Agenda
Advisory Committee on Rules of Civil Procedure

November 19, 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
Simplified Civil Procedures	Tab 2	Fran Wikstrom
Rule 26. General provisions governing discovery.	Tab 3	Leslie Slaugh
Rule 3. Commencement of action.	Tab 4	Tom Lee Hutch Fale
Rule 7. Pleadings allowed; motions, memoranda, hearings, orders, objection to commissioner's order.	Tab 5	Tim Shea

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

Meeting Schedule

January 28, 2009
February 25, 2009
March 25, 2009
April 22, 2009
May 27, 2009
September 23, 2009
October 28, 2009
November 18, 2009
January 27, 2010

Tab 1

MINUTES

UTAH SUPREME COURT ADVISORY COMMITTEE ON THE RULES OF CIVIL PROCEDURE

Wednesday, October 22, 2008
Administrative Office of the Courts

Francis M. Wikstrom, Presiding

PRESENT: Francis M. Wikstrom, Honorable Lyle R. Anderson, Lincoln Davies, Jonathan Hafen, Thomas R. Lee, Judge R. Scott Waterfall, Cullen Battle, Honorable Anthony B. Quinn, Leslie W. Slaugh, Lori Woffinden, James T. Blanch, Francis J. Carney, Todd M. Shaughnessy, Steven Marsden, Honorable Derek Pullan

EXCUSED: Terrie T. McIntosh, Honorable David O. Nuffer, David W. Scofield, Barbara Townsend, Matty Branch, Janet H. Smith, Anthony W. Schofield

STAFF: Tim Shea, Trystan B. Smith

GUEST: Rich Humpherys

I. APPROVAL OF MINUTES.

Mr. Wikstrom called the meeting to order at 4:00 p.m., and entertained comments from the committee concerning the May 28, 2008 minutes and the September 17, 2008 minutes. Mr. Shea noted two spelling changes to the May 28th minutes. With those changes, Mr. Wikstrom asked for a motion that the minutes from both meetings be approved. The motion was duly made and seconded, and unanimously approved.

II. SIMPLIFIED CIVIL PROCEDURES.

Mr. Wikstrom asked the committee for its thoughts and comments on how to approach the topic.

Judge Quinn suggested that the committee draft a set of guiding principles, and elicit the Supreme Court's reaction before drafting a set of proposed rules.

Mr. Battle suggested a grass roots approach where the committee elicited comments from the Bar and the general public.

Mr. Wikstrom suggested the committee first reach a consensus on a set of principles before eliciting the Supreme Court's reaction. He agreed to draft an initial set of guiding principles for the committee to discuss at next month's meeting.

III. FINAL RECOMMENDATIONS ON AMENDMENTS TO RULES 6, 45, AND 103.

Mr. Wikstrom addressed the final recommendations concerning the proposed amendments to Rules 6, 45, and 103.

The committee addressed the meaning of "inaccessibility" under Rule 6(a)(3). Mr. Lee noted his concern regarding the definition of "legal holiday" under Rule 6(a)(6). After discussion, the committee considered revising the subsection to state "any day designated by the Governor or Legislature as a state holiday." Mr. Lee moved to revise the subsection, but later withdrew his motion.

The committee agreed to revise the 90 day deadline under Rule 60(b) to 91 days (or 13 weeks).

After debating the need to expand the 10 day time period under Rule 3(a), the committee agreed it should not revise the 10 day time period to file a Complaint after service of a Summons under Rule 3(a).

After discussing the remaining comments concerning Rule 6, the committee unanimously approved the proposed amendments, and recommended to the Supreme Court that the amendments not be approved until e-filing was operational.

The committee discussed the comments to Rules 45 and 103 and agreed to submit the proposed amendments without further changes.

IV. RULE 30(b)(6) DESIGNATION OF TRIAL WITNESSES.

Mr. Wikstrom invited Mr. Humpherys to discuss a proposed amendment to Rule 30(b)(6). Mr. Humpherys suggested a revision to Rule 30(b)(6) that would allow a party to request that another party designate a company representative as a trial witness.

The committee questioned a trial court's power to require a company representative to travel from outside the state to testify at trial.

The committee debated the need for such a rule and questioned Mr. Humpherys concerning his experiences at trial.

The committee also questioned whether there were other jurisdictions that had a similar rule that would allow a company representative as a trial witness. Mr. Wikstrom asked Mr. Shea and Mr. Humpherys to look at what other jurisdictions may have done concerning the issue, and readdress the subject at a subsequent meeting.

V. CANFIELD REQUEST.

Mr. Wikstrom asked that the committee address this request at the next meeting.

VI. RULE 26.

Mr. Wikstrom asked that the committee address Rule 26 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, November 19, 2008, at the Administrative Office of the Courts.

Tab 2

Concerns:

Our civil justice system is unavailable to the middle class because of expense.

We have done a good job of achieving "just" results but at the expense of "speedy" and "inexpensive" (see Rule 1).

Discovery has become the most expensive part of litigation and will continue to become more expensive as we experience the electronic information explosion.

Expert discovery has become an increasingly expensive part of discovery.

Principles:

The Rules should be designed for the majority of cases, not the exceptional, complex cases.

All facts are not discoverable. Discovery must be limited by proportionality (cost of discovery vs. amount at issue) and by the likelihood of finding really usable evidence.

The paradigm should be reversed from "all facts are discoverable unless the other party obtains a protective order" to "absent agreement, no facts are discoverable unless the party seeking discovery can demonstrate proportionality and reasonable likelihood of finding usable evidence."

Parties should be required to produce, without request, at the onset of litigation, all documents and things that they might use as evidence to support their claims or defenses. Failure to do so would preclude use at trial.

The discovery "defaults" should be drastically limited unless the parties agree otherwise or the party seeking additional discovery satisfies the court that it is appropriate.

Courts should consider cost-shifting or "co-pay" requirements in appropriate cases where the discovery burdens are not bilateral.

Clients should be required to certify that they have been given a discovery budget by counsel and have approved it.

Expert testimony should be strictly limited to the contents of the expert report. Expert depositions should be prohibited.

If the parties and their counsel agree to a discovery plan, the court should adopt it.

Responses:

Cullen Battle

Overall comment: It seems kind of watered down compared to your earlier piece, but if that's what it takes to achieve consensus, I can live with it.

Specific comments.

1. Expert Testimony. I agree with Frank's comments.

2. Scope of Discovery. I'm a bit uncomfortable with the paradigm that "absent agreement, no facts are discoverable unless the party seeking discovery can demonstrate proportionality and reasonable likelihood of finding usable evidence." Defendants who have things to hide will lick their chops over this one. What if we said "absent agreement, discovery should be constrained by principles of proportionality and reasonable likelihood of finding usable evidence." Todd's suggestion regarding the discovery plan would reinforce this concept.

I agree with Frank's thoughts on overall presentation to the bar and public.

Todd Shaughnessy

1-- Expert Discovery: I'd favor a general statement, rather than a specific one, for all of the reasons we discussed at our last meeting. Something like "Expert discovery should be limited." If we start out by saying we want to ban expert depositions, I suspect some people will never get past this and we'll have a hard time getting them on board with other changes.

2-- Discovery Plan: After saying the court should adopt a discovery plan if the parties agree, maybe add: "If the parties cannot agree, the court must consider proportionality and cost-shifting in setting an appropriate discovery plan."

3-- Trial Settings: Since the amount of discovery undertaken often expands to fill the time within which it is allowed, do we want to include something about reconsidering the manner in which a case is set for trial (which raises a number of issues for the bench) or about holding parties to discovery cutoffs (with the idea that those cases that reach this point can get a first-place trial setting relatively quickly).

Derek Pullan

1. I agree with Cullen that Principle 3 should reflect the general statement that "discovery should be limited by principles or proportionality and reasonable likelihood of finding useable evidence." This new term---"usable evidence"---suggests to me an effort to narrow the current scope of discovery---"reasonably calculated to lead to the discovery of admissible evidence."

URCP 26(b)(1). I believe this narrowing would be consistent with what we are trying to accomplish.

2. I agree with Todd that we should have a more general statement about expert discovery, i.e. "The scope of expert discovery should be limited."

3. Given our discussion last week and the case provided by Fran, it seems clear that the principle of limiting discovery based on proportionality already exists in the rules. URCP 26(b)(3). The mechanism by which this happens is less clear. Rule 26 allows "the court" to limit discovery on this ground, but this cannot be done meaningfully without the assistance of the parties and their counsel. In my view, limiting the costs of litigation for those without access to justice will require that judges be involved earlier on in the discovery planning. Therefore, I would suggest a general of principle: "The role of the court in ensuring the speedy and inexpensive determination of every action should be reevaluated."

4. Examining how trials are set is a difficult question. On the one hand, judges want to schedule cases for trial that are actually ready for trial. Setting dates before discovery has closed almost inevitably results in the trial date being continued. On the other hand, attorneys who take the smaller cases with which we are concerned, want to know that discovery deadlines are firm and the trial can happen soon (a sure end to a case that would not otherwise be profitable). Each judge manages his or her calendar differently and the method by which trial dates are obtained is an important part of that discretion. Because we are at the stage of stating general principles and to avoid a premature (and likely negative) response from the Board of District Court Judges, I would simply use the general principle statement: "The role of the court in ensuring the speedy and inexpensive determination of every action should be reevaluated."

5. I would eliminate the principles relating to cost-shifting and a discovery budget. These are too specific and will likely foreclose consensus.

Tony Quinn

More thought and more discussion need to go into case management orders. My impression is that the discussion contemplated by rule 26(f)(1) rarely occurs. Problems and expense could be avoided if the attorneys actually discussed the discovery needs of each case.

Deadlines in case management orders need to be taken more seriously.

Case specific mandatory disclosures for certain common case types.

Tab 3

Rule 26.

I am writing to request that we modify rule 26 for divorce cases. I spoke with you about this when you presented at the Central Utah Bar Association Lunch a few months ago. You asked me to write you an email. Rule 26 provides:

> 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.

Divorce cases generally begin in with a motion for temporary orders before a court commissioner. Rule 101 requires that the moving party serve the responding party with a motion and affidavit 14 days before that hearing. The motion is to contain attachments that include income verification and a financial declaration. Frequently, you are setting this hearing without knowing who will be representing the other party.

Often in divorce cases, one party has sole access to the family financial information. Sometimes a wife does not know what her husband earns. Sometimes the wife pays all the bills and the husband is ignorant of those expenses. Every family is different, but It is quite common for a spouse to have blind spots regarding portions of the family finances.

Often, the only way the uninformed spouse can get at unknown financial information is to subpoena it. As I read rule 26, I cannot subpoena financial information prior to an attorney planning meeting or without the agreement of counsel. This gives the knowledgeable spouse a tremendous advantage in the hearing on the motion for temporary orders.

The motion for temporary orders hearing is critical to the case. This hearing is the first thing to occur and often sets the tone for the rest of the case. Commissioners are naturally reticent to modify the initial temporary order; they don't want to see the same issues over and over again. Some divorce cases take a long time to litigate. This initial order can substantially affect the party’s rights for sometimes a year of longer. It is imperative, therefore, to get the best information possible to the commissioner at this hearing. That can best be accomplished by allowing subpoena's to be used prior to the Rule 101 hearing.

There are exemptions' to the need for Attorney planning meeting they are found in 26(a)(2) (see also Rule 26(f) requiring a discovery and scheduling conference for all cases except those exempt under (a)(2)). I propose that we add an additional exemption to (a)(2) for divorce cases. The exemption could read something like: "for motion practice before the commissioner under rule 101"

Of course, there are other ways to do this that would be equally acceptable. I am most concerned about changing the requirement for a scheduling conference before issuing subpoenas in a divorce case. There are probably several acceptable ways to accomplish this. Please consider this request for change and let me know if I can be of assistance.

Ken Parkinson
Howard, Lewis & Petersen

Several recent cases in our office have highlighted a loophole in the discovery timing rules. Some attorneys are serving document subpoenas immediately after the complaint and before an answer is filed. I could find no rule that prohibits this.

Prior to the 1999 amendments, the rules prohibited some discovery immediately after the complaint except by leave of court. The time limits were 30 days for depositions (Rule 30(a)), 45 days for interrogatories (Rule 33(a)), 45 days for requests for production (Rule 34(b)). Because a records subpoena had to be tied to a deposition, it could not be served until 30 days after the complaint.

In 1999, Rule 26(d) prohibited any discovery "before the parties have met and conferred as required by Subdivision (f)." This provision does not apply, however, to cases exempt under Subdivision (a)(2). Among the exemptions are any case "in which any party not admitted to practice law in Utah is not represented by counsel." Rule 26(a)(2)(A)(vi). By definition, therefore, all cases are exempt from the discovery timing rules during the period between filing the complaint and the filing of an answer.

I recommend the following initial sentence could be added to Rule 26(d): "In all cases, a party may not seek discovery from any source until 30 days after service of the pleading to which the discovery relates."

Alternatively, Rule 26(a)(2)(A)(vi) could be amended to read: "in which any party not admitted to practice law in Utah has answered or otherwise appeared in the case and is not represented by counsel."

Leslie W. Slaugh
Howard, Lewis & Petersen

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 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)(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:

(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;

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

(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)(4) Trial preparation: Materials. Subject to the provisions of Subdivision (b)(5) 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)(5) Trial preparation: Experts.

(b)(5)(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)(5)(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)(5)(C) Unless manifest injustice would result,

(b)(5)(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)(5) of this rule; and

(b)(5)(C)(ii) With respect to discovery obtained under Subdivision (b)(5)(A) of this rule the court may require, and with respect to discovery obtained under Subdivision (b)(5)(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)(6) Claims of Privilege or Protection of Trial Preparation Materials.

(b)(6)(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)(6)(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)(E) what changes should be made in the limitations on discovery imposed under these rules, and what other limitations should be imposed;

(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)(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)-(8), 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.

Advisory Committee Notes

Tab 4

10-day summons. Rule 3(a)(2).

Tom Lee

One of my former students who is defending some debt collection cases has raised a concern regarding the URCP's provisions for a summons in an action commenced under Rule 3(a)(2) (ten day summons). The specific provision in question is Rule 4(c)(2), which says that "If the action is commenced under Rule 3(a)(2), the summons shall state that the defendant need not answer if the complaint is not filed within 10 days after service and shall state the telephone number of the clerk of the court where the defendant may call at least 13 days after service to determine if the complaint has been filed."

The concern is that the required terms of the summons may be misleading, in that they suggest that a defendant "need not answer" if he calls the court "at least 13 days after service" and finds that no complaint has been filed. My former student says that there is a good chance that if you call in that time frame you will be told that there is no complaint on file despite the fact that the complaint will ultimately be filed on a timely basis--e.g., because the complaint is filed on the 14th day (which would be allowed under the time calculation rules), because the clerk's office doesn't record it immediately upon filing, or (more invidiously) if the plaintiff's counsel time-stamps the complaint on one day and waits to submit it until later. In any of these events, the rule arguably misleads the debtor into assuming that he need not answer despite the fact that he may be subject to a default.

Is this of concern to you? I know we have considered the 10-day summons rule in the past, but I couldn't remember whether we looked specifically at the summons language in Rule 4(c)(2). At a minimum, even if we retain the 10-day summons, wouldn't it make sense to require more careful disclosure in the summons? The suggestion that a defendant call the clerk "13 days after service" makes little sense--especially when combined with the implication that the defendant "need not answer" if the complaint has not been filed in that time frame. If the summons is going to mention a time frame, shouldn't it say 15 days (to take account of the possibility of a complaint being filed on the 14th day at 5:00 p.m.--a practice that my former student says is very common among debt collectors)? And wouldn't it make even more sense to simply say that even after 15 days, there is some possibility that the complaint will yet be filed, but not be on record yet in the clerk's office, and that the defendant should contact legal counsel to advise him regarding his rights?

This strikes me as a terrible trap for the unwary debtor. It seems to me that the summons rule requires a disclosure that is inherently misleading--that may lull a lot of debtors into believing that they are no longer on the hook when in fact they are in imminent danger of a default.

Brent Johnson

Would it be possible to have your committee consider prohibiting the use of a 10 day summons in eviction cases? Apparently some attorneys are using them, and it is creating problems for the clerks with some of the time frames.

Rule 3. Commencement of action.

(a) How commenced. A civil action is commenced (1) by filing a complaint with the court, or (2) by service of a summons together with a copy of the complaint in accordance with Rule 4. If the action is commenced by the service of a summons and a copy of the complaint, then the complaint, the summons and proof of service, must be filed within ten days of such service. If, in a case commenced under paragraph (a)(2) of this rule, the complaint, summons and proof of service are not filed within ten days of service, the action commenced shall be deemed dismissed and the court shall have no further jurisdiction thereof. If a check or other form of payment tendered as a filing fee is dishonored, the party shall pay the fee by cash or cashier's check within 10 days after notification by the court. Dishonor of a check or other form of payment does not affect the validity of the filing, but may be grounds for such sanctions as the court deems appropriate, which may include dismissal of the action and the award of costs and attorney fees.

(b) Time of jurisdiction. The court shall have jurisdiction from the time of filing of the complaint or service of the summons and a copy of the complaint.

Advisory Committee Notes

Tab 5

Emails concerning Rule 7

Leslie Slaugh:

Amend Rule 7(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. A party should not attach documents already on file with the court unless the document is of central importance and a duplicate copy attached to the memorandum would be helpful to the court.

Judge Claudia Laycock:

Rule 7(g) of the Rules of Civ. Pro. deals with objections to the court commissioner's recommendations. Now that we have a set of rules that deals specifically with the commissioners, it seems logical that Rule 7(g) should be moved to Rule 101 and its group of rules. I think that it would be most properly placed within Rule 101, since 101 deals with motion practice before court commissioners.

I can see why it was moved to its current location, as the commissioner's recommendation is the order of the court until modified by the court, but domestic practitioners are not logically going to go to Rule 7 first to find out what the 10-day rule requires for filing an objection. They will naturally turn to Rule 101, as our commissioner and I did today!

John Bluth:

I have a situation regarding Rule 7 that may be something the Rules Committee can clarify. Twice in the last month, I have come across a situation where opposing counsel, without any stipulation or even discussion, have both opposed a motion we filed and supported a motion by the opposing party in the same memorandum. This creates a couple of issues. First, there is the issue of the deadline for replying on our motion/responding to theirs – if there is only one reply/response, is the deadline the same as for a reply or opposition? Second, it creates a situation where the party serving the opposition/memo in support may be able to effectively control the processing of our motion – we have to decide whether to file separate memos to reply/respond to one memo by opposing counsel, which may confuse the problems in terms of filing a request to submit. While Rule 7 does not appear to contemplate such “joint” memoranda, it does not specifically prohibit it either. Although I would prefer that the Rule require separate memos unless the parties agree, if joint memos are going to be permitted, then clarification regarding deadlines and requesting to submit for decision would still be helpful.

Lisa Peck:

Last summer, I was involved in a dispute re: timing of action in response to a 3rd District Court order. Specifically, we were granted fees on summary judgment, and we were directed to submit an Affidavit of Fees and Order within a certain amount of time after the Court's Order on Summary Judgment was entered. The Court's Order, containing the direction, was mailed to counsel with a certificate of service by mail. In following timing of the Court's direction, we added 3 days for service of the Order by mail to our response/action time (Utah R. Civ. P. Rule 7); however, the opponent argued that our submission was untimely because the 3 day mailing rule did not apply

to court orders (Utah R. Civ. P., Rule 6), and so he argued that our submission was not within the time from the date of ENTRY of the order. Ultimately, he was deemed correct but we were able to avoid the penalty because I had filed a Motion to Extend Time under Rule 6 together with our submission, which the Court granted - BUT, it was a protracted argument regarding the timing of actions when directed by a Court order. I found that many other lawyers understood the 3 day mailing rule to apply to actions directed by Court order, whereas a few others thought it did not and that it followed the rule similar to appeals (30 days from entry of order - no mailing time). The Court itself wrote a detailed opinion on the issue because it was unclear under the rules.

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. An application to the court for an order to show cause shall be made only for enforcement of an existing order or for sanctions for violating an existing order. An application for an order to show cause must be supported by an affidavit sufficient to show 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.

Advisory Committee Notes