Agenda
Advisory Committee on Rules of Civil Procedure

May 23, 2007
4:00 to 6:00 p.m.

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

Approval of minutes	Fran Wikstrom
Final recommendations on rules published for comment.	Tim Shea
Rule 10. Sanctions for uncivil materials.	Tom Lee
Rules 7 and 101. Limits on order to show cause.	Tim Shea
Rule 40. Postponement of proceedings.	Frank Carney
Rule 41. Dismissal of actions.	Tim Shea
Style amendments.	Jon Hafen Mr. Schofield

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

Meeting Schedule

September 26, 2007
October 24, 2007
November 28, 2007

MINUTES

UTAH SUPREME COURT ADVISORY COMMITTEE ON THE RULES OF CIVIL PROCEDURE

Wednesday, April 25, 2007
Administrative Office of the Courts

Francis M. Wikstrom, Presiding

PRESENT: Francis M. Wikstrom, James T. Blanch, Francis J. Carney, Terrie T. McIntosh, Leslie W. Slaugh, Honorable Lyle R. Anderson, Honorable David O. Nuffer, Thomas R. Lee, Cullen Battle, Barbara Townsend, Debora Threedy, Lori Woffinden, Judge Derek Pullan

EXCUSED: Janet H. Smith, Judge R. Scott Waterfall, David W. Scofield, Jonathan Hafen, Todd M. Shaughnessy, Honorable Anthony B. Quinn, Honorable Anthony W. Schofield, Steven Marsden

STAFF: Tim Shea, Matty Branch, Trystan B. Smith

Mr. Wikstrom called the meeting to order at 4:05 p.m., and welcomed a new member to the committee, Judge Derek Pullan.

I. APPROVAL OF MINUTES.

Mr. Wikstrom entertained comments from the committee concerning the March 28, 2007 minutes. Seeing none, Mr. Carney moved to approve the March 28, 2007 minutes as submitted. The committee unanimously approved the minutes.

II. RULES 10 & 12. SANCTIONS FOR UNCIVIL MATERIALS.

Mr. Lee brought Rules 10 & 12 to the committee.

Mr. Lee indicated to the committee his concerns about satellite litigation with drafting a proposed Rule 11A to govern "redundant, immaterial, impertinent, or scandalous matters" in all pleadings and other papers.

Mr. Battle and Mr. Lee expressed their concerns about the need to address uncivil materials through either Rule 10 or Rule 12.

The committee indicated their desire to address uncivil materials in not only "pleadings" but "other papers." The committee debated several different proposed revisions.

The committee considered whether it should revise the language of Rule 12(f) where there was an established body of case law interpreting its language. The committee also

discussed whether a trial court should have the authority to strike an entire pleading or paper instead of the uncivil materials contained in a pleading or paper.

Mr. Wikstrom and Mr. Blanch suggested revising 10(h) to state, "Improper Content. The court may strike and disregard all or any part of a pleading or other paper that contains redundant, immaterial, or scandalous matter." The committee agreed with the revision.

The committee agreed it would not revise Rule 12(f).

III. RULES 7 & 101. MOTIONS.

Mr. Shea brought Rules 7 and 101 to the committee. Mr. Shea drafted a proposed Rule 7(b)(2) placing explicit limits on the circumstances in which a party may seek an order to show cause. Mr. Shea also amended Rule 101 (i) to explicitly limit orders to show cause to those circumstances where a party seeks to enforce an existing order or sanctions for violating an existing order.

Mr. Carney questioned whether it was necessary to include the last sentence of the proposed Rule 7(b)(2) indicating the "Court shall proceed in accordance with Utah Code Title 78, Chapter 32, Contempt." The committee agreed to remove the sentence.

Judge Nuffer suggested the committee revise the second to last sentence of Rule 7(b)(2) to state, "Upon motion supported by affidavit or other evidence sufficient to show probable cause to believe a party has violated a court order . . . ." The committee unanimously agreed with Judge Nuffer's suggested revision.

The committee further agreed to adopt the changes to Rule 101 (i).

IV. STYLE AMENDMENTS.

The committee agreed to address style amendments at the next meeting.

V. RULE 40. ASSIGNMENT OF CASES FOR TRIAL; CONTINUANCE.

Mr. Carney brought Rule 40 to the committee. Mr. Carney questioned whether Rule 40(a) was still necessary in light of the elimination of the Code of Judicial Administration.

Judge Nuffer indicated that Rule 16 provided authority for a party to file a certificate for readiness for trial. Ms. Townsend moved to remove Rule 40(a). The committee unanimously agreed to the subsection's removal.

Judge Anderson suggested the title to Rule 40 should be revised. The committee voted to revise the title of Rule 40 to state, "Postponement of the Trial" instead of "Continuance of the Trial."

VI. ADJOURNMENT.

The meeting adjourned at 5:30 p.m. The next committee meeting will be held at 4:00 p.m. on Wednesday, May 23, 2007, 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: May 15, 2007
Re: Comments to Rules

The comment period for several proposed rule changes has expired. Although the changes are significant, we generated very little comment. Rules of Evidence 509 and 702 gathered all of the attention. The following rules were published for comment:

URCP 016. Pretrial conferences, scheduling, and management conferences. Amend. Coordinates sanction provisions with those in Rule 35 and Rule 37. Adopt the federal provisions governing discovery of electronically stored information. Proposed effective date: November 1, 2007.

URCP 023A. Derivative actions by shareholders. Renumber and amend. Renumbers the rule to conform to Supreme Court protocol. Amends the rule to more clearly delineate the content of the petition. Proposed effective date: November 1, 2007.

URCP 026. General provisions governing discovery. Amend. Adopt the federal provisions governing discovery of electronically stored information. Proposed effective date: November 1, 2007.

URCP 033. Interrogatories to parties. Amend. Adopt the federal provisions governing discovery of electronically stored information. Proposed effective date: November 1, 2007.

URCP 034. Production of documents and things and entry upon land for inspection and other purposes. Amend. Adopt the federal provisions governing discovery of electronically stored information. Proposed effective date: November 1, 2007.

URCP 035. Physical and mental examination of persons. Amend. Coordinates sanction provisions with those in Rule 16 and Rule 37. Proposed effective date: November 1, 2007.

URCP 037. Failure to make or cooperate in discovery; sanctions. Amend. Creates sanctions for spoliation of evidence. Coordinates sanction provisions with those in Rule 16 and Rule 35. Adopt the federal provisions governing discovery of electronically stored information. Proposed effective date: November 1, 2007.

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URCP 045. Subpoena. Amend. Require person scheduling deposition to give advance notice before serving subpoena. Permit person serving subpoena rather than recipient to decide whether records should be copied and delivered or delivered for inspection and copying. Requires advance payment of costs upon request. Clarifies the grounds and procedures for objecting to a subpoena. Requires declaration under penalty of perjury to accompany documents produced under a subpoena. Adopt the federal provisions governing discovery of electronically stored information. Delete committee note. Proposed effective date: November 1, 2007.

URCP Form 40. Subpoena. Repeal & Reenact. Subpoena, Notice of Rights, Objection. Proposed effective date: November 1, 2007.

URCP 101. Motion practice before court commissioners. Amend. Permit motion for default judgment to be heard by the court commissioner. Technical amendments. Proposed effective date: November 1, 2007.

URCP 106. Modification of divorce decrees. Amend. Expand to include modification of any final domestic relations order. Proposed effective date: November 1, 2007.

We received only the following two comments

Comments: Rules of Civil Procedure

I support the modification of URCP 37 to include a specific reference to sanctions for destruction or spoliation of evidence. The courts should be more actively involved in both preventing spoliation - through appropriate preservation and disclosure orders, CMOs, etc. - and in sanctioning spoliation/destruction when it comes to light.

I would even like to see the rule expanded to not just rely on the existence of a duty to preserve elsewhere, but affirmatively state a duty to preserve, for a reasonable time, evidence that is reasonably likely to be pertinent to an action when a party knows or should reasonably anticipate that a legal claim has been or likely will be brought.

Thanks for your efforts.

Posted by Edward Havas February 14, 2007 03:57 PM

Re: Rule 101. Is there any interest in amending Rule 101 to eliminate the requirement that even unopposed motions before commissioners be subject to a hearing? Mandatory hearings on unopposed motions appears to me as worse than futile for both litigants and the court.

Posted by Eric K. Johnson February 9, 2007 10:57 AM

I inquired of the commissioners about the practice and their uniform response was that it is impossible to tell in advance whether the motion will be contested. If the parties stipulate to an agreement the clerk will strike the hearing from the calendar.

Encl. Draft rules

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) provisions for preservation, disclosure or discovery of electronically stored information;

(b)(7) any agreements the parties reach for asserting claims of privilege or of protection as trial-preparation material after production; and

~~(b)(6)~~ (b)(8) 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 ~~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.

Rule 26. General provisions governing discovery.

(a) Required disclosures; Discovery methods.

(a)(1) Initial disclosures. Except in cases exempt under subdivision (a)(2) and except as otherwise stipulated or directed by order, a party shall, without awaiting a discovery request, provide to other parties:

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

(a)(1)(B) a copy of, or a description by category and location of, all discoverable documents, data compilations, electronically stored information, and tangible things in the possession, custody, or control of the party supporting its claims or defenses, unless solely for impeachment;

(a)(1)(C) a computation of any category of damages claimed by the disclosing party, making available for inspection and copying as under Rule 34 all discoverable documents or other evidentiary material on which such computation is based, including materials bearing on the nature and extent of injuries suffered; and

(a)(1)(D) for inspection and copying as under Rule 34 any insurance agreement under which any person carrying on an insurance business may be liable to satisfy part or all of a judgment which may be entered in the case or to indemnify or reimburse for payments made to satisfy the judgment.

Unless otherwise stipulated by the parties or ordered by the court, the disclosures required by subdivision (a)(1) shall be made within 14 days after the meeting of the parties under subdivision (f). Unless otherwise stipulated by the parties or ordered by the court, a party joined after the meeting of the parties shall make these disclosures within 30 days after being served. A party shall make initial disclosures based on the information then reasonably available and is not excused from making disclosures because the party has not fully completed the investigation of the case or because the party challenges the sufficiency of another party's disclosures or because another party has not made disclosures.

(a)(2) Exemptions.

(a)(2)(A) The requirements of subdivision (a)(1) and subdivision (f) do not apply to actions:

(a)(2)(A)(i) based on contract in which the amount demanded in the pleadings is $20,000 or less;

(a)(2)(A)(ii) for judicial review of adjudicative proceedings or rule making proceedings of an administrative agency;

(a)(2)(A)(iii) governed by Rule 65B or Rule 65C;

(a)(2)(A)(iv) to enforce an arbitration award;

(a)(2)(A)(v) for water rights general adjudication under Title 73, Chapter 4; and

(a)(2)(A)(vi) in which any party not admitted to ~~the~~ practice law in Utah is not represented by counsel.

(a)(2)(B) In an exempt action, the matters subject to disclosure under subpart (a)(1) are subject to discovery under subpart (b).

(a)(3) Disclosure of expert testimony.

(a)(3)(A) A party shall disclose to other parties the identity of any person who may be used at trial to present evidence under Rules 702, 703, or 705 of the Utah Rules of Evidence.

(a)(3)(B) Unless otherwise stipulated by the parties or ordered by the court, this disclosure shall, with respect to a witness who is retained or specially employed to provide expert testimony in the case or whose duties as an employee of the party regularly involve giving expert testimony, be accompanied by a written report prepared and signed by the witness or party. The report shall contain the subject matter on which the expert is expected to testify; the substance of the facts and opinions to which the expert is expected to testify; a summary of the grounds for each opinion; the qualifications of the witness, including a list of all publications authored by the witness within the preceding ten years; the compensation to be paid for the study and testimony; and a listing of any other cases in which the witness has testified as an expert at trial or by deposition within the preceding four years.

(a)(3)(C) Unless otherwise stipulated by the parties or ordered by the court, the disclosures required by subdivision (a)(3) shall be made within 30 days after the expiration of fact discovery as provided by subdivision (d) or, if the evidence is intended

solely to contradict or rebut evidence on the same subject matter identified by another party under paragraph (3)(B), within 60 days after the disclosure made by the other party.

(a)(4) Pretrial disclosures. A party shall provide to other parties the following information regarding the evidence that it may present at trial other than solely for impeachment:

(a)(4)(A) the name and, if not previously provided, the address and telephone number of each witness, separately identifying witnesses the party expects to present and witnesses the party may call if the need arises;

(a)(4)(B) the designation of witnesses whose testimony is expected to be presented by means of a deposition and, if not taken stenographically, a transcript of the pertinent portions of the deposition testimony; and

(a)(4)(C) an appropriate identification of each document or other exhibit, including summaries of other evidence, separately identifying those which the party expects to offer and those which the party may offer if the need arises.

Unless otherwise stipulated by the parties or ordered by the court, the disclosures required by subdivision (a)(4) shall be made at least 30 days before trial. Within 14 days thereafter, unless a different time is specified by the court, a party may serve and file a list disclosing (i) any objections to the use under Rule 32(a) of a deposition designated by another party under subparagraph (B) and (ii) any objection, together with the grounds therefor, that may be made to the admissibility of materials identified under subparagraph (C). Objections not so disclosed, other than objections under Rules 402 and 403 of the Utah Rules of Evidence, shall be deemed waived unless excused by the court for good cause shown.

(a)(5) Form of disclosures. Unless otherwise stipulated by the parties or ordered by the court, all disclosures under paragraphs (1), (3) and (4) shall be made in writing, signed and served.

(a)(6) Methods to discover additional matter. Parties may obtain discovery by one or more of the following methods: depositions upon oral examination or written questions; written interrogatories; production of documents or things or permission to enter upon

land or other property, for inspection and other purposes; physical and mental examinations; and requests for admission.

(b) Discovery scope and limits. Unless otherwise limited by order of the court in accordance with these rules, the scope of discovery is as follows:

(b)(1) In general. Parties may obtain discovery regarding any matter, not privileged, which is relevant to the subject matter involved in the pending action, whether it relates to the claim or defense of the party seeking discovery or to the claim or defense of any other party, including the existence, description, nature, custody, condition, and location of any books, documents, or other tangible things and the identity and location of persons having knowledge of any discoverable matter. It is not ground for objection that the information sought will be inadmissible at the trial if the information sought appears reasonably calculated to lead to the discovery of admissible evidence.

(b)(2) 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. The party shall expressly make any claim that the source is not reasonably accessible, describing the source, the nature and extent of the burden, the nature of the information not provided, and any other information that will enable other parties to assess the claim. 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 order discovery from such sources if the requesting party shows good cause, considering the limitations of subsection (b)(3). The court may specify conditions for the discovery.

~~(b)(2)~~ (b)(3) Limitations. The frequency or extent of use of the discovery methods set forth in Subdivision (a)(6) shall be limited by the court if it determines that:

~~(i)~~ (b)(3)(A) 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)~~ (b)(3)(B) the party seeking discovery has had ample opportunity by discovery in the action to obtain the information sought; or

~~(iii)~~ (b)(3)(C) the discovery is unduly burdensome or expensive, taking into account the needs of the case, the amount in controversy, limitations on the parties' resources, and the importance of the issues at stake in the litigation. The court may act upon its own initiative after reasonable notice or pursuant to a motion under Subdivision (c).

~~(b)(3)~~ (b)(4) Trial preparation: Materials. Subject to the provisions of Subdivision (b)(4) of this rule, a party may obtain discovery of documents and tangible things otherwise discoverable under Subdivision (b)(1) of this rule and prepared in anticipation of litigation or for trial by or for another party or by or for that other party's representative (including the party's attorney, consultant, surety, indemnitor, insurer, or agent) only upon a showing that the party seeking discovery has substantial need of the materials in the preparation of the case and that the party is unable without undue hardship to obtain the substantial equivalent of the materials by other means. In ordering discovery of such materials when the required showing has been made, the court shall protect against disclosure of the mental impressions, conclusions, opinions, or legal theories of an attorney or other representative of a party concerning the litigation.

A party may obtain without the required showing a statement concerning the action or its subject matter previously made by that party. Upon request, a person not a party may obtain without the required showing a statement concerning the action or its subject matter previously made by that person. If the request is refused, the person may move for a court order. The provisions of Rule 37(a)(4) apply to the award of expenses incurred in relation to the motion. For purposes of this paragraph, a statement previously made is (A) a written statement signed or otherwise adopted or approved by the person making it, or (B) a stenographic, mechanical, electrical, or other recording, or a transcription thereof, which is a substantially verbatim recital of an oral statement by the person making it and contemporaneously recorded.

(b)(4) Trial preparation: Experts.

(b)(4)(A) A party may depose any person who has been identified as an expert whose opinions may be presented at trial. If a report is required under subdivision (a)(3)(B), any deposition shall be conducted within 60 days after the report is provided.

(b)(4)(B) A party may discover facts known or opinions held by an expert who has been retained or specially employed by another party in anticipation of litigation or

preparation for trial and who is not expected to be called as a witness at trial, only as provided in Rule 35(b) or upon a showing of exceptional circumstances under which it is impracticable for the party seeking discovery to obtain facts or opinions on the same subject by other means.

(b)(4)(C) Unless manifest injustice would result,

(b)(4)(C)(i) The court shall require that the party seeking discovery pay the expert a reasonable fee for time spent in responding to discovery under Subdivision (b)(4) of this rule; and

(b)(4)(C)(ii) With respect to discovery obtained under Subdivision (b)(4)(A) of this rule the court may require, and with respect to discovery obtained under Subdivision (b)(4)(B) of this rule the court shall require, the party seeking discovery to pay the other party a fair portion of the fees and expenses reasonably incurred by the latter party in obtaining facts and opinions from the expert.

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

(b)(5)(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)(5)(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.

(c) Protective orders. Upon motion by a party or by the person from whom discovery is sought, accompanied by a certification that the movant has in good faith conferred or

attempted to confer with other affected parties in an effort to resolve the dispute without court action, and for good cause shown, the court in which the action is pending or alternatively, on matters relating to a deposition, the court in the district where the deposition is to be taken may make any order which justice requires to protect a party or person from annoyance, embarrassment, oppression, or undue burden or expense, including one or more of the following:

(c)(1) that the discovery not be had;

(c)(2) that the discovery may be had only on specified terms and conditions, including a designation of the time or place;

(c)(3) that the discovery may be had only by a method of discovery other than that selected by the party seeking discovery;

(c)(4) that certain matters not be inquired into, or that the scope of the discovery be limited to certain matters;

(c)(5) that discovery be conducted with no one present except persons designated by the court;

(c)(6) that a deposition after being sealed be opened only by order of the court;

(c)(7) that a trade secret or other confidential research, development, or commercial information not be disclosed or be disclosed only in a designated way;

(c)(8) that the parties simultaneously file specified documents or information enclosed in sealed envelopes to be opened as directed by the court.

If the motion for a protective order is denied in whole or in part, the court may, on such terms and conditions as are just, order that any party or person provide or permit discovery. The provisions of Rule 37(a)(4) apply to the award of expenses incurred in relation to the motion.

(d) Sequence and timing of discovery. Except for cases exempt under subdivision (a)(2), except as authorized under these rules, or unless otherwise stipulated by the parties or ordered by the court, a party may not seek discovery from any source before the parties have met and conferred as required by subdivision (f). Unless otherwise stipulated by the parties or ordered by the court, fact discovery shall be completed within 240 days after the first answer is filed. Unless the court upon motion, for the convenience of parties and witnesses and in the interests of justice, orders otherwise,

methods of discovery may be used in any sequence and the fact that a party is conducting discovery, whether by deposition or otherwise, shall not operate to delay any other party's discovery.

(e) Supplementation of responses. A party who has made a disclosure under subdivision (a) or responded to a request for discovery with a response is under a duty to supplement the disclosure or response to include information thereafter acquired if ordered by the court or in the following circumstances:

(e)(1) A party is under a duty to supplement at appropriate intervals disclosures under subdivision (a) if the party learns that in some material respect the information disclosed is incomplete or incorrect and if the additional or corrective information has not otherwise been made known to the other parties during the discovery process or in writing. With respect to testimony of an expert from whom a report is required under subdivision (a)(3)(B) the duty extends both to information contained in the report and to information provided through a deposition of the expert.

(e)(2) A party is under a duty seasonably to amend a prior response to an interrogatory, request for production, or request for admission if the party learns that the response is in some material respect incomplete or incorrect and if the additional or corrective information has not otherwise been made known to the other parties during the discovery process or in writing.

(f) Discovery and scheduling conference.

The following applies to all cases not exempt under subdivision (a)(2), except as otherwise stipulated or directed by order.

(f)(1) The parties shall, as soon as practicable after commencement of the action, meet in person or by telephone to discuss the nature and basis of their claims and defenses, to discuss the possibilities for settlement of the action, to make or arrange for the disclosures required by subdivision (a)(1), to discuss any issues relating to preserving discoverable information and to develop a stipulated discovery plan. Plaintiff's counsel shall schedule the meeting. The attorneys of record shall be present at the meeting and shall attempt in good faith to agree upon the discovery plan.

(f)(2) The plan shall include:

(f)(2)(A) what changes should be made in the timing, form, or requirement for disclosures under subdivision (a), including a statement as to when disclosures under subdivision (a)(1) were made or will be made;

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

(f)(2)(C) any issues relating to preservation, disclosure or discovery of electronically stored information, including the form or forms in which it should be produced;

(f)(2)(D) 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;

~~(f)(2)(C)~~ (f)(2)(E) what changes should be made in the limitations on discovery imposed under these rules, and what other limitations should be imposed;

~~(f)(2)(D)~~ (f)(2)(F) the deadline for filing the description of the factual and legal basis for allocating fault to a non-party and the identity of the non-party; and

~~(f)(2)(E)~~ (f)(2)(G) any other orders that should be entered by the court.

(f)(3) Plaintiff's counsel shall submit to the court within 14 days after the meeting and in any event no more than 60 days after the first answer is filed a proposed form of order in conformity with the parties' stipulated discovery plan. The proposed form of order shall also include each of the subjects listed in Rule 16(b)(1)-(6), except that the date or dates for pretrial conferences, final pretrial conference and trial shall be scheduled with the court or may be deferred until the close of discovery. If the parties are unable to agree to the terms of a discovery plan or any part thereof, the plaintiff shall and any party may move the court for entry of a discovery order on any topic on which the parties are unable to agree. Unless otherwise ordered by the court, the presumptions established by these rules shall govern any subject not included within the parties' stipulated discovery plan.

(f)(4) Any party may request a scheduling and management conference or order under Rule 16(b).

(f)(5) A party joined after the meeting of the parties is bound by the stipulated discovery plan and discovery order, unless the court orders on stipulation or motion a

modification of the discovery plan and order. The stipulation or motion shall be filed within a reasonable time after joinder.

(g) Signing of discovery requests, responses, and objections. Every request for discovery or response or objection thereto made by a party shall be signed by at least one attorney of record or by the party if the party is not represented, whose address shall be stated. The signature of the attorney or party constitutes a certification that the person has read the request, response, or objection and that to the best of the person's knowledge, information, and belief formed after reasonable inquiry it is: (1) consistent with these rules and warranted by existing law or a good faith argument for the extension, modification, or reversal of existing law; (2) not interposed for any improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation; and (3) not unreasonable or unduly burdensome or expensive, given the needs of the case, the discovery already had in the case, the amount in controversy, and the importance of the issues at stake in the litigation. If a request, response, or objection is not signed, it shall be stricken unless it is signed promptly after the omission is called to the attention of the party making the request, response, or objection, and a party shall not be obligated to take any action with respect to it until it is signed.

If a certification is made in violation of the rule, the court, upon motion or upon its own initiative, shall impose upon the person who made the certification, the party on whose behalf the request, response, or objection is made, or both, an appropriate sanction, which may include an order to pay the amount of the reasonable expenses incurred because of the violation, including a reasonable attorney fee.

(h) Deposition where action pending in another state. Any party to an action or proceeding in another state may take the deposition of any person within this state, in the same manner and subject to the same conditions and limitations as if such action or proceeding were pending in this state, provided that in order to obtain a subpoena the notice of the taking of such deposition shall be filed with the clerk of the court of the county in which the person whose deposition is to be taken resides or is to be served, and provided further that all matters arising during the taking of such deposition which by the rules are required to be submitted to the court shall be submitted to the court in the county where the deposition is being taken.

(i) Filing.

(i)(1) Unless otherwise ordered by the court, a party shall not file disclosures or requests for discovery with the court, but shall file only the original certificate of service stating that the disclosures or requests for discovery have been served on the other parties and the date of service. Unless otherwise ordered by the court, a party shall not file a response to a request for discovery with the court, but shall file only the original certificate of service stating that the response has been served on the other parties and the date of service. Except as provided in Rule 30(f)(1), Rule 32 or unless otherwise ordered by the court, depositions shall not be filed with the court.

(i)(2) A party filing a motion under subdivision (c) or a motion under Rule 37(a) shall attach to the motion a copy of the request for discovery or the response which is at issue.

Rule 33. Interrogatories to parties.

(a) Availability; procedures for use. Without leave of court or written stipulation, any party may serve upon any other party written interrogatories, not exceeding 25 in number including all discrete subparts, to be answered by the party served or, if the party served is a public or private corporation, a partnership, an association, or a governmental agency, by any officer or agent, who shall furnish such information as is available to the party. Leave to serve additional interrogatories shall be granted to the extent consistent with the principles of Rule 26(b)(2). Without leave of court or written stipulation, interrogatories may not be served before the time specified in Rule 26(d).

(b) Answers and objections.

(b)(1) Each interrogatory shall be answered separately and fully in writing under oath, unless it is objected to, in which event the objecting party shall state the reasons for objection and shall answer to the extent the interrogatory is not objectionable.

(b)(2) The answers are to be signed by the person making them, and the objections signed by the attorney making them.

(b)(3) The party upon whom the interrogatories have been served shall serve a copy of the answers and objections, if any, within 30 days after the service of the interrogatories. A shorter or longer time may be ordered by the court or, in the absence of such an order, agreed to in writing by the parties subject to Rule 29.

(b)(4) All grounds for an objection to an interrogatory shall be stated with specificity. Any ground not stated in a timely objection is waived unless the party's failure to object is excused by the court for good cause shown.

(b)(5) The party submitting the interrogatories may move for an order under Rule 37(a) with respect to any objection to or other failure to answer an interrogatory.

(c) Scope; use at trial. Interrogatories may relate to any matters which can be inquired into under Rule 26(b), and the answers may be used to the extent permitted by the Rules of Evidence.

An interrogatory otherwise proper is not necessarily objectionable merely because an answer to the interrogatory involves an opinion or contention that relates to fact or the application of law to fact, but the court may order that such an interrogatory need

not be answered until after designated discovery has been completed or until a pretrial conference or other later time.

(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. Production of documents and things and entry upon land for inspection and other purposes.

(a) Scope. Any party may serve on any other party a request

(a)(1) to produce and permit the party making the request, or someone acting on his behalf, to inspect, ~~and~~ copy, test or sample any designated documents or electronically stored information (including writings, drawings, graphs, charts, photographs, ~~phono-records~~ 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 ~~through detection devices~~ into reasonably usable form), or to inspect, ~~and~~ 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

(a)(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.

(b)(1) The request shall set forth the items to be inspected either by individual item or by category, and describe each item and category 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).

(b)(2) 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, ~~in which event~~ including an objection to the requested form or forms for producing electronically stored information, stating the reasons for the objection ~~shall be stated~~. 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.

(b)(3) Unless the parties otherwise agree or the court otherwise orders:

(b)(3)(A) ~~A~~ 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~~.~~;

(b)(3)(B) 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

(b)(3)(C) a party need not produce the same electronically stored information in more than one form.

(c) Persons not parties. This rule does not preclude an independent action against a person not a party for production of documents and things and permission to enter upon land.

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 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.

(d)(2) 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).

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 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.

(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. 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. Subpoena.

(a) Form; issuance.

(a)(1) Every subpoena shall:

(a)(1)(A) issue from the court in which the action is pending;

(a)(1)(B) state the title and case number of the action, the name of the court from which it is issued, and the name and address of the party or attorney ~~serving~~ responsible for 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~~ testing or sampling documents, electronically stored information or tangible things in the possession, custody or control of that person, or

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

(a)(1)(C)(iv) to appear and to permit inspection of premises~~, 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) set forth the text of~~ (a)(1)(E) include a ~~N~~notice to ~~P~~persons ~~S~~served with a ~~S~~subpoena~~,~~ in a form substantially similar ~~form~~ to the subpoena form appended to these rules. A subpoena may specify the form or forms in which electronically stored information is to be produced.

~~(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 responsible for 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 or electronically stored information, to produce documents, electronically stored information or tangible things for inspection, copying, testing or sampling or to permit inspection of premises, the party or attorney responsible for issuing the subpoena shall serve each party with notice of the subpoena by delivery or other method of actual notice before serving 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, electronically stored information or tangible 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, electronically stored information or tangible 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 responsible for issuing the subpoena shall pay the reasonable cost of producing or copying ~~the~~ documents, electronically stored information or tangible things. Upon the request of any other party and the payment of reasonable costs, the party ~~serving~~ or attorney responsible for issuing the subpoena shall provide to the requesting party copies of all documents, electronically stored information 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 or electronically stored information, to produce ~~or to permit inspection and copying of~~ documents, electronically stored information or tangible things, 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 cost;

(e)(3)(G) requires the person to produce electronically stored information in a form or forms to which the person objects;

(e)(3)(H) requires the person to provide electronically stored information from sources that the person identifies as not reasonably accessible because of undue burden or cost; or

(e)(3)(I) 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.

(e)(4)(C) 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 responsible for issuing the subpoena to contest the objection.

(e)(4)(D) If the objection is that the electronically stored information is from sources that are not reasonably accessible because of undue burden or cost, the person from whom discovery is sought must show that the information sought is not reasonably accessible because of undue burden or cost.

(e)(4)(E) The person shall serve the objection on the party or attorney responsible for issuing the subpoena. The party or attorney responsible for 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 responsible for 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~~ compelling 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 responsible for 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 electronically stored information or to produce documents, electronically stored information or tangible things shall serve on the party or attorney responsible for issuing the subpoena a declaration under penalty of law stating in substance:

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

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

(f)(1)(C) that the documents, electronically stored information or tangible things 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, electronically stored information or tangible things.

~~(d)(1)~~ (f)(2) A person ~~responding to a subpoena~~ commanded to copy and mail or deliver documents or electronically stored information or to produce documents, electronically stored information or tangible things 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.~~

(f)(3) 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 the form or forms in which the person ordinarily maintains it or in a form or forms that are reasonably usable.

(f)(4) If the information produced in response to a subpoena is subject to a claim of privilege or of protection as trial-preparation material, the person making the claim may notify any party who received the information of the claim and the basis for it. After being notified, the party must promptly return, sequester, or destroy the specified information and any copies of it 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 the information. The person who produced the information must preserve the information until the claim is resolved.

~~(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 of 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 law 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 Utah Code Section 46-5-101, 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

Rule 101. Motion practice before court commissioners.

(a) Written motion required. An application to a court commissioner for an order shall be by motion which, unless made during a hearing, shall be made in accordance with this rule. A motion shall be in writing and state succinctly and with particularity the relief sought and the grounds for the relief sought.

(b) Time to file and serve. The moving party shall file the motion and attachments with the clerk of the court and obtain a hearing date and time. The moving party shall serve the responding party with the motion and attachments and notice of the hearing at least 14 calendar days before the hearing. A party may file and serve with the motion a memorandum supporting the motion. If service is more than 90 days after the date of entry of the most recent appealable order, service may not be made through counsel.

(c) Response; reply. The responding party shall file and serve the moving party with a response and attachments at least 5 business days before the hearing. A party may file and serve with the response a memorandum opposing the motion. The moving party may file and serve the responding party with a reply and attachments at least 3 business days before the hearing. The reply is limited to responding to matters raised in the response.

(d) Attachments; objection to failure to attach.

(d)(1) As used in this rule “attachments” includes all records, forms, information and affidavits necessary to support the party’s position. Attachments for motions and responses regarding alimony shall include income verification and a financial declaration. Attachments for motions and responses regarding child support and child custody shall include income verification, a financial declaration and a child support worksheet. A financial declaration shall be verified.

(d)(2) If attachments necessary to support the moving party’s position are not served with the motion, the responding party may file and serve an objection to the defect with the response. If attachments necessary to support the responding party’s position are not served with the response, the moving party may file and serve an objection to the defect with the reply. The defect shall be cured within 2 business days after notice of the defect or at least 2 business days before the hearing, whichever is earlier.

(e) Courtesy copy. Parties shall deliver to the court commissioner a courtesy copy of all papers filed with the clerk of the court within the time required for filing with the clerk. The courtesy copy shall state the name of the court commissioner and the date and time of the hearing.

(f) Late filings; sanctions. If a party files or serves papers beyond the time required in subsections (b) or (c), the court commissioner may hold or continue the hearing, reject the papers, impose costs and attorney fees caused by the failure and by the continuance, and impose other sanctions as appropriate.

(g) Counter motion. Opposing a motion is not sufficient to grant relief to the responding party. An application for an order may be raised by counter motion. This rule applies to counter motions except that a counter motion shall be filed and served with the response. The response to the counter motion shall be filed and served no later than the ~~response~~ reply. The reply to the response to the counter motion shall be filed and served at least 2 business days before the hearing. A separate notice of hearing on counter motions is not required.

(h) Limit on hearing. The court commissioner shall not hold a hearing on a motion before the deadline for an appearance by the respondent under Rule 12.

(i) Limit on order to show cause. The court shall issue an order to show cause only upon motion supported by affidavit or other evidence sufficient to show probable cause to believe a party has violated a court order. The court commissioner shall proceed in accordance with Utah Code Title 78, Chapter 32, Contempt.

(j) Motions to judge. The following motions shall be to the judge to whom the case is assigned: motion for alternative service; motion to waive 90-day waiting period; motion to waive divorce education class; ~~motion for entry of default judgment;~~ motion for leave to withdraw after a case has been certified as ready for trial; and motions in limine. A court may provide that other motions be to the judge.

Rule 106. Modification of ~~divorce decrees~~ final domestic relations order.

(a) Commencement; service; answer. Except as provided in Utah Code Section 30-3-37, proceedings to modify a divorce decree or other final domestic relations order shall be commenced by filing a petition to modify ~~the divorce decree~~. Service of the petition, or motion under Section 30-3-37, and summons upon the opposing party shall be in accordance with Rule 4. The responding party shall serve the answer within the time permitted by Rule 12.

(b) Temporary orders.

(b)(1) The judgment, order or decree sought to be modified remains in effect during the pendency of the petition. The court may make the modification retroactive to the date on which the petition was served. During the pendency of a petition to modify, the court:

(b)(1)(A) may order a temporary modification of child support as part of a temporary modification of custody or parent-time; and

(b)(1)(B) may order a temporary modification of custody or parent-time to address an immediate and irreparable harm or to ratify changes made by the parties, provided that the modification serves the best interests of the child.

(b)(2) Nothing in this rule limits the court's authority to enter temporary orders under Utah Code Section 30-3-3.

Rule 10. Form of pleadings and other papers.

(a) Caption; names of parties; other necessary information. All pleadings and other papers filed with the court shall contain a caption setting forth the name of the court, the title of the action, the file number, the name of the pleading or other paper, and the name, if known, of the judge (and commissioner if applicable) to whom the case is assigned. In the complaint, the title of the action shall include the names of all the parties, but other pleadings and papers need only state the name of the first party on each side with an indication that there are other parties. A party whose name is not known shall be designated by any name and the words "whose true name is unknown." In an action in rem, unknown parties shall be designated as "all unknown persons who claim any interest in the subject matter of the action." Every pleading and other paper filed with the court shall also state the name, address, telephone number and bar number of any attorney representing the party filing the paper, which information shall appear in the top left-hand corner of the first page. Every pleading shall state the name and address of the party for whom it is filed; this information shall appear in the lower left-hand corner of the last page of the pleading. The plaintiff shall file together with the complaint a completed cover sheet substantially similar in form and content to the cover sheet approved by the Judicial Council.

(b) Paragraphs; separate statements. All averments of claim or defense shall be made in numbered paragraphs, the contents of each of which shall be limited as far as practicable to a statement of a single set of circumstances; and a paragraph may be referred to by number in all succeeding pleadings. Each claim founded upon a separate transaction or occurrence and each defense other than denials shall be stated in a separate count or defense whenever a separation facilitates the clear presentation of the matters set forth.

(c) Adoption by reference; exhibits. Statements in a pleading may be adopted by reference in a different part of the same pleading or in another pleading, or in any motion. An exhibit to a pleading is a part thereof for all purposes.

(d) Paper quality, size, style and printing. All pleadings and other papers filed with the court, except printed documents or other exhibits, shall be typewritten, printed or photocopied in black type on good, white, unglazed paper of letter size (8 1/2" x 11"),

with a top margin of not less than 2 inches above any typed material, a left-hand margin of not less than 1 inch, a right-hand margin of not less than one-half inch, and a bottom margin of not less than one-half inch. All typing or printing shall be clearly legible, shall be double-spaced, except for matters customarily single-spaced or indented, and shall not be smaller than 12-point size. Typing or printing shall appear on one side of the page only.

(e) Signature line. Names shall be typed or printed under all signature lines, and all signatures shall be made in permanent black or blue ink.

(f) Enforcement by clerk; waiver for pro se parties. The clerk of the court shall examine all pleadings and other papers filed with the court. If they are not prepared in conformity with ~~this rule~~ subdivisions (a) – (e), the clerk shall accept the filing but may require counsel to substitute properly prepared papers for nonconforming papers. The clerk or the court may waive the requirements of this rule for parties appearing pro se. For good cause shown, the court may relieve any party of any requirement of this rule.

(g) Replacing lost pleadings or papers. If an original pleading or paper filed in any action or proceeding is lost, the court may, upon motion, with or without notice, authorize a copy thereof to be filed and used in lieu of the original.

(h) No improper content. The court may strike and disregard all or any part of a pleading or other paper that contains redundant, immaterial, impertinent or scandalous matter.

Rule 7. Pleadings allowed; motions, memoranda, hearings, orders, objection to commissioner's order.

(a) Pleadings. There shall be a complaint and an answer; a reply to a counterclaim; an answer to a cross claim, if the answer contains a cross claim; a third party complaint, if a person who was not an original party is summoned under the provisions of Rule 14; and a third party answer, if a third party complaint is served. No other pleading shall be allowed, except that the court may order a reply to an answer or a third party answer.

(b)(1) Motions. An application to the court for an order shall be by motion which, unless made during a hearing or trial or in proceedings before a court commissioner, shall be made in accordance with this rule. A motion shall be in writing and state succinctly and with particularity the relief sought and the grounds for the relief sought.

(b)(2) Limit on order to show cause. A party requesting relief other than enforcement of an existing order or sanctions for violating an existing order shall file a motion for the relief sought and not a motion for an order to show cause. The court shall issue an order to show cause only upon motion supported by an affidavit sufficient to show probable cause to believe a party has violated a court order.

(c) Memoranda.

(c)(1) Memoranda required, exceptions, filing times. All motions, except uncontested or ex parte motions, shall be accompanied by a supporting memorandum. Within ten days after service of the motion and supporting memorandum, a party opposing the motion shall file a memorandum in opposition. Within five days after service of the memorandum in opposition, the moving party may file a reply memorandum, which shall be limited to rebuttal of matters raised in the memorandum in opposition. No other memoranda will be considered without leave of court. A party may attach a proposed order to its initial memorandum.

(c)(2) Length. Initial memoranda shall not exceed 10 pages of argument without leave of the court. Reply memoranda shall not exceed 5 pages of argument without leave of the court. The court may permit a party to file an over-length memorandum upon ex parte application and a showing of good cause.

(c)(3) Content.

(c)(3)(A) A memorandum supporting a motion for summary judgment shall contain a statement of material facts as to which the moving party contends no genuine issue exists. Each fact shall be separately stated and numbered and supported by citation to relevant materials, such as affidavits or discovery materials. Each fact set forth in the moving party's memorandum is deemed admitted for the purpose of summary judgment unless controverted by the responding party.

(c)(3)(B) A memorandum opposing a motion for summary judgment shall contain a verbatim restatement of each of the moving party's facts that is controverted, and may contain a separate statement of additional facts in dispute. For each of the moving party's facts that is controverted, the opposing party shall provide an explanation of the grounds for any dispute, supported by citation to relevant materials, such as affidavits or discovery materials. For any additional facts set forth in the opposing memorandum, each fact shall be separately stated and numbered and supported by citation to supporting materials, such as affidavits or discovery materials.

(c)(3)(C) A memorandum with more than 10 pages of argument shall contain a table of contents and a table of authorities with page references.

(c)(3)(D) A party may attach as exhibits to a memorandum relevant portions of documents cited in the memorandum, such as affidavits or discovery materials.

(d) Request to submit for decision. When briefing is complete, either party may file a "Request to Submit for Decision." The request to submit for decision shall state the date on which the motion was served, the date the opposing memorandum, if any, was served, the date the reply memorandum, if any, was served, and whether a hearing has been requested. If no party files a request, the motion will not be submitted for decision.

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

(f) Orders.

(f)(1) An order includes every direction of the court, including a minute order entered in writing, not included in a judgment. An order for the payment of money may be enforced in the same manner as if it were a judgment. Except as otherwise provided by these rules, any order made without notice to the adverse party may be vacated or modified by the judge who made it with or without notice. Orders shall state whether they are entered upon trial, stipulation, motion or the court's initiative.

(f)(2) Unless the court approves the proposed order submitted with an initial memorandum, or unless otherwise directed by the court, the prevailing party shall, within fifteen days after the court's decision, serve upon the other parties a proposed order in conformity with the court's decision. Objections to the proposed order shall be filed within five days after service. The party preparing the order shall file the proposed order upon being served with an objection or upon expiration of the time to object.

(f)(3) Unless otherwise directed by the court, all orders shall be prepared as separate documents and shall not incorporate any matter by reference.

(g) Objection to court commissioner's recommendation. A recommendation of a court commissioner is the order of the court until modified by the court. A party may object to the recommendation by filing an objection in the same manner as filing a motion within ten days after the recommendation is made in open court or, if the court commissioner takes the matter under advisement, ten days after the minute entry of the recommendation is served. A party may respond to the objection in the same manner as responding to a motion.

Rule 101. Motion practice before court commissioners.

(a) Written motion required. An application to a court commissioner for an order shall be by motion which, unless made during a hearing, shall be made in accordance with this rule. A motion shall be in writing and state succinctly and with particularity the relief sought and the grounds for the relief sought.

(b) Time to file and serve. The moving party shall file the motion and attachments with the clerk of the court and obtain a hearing date and time. The moving party shall serve the responding party with the motion and attachments and notice of the hearing at least 14 calendar days before the hearing. A party may file and serve with the motion a memorandum supporting the motion. If service is more than 90 days after the date of entry of the most recent appealable order, service may not be made through counsel.

(c) Response; reply. The responding party shall file and serve the moving party with a response and attachments at least 5 business days before the hearing. A party may file and serve with the response a memorandum opposing the motion. The moving party may file and serve the responding party with a reply and attachments at least 3 business days before the hearing. The reply is limited to responding to matters raised in the response.

(d) Attachments; objection to failure to attach.

(d)(1) As used in this rule “attachments” includes all records, forms, information and affidavits necessary to support the party’s position. Attachments for motions and responses regarding alimony shall include income verification and a financial declaration. Attachments for motions and responses regarding child support and child custody shall include income verification, a financial declaration and a child support worksheet. A financial declaration shall be verified.

(d)(2) If attachments necessary to support the moving party’s position are not served with the motion, the responding party may file and serve an objection to the defect with the response. If attachments necessary to support the responding party’s position are not served with the response, the moving party may file and serve an objection to the defect with the reply. The defect shall be cured within 2 business days after notice of the defect or at least 2 business days before the hearing, whichever is earlier.

(e) Courtesy copy. Parties shall deliver to the court commissioner a courtesy copy of all papers filed with the clerk of the court within the time required for filing with the clerk. The courtesy copy shall state the name of the court commissioner and the date and time of the hearing.

(f) Late filings; sanctions. If a party files or serves papers beyond the time required in subsections (b) or (c), the court commissioner may hold or continue the hearing, reject the papers, impose costs and attorney fees caused by the failure and by the continuance, and impose other sanctions as appropriate.

(g) Counter motion. Opposing a motion is not sufficient to grant relief to the responding party. An application for an order may be raised by counter motion. This rule applies to counter motions except that a counter motion shall be filed and served with the response. The response to the counter motion shall be filed and served no later than the reply. The reply to the response to the counter motion shall be filed and served at least 2 business days before the hearing. A separate notice of hearing on counter motions is not required.

(h) Limit on hearing. The court commissioner shall not hold a hearing on a motion before the deadline for an appearance by the respondent under Rule 12.

(i) Limit on order to show cause. A party requesting relief other than enforcement of an existing order or sanctions for violating an existing order shall file a motion for the relief sought and not a motion for an order to show cause. The court shall issue an order to show cause only upon motion supported by affidavit or other evidence sufficient to show probable cause to believe a party has violated a court order. ~~The court commissioner shall proceed in accordance with Utah Code Title 78, Chapter 32, Contempt.~~

(j) Motions to judge. The following motions shall be to the judge to whom the case is assigned: motion for alternative service; motion to waive 90-day waiting period; motion to waive divorce education class; motion for leave to withdraw after a case has been certified as ready for trial; and motions in limine. A court may provide that other motions be to the judge.

Rule 40. ~~Assignment of cases for trial; continuance~~ Postponement of proceedings.

~~(a) Order and precedence. The district courts shall provide by rule for the placing of actions upon the trial calendar (1) without request of the parties or (2) upon request of a party and notice to the other parties or (3) in such other manner as the courts may deem expedient. Precedence shall be given to actions entitled thereto by statute.~~

~~(b) Postponement of the trial. Upon motion of a party, the~~ (a) Authority. The court may ~~in its discretion~~, ~~and~~ upon such terms as ~~may be~~ are just, ~~including the payment of costs occasioned by such postponement,~~ postpone a trial or proceeding ~~upon~~ for good cause ~~shown~~. If the ~~motion is made upon the~~ ground ~~of~~ is the absence of evidence, ~~such~~ the motion to postpone ~~shall also set forth~~ must show the materiality of the evidence ~~expected to be obtained~~ and ~~shall show that~~ due diligence ~~has been used~~ to procure it. ~~The court may also require the party seeking the continuance to state, upon affidavit or under oath, the evidence he expects to obtain, and if~~ If the adverse party ~~thereupon admits~~ stipulates that ~~such~~ the evidence ~~would~~ be ~~given~~ admitted, ~~and that it may be considered as actually given on the trial, or offered and excluded as improper,~~ the trial ~~shall~~ or proceeding will not be postponed upon that ground.

~~(c)~~ (b) Taking testimony of witnesses present. If ~~required by the adverse party~~ requested, the court shall~~, as a condition to such postponement, proceed to have~~ take the testimony of any witness present ~~taken, in the same manner as if at the trial; and the testimony so taken may be read on the trial with the same effect, and subject to the same objections that may be made with respect to a deposition~~ under ~~the provisions of~~ Rule 32~~(c)(3)(A) and (B)~~.

Rule 40. Postponement of proceedings.

(a) Authority. The court may, upon such terms as are just, postpone a trial or proceeding for good cause. If the ground is the absence of evidence, the motion to postpone must show the materiality of the evidence and due diligence to procure it. If the adverse party stipulates that the evidence be admitted, the trial or proceeding will not be postponed upon that ground.

(b) Taking testimony of witnesses present. If requested, the court shall take the testimony of any witness present under Rule 32.

Rule 41. Dismissal of actions.

(a) Voluntary dismissal; ~~effect thereof~~ no adjudication of the merits.

(a)(1) ~~By plaintiff.~~ Subject to ~~the provisions of~~ Rule 23(e)~~, of Rule 66(i),~~ and ~~of~~ any applicable statute, ~~an action may be dismissed by the plaintiff~~ a party may dismiss a complaint, counterclaim, cross-claim or third-party claim without a court order ~~of court~~ by filing a notice of dismissal at any time before ~~service by the adverse party of an answer or other response to the complaint permitted under these rules~~ a responsive pleading is served or, if there is none, before evidence is introduced at the trial or hearing. ~~Unless otherwise stated in the notice of dismissal, the dismissal is without prejudice, except that a notice of dismissal operates as an adjudication upon the merits when filed by a plaintiff who has once dismissed in any court of the United States or of any state an action based on or including the same claim.~~

(a)(2) ~~By order of court.~~ Unless ~~the plaintiff~~ a party timely files a notice of dismissal under ~~paragraph (1) of this~~ subdivision (a)(1), ~~of this rule, an action may only be dismissed at the request of the plaintiff on order of the~~ a claim may be dismissed only by court order based ~~either~~ on:

(a)(2)(i) a stipulation of all of the parties who have appeared in the action; or

(a)(2)(ii) upon such terms and conditions as the court deems proper.

(a)(3) If a counterclaim has been ~~pleaded by a defendant prior to the~~ filed before service ~~upon him~~ of ~~the plaintiff's~~ a motion to dismiss, the action shall not be dismissed against the defendant's objection unless the counterclaim ~~can~~ remains pending for ~~independent~~ adjudication ~~by the court~~.

(a)(4) Unless otherwise ~~specified in the~~ ordered or stated in the notice of dismissal, a dismissal under this ~~paragraph is without prejudice~~ subdivision does not adjudicate the merits of the claim, except that dismissal adjudicates the merits if the party has previously dismissed an action based on or including the same claim.

(b) Involuntary dismissal; ~~effect thereof~~ adjudication of the merits. ~~For failure of the plaintiff to prosecute or to comply with these rules or any order of court, a defendant may move for dismissal of an action or of any claim against him.~~

(b)(1) The court may dismiss an action or claim for failure of a party to prosecute the action or claim or to comply with these rules or a court order.

(b)(2) ~~After the plaintiff, in~~ In an action tried by the court without a jury, ~~has completed the presentation of his evidence~~ the defendant~~, without waiving his right to offer evidence in the event the motion is not granted,~~ may move for ~~a~~ dismissal after the plaintiff has completed the presentation of evidence on the ground that ~~upon the facts and the law~~ the plaintiff has shown no right to relief. The court ~~as trier of the facts~~ may ~~then~~ determine ~~them~~ the facts and ~~render~~ enter judgment against the plaintiff or may decline to ~~render any~~ enter judgment until the close of all the evidence. If the court ~~renders~~ enters judgment ~~on the merits~~ against the plaintiff, the court shall make findings as provided in Rule 52(a). If the court declines to enter judgment, the defendant shall offer evidence.

(b)(3) Unless ~~the court in its order for dismissal~~ otherwise ~~specifies~~ ordered, a dismissal under this subdivision ~~and any dismissal not provided for in this rule, other than a dismissal for lack of jurisdiction or for improper venue or for lack of an indispensable party, operates as an adjudication upon~~ adjudicates the merits of the claim.

~~(c) Dismissal of counterclaim, cross-claim, or third-party claim. The provisions of this rule apply to the dismissal of any counterclaim, cross-claim, or third-party claim. A voluntary dismissal by the claimant alone pursuant to Paragraph (1) of Subdivision (a) of this rule shall be made before a responsive pleading is served or, if there is none, before the introduction of evidence at the trial or hearing.~~

~~(d)~~ (c) Costs of previously-dismissed action. If a plaintiff who has ~~once~~ previously dismissed an action ~~in any court~~ commences an action based upon or including the same claim against the same defendant, the court may ~~make such~~ order ~~for the~~ payment of costs of the action previously dismissed as it ~~may~~ deems proper and may stay the proceedings ~~in the action~~ until the plaintiff has complied with the order.

~~(e)~~ (d) Bond or undertaking to be delivered ~~to adverse party~~. ~~Should a party dismiss his~~ If a complaint, counterclaim, cross-claim~~,~~ or third-party claim~~, pursuant to Subdivision (a)(1)(i) above, after a provisional remedy has been allowed such party, the bond or undertaking filed in support of such provisional remedy~~ is dismissed, any security must ~~thereupon~~ be delivered ~~by the court~~ to the ~~adverse~~ party ~~against~~ to whom ~~such provisional remedy was obtained~~ it is due.

Rule 41. Dismissal of actions.

(a) Voluntary dismissal; no adjudication of the merits.

(a)(1) Subject to Rule 23(e) and any applicable statute, a party may dismiss a complaint, counterclaim, cross-claim or third-party claim without a court order by filing a notice of dismissal at any time before a responsive pleading is served or, if there is none, before evidence is introduced at the trial or hearing.

(a)(2) Unless a party timely files a notice of dismissal under subdivision (a)(1), a claim may be dismissed only by court order based on:

(a)(2)(i) a stipulation of all of the parties who have appeared in the action; or

(a)(2)(ii) upon such terms and conditions as the court deems proper.

(a)(3) If a counterclaim has been filed before service of a motion to dismiss, the action shall not be dismissed against the defendant's objection unless the counterclaim remains pending for adjudication.

(a)(4) Unless otherwise ordered or stated in the notice of dismissal, a dismissal under this subdivision does not adjudicate the merits of the claim, except that dismissal adjudicates the merits if the party has previously dismissed an action based on or including the same claim.

(b) Involuntary dismissal; adjudication of the merits.

(b)(1) The court may dismiss an action or claim for failure of a party to prosecute the action or claim or to comply with these rules or a court order.

(b)(2) In an action tried by the court without a jury, the defendant may move for dismissal after the plaintiff has completed the presentation of evidence on the ground that the plaintiff has shown no right to relief. The court may determine the facts and enter judgment against the plaintiff or may decline to enter judgment until the close of all the evidence. If the court enters judgment against the plaintiff, the court shall make findings as provided in Rule 52(a). If the court declines to enter judgment, the defendant shall offer evidence.

(b)(3) Unless otherwise ordered, a dismissal under this subdivision adjudicates the merits of the claim.

(c) Costs of previously-dismissed action. If a plaintiff who has previously dismissed an action commences an action based upon or including the same claim against the same defendant, the court may order payment of costs of the action previously dismissed as it deems proper and may stay the proceedings until the plaintiff has complied with the order.

(d) Bond or undertaking to be delivered. If a complaint, counterclaim, cross-claim or third-party claim is dismissed, any security must be delivered to the party to whom it is due.