Agenda
Advisory Committee on Rules of Civil Procedure

March 26, 2008
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	Tab 1	Fran Wikstrom
Rule 35. Physical and mental examination of persons.	Tab 2	Frank Carney Tom Lee Guests
Rule 6, et al. Time	Tab 3	Tim Shea
SB 205. Uniform Interstate Depositions and Discovery Act.	Tab 4	Tim Shea
Overall evaluation of URCP		Fran Wikstrom

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

Meeting Schedule

April 23, 2008
May 28, 2008
September 24, 2008
October 22, 2008
November 19, 2008 (3d Wednesday)

Tab 1

MINUTES

UTAH SUPREME COURT ADVISORY COMMITTEE ON THE RULES OF CIVIL PROCEDURE

Wednesday, February 27, 2008
Administrative Office of the Courts

Francis M. Wikstrom, Presiding

PRESENT: Francis M. Wikstrom, James T. Blanch, Francis J. Carney, Terrie T. McIntosh, Honorable Lyle R. Anderson, Honorable Derek Pullan, Honorable David O. Nuffer, Janet H. Smith, Jonathan Hafen, Thomas R. Lee, Judge R. Scott Waterfall, Barbara Townsend, Lincoln Davies, Matty Branch

EXCUSED: Todd M. Shaughnessy, Leslie W. Slaugh, David W. Scofield, Cullen Battle, Honorable Anthony B. Quinn, Anthony W. Schofield, Steve Marsden, Lori Woffinden

STAFF: Tim Shea, Trystan B. Smith

I. APPROVAL OF MINUTES.

Mr. Wikstrom called the meeting to order at 4:00 p.m., and entertained comments from the committee concerning the January 23, 2008 minutes. No comments were made and Mr. Wikstrom asked for a motion that the minutes be approved. The motion was duly made and seconded, and unanimously approved.

II. RULE 35. PHYSICAL AND MENTAL EXAMINATION OF PERSONS.

Mr. Wikstrom asked that the committee address Rule 35 in detail at the next meeting. Mr. Wikstrom asked Mr. Carney to circulate the proposed revisions to members of the plaintiff and defense bars, and invite to our next meeting spokespersons to discuss the proposed changes.

III. RULE 6, ET AL. TIME.

Mr. Shea brought Rule 6 to the committee. Mr. Shea summarized the committee members' findings after their review of the proposed time period revisions to reflect the "days-are-days" approach.

The committee considered whether it wanted to change certain time periods from days to hours. After discussion, the committee decided those time periods currently delineated in hours should remain the same.

Mr. Shea noted that the mechanism for counting, and the designation of days will be similar to the federal rules. However, the actual time periods for certain rules may differ from the federal rules.

Mr. Lee questioned whether the "same time" language in Rule 6© allowed for filing at the beginning of the next business day, or at the same hour the next business day. After discussion, the committee asked Mr. Shea to revise the subsection to reflect the language in the federal rule.

The committee agreed to revise Rule 6(d) to state, "For electronic filing, *the filing must be done before midnight*."

The committee agreed to revise Rule 6(f)(13) to include any day designated by the President, Governor, or the Legislature.

IV. RULE 103. CHILD SUPPORT WORKSHEETS.

Mr. Shea brought Rule 103. The committee agreed to repeal Rule 103 feeling it was redundant.

V. SB 205. UNIFORM INTERSTATE DEPOSITIONS AND DISCOVERY ACT.

Mr. Shea brought SB 205 to the committee. Mr. Wikstrom asked that the committee address the proposed legislation after the legislative session ends.

VI. OVERALL EVALUATION OF URCP.

Judge Derek Pullan brought a proposal to the committee to revise Rule 26 to allow for a fast-track discovery process for cases with an amount in controversy under $120,000 . The committee discussed the inaccessibility of the legal system because the extensive scope and expense of discovery. The committee further discussed the dramatic decline in the number of jury trials because of the expense of discovery. Mr. Hafen suggested a pilot program where parties could choose to fast-track discovery for certain cases. Judge Pullan indicated he would recommend to his colleagues that the pilot program begin in the Fourth District. The committee further discussed gathering empirical data addressing the amount in controversy and the expense incurred for conducting discovery.

Mr. Wikstrom asked the committee to study Judge Pullan's proposal, and be prepared to discuss the proposal at the next meeting.

VII. ADJOURNMENT.

The meeting adjourned at 6:00 p.m. The next meeting of the committee will be held at 4:00 p.m. on Wednesday, March 26, 2008, at the Administrative Office of the Courts.

Tab 2

Rule 35. Physical and mental examination of persons.

(a) Order for examination. When the mental or physical condition ~~(including the blood group)~~ or attribute 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~~ The order shall specify the time, place, manner, conditions, and scope of the examination and the person ~~or persons~~ by whom it is to be made. The party being examined may record the examination by videotape or other means absent a showing that the recording would unduly interfere with the examination.

(b) Reports of examining physicians.

~~(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. If an examiner fails or refuses to make a report, the court on motion may take any action authorized by Rule 37(b)(2).~~

(b)(1) The party examined may request and obtain the examiner's report. The examiner's report must be in writing and must state in detail the examiner's findings, including diagnoses, conclusions, and the results of any tests.

(b)(2) By requesting and obtaining ~~a report of the examination so ordered~~ the examiner's report 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), 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.~~

(c)(1) If the examiner has performed ten or more examinations in the preceding year, for litigation purposes under this rule or under a comparable rule of another jurisdiction, the party requesting the examination shall, at its own expense, provide to the party examined a copy of the reports of all examinations conducted by the examiner in the preceding four years.

(c)(2) If the examiner has performed fewer than ten examinations in the preceding year, for litigation purposes under this rule or under a comparable rule of another jurisdiction, the court may order the party requesting the examination to provide a copy of the reports of examinations conducted by the examiner upon payment of reasonable costs by the requesting party.

(c)(3) The examiner shall redact any personal identifying information from the reports.

(d) Subdivisions (b) and (c) apply also to examinations made by agreement of the parties, unless the agreement expressly provides otherwise. Subdivisions (b) and (c) do not preclude discovery of an examiner's report or deposing an examiner under other rules.

~~(d)~~ (e) 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 (b) or (c), the court on motion may take any action authorized by Rule 37(b)(2).

ABBOTT & ASSOCIATES
ATTORNEYS-AT-LAW

March 7, 2008

Tim Shea
Administrative Office of the Courts
450 South State, #N31
Salt Lake City, Utah 84111

Re: Amendments to URCP 35

Dear Mr. Shea:

I understand that changes to URCP 35 are being considered. Please pass this letter on to the committee responsible for recommending changes to the rules.

I believe that several changes to Rule 35 are needed. These changes are needed due to growth of the professional Rule 35 examiner. There are several physicians in the Salt Lake County area who do a significant number of Rule 35 exams. They have become quite sophisticated. In my opinion, they trod upon the fairness of the litigation process. Specifically, these few doctors frequently delve into areas that have nothing to do with the physical health of the litigant. Therefore, I believe that Rule 35 should be changed in the following ways:

1) A restriction should be placed on the examiner, preventing the examiner from asking questions that do not directly relate to the medical condition of the litigant. For example, I have had clients who have been asked whether the traffic light was red or green. Essentially, this forces the plaintiff to undergo a second deposition. The problem with the second deposition is that the plaintiff is unrepresented by counsel during the exam. Further, there is no neutral party recording the exam and we sometimes end up with a dispute of credibility between the examiner and the litigant. When faced with those examiners a second time, I have asked the trial court judge to limit the questions they may ask. While sometimes successful, some judges are reluctant to do so because there is no guidance in Rule 35. I believe the rule should specifically state that the doctor must limit the exam to the physical and mental condition of the litigant. No other questions are allowed.

2) While we have numerous physicians in Utah County who are willing to do Rule 35 exams, a few defense firms insist on using a handful of professional examienrs located in Salt Lake County. The rule should be modified to require that the exam be held in the county in which the

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litigant resides, or in which the plaintiff filed the lawsuit. It would be reasonable to make an exception to this requirement if no suitable examiner may be found in such counties. This is a common sense approach and is similar to the existing restrictions on the places in which depositions may be held.

Specifically, I suggest the following additions:

At the end of paragraph (a) add the following sentence: "In specifying the scope of the examination, the court shall state the physical or mental conditions in controversy. The examiner shall not conduct an examination beyond the scope of the examination stated in the order. The place of the examination shall be in the County in which the person to be examined resides or if the person to be examined is the plaintiff in the lawsuit, the county in which the lawsuit was filed. A court may order that the examination occur in another place if the party seeking the examination shows that a suitable examiner may not be found in the county in which the person to be examined resides or in the county in which the case is filed."

I also understand that the committee is considering amending the rule to give the party being examined the the right to record the examination. That is a much needed change and should be adopted.

I also understand that the committee is considering amending the rule to give the party being examined the right to view previous examination reports prepared by the physician conducting the examination. That rule change is much needed. The existing rule makes such a requirement but is unworkable for several reasons. First, the existing rule is ambiguously worded. At one point it seems to say that only exams requested by the same party are required. In most cases, the litigant requesting the exam has never requested exams in the past. This is because the plaintiff is not entitled to name the defense law firm or the insurance company in the lawsuit. Therefore, while the defense firm or the insurance company may have used the examiner hundreds of times, the actual litigant may never have done so. Because the defense firm and the insurance company are the ones driving the litigation process, the change is needed.

I appreciate the work that is being done to improve Rule 35. If you or a member of the committee has any questions, please call me.

Sincerely,

Nelson Abbott
nelson@utlawhelp.com

Kathleen Phinney

(a) (line 3) adding “or attribute”

I have practiced in the area of plaintiff personal injury for the past 13 years. Most of my cases involve clients involved in auto collisions.

I have concerns over the term “attribute” unless there is a definition attached. In my experience, ambiguity has led to abuse. Most of my women clients have had at least one episode of depression prior to injury or what the doctor may have referred in their records as depression even though it was not clinically diagnosed as such. If my clients claimed depression, increased depression or even additional pain and suffering as a result of an injury, they were required to turn over their personal diaries and counseling records to the defense medical expert on the basis that they were placing their mental condition at issue. This interpretation of the rule expanded the scope of the term “mental condition” to apply to almost all of my female clients in litigation. Providing embarrassing personal information has led to cases of abuse.

In one case, the defense counsel told my client’s husband that the client, a mother of several small children, was having an affair. After six weeks, the defense counsel admitted that the only evidence was a statement in her counseling records that at times she was unhappy in her marriage and another statement that she had a conversation with an old boyfriend. The distrust caused by this false accusation had a serious effect on the couple’s already strained relationship and within a year they divorced.

In another case, defense learned though private records that my client’s mother had an affair 20 years before. At the time of trial, the mother was a highly-respected member of her family and church. Defense counsel threatened the mother that they would expose the affair if she testified about her daughter’s injury in trial. He claimed that the affair was relevant because it makes her testimony less credible. While the judge ruled against the defense using that information at trial, the threat had enough of a chilling effect that the mother did not testify.

In an automobile injury arbitration, the defense counsel brought up sexual abuse to my client by her brother while they were children. The client’s husband and her minor children attended the arbitration. Gratefully, the children were out of ear shot when it was first brought up and were spared any details.

In yet another case, my client, a 17 year old mother claimed that the substantial brain injury to her unborn baby resulted from a car accident. The baby was born within hours of the collision where the car was hit by a driver of a large nationally-known beverage company. The defense used a statement apparently made by an uncle that came out in a private record to make a claim that the child and brain injury were a result of incest. The angry uncle contacted me and inform me that the defense was encouraging him to testify to that at trial. He denied making any such statement but it had already impacted his relationship with his niece and, again, caused unnecessary harm to a family.

In my experience, the most embarrassing fact of a client’s life that comes from a counseling record or diary somehow becomes relevant to the “mental condition” of the client through reliance on the medical expert’s opinion. While I have seen the door

slowly closing on this type of abuse over the past ten years, I am concerned that the term “attribute” may open the door wide again. I propose that a comment be made to the rule that defines the scope of the term “attribute” to avoid broadening the scope of discovery beyond what is really necessary for the parties to prove their case.

Comment on (a) Order for examination - “The party being examined may record the examination by videotape or other means absent a showing that the recording would unduly interfere with the examination.”

I strongly support the inclusion of this part of the rule. I believe it keeps both sides honest. I had a client involved in an auto collision whose medical condition caused one arm to be noticeably different in color from the other, almost a purple color. During the unrecorded examination, the DME doctor examined her in an unlit room. She repeatedly asked him why he didn’t turn on the lights. During the arbitration, the DME doctor testified by telephone that he never noticed the arm color was different and, therefore, could not say she had the claimed medical condition. Gratefully, the arbitrator was in the same room with the my client. The room had the lights on and she got a deserved award.

Comment on (c):

I strongly support the inclusion of (c)(1)(2)(3) and (d)(2).

In my experience in the area of low vehicle damage auto collisions, I have received several awards from arbitrators of $100,000 and higher for long-term injuries the client received. If I took these same cases to trial, my chances of getting any recovery would be small. During a trial several years ago in the 4th District, I was told that State Farm had won all of these type of cases in that area for the past ten years. I believe the difference is the reliance on expert testimony. During my limited experience of several jury trials for low speed collisions, I found that the well-used defense medical examiner appeared qualified and competent to the jury. (S)he appeared more comfortable in that environment than the treating doctor with limited or no court room experience. The expert doctors stated their opinions in strong, confident language. Treating doctors stated their opinions “within a reasonable degree of medical certainty” but they usually qualify it by accurately saying there is no way to be completely certain. This sounds like the treating doctor is not as confident of his opinion as the expert. In my experience, it has been difficult to prove bias on the part of the expert witness, I believe in part because the entire concept that an expert would sway his opinion because of financial gain is difficult for a lay person to accept. The plaintiff usually has the burden of proof so where the experienced, highly-credentialed confident expert disagrees with the treating doctor, the jury is not convinced that burden has been met.

On the other hand, when I present a case before an arbitrator, usually a defense attorney, he is not overly persuaded by the expert doctor’s opinion. While the DME reports are taken into consideration, it has always been the case for me that the treating medical doctor’s opinions have had the most effect on the final decision by the arbitrator.

Allowing the plaintiff to have prior written reports provides the plaintiff with tangible evidence of bias and makes it easier to prove if it does exist. Even more beneficial, I

believe there will be less “cookie cutter” reports. On several occasions I have jokingly commented to defense attorneys using certain DME examiners that they should save the money for the report, I’ll just change the name on reports from a prior cases to the new client.

Defense should have the right to have the client examined by a medical doctor and for those limited number of cases, a mental examination for those whose condition is truly at issue. What a difference it would make to the entire process if the plaintiff’s counsel, defense counsel and judges agreed on a list of expert doctors that all sides could rely on for honest accurate reports. Short of that, and because that is not likely, I believe DMEs are essential for fairness in a case but I also believe they can and have been used for improper purposes and some restrictions are necessary. I applaud the efforts of this committee in addressing these concerns and in proposing additions to prevent the use of these needed exams for improper purposes.

Clark Newall

I applaud the committee for the proposed amendments to URCP 35. The addition of the videotaped record of examinations not only protects the integrity of the examination, it also eliminates unnecessary and wasteful disputes in court of the "he said--she said" variety. The “independent medical examination” may have had its roots in English common law, wherein the court appointed an “assessor” to advise the court on the condition of the litigant. English procedure retains that practice to this day, but also recognizes that certain situations call for adversarial opinions. See United Kingdom Civil Procedure Rules Part 35 “Experts and Assessors” at http://www.justice.gov.uk/civil/procrules_fin/contents/parts/part35.htm.

The notion that rule 35 examinations are truly independent may thus have been true at one time, but as the examinations proliferated and some physicians found that they could practice full-time as examiners, the actual practice of the examination has come more to resemble a litigation tactic than a neutral investigation of the facts.

I note that at least one Utah trial court seems to have recognized the adversarial nature of the medical examination long before Rule 35 ever existed and compensated for that by allowing the examinee to have knowledgeable witnesses present. See Larson v. Salt Lake City, 97 P. 483, 484 (Utah 1908) (“Thereupon the court made an order requiring the plaintiff, at a time specified, and at her home, or at some place to be designated by her, to submit to an examination to be made by the physician and surgeon suggested by the defendant, the plaintiff's physician and attorneys, if she desired them, to be present at such examination.”)

Other courts have recognized the adversarial nature of the modern "independent" medical examination and allowed some form of representation or recording. I note that recording of the examination protects all parties as well as serving to assure the integrity of the examination

“However, in the context of an adversary proceeding, the plaintiffs' interest in protecting themselves from unsupervised interrogation by an agent of their opponents outweighs the defendants' interest in making the most effective use of their expert. The

defendants' expert is being engaged to advance the interests of the defendants; clearly, the doctor cannot be considered a neutral in the case. There are numerous advantages. . . which the defendants might unfairly derive from an unsupervised examination. In sum, I do not believe that the role of the defendants' expert in the truth-seeking process is sufficiently impartial to justify the license sought by the defendants." Zabkowicz v. West Bend Co., 585 F.Supp. 635, 636 (D.C.Wis.,1984) (allowing the recording of a psychiatric examination.)

"The Rule 35 examination is part of the litigation process, often a critical part. Parties are, in general, entitled to the protection and advice of counsel when they enter the litigation arena. An attorney's protection and advice may be needed in the context of a Rule 35 examination, and we see no good reason why it should not be available." Langfeldt-Haaland v. Saupe Enterprises, Inc. 768 P.2d 1144, 1146 (Alaska,1989)

Recently the Oklahoma supreme court, considering the propriety of videotaping a Rule 35 examination, specifically allowed all such examinations to be recorded, despite the typical objection by the examiner that the recording interferes with the examination. Although Oklahoma, unlike Utah, permits audio recording of examinations by statute, the Oklahoma court's reasoning on the typical objection raised by examiners ("too intrusive") is significant.

"Here, the doctor expressed concerns that videotaping would be an invasion of privacy of the other patients in the office, annoying and distracting, and intrusive and an interference with the doctor's examination. . . . None of these concerns are reasons to prohibit videotaping the examination altogether because they can all be readily addressed by an agreement between the parties or by order of the trial court when the time, place, manner, conditions and scope of the examination are set. . . . Accordingly, we hold that a party to a lawsuit who is required to submit to a medical examination . . . is permitted to videotape the examination." Boswell v. Schultz, WL 4246290 (Okla.,2007).

Another commendable change comes in the clarification that those examiners who routinely perform Rule 35 examinations are required to provide their reports to the parties. The language of the existing section c is not a model of clarity and seems both too narrow in one sense ("employed bythe party") and too broad in another ("any treatment previously given.") The intent of the rule is more clearly expressed in the proposed language: those who regularly perform examinations for litigation should have to disclose the reports that they have written—thus the fact finder can have evidence from which to judge whether a particular examiner churns out "boilerplate reports" to satisfy the retaining party or whether he instead makes a genuine effort to ascertain the nature of the examinee's condition.

I propose another salutary amendment: require that the examiner and the parties refer to the examination by a neutral term, such as "Rule 35 examination." This will eliminate the use of the msleading term "independent", a misnomer that still has currency among some courts and particularly among some examiners.

I give these amendments my strongest support.

Clark Newall

in considering the comments and intent of the proposed amendment from the point of view of a physician, i realize that there are certain factors the committee may not have considered and that may be of significance. first, the examination of a person with a physical condition for the purpose of determining impairment is a time-consuming and painstaking process when properly done. in particular, in the case of neck injuries, back injuries and some joint injuries, it requires repeated and precise measurement of angles of movement which can only be done accurately with special instruments not typically available in a practitioner's office. although an orthopedic surgeon MAY have one or more of the instruments available, he is not likely to be skilled in their use or have the necessary patience for the multiple measurements that must be made unless he has a practice in which he largely does impairment evaluations. for this reason, the physicians who do this work as it should be done have two characteristics: they do the impairment evaluations repeatedly and frequently and they often use ancillary personnel to do the actual measurements.

the virtue of a video of the examination is that it allows the attorney to see if the measurements were actually done and if they were done properly. however, bear in mind that because these may have been done by an ancillary person, the video may not show the measurement. this is particularly the case when the measurements are done at a different facility, such as a physical therapist's office. (physical therapists and occupational therapists are the persons usually trained in the measurement techniques.) in addition, the actual calculation of an impairment requires the use of a complex set of rules, usually best organized in a pre-formatted sheet of measurements and deductions. the fact that this type of material is rarely seen in rule 35 exams in utah suggests that the proper examination for impairment is rarely done. video is the cure for this also, since the measurement of the angles is both obvious and time-consuming.

finally, as to the desire to broaden the pool of physicians doing rule 35 exams, i suggest that the proposed rule 35 is not likely to accomplish this. the reason has little to do with the rule, and everything to do with the burdensome and exacting nature of doing a proper examination. most physicians simply don't have the time, the training or the desire to spend an hour or two doing picky little measurements and poring over a pile of records. nuff said

Fred R. Silvester

Dear Rules Committee:

I have reviewed the suggested revisions to Rule 35. Due to my involvement in litigating the terms of the present Rule on a number of occasions, I complement the committee on its attempt to clarify this Rule, it is long over due. I would suggest further clarification. b (2) does not seem to be necessary under our present discovery rules. A copy of the report should always be provided to the examinee, and the Court already has sufficient authority under other rules to determine when and if other treatment is discoverable. The disputes which will arise under this formulation will be the extent of

the waiver of privilege. For example, does requesting or receiving the report waive the privilege with respect to ancient psychiatric records where the claimant maybe claiming an emotional component to pain and suffering or should the issue of discoverability be determined under Rule 26.

The other area I would suggest needs further evaluation is the provision in C(1) which set the standard for disclosure of other reports by the examiner at 10 examination. The " for litigation" requirement is vague in this respect. Those examiners who spend substantial amounts of their practice doing defense examinations often do a number of those examinations in the context of workers compensation claims. This section need to make clear that administrative adjudications such as worker's compensation are included in the threshold, otherwise, few defense examiners will meet the threshold and the purpose of this section will be thwarted.

I believe deleting b(2) and clarifying in c(1) the threshold applies to "all non-patient examinations for purpose of resolution of claims" will avoid some of the motion practice that we now face.

Thank you for your consideration.

Robert H. Wilde

I have reviewed the current iteration of Rule 35 and have the following thoughts. I would appreciate it if you would forward them to the committee.

Lines 11-13 allow videotaping of the examination. Either the rule or the comment should make it clear that the taping need not be done by a professional videographer. Rule 30(b) URCP doesn't require a professional to record depositions and neither should this rule.

For the sake of clarity subparagraph (b)(1), either in the rule or in the comment, should refer to Rule 26(a)(3) URCP so that it is clear that any Rule 35 examination which will be offered at trial will have to meet the expert witness report standards.

The references at lines 46 and 51 and 52 to "the preceding year" should be "the preceding 12 months" so that it is clear the reference is to a rolling 12 month period and not to a calendar year.

The reference at line 52 to "for litigation purposes" needs to be clarified either in the rule or the comment so that it is clear that examinations for workers compensation proceedings and, perhaps, social security proceedings are included.

Paragraph (d) is problematic in that it appears to allow some professional witnesses to stay below the radar. It should be changed to provide ". . . expressly provides otherwise, in writing."

The comment should state that examinations performed under this rule should be referred to as "Rule 35 Examinations" rather than independent medical examinations.

Thank you for your consideration of my thoughts.

Robert H. Wilde

I nominate Paul Simmons and Ed Havas as the plaintiffs representatives.

In proposed (a) I would specify that videotaping need not be done by a professional. This could probably be included more easily in the committee note than in the text.

In (b)(1) I would think a reference to the standards of Rule 26(a)(4) might be appropriate. Once again, this could probably be handled more easily in the committee note.

If (d) becomes the rule then we all will need to be alert that when we agree to a Rule 35 examination we are not agreeing that our examination is not excluded from the count.

In a perfect world I would include, somewhere, either in the rule or the note, a reference to the fact that examinations under this rule ought to be referred to as "Rule 35 Examinations" rather than independent medical examinations.

Many thanks to those who have worked on untying this Gordian knot.

Elizabeth Bowman, RN JD

RE: Rule 35 comments:

Dear Mr. Shea:

Please consider adding some protection in addition to video recording to the rule. The party being examined needs water and, if the examination is longer than 4 hours, food. The party being examined needs regularly scheduled breaks. Examiners should never be allowed to examine parties without having staff within hearing at all times during any examination, and present during physical examinations.

I wonder if the committee might consider adding limits to the time the examination can take similar to those of depositions -- R 30(d)(2).

One defense neuropsychologist has had two of my clients come to his office alone, (in an insurance building) for all day Saturday and all day Sunday sessions, into the evening. He had no staff on site and insists the party being examined be alone. He provided no food or water, and the building?s drinking fountain was broken. One of my clients said the bathroom was disgusting. One of my brain injured clients threw up during the examination (nausea is a symptom of brain injury) and he insisted she come back for two more days of testing.

One of my clients who suffered a stroke was asked to stand on one leg during his R 35 examination. He almost fell over, and saved himself by grabbing a table. The physician asked him to do it again, risking a fall, and another head injury. I think this type of abuse would end if the examination is required to be videotaped.

Thank you for this opportunity to comment. Please do not hesitate to contact me if I might be of further assistance.

Tab 3

Rule 6. Time.

~~(a) Computation. In computing any period of time prescribed or allowed by these rules, by the local rules of any district court, by order of court, or by any applicable statute, the day of the act, event, or default from which the designated period of time begins to run shall not be included. The last day of the period so computed shall be included, unless it is a Saturday, a Sunday, or a legal holiday, in which event the period runs until the end of the next day that is not a Saturday, a Sunday, or a legal holiday. When the period of time prescribed or allowed, without reference to any additional time provided under subsection (e), is less than 11 days, intermediate Saturdays, Sundays and legal holidays shall be excluded in the computation.~~

~~(b) Enlargement. When by these rules or by a notice given thereunder or by order of the court an act is required or allowed to be done at or within a specified time, the court for cause shown may at any time in its discretion (1) with or without motion or notice order the period enlarged if request therefor is made before the expiration of the period originally prescribed or as extended by a previous order or (2) upon motion made after the expiration of the specified period permit the act to be done where the failure to act was the result of excusable neglect; but it may not extend the time for taking any action under Rules 50(b), 52(b), 59(b), (d) and (e), and 60(b), except to the extent and under the conditions stated in them.~~

~~(c) Unaffected by expiration of term. The period of time provided for the doing of any act or the taking of any proceeding is not affected or limited by the continued existence or expiration of a term of court. The continued existence or expiration of a term of court in no way affects the power of a court to do any act or take any proceeding in any civil action that has been pending before it.~~

~~(d) Notice of hearings. Notice of a hearing shall be served not later than 5 days before the time specified for the hearing, unless a different period is fixed by these rules or by order of the court. Such an order may for cause shown be made on ex parte application.~~

~~(e) Additional time after service by mail. Whenever a party has the right or is required to do some act or take some proceedings within a prescribed period after the service of a notice or other paper upon him and the notice or paper is served upon him~~

~~by mail, 3 days shall be added to the end of the prescribed period as calculated under subsection (a). Saturdays, Sundays and legal holidays shall be included in the computation of any 3-day period under this subsection, except that if the last day of the 3-day period is a Saturday, a Sunday, or a legal holiday, the period shall run until the end of the next day that is not a Saturday, Sunday, or a legal holiday.~~

(a) Computing time. The following rules apply in computing any time period specified in these rules, any local rule or court order, or in any statute that does not specify a method of computing time.

(a)(1) Period stated in days or a longer unit. When the period is stated in days or a longer unit of time:

(a)(1)(A) exclude the day of the event that triggers the period;

(a)(1)(B) count every day, including intermediate Saturdays, Sundays, and legal holidays; and

(a)(1)(C) include the last day of the period, but if the last day is a Saturday, Sunday, or legal holiday, the period continues to run until the end of the next day that is not a Saturday, Sunday or legal holiday.

(a)(2) Period stated in hours. When the period is stated in hours:

(a)(2)(A) begin counting immediately on the occurrence of the event that triggers the period;

(a)(2)(B) count every hour, including hours during intermediate Saturdays, Sundays, and legal holidays; and

(a)(2)(C) if the period would end on a Saturday, Sunday, or legal holiday, the period continues to run until the same time on the next day that is not a Saturday, Sunday, or legal holiday.

(a)(3) Inaccessibility of the clerk's office. Unless the court orders otherwise, if the clerk's office is inaccessible:

(a)(3)(A) on the last day for filing under Rule 6(a)(1), then the time for filing is extended to the first accessible day that is not a Saturday, Sunday or legal holiday; or

(a)(3)(B) during the last hour for filing under Rule 6(a)(2), then the time for filing is extended to the same time on the first accessible day that is not a Saturday, Sunday, or legal holiday.

(a)(4) “Last day” defined. Unless a different time is set by a statute, local rule, or court order, filing on the last day means:

(a)(4)(A) for electronic filing, the filing must be made before midnight; and

(a)(4)(B) for filing by other means, the filing must be made before the clerk’s office is scheduled to close.

(a)(5) “Next day” defined. The “next day” is determined by continuing to count forward when the period is measured after an event and backward when measured before an event.

(a)(6) “Legal holiday” defined. “Legal holiday” means the day for observing:

(a)(6)(A) New Year's Day;

(a)(6)(B) Martin Luther King, Jr. Day;

(a)(6)(C) Washington and Lincoln Day;

(a)(6)(D) Memorial Day;

(a)(6)(E) Independence Day;

(a)(6)(F) Pioneer Day;

(a)(6)(G) Labor Day;

(a)(6)(H) Columbus Day;

(a)(6)(I) Veterans' Day;

(a)(6)(J) Thanksgiving Day;

(a)(6)(K) Christmas Day; and

(a)(6)(L) any day designated by the President or Congress as a national holiday or the Governor or Legislature as a state holiday.

(b) The court may extend any time period other than those stated in Rules 50(b), 52(b), 59(b), 59(d), 59(e) and 60(b). If the request to extend a time period is made before expiration of the period, as originally prescribed or as extended by a previous order, the order may be entered upon an ex parte application and a showing of good cause. If the request to extend the time period is made after expiration of the period, the request shall be made by motion and may be granted upon a showing of excusable neglect.

(c) Notice of a hearing shall be served not less than 7 days before the day of the hearing, unless a different period is stated by these rules or by order of the court. An

order to shorten the time period may be entered upon an ex parte application and a showing of good cause.

Rule	Change	To
Tony Schofield		
3(a)	10	14
4(c)(2)	13	14
4(f)(1)	20	21
5(b)(1)(B)	5	7
7(c)(1)	5	7
7(c)(1)	10	14
7(f)	15	21
7(f)	5	7
12(a)	20	21
12(a)(1)	10	14
12(a)(2)	10	14
12(e)	10	14
12(f)	20	21
Frank Carney		
14(a)	10	14
15(a)	20	21
15(a)	10	14
17(c)(2)	20	21
17(c)(3)	20	21
27(a)(2)	20	21
31(a)(4)	7	14
38(b)	10	14
38(c)	10	14
Jon Hafen		
50(b)	10	14
50(c)(2)	10	14
52(b)	10	14
53(d)(1)	20	21
53(e)(2)	10	14

Rule	Change	To
54(d)(2)	5	14
54(d)(2)	7	14
56(a)	20	21
Cullen Battle		
59(b)	10	14
59(c)	10	14
59(c)	20	21
59(d)	10	14
59(e)	10	14
60(b)	3 months	90
Tom Lee		
62(a)	10	14
63(b)(1)(B)	20	21
63(b)(1)(B)(iii)	20	21
64(d)(3)(C)	10	14
64(d)(3)(D)(ii)	10	14
64(e)(2)	10	14
64(f)(1)	5	7
64A(i)(5)	10	14
David Scofield		
64D(g)	7	14
64D(h)	10	14
64D(i)	20	21
64(D)(l)(3)	7	14
64E(d)(1)	10	14
65A(b)(2)	10	14

James Blanch		
65C(g)(3)	20	21
65C(i)	Delete “plus time …”	

65C(m)(1)	5	7
66(f)	10	14
68(c)(3)	10	14
68(c)(4)	10	14
Steve Marsden		
69C(f)	20	21
69C(f)	7	14
69C(i)(2)	5	7
69C(i)(2)	15	21
74(c)	20	21
Leslie Slaugh		
101(b)	Delete “calendar”	
101(c)	5	7

Tab 4

UNIFORM INTERSTATE DEPOSITIONS AND DISCOVERY ACT

2008 GENERAL SESSION

STATE OF UTAH

Chief Sponsor: Lyle W. Hillyard

House Sponsor: Stephen H. Urquhart

LONG TITLE

General Description:

This bill establishes a process for a party residing in another state that is involved in a civil case in Utah to issue and serve subpoenas in Utah.

Highlighted Provisions:

This bill:

- establishes definitions and defines the scope of the bill;
- authorizes issuance and service of subpoenas by out-of-state parties under certain circumstances;
- clarifies the application of certain Utah statutes and court rules relating to issuance, service, and enforcement of subpoenas;
- establishes criteria for interpreting and applying this uniform law; and
- establishes May 5, 2008 as the date when this uniform law applies to discovery requests in pending cases.

Monies Appropriated in this Bill:

None

Other Special Clauses:

None

Utah Code Sections Affected:

ENACTS:

78B-17-101, Utah Code Annotated 1953

78B-17-102, Utah Code Annotated 1953

78B-17-103, Utah Code Annotated 1953

78B-17-201, Utah Code Annotated 1953

78B-17-202, Utah Code Annotated 1953

78B-17-203, Utah Code Annotated 1953

78B-17-204, Utah Code Annotated 1953

78B-17-301, Utah Code Annotated 1953

78B-17-302, Utah Code Annotated 1953

Be it enacted by the Legislature of the state of Utah:

Section 1. Section **78B-17-101** is enacted to read:

CHAPTER 17. UTAH UNIFORM INTERSTATE DEPOSITIONS AND DISCOVERY ACT

Part 1. General Provisions

78B-17-101. Title.

This chapter is known as the "Utah Uniform Interstate Depositions and Discovery Act."

Section 2. Section **78B-17-102** is enacted to read:

78B-17-102. Definitions.

As used in this chapter:

(1) "Foreign jurisdiction" means a state other than Utah.

(2) "Foreign subpoena" means a subpoena issued under authority of a court of record of a foreign jurisdiction.

(3) "Person" means an individual, corporation, business trust, estate, trust, partnership, limited liability company, association, joint venture, public corporation, government or governmental subdivision, agency or instrumentality, or any other legal or commercial entity.

(4) "State" means a state of the United States, the District of Columbia, Puerto Rico, the United States Virgin Islands, a federally recognized Indian tribe, or any territory or insular possession subject to the jurisdiction of the United States.

(5) "Subpoena" means a document, however denominated, issued under authority of a

court of record requiring a person to:

(a) attend and give testimony at a deposition;

(b) produce and permit inspection and copying of designated books, documents, records, electronically stored information, or tangible things in the possession, custody, or control of the person; or

(c) permit inspection of premises under the control of the person.

Section 3. Section **78B-17-103** is enacted to read:

78B-17-103. Scope -- Unauthorized practice of law prohibited -- Reciprocity required.

(1) Except as provided in Subsection (3), this chapter applies only to issuance, service, and enforcement of subpoenas as provided in this chapter.

(2) Except as provided in Subsection 78B-17-201(1)(b), nothing in this chapter may be construed to exempt an attorney from another state from complying with statutes and rules governing unauthorized practice of law or from the requirements contained in the Utah Rules of Civil Procedure governing limited appearance.

(3) Parties resident in another state may use the provisions of this chapter for issuance, service, or enforcement of subpoenas only if the other state has enacted this uniform act or enacted provisions substantially similar to this uniform act.

Section 4. Section **78B-17-201** is enacted to read:

Part 2. Process for Issuance and Service of a Subpoena by a Party in Another State

78B-17-201. Issuance of subpoena.

(1) (a) To request issuance of a subpoena under this section, a party must submit a foreign subpoena to a court in the judicial district in which discovery is sought to be conducted in Utah.

(b) A request for the issuance of a subpoena under this chapter does not constitute an appearance in the courts of this state.

(2) When a party submits a foreign subpoena to a clerk of court in Utah, the clerk, in accordance with that court's procedure, shall promptly issue a subpoena for service upon the

person to whom the foreign subpoena is directed.

(3) A subpoena under Subsection (2) must:

(a) incorporate the terms used in the foreign subpoena; and

(b) contain or be accompanied by the names, addresses, and telephone numbers of all counsel of record in the proceeding to which the subpoena relates and of any party not represented by counsel.

Section 5. Section **78B-17-202** is enacted to read:

78B-17-202. Service of subpoena.

A subpoena issued by a clerk of court under Section 78B-17-201 must be served in compliance with Rule 4 and Rule 5, Utah Rules of Civil Procedure.

Section 6. Section **78B-17-203** is enacted to read:

78B-17-203. Depositions, production, inspection, and contempt remedies for subpoenas.

Section 78B-6-301 and Utah Rules of Civil Procedure 26 through 37 and 45 apply to subpoenas issued under Section 78B-17-201.

Section 7. Section **78B-17-204** is enacted to read:

78B-17-204. Application to court.

An application to the court for a protective order or to enforce, quash, or modify a subpoena issued by a clerk of court under Section 78B-17-201 must comply with the rules or statutes of Utah and be submitted to the court in the judicial district in which discovery is to be conducted.

Section 8. Section **78B-17-301** is enacted to read:

Part 3. Uniform Application and Construction - Application to Pending Actions

78B-17-301. Uniformity of application and construction.

In applying and construing this uniform act, consideration must be given to the need to promote uniformity of the law with respect to its subject matter among states that enact it.

Section 9. Section **78B-17-302** is enacted to read:

78B-17-302. Application to pending actions.

This chapter applies to requests for discovery in cases pending on May 5, 2008.

Rule 26. General provisions governing discovery.

…

(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.

…

The website for the Uniform Law Commission lists just 3 other states considering the Uniform Interstate Depositions and Discovery Act.

Maryland: Legislature adjourns April 7

(http://mlis.state.md.us/2008rs/billfile/hb0088.htm HB 88/SB 103)

Tennessee: Legislature adjourns late April

(http://www.legislature.state.tn.us/ HB 2668/SB 2624)

Colorado: Legislature adjourns May 7

(http://www.leg.state.co.us/Clics/CLICS2008A/csl.nsf/BillFoldersHouse?openFrameset HB 1174)