. The Committee Note observes that "a Rule 34 request for production of ‘documents' should be understood to encompass, and the response should include, electronically stored information unless discovery in the action has clearly distinguished between electronically stored information and ‘documents.'" In effect, simpler is better, or at least goes farther.

Test or sample [Amended Rule 34(a)]

Under amended Rule 34(a), a reviewing party has the right to "test or sample" electronically stored information. The Committee Note observes that the right to do so had not been clear in the current version of the rule. The complexity of electronic information systems can be challenging for a party

seeking specific kinds of information from an adversary. Alternative approaches to address this complexity have included very broad requests, multiple rounds of discovery and depositions under Rule 30(b)(6). All of these strategies increase the cost and time expended on discovery. The explicit option to test or sample as part of the initial production process should help counsel devise ways to obtain complete responses to pertinent requests more quickly and economically.

Form of production [Amended Rule 34(b)]

The same information can be stored in different forms. Examples are a letter stored as a paper printout, as a word processing file, or as a scanned image; an e-mail message printed to paper, exported to various computer-readable file formats, or imaged in TIFF or PDF formats; sounds stored in analog or digital form suitable for audiotape, in digital form suitable for CD-ROM players, as WAV files to be played on a computer, or as MP3 files for an iPod®; and database information in the database program tables, in a comma-delimited text file for export, in a paper report, in a TIFF or PDF image, or displayed in an on-screen report.

Amended Rule 34(b) permits a requesting party to specify the form for producing electronically stored information. If the responding party objects or if no form was specified, the responding party must state the form or form it intends to use. The default forms are those (1) "in which [the electronically stored information] is ordinarily maintained" or (2) "that are reasonably usable."

The utility to a requesting party of the different forms in which a particular item of electronically stored information can be produced may vary. For example, when an email message in Microsoft's Outlook program is produced as a paper printout, it will not display the background information and linkages to other messages that would appear if it were produced in the original .PST computer file format. An intermediate format such as TIFF (Tagged Image File Format) may include some or all of the additional information, depending on how it was generated, what the source information was and what the requesting party is looking for. An excellent discussion of these issues and their implications for discovery is found in the opinion of Magistrate Judge David Waxse in Williams v. Sprint/United Management Company, 230 F.R.D. 640 (D. Kan. 2005).

It would be easy for a requesting party to subject a producing party to extra work with demands for multiple forms of the same discovery information. Amended Rule 34(b) provides a counter to this by stating that "a party need not produce the same electronically stored information in more than one form." The court retains its general power under the discovery rules to override this provision in appropriate circumstances.

Rule 33
Production as answer [Amended Rule 33(d)]

Current Rule 33(d) gives a responding party the right to produce business records in answer to an interrogatory if the burden of deriving the answer will be substantially the same for both parties. Amended Rule 33(d) extends this right to the newly introduced category of electronically stored information.

The option to produce electronically stored information will be a boon in some situations. However, the Committee Note points out that a party that chooses to respond to a Rule 33 interrogatory by producing

electronically stored information may find itself obligated to provide technical support and even direct access to its electronic information system. This is because the rule obligates the producing party to provide "sufficient detail to permit the interrogating party to locate and to identify, as readily as can the party served, the records from which the answer may be ascertained," and further requires that the party serving the interrogatory be afforded "reasonable opportunity to examine, audit or inspect" the records that are identified. This degree of disclosure can raise concerns when sensitive confidentiality and privacy interests are involved. The Committee Note concludes that the burdens associated with producing electronically stored information in such cases may lead a responding party to "derive or ascertain and provide the answer itself" rather than invoke Rule 33(d).

Rule 26
Initial disclosures [Amended Rule 26(a)(1)(B)]

Current Rule 26(a)(1)(B) requires each party to disclose during the opening stages of a case a copy or a description by category and location of all documents and things in the disclosing party's possession, custody or control that it may use affirmatively to support its claims or defenses. The new category of electronically stored information is added to the list by the amendment to Rule 26(a)(1)(B).

Production issues and accessibility [Amended Rule 26(b)(2)(B)]

It may be easier and less expensive in many circumstances to produce discovery information in an electronic form than to do so in traditional, hard-copy formats. However, a wide variety of issues can plague a party attempting to collect, review and produce responsive electronically stored information. The information might be difficult or impossible to locate, stored in obsolete and unreadable file formats, stored in forms that require significant expenditures of time or money to render usable and comprehensible, so evanescent that it cannot be captured without alteration or at all, incredibly voluminous, or so riddled with highly sensitive confidential or privileged content that a privilege review becomes more expensive than the sums at issue in the litigation. Some of these issues challenge a party's ability to manage the discovery process after it has determined that a source contains relevant electronically stored information. But others affect a party's threshold ability to ascertain whether a source contains any discoverable information. Rule 26(b)(2)(B) addresses the latter difficulty by providing that electronically stored information need not be provided if the source is not reasonably accessible on account of either undue burden or undue cost.

The party seeking the discovery need not accept the objection of the party from whom the discovery is requested, and may move to compel the discovery in question. In the motion practice that follows, the burden is on the party from whom the discovery is sought to demonstrate "undue burden or cost."

The amended rule does not specify the test for whether the burden has been sustained. The public discussion preceding adoption of the amendment indicates that simple explanations such as "inactive" or "backup" will not suffice. Many enterprises routinely use their backup tapes as an archive and can readily spool up and restore a tape to search for and retrieve particular files. What the tests may be and how they evolve with changing technology will be closely watched as courts start to apply the amended rule.

The amended rule permits a court to compel production even if the party from whom the information is sought has sustained its burden, if the party requesting the information can show good cause. This inquiry invokes the balancing provisions of Rule 26(b)(2)(C). The Committee Note suggests several

factors that may be considered by a court seeking to balance the costs and benefits of discovery of electronically stored information. These include: (1) the specificity of the discovery request, (2) the quantity of information available from other and more easily accessed sources, (3) the failure to produce relevant information that seems likely to have existed but is no longer available on more easily accessed sources, (4) the likelihood of finding relevant, responsive information that cannot be obtained from other, more easily accessed sources, (5) predictions as to the importance and usefulness of the further information, (6) the importance of the issues at stake in the litigation, and (7) the parties' resources. Rule 26(b)(2)(C) further permits a court to alter the balance by, for example, setting limits on the permitted scope of discovery or shifting some of the production costs to the requesting party.

The foregoing inquiry is not a new one. Readers familiar with the current landscape of e-discovery decisions will recognize similarities to – and some differences from – the balancing tests that have been developed and applied in recent years by courts confronted with production and cost-shifting cases. A well-known example is the seven-factor test developed by Judge Scheindlin in her first Zubulake opinion (Zubulake v. UBS Warburg, LLC, 217 F.R.D. 309, 324 (S.D.N.Y. May 13, 2003)), which takes into account, but does not weight equally: (1) the extent to which the request is specifically tailored to discover relevant information, (2) the availability of such information from other sources, (3) the total cost of production, compared to the amount in controversy, (4) the total cost of production, compared to the resources available to each party, (5) the relative ability of each party to control costs and its incentive to do so, (6) the importance of the issues at stake in the litigation, and (7) the relative benefits to the parties of obtaining the information.

It is important to recognize that amended Rule 26(b)(2)(B) only relieves a party from having to produce electronically stored information from sources that are not reasonably accessible. It does not in any way address the party's responsibility to preserve relevant information on those sources during the pendency of the litigation.

Privileged and trial-preparation information [Amended Rule 26(b)(5)(B)]

One of the most difficult problems associated with discovery of electronically stored information is that of privileged or confidential content. Electronically stored information is frequently voluminous. It also characteristically includes metadata (which shows the history and context of the information) and links to other information. These additional layers are generally invisible or lost with hard-copy production, and often are not readily visible even to someone viewing the display from the application program that created the information. They are visible, however, to an appropriately armed investigator, and the information content can be extremely valuable or devastating, depending on the perspective of the party.

With privileged information in particular, the consequences of disclosure can shift the case dynamics radically. As Magistrate Judge Grimm observed in Hopson v. Mayor and City Council of Baltimore, 232 F.R.D. 228 (D. Md. 2005), the consequences may vary dramatically with the jurisdiction. He identified three dominant schools of thought: (1) "strict accountability", which almost always finds waiver, even if production is inadvertent, because "once confidentiality is lost, it can never be restored", (2) the "lenient/ "to err is human" approach, which views waiver as requiring intentional and knowing relinquishment of the privilege and finds waiver in circumstances of inadvertent disclosure only if caused by gross negligence, and (3) a "balancing test" approach that requires the court to make a case-by-case determination of whether the conduct is excusable so that it does not entail a necessary waiver. 232 F.R.D. at 235-36. Moreover, the scope of a waiver can vary from the contents of the particular information disclosed, through the information necessarily related to it, to all information encompassed

within the subject matter of the disclosed information. 232 F.R.D. at 237.

Amended Rule 26(b)(5)(B) does not even attempt to resolve the scope of waiver question. It leaves that to local substantive law. But it does create a process and procedure to stop the spread of an initial disclosure – figuratively, a "litigation hold" for privilege waivers – so that the parties and the supervising court have an unimpeded opportunity to address the consequences of the disclosure. It does so by requiring a party that has received allegedly privileged information, upon receipt of a notice of a claim of privilege, to "promptly return, sequester, or destroy the specified information and any copies it has." Moreover, the receiving party "may not use or disclose the information until the claim is resolved." Recognizing that a receiving party's first response to receipt of privileged information may well be to distribute it to other members of the litigation team, the amended rule further requires that the receiving party "must take reasonable steps to retrieve" the information.

The receiving party may bring the issue to the court's attention for determination. The producing party must preserve the information until the claim of non-waiver is resolved.

Conference of parties to plan discovery [Amended Rule 26(f)]

Current Rule 26(f) requires the parties to confer as soon as practicable, and in any event before the first scheduling conference, regarding the nature and basis of their claims and defenses, the possibilities for settlement and a discovery plan. Amended Rule 26(f) adds several items to counsel's agenda for their planning conference. These include (1) preservation of discoverable information, (2) any issues relating to disclosure or discovery of electronically stored information, including the form or forms in which it should be produced, and (3) any issues regarding claims of privilege or protection as trial-preparation material, including, if the parties agree on a procedure for asserting non-waiver after production of privileged or trial-preparation material, whether to ask the court to include their agreement in an order. As is discussed below, this last subject is particularly important for discovery of electronically stored information.

There are several reasons why counsel should engage in the extra planning needed to take full advantage of this opportunity to discuss the weaknesses and strong points of their clients' records systems. First, courts will expect it. The standing orders and local rules that have already been issued by, e.g., the District of Delaware, the District of New Jersey and the Middle District of Pennsylvania, are explicit in this regard.

Second, an agreement regarding non-waiver of privilege is best reached before any disclosures of privileged information have taken place. If the parties are concerned about the effectiveness of such arrangements as to third parties, early agreement and a decision to request that the court incorporate the agreement in an order is even more important. See, for example, Judge Grimm's decision in Hopson, 232 F.R.D. at 239, where he concluded, among matters, that the only way to ensure that the parties' non-waiver agreement will be effective against third parties is to include it in an order by the court.

Third, the planning conference is probably the best opportunity counsel will have to control the direction and, therefore, the cost and duration of discovery. The Committee Notes suggest that counsel consider various protocols to improve the efficiency and economy of discovery for electronically stored information. A specific example is the "quick peek", where the party from whom discovery is sought provides a sampling of requested materials for initial examination without waiving any privilege or protection, and requesting counsel then designates the particular information to be produced. Another approach might be to partition the discovery into phases, with review and production initially being

restricted to designated categories of information that have the highest probable value, and other categories being held back from review until it is determined that more or different information is needed.

What is striking about the amendment to Rule 26(f) is the emphasis placed on collaborative efforts between adversaries. Counsel may have difficulty adjusting to this direction in the rules amendments, but resistance will be at their peril. Local rules and standing orders are even more explicit about this requirement. A particularly strong example is the Electronic Discovery Default Standard by the District of Delaware (available under "Policies and Procedures" at http://www.ded.uscourts.gov/OrdersMain.htm). The Standard begins with the affirmative statement that: "It is expected that parties to a case will cooperatively reach agreement on how to conduct e-discovery." The Standard further requires that each party designate a single individual as its "e-discovery liaison." The e-discovery liaison need not be an attorney, but must be familiar with the party's systems and capabilities, be able to explain and answer relevant questions about the systems, be knowledgeable about the technical aspects of e-discovery, and be prepared to participate in e-discovery dispute resolutions.

Rule 16
Scheduling order [Amended Rule 16(b)]

Current Rule 16(b) requires the court to enter a scheduling order at an early stage of the case, after receiving counsel's report under Rule 26(f) or consulting with counsel. The scheduling order should, among matters, limit the time to complete discovery. The scheduling order may also include other matters pertinent to the administration of the case.

The amendment to Rule 16(b) adds "provisions for disclosure or discovery of electronically stored information" and "any agreements the parties reach for asserting claims of privilege or protection as trial preparation materials after production" to the matters that the court may include in the scheduling order. This language confirms the importance of counsel's early identification and discussion in the Rule 26(f) conference of possible issues and concerns relating to discovery of electronically stored information.

Rule 37
Safe harbor [Amended Rule 37(f)]

The amendment to Rule 37 is completely new. Sometimes referred to as the "safe harbor" rule, it provides:

(f) Electronically Stored Information. Absent exceptional circumstances, a court may not impose sanctions under these rules on a party for failing to provide electronically stored information lost as a result of the routine, good-faith operation of an electronic information system.

Counsel and parties should be careful about how much reliance they place on the protection afforded by amended Rule 37(f). It is directed very narrowly to information that has been lost due to the "routine operation of an electronic information system." The Committee Note explains that "routine operation" refers to the way such systems are "generally designed, programmed, and implemented to meet the party's technical and business needs."

Amended Rule 37(f) provides protection only if the operation of the system was in good faith. Many obligations of a party may affect what constitutes good faith. For example, a party has a general obligation to preserve information that is relevant to current or reasonably anticipated litigation. A party may have specific preservation obligations under common law, statutes, regulations and court orders. These obligations may well require a party to make reasonable efforts to stop an electronic information system from overwriting specific stored information. Whether a party has done so is a case-specific inquiry.

The amendment to Rule 37 also applies only to sanctions "under these rules." Sanctions under other rules, statues and regulations, such as the SEC regulations regarding preservation of broker-customer communications, are not affected by the amendment.

Notwithstanding its limitations, amended Rule 37(f) is significant because of the principle it sets forth, in the substantive text of the procedural rules and therefore with the explicit blessing of the Supreme Court, that destruction of discoverable and relevant electronically stored material is to be expected and tolerated in appropriate circumstances. Alternatively stated, strict liability is not the rule.

Rule 45
Subpoena practice

Amended Rule 45 on subpoenas recaps the changes to the other discovery rules in microcosm. Thus:

electronically stored information is added as a category of information that may be sought by subpoena **[Amended Rule 45(a)(1)(C)]**;

testing or sampling may be requested **[Amended Rule 45(a)(1)]**;

the subpoena may specify the form or forms in which electronically stored information is to be produced **[Amended Rule 45(a)(1)]**;

the default form of production for electronically stored information is "a form or forms in which the person ordinarily maintains it or in a form or forms that are reasonably usable" **[Amended Rule 45(d)(1)(B)]**;

the same electronically stored information need only be produced in one form **[Amended Rule 45(d)(1)(C)]**;

electronically stored information from sources identified as not reasonably accessible because of undue burden or cost need not be produced **[Amended Rule 45(d)(1)(D)]**;

the burden to show undue burden or cost is on the party from whom discovery is sought **[Amended Rule 45(d)(1)(D)]**;

if the burden of showing undue burden or cost is met, the court may nonetheless order discovery from such sources if the requesting party shows good cause, considering the limitations of Rule 26(b)(2)(C), and the court may specify the conditions upon which such discovery shall proceed **[Amended Rule 45(d)(1)(D)]**;

a claim of privilege or protection as trial-preparation material may be made after production of

discovery material by notice to the receiving party, and the receiving party must then promptly return, sequester, or destroy the specified information and any copies, may not use or disclose the information until the claim is resolved, and, if the information has been disclosed before receiving notice, must take reasonable steps to retrieve the information **[Amended Rule 45(d)(2)(B)]**;

the receiving party may promptly present the privilege or trial-preparation protection issue for determination **[Amended Rule 45(d)(2)(B)]**; and

the person who produced the information must preserve it until the claim is resolved **[Amended Rule 45 (d)(2)(B)]**.

Conclusion

Taken as a whole, the amended discovery rules provide courts, counsel and parties with a great deal of flexibility as they take on the challenges presented by advances in computer technology

E-discovery rules deadline moves up in some states

They may already be instituted in some states

August 14, 2006 (Computerworld) New rules governing electronic discovery of documents in civil litigation that were scheduled to take effect on Dec. 1 could go into effect three months ahead of time, or even earlier in some states.

Depending on which state you're in, those rules could go into effect Sept. 1 – or may already be in effect, according to Tom Allman, a senior counsel with Mayer, Brown, Rowe & Maw LLP in Chicago and one of the prime movers behind getting the rules changed in the first place.

The new rules (see: New e-discovery rules go into effect in December) require that when two companies are involved in civil litigation, they must meet within 30 days of the filing of the lawsuit to decide how to handle electronic data, including which records are to be shared and in which electronic format, as well as on a definition for "accessible data." On the federal level, those rules are scheduled to take effect on Dec. 1, unless Congress passes legislation to do otherwise, which nobody expects it to do, Allman said.

The state of New Jersey ordered on July 27 that it would adopt the rules in their entirety, effective Sept. 1. Several states, including California, Maryland and Texas, have either adopted some of the new rules or have had e-discovery rules of their own already, said Allman. In addition, the rules are being considered in about 10 other states, he said.

Allman advised users who are setting up or changing their e-discovery plans to not make rash decisions, such as eliminating as much data as possible to help reduce potential future liability.

"The fact that you might save something you regret is balanced by the fact that you might save something you need," he said. "You'd better base your decision on neutral grounds, and not because you're afraid something's going to bite you down the road."

Such decisions might also be different based on employee classification, Allman said. For example, it is more important to save all documents from scientists in a research and development division of a chemical company – where they might be needed later to justify a patent – than for the sales force, he said.

And organizations that are panicking because their instant messaging system doesn't allow them to save messages may not need to worry, Allman said. While there are no specific cases dealing with instant messaging, it was mentioned in one case in the context of material considered "ephemeral" and thus not required to be saved. "There is a substantial argument that you are not penalized for not instituting a system that captured all the past messages," Allman said.

Administrative Office of the Courts

Chief Justice Christine M. Durham
Utah Supreme Court
Chair, Utah Judicial Council

Daniel J. Becker
State Court Administrator
Myron K. March
Deputy Court Administrator

MEMORANDUM

To: Civil Procedures Committee
From: Tim Shea
Date: September 20, 2006
Re: Rule 23A. Derivative actions

Judge Schofield suggested that statute Rule 23A incorrectly refers to "a court of the United States," a phrase taken verbatim from the federal rule. The remainder of the amendments are changes to remove the gender specific pronouns or to create a checklist of allegations required in the complaint.

450 South State Street / P.O. Box 140241 / Salt Lake City, Utah 84114-0241 / 801-578-3808 / Fax: 801-578-3843 / email: tims@email.utcourts.gov

Rule ~~23.1~~ 23A. Derivative actions by shareholders.

(a) ~~In~~ The complaint in a derivative action brought by one or more shareholders or members to enforce a right of a corporation or of an unincorporated association~~, the corporation or association having failed to enforce a right which may properly be asserted by it, the complaint~~ shall be verified and shall allege:

(a)(1) the right that the corporation or association could have enforced and did not;

~~(1)~~ (a)(2) that the plaintiff was a shareholder or member at the time of the transaction ~~of which he complains~~ complained of or that ~~his~~ the plaintiff's share or membership thereafter devolved ~~on him~~ to the plaintiff by operation of law~~, and~~;

~~(2)~~ (a)(3) that the action is not a collusive one to confer jurisdiction on ~~a~~ the court ~~of the United States which~~ that it would not otherwise have~~.~~;

(a)(4) ~~The complaint shall also allege~~ with particularity, the plaintiff's efforts, if any, ~~made by the plaintiff~~ to obtain the desired action ~~he desires from the directors or comparable authority and, if necessary, from the shareholders or members,~~; and

(a)(5) the reasons for ~~his~~ the failure to obtain the action or for not making the effort.

(b) The derivative action may not be maintained if it appears that the plaintiff does not fairly and adequately represent the interests of the shareholders or members similarly situated in enforcing the right of the corporation or association.

(c) The action shall not be dismissed or compromised without the approval of the court, and notice of the proposed dismissal or compromise shall be given to shareholders or members in such manner as the court directs.

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MEMORANDUM

To: Civil Procedures Committee
From: Tim Shea
Date: September 20, 2006
Re: Actions by minors

In the 2006 general session, the Legislature enacted a law permitting a minor to be emancipated by judicial decree. Minors have been emancipated by marriage for many years. There are other statutes that permit a minor to maintain an action personally, rather than by representative, even though not emancipated.

15-2-1: "…[A]ll minors obtain their majority by marriage."
30-6-1: "Cohabitant" means … a person who is 16 years of age or older who …."
78-3a-1005: "An emancipated minor may … sue or be sued…."
78-45f-302: "A minor parent … may maintain a proceeding on behalf of or for the benefit of the minor's child."

There may be others. URCP 17 does not currently recognize a minor as a proper party, so I have prepared some suggested amendments.

Rule 17. Parties plaintiff and defendant.

(a) Real party in interest. Every action shall be prosecuted in the name of the real party in interest. An executor, administrator, guardian, bailee, trustee of an express trust, a party with whom or in whose name a contract has been made for the benefit of another, or a party authorized by statute may sue in that person's name without joining the party for whose benefit the action is brought; and when a statute so provides, an action for the use or benefit of another shall be brought in the name of the state of Utah. No action shall be dismissed on the ground that it is not prosecuted in the name of the real party in interest until a reasonable time has been allowed after objection for ratification of commencement of the action by, or joinder or substitution of, the real party in interest; and such ratification, joinder, or substitution shall have the same effect as if the action had been commenced in the name of the real party in interest.

(b) Minors or incompetent persons. An emancipated minor or a minor authorized by statute may appear personally. An unemancipated minor or an insane or incompetent person who is a party must appear either by a general guardian or by a guardian ad litem appointed in the particular case by the court in which the action is pending. A guardian ad litem may be appointed in any case when it is deemed by the court in which the action or proceeding is prosecuted expedient to represent the minor, insane or incompetent person in the action or proceeding, notwithstanding that the person may have a general guardian and may have appeared by the guardian. In an action in rem it shall not be necessary to appoint a guardian ad litem for any unknown party who might be a minor or an incompetent person.

(c) Guardian ad litem; how appointed. A guardian ad litem appointed by a court must be appointed as follows:

(c)(1) When the minor is plaintiff, upon the application of the minor, if the minor is of the age of fourteen years, or if under that age, upon the application of a relative or friend of the minor.

(c)(2) When the minor is defendant, upon the application of the minor if the minor is of the age of fourteen years and applies within 20 days after the service of the summons, or if under that age or if the minor neglects so to apply, then upon the application of a relative or friend of the minor, or of any other party to the action.

(c)(3) When a minor defendant resides out of this state, the plaintiff, upon motion therefor, shall be entitled to an order designating some suitable person to be guardian ad litem for the minor defendant, unless the defendant or someone in behalf of the defendant within 20 days after service of notice of such motion shall cause to be appointed a guardian for such minor. Service of such notice may be made upon the defendant's general or testamentary guardian located in the defendant's state; if there is none, such notice, together with the summons in the action, shall be served in the manner provided for publication of summons upon such minor, if over fourteen years of age, or, if under fourteen years of age, by such service on the person with whom the minor resides. The guardian ad litem for such nonresident minor defendant shall have 20 days after appointment in which to plead to the action.

(c)(4) When an insane or incompetent person is a party to an action or proceeding, upon the application of a relative or friend of such insane or incompetent person, or of any other party to the action or proceeding.

(d) Associates may sue or be sued by common name. When two or more persons associated in any business either as a joint-stock company, a partnership or other association, not a corporation, transact such business under a common name, whether it comprises the names of such associates or not, they may sue or be sued by such common name. Any judgment obtained against the association shall bind the joint property of all the associates in the same manner as if all had been named parties and had been sued upon their joint liability. The separate property of an individual member of the association may not be bound by the judgment unless the member is named as a party and the court acquires jurisdiction over the member.

(e) Action against a nonresident doing business in this state. When a nonresident person is associated in and conducts business within the state of Utah in one or more places in that person's own name or a common trade name, and the business is conducted under the supervision of a manager, superintendent or agent the person may be sued in the person's name in any action arising out of the conduct of the business.

(f) As used in these rules, the term plaintiff shall include a petitioner, and the term defendant shall include a respondent.