Agenda
Advisory Committee on Rules of Civil Procedure

June 24, 2009
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

Video Conference: https://www.via3.com/via3/login/login.aspx

Approval of minutes	Tab 1	Fran Wikstrom
Simplified Civil Procedures	Tab 2	Fran Wikstrom

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

Meeting Schedule

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, May 27, 2009
Administrative Office of the Courts

Francis M. Wikstrom, Presiding

PRESENT: Francis M. Wikstrom, Terrie T. McIntosh, Honorable Lyle R. Anderson, Francis J. Carney, Todd M. Shaughnessy, Janet H. Smith, Jonathan Hafen, David W. Scofield, Cullen Battle, Steven Marsden, Honorable Derek Pullan, Lori Woffinden, Matty Branch

EXCUSED: Honorable David O. Nuffer, Thomas R. Lee, Lincoln Davies, Barbara Townsend, Honorable Anthony B. Quinn, Anthony W. Schofield, James T. Blanch, Leslie W. Slaugh

STAFF: Tim Shea, Trystan B. Smith

GUEST: Xue Song

Ms. Song is a practicing lawyer and administrative law judge visiting Utah from China as a part of an exchange program. She accompanied Mr. Wikstrom as his guest to observe the committee's discussions.

I. APPROVAL OF MINUTES.

Mr. Wikstrom called the meeting to order at 4:00 p.m., and entertained comments from the committee concerning the April 22, 2009 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. ABSTRACT OF JUDGMENT.

Mr. Shea brought a proposed amendment to Rule 58A to the committee. He indicated the Policy and Planning Committee of the Judicial Council recommended a rule describing an abstract of judgment. Currently (Utah Code Ann. § 78B-5-202(3)) provides that an abstract of a judgment entered in one court and filed in another has the same force and effect as in the first, but the statute does not describe what the abstract consists of. Mr. Shea proposed language describing an abstract of judgment under subsection (g) of Rule 58A.

Mr. Battle questioned the need for an abstract of judgment. Mr. Carney also questioned why a party would need to file an abstract of judgment instead of filing the judgment with the County Recorder's. Mr. Shea indicated in some cases the judgment, the document itself, may be destroyed over a certain period of time. He further noted that prosecutors, in the course of proving enhancements for prior convictions, may use an abstract of judgment to prove a prior conviction. Ms. Branch also noted that an abstract of judgment may be necessary for a writ of execution, or a garnishment.

Mr. Wikstrom suggested a revision to subsection (g)(4), revising the last clause of the subsection to state, "or, attaches a copy of the judgment."

Ms. Smith moved to adopt subsection (g) with the revisions Mr. Wikstrom suggested. The committee unanimously agreed to the proposed changes to Rule 58A with the suggested revisions.

III. RULE 58B. SATISFACTION OF JUDGMENT.

Mr. Shea brought Rule 58B to the committee. He indicated that while in the process of creating forms and instructions for pro se parties, he found a number of ambiguities and policy questions that warranted the committee's attention.

Mr. Carney suggested the committee submit the issues and proposed changes to a sampling of debtor/creditor lawyers and ask for feedback about the proposed changes.

Ms. Woffinden agreed to examine Rule 58B and suggest any changes she felt necessary.

The committee agreed with Mr. Carney's suggestion and agreed to revisit the issue at a future meeting.

IV. SIMPLIFIED CIVIL PROCEDURES.

Mr. Wikstrom brought simplified civil procedures back to the committee. He noted that Mr. Shea incorporated the Institute's suggested changes into the rules for the committee's discussions. Mr. Wikstrom asked that the committee initially examine and discuss the suggested changes as broad concepts, and wait to address the details of the changes at a future time. The committee then proceeded to analyze the Institute's proposed changes to Rules 1, 8, 16 and 26.

The committee initially examined Rule 1. Mr. Scofield suggested that the language "and administered" should be revised to state, "and applied." The committee unanimously agreed to the revision.

The committee next examined Rule 8.

The suggested changes to Rule 8 would require a plaintiff to plead, in summary, a statement of facts on which the claim is based, the evidence supporting the factual statements, a

statement of the remedy sought, the monetary amount demanded, and the terms of any other remedy sought. The statements of facts must also set forth in detail the time, place, participants and events of the facts plead. Mr. Wikstrom characterized the proposed changes as pleading the "ultimate facts."

Mr. Hafen questioned whether requiring pleading with ultimate facts supported the committee's initial goal of increasing access to justice.

Mr. Carney questioned how the proposed changes were different than pleading with particularity under Rule 9. He further questioned why Rule 8 should not be amended to require pleading with particularity as the standard has been formulated under Rule 9.

Mr. Wikstrom questioned whether it was necessary to include the monetary amount demanded and the terms of any other remedy sought as a part of a party's claims for relief. Mr. Battle and Ms. Smith indicated that they had no objection to including the monetary amount as a part of the original claim. Ms. Smith noted that in certain cases plaintiffs will intentionally omit a monetary demand to avoid removal to federal court. Therefore, inclusion of the monetary amount would prevent such practices.

Mr. Shaughnessy noted that it would be more helpful to explain not only the monetary amount, but the category of damages claimed.

The committee next examined Rule 16.

The major revisions the Institute incorporated would (1) require the parties to appear at a pretrial conference, and (2) allow the Court to independently determine whether the parties' proposed discovery plan was proportional to the needs of the case. Mr. Wikstrom began the discussion indicating the second change did not coincide with the committee's principles. The committee wanted the parties to have independence in crafting discovery plans for their cases.

Judge Pullan noted that the changes would require a hearing to allow the trial judge to determine what was proportional.

Mr. Marsden questioned why the trial judge should not have the authority to oversee case management orders to avoid the needless waste of the parties' resources and to further judicial economy.

Mr. Wikstrom and Mr. Battle indicated it would be impracticable to require judicial oversight in every civil case.

Judge Pullan noted that although unpopular, early judicial involvement may be necessary to accomplish the committee's goals.

Mr. Carney suggested re-emphasizing proportionality, and then allowing the parties to move for judicial intervention. Mr. Hafen responded by questioning how the trial judge would

know what was proportional, unless the complaint stated the amount-in-controversy. Mr. Hafen also questioned whether it was wise for the committee to require a lawyer to give a client a comprehensive discovery budget as a part of the civil procedure rules.

Mr. Carney suggested the committee could get back to its initial goal of allowing access to justice by crafting the revisions to focus on cases worth less than $100,000. He questioned how the simplified rules could afford the public access to justice in cases worth under $100,000? Mr. Carney went on to suggest a very limited, but mandatory discovery process for low money value cases, which allowed a party to show good cause to opt-out.

Mr. Wikstrom asked why the rules should not require all cases to be subject to a very limited, but mandatory discovery process. If a party wanted to opt-out, then the party would have the burden to show the discovery requested was necessary and proportionate.

Finally, the committee examined Rule 26.

Mr. Wikstrom initially noted the committee's principles contemplated that initial disclosures would not be simultaneous, but successive. The committee agreed that within thirty days after filing the complaint, the plaintiff should file initial disclosures, and then the defendant(s) would be given, a yet to be determined time, to file initial disclosures.

Mr. Hafen noted that the suggested language, "possession and control that relate to the proceedings," under subsection (a)(1)(c) was too broad. Mr. Wikstrom further noted that the language was inconsistent with the committee's principles. The committee wanted the documents that a party may want to use as exhibits at trial to be disclosed. He suggested that a party should produce the documents that the party thinks it might want to use at trial, and disclose the identity of the people that the party might call as witnesses, in the party's initial disclosures.

Mr. Battle suggested that the committee consider revising Rule 26 to require a party to produce documents, instead of simply disclosing categories of documents to be exchanged. Mr. Battle also suggested revising Rule 26 to require a party to produce everything in their possession or control that was relevant.

Mr. Marsden cautioned that requiring people to produce documents at the initial disclosure stage may require more time after filing of the complaint for the production of initial disclosures. He also cautioned the committee to consider electronic discovery and the hardship with producing electronic discovery during the initial disclosure phase.

Mr. Carney noted the reason the current iteration of Rule 26 allowed the description of categories of documents is because documents may not be in a party's possession, custody or control at the time of filing of the complaint, for example in personal injury cases or employment cases.

Mr. Hafen questioned whether requiring production of documents would hurt the committee's goal to increase access to justice.

Mr. Wikstrom asked the committee to consider whether it needed special provisions for personal injury cases and employment cases.

Mr. Hafen noted in the Institute's suggested changes to subsection (b)(1) that a party is not entitled to disclosure of information simply because it appeared reasonably calculated to lead to the discovery of admissible evidence. He indicated the revision would amount to a 'sea change' in current practice.

Mr. Scofield noted that the language relevant to the issues in the case as they have been raised in the pleadings, under subsection (b)(1), may limit discovery on credibility and impeachment issues.

Mr. Hafen also questioned the language in subsection (b)(3) that would allow for the trial judge to shift the cost of discovery. He suggested rewording the language to allow the trial judge to require the requesting party to pay for any additional requested discovery.

The committee concluded its discussion by debating Mr. Hafen's proposal that in every case with an amount-in-controversy under $150,000 that no expert discovery would be allowed, a trial date would be set within 120 days, and a party would be allowed no more than two depositions. The committee also debated, whether or how, a party should be able to opt-out if the case warranted.

After considerable discussion, the committee agreed to revisit simplified rules and the Institute's remaining changes, at a future meeting.

V. ADJOURNMENT.

The meeting adjourned at 6:00 p.m. The next committee meeting will be held at 4:00 p.m. on Wednesday, June 24, 2009, at the Administrative Office of the Courts.

Tab 2

Rule 1. General provisions.

(a) Scope of rules. These rules shall govern the procedure in the courts of the state of Utah in all actions, suits, and proceedings of a civil nature, whether cognizable at law or in equity, and in all special statutory proceedings, except as governed by other rules promulgated by this court or enacted by the Legislature and except as stated in Rule 81. They shall be liberally construed and applied to secure the just, speedy, and inexpensive determination of every action.

(b) Effective date. These rules shall take effect on January 1, 1950; and thereafter all laws in conflict therewith shall be of no further force or effect. They govern all proceedings in actions brought after they take effect and also all further proceedings in actions then pending, except to the extent that in the opinion of the court their application in a particular action pending when the rules take effect would not be feasible or would work injustice, in which event the former procedure applies.

Advisory Committee Notes

IAALS Commentary:

This addition is meant to align Utah Rule 1 with Federal Rule of Civil Procedure 1, which was amended in 1993 to include the words “and administered” in order to “recognize the affirmative duty of the court to exercise the authority conferred by these rules to ensure that civil litigation is resolved not only fairly, but also without undue cost or delay. As officers of the court, attorneys share this responsibility with the judge to whom the case is assigned.” (Advisory Committee Note (1993)).

Source of Change:

FED. R. CIV. P. 1 – These rules govern the procedure in all civil actions and proceedings in the United States district courts, except as stated in Rule 81. They should be construed and administered to secure the just, speedy, and inexpensive determination of every action and proceeding.

From Judge David Nuffer:

I would like to suggest that as we delve into the rules, we consider reversion to the pre-2000 version of the disclosure rule to get more information on the table earlier. And cases involving "information assymetry" that might need more discovery.

Rule 8. General rules of pleadings.

(a) Claims for relief. A pleading which sets forth a claim for relief, whether an original claim, counterclaim, cross-claim or third-party claim, shall ~~contain (1) a short and plain statement of the claim showing that the pleader is entitled to relief; and (2) a demand for judgment for the relief to which he deems himself entitled.~~ state with particularity the facts [f1] on which the claim is based and the remedy requested, including the types of damages. The statement of facts must be sufficient, if ultimately proven, to establish the elements of the claim and must, so far as reasonably practicable, set forth detail as to time, place, participants, and events. In connection with an objection that a pleading lacks sufficient detail, the court should permit a limited opportunity to develop the facts when necessary and when the claimant does not have access to the information otherwise. Relief in the alternative or of several different types may be demanded.

(b) Defenses; form of denials. A party shall state in short and plain terms his defenses to each claim asserted and shall admit or deny the averments upon which the adverse party relies. If he is without knowledge or information sufficient to form a belief as to the truth of an averment, he shall so state and this has the effect of a denial. Denials shall fairly meet the substance of the averments denied. When a pleader intends in good faith to deny only a part or a qualification of an averment, he shall specify so much of it as is true and material and shall deny only the remainder. Unless the pleader intends in good faith to controvert all the averments of the preceding pleading, he may make his denials as specific denials of designated averments or paragraphs, or he may generally deny all the averments except such designated averments or paragraphs as he expressly admits; but, when he does so intend to controvert all its averments, he may do so by general denial subject to the obligations set forth in Rule 11.

(c) Affirmative defenses. In pleading to a preceding pleading, a party shall set forth affirmatively accord and satisfaction, arbitration and award, assumption of risk, contributory negligence, discharge in bankruptcy, duress, estoppel, failure of consideration, fraud, illegality, injury by fellow servant, laches, license, payment, release, res judicata, statute of frauds, statute of limitations, waiver, and any other matter constituting an avoidance or affirmative defense. When a party has mistakenly

designated a defense as a counterclaim or a counterclaim as a defense, the court on terms, if justice so requires, shall treat the pleadings as if there had been a proper designation. The requirements of section (a) concerning the detail of statements of claims shall apply to affirmative defenses.

(d) Effect of failure to deny. Averments in a pleading to which a responsive pleading is required, other than those as to the amount of damage, are admitted when not denied in the responsive pleading. Averments in a pleading to which no responsive pleading is required or permitted shall be taken as denied or avoided.

(e) Pleading to be concise and direct; consistency.

(e)(1) ~~Each~~ Subject to the requirements of Subsection (a), each averment of a pleading shall be simple, concise, and direct. No technical forms of pleading or motions are required.

(e)(2) A party may set forth two or more statements of a claim or defense alternately or hypothetically, either in one count or defense or in separate counts or defenses. When two or more statements are made in the alternative and one of them if made independently would be sufficient, the pleading is not made insufficient by the insufficiency of one or more of the alternative statements. A party may also state as many separate claims or defenses as he has regardless of consistency and whether based on legal or on equitable grounds or on both. All statements shall be made consistent with the requirements of this Rule 8 and subject to the obligations set forth in Rule 11.

(f) Construction of pleadings. All pleadings shall be so construed as to do substantial justice.

IAALS Commentary:

This section was amended to establish a fact-based pleading standard. The requirement that facts be pled also bolsters Rules 12(c) and 56, because it clarifies at an early stage the material facts at issue. The Committee may also wish to consider whether Rule 15 might be affected by the adoption of a fact-pleading standard.

Source of Change:

R. TRANSNAT'L CIV. P.

12.1 The plaintiff must state the facts on which the claim is based, describe the evidence to support those statements, and refer to the legal grounds that support the claim, including foreign law, if applicable.

12.3 The statement of facts must, so far as reasonably practicable, set forth detail as to time, place, participants, and events. A party who is justifiably uncertain of a fact or legal grounds may make statements about them in the alternative. In connection with an objection that a pleading lacks sufficient detail, the court should give due regard to the possibility that necessary facts and evidence will develop in the course of the proceeding.

12.5 The complaint must state the remedy requested, including the monetary amount demanded and the terms of any other remedy sought.

13.4 The requirements of Rule 12 concerning the detail of statements of claims apply to denials, affirmative defenses, counterclaims, and third-party claims.

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

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

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

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

(a)(3) discouraging wasteful pretrial activities;

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

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

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

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

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

(b)(2) to file motions; and

(b)(3) to complete discovery.

The scheduling order may also include:

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

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

(b)(6) provisions for preservation, disclosure or discovery of electronically stored information;

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

(b)(8) court authorization of the parties' discovery plan as set forth pursuant to Rule 26(f)(2). If parties and counsel agree to a discovery plan and the parties certify that they each have been given a budget for the discovery contemplated by the plan and have approved it, the court shall approve the plan. Otherwise, the court shall determine whether the planned discovery is proportional to the amount in controversy or the complexity of the case before adopting it. If it is not, the court shall require the parties to limit the discovery plan as required to assure proportionality; and

~~(b)(8)~~ (b)(9) any other matters appropriate in the circumstances of the case.

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

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

(d) Sanctions. If a party or a party's attorney fails to obey a scheduling or pretrial order, if no appearance is made on behalf of a party at a scheduling or pretrial conference, if a party or a party's attorney is substantially unprepared to participate in the conference, or if a party or a party's attorney fails to participate in good faith, the court, upon motion or its own initiative, may take any action authorized by Rule 37(b)(2).

Advisory Committee Notes

IAALS Commentary

This rule was amended to mandate that the court review the costs associated with a discovery plan to which the parties and counsel have agreed. A safety net was included, however, to ensure that the court could reject a discovery plan – even if agreed upon – if it was disproportionate to the amount in controversy or complexity of

the case. The latter provision concerning case complexity was included for cases with no amount in controversy, such as those seeking injunctive relief. Section 16(b)(8) was added to ensure consistency with the new provisions of Rule 26(f)(2).

Source of Change:

Get the parties involved. The parties should certify that they have been given a discovery budget and have approved it. If the parties and counsel agree to a discovery plan, the court should adopt it.

Rule 26. General provisions governing discovery.

(a) Required disclosures~~; Discovery methods~~. These limitations apply unless a practice area has developed its own protocol for disclosure and discovery which has been approved by the court and which is published.

~~(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)(1) Initial disclosures. Within ~~90~~30 days after the filing of the complaint the plaintiff shall, ~~each party~~and within 30 days after filing an answer a defendant shall disclose to the other party or parties:

(a)(1)(A) a copy of all documents which that party refers to in its complaint or answer, or ~~intends to~~may use at trial;

(a)(1)(B) a written disclosure statement identifying the name, address and telephone number of each non-expert witness that party ~~intends to~~may call at trial in its case-in-chief, together with a short summary statement of the expected testimony for that witness; and

~~(a)(1)(C) a copy of all documents within that party's possession or control that relate to the facts as stated in the pleadings.~~

(a)(1)(~~D~~C) In actions claiming damages for personal or emotional injuries, the claimant shall disclose the names and addresses of health care providers who have provided care with respect to the condition for which damages are sought within five years prior to the date of injury, and shall produce all records from those providers or shall provide a waiver allowing the opposing party to obtain those records, subject to automatic protective provisions that restrict the use of the materials to the instant litigation. The defending party shall provide copies of all applicable insurance policies, and any insurance claims documents that address the facts of the case.

(a)(1)(~~E~~D) In actions seeking damages for loss of employment, the claimant shall disclose the names and addresses of employers for five years prior to the date of disclosure, all documents reflective of claimant's efforts to find employment following departure from the defending party's employ; and written waivers allowing the defending party to obtain the claimant's personnel files from each such employer, subject to automatic protective provisions that restrict the use of the materials to the instant litigation. The defending party shall produce the claimant's personnel files and all applicable personnel policies and employee handbooks;

(a)(1)(~~F~~E) Each party shall have a continuing obligation to supplement these disclosures, and no party may seek additional discovery until that party's obligations under this section are satisfied, unless ordered by the court upon a showing of good cause.

(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~~ ordered by the court or stipulated by the parties, 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.~~ Parties may only seek discovery limited to matters directly relevant to the issues in the case as they have been stated in the pleadings. A party is not entitled to disclosure of information simply because it appears reasonably calculated to lead to the discovery of admissible evidence. The parties may not engage in discovery beyond the prescribed limits unless they and their clients agree to such discovery, or the court concludes that it is proportional and necessary given the amount in controversy or the complexity of the case. The court may act upon its own initiative after reasonable notice or pursuant to a motion under Subdivision (c).

(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)(3) Cost-shifting. The court may shift or allocate the costs of discovery where clearly necessary to achieve proportionality to the amount in controversy or complexity of the case.

(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. The only discovery available of opposing parties' experts shall be the expert report. No depositions of expert witnesses shall be permitted. Experts may not testify in direct examination concerning any matter that is not set forth in the report.

~~(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) and the requesting party has met its obligations under Subdivision (a)(1)(~~F~~E). 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)(E) certification by each party that counsel has provided a comprehensive discovery budget that has met that party's approval;

(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

IAALS Commentary Section (a)

In order to expand the initial disclosure requirements, the existing text was deleted and replaced with the more expansive requirements taken from the New Mexico draft rules. The section was also amended to reflect the new fact-based pleading standard. Under the amended text, parties are required to disclose documents that "relate" to the facts in the pleadings – not just those that support the party's facts as set forth in the pleadings. The section was supplemented with a provision from the Transnational Rules that was designed to force parties to comply with their initial disclosure requirements by prohibiting further discovery until these are met. Section (a)(1)(D) includes disclosure requirements for several specialty practice areas and can be expanded as specialized disclosure requirements are developed in other areas.

Source of Change:

Early production of documents. Parties should be required to produce, early and without request, all evidence that they might rely on to support their claims or defenses. Specialty practice areas should develop their own particular disclosure requirements.

New Mexico Draft Rule

A. Within 90 days after the filing of the complaint, each party shall disclose to the other party or parties:

(1) A copy of all documents which that party refers to in its complaint or answer, or intends to use at trial.

(2) A written disclosure statement identifying the name, address and telephone number of each non-expert witness that party intends to call at trial, together with a statement of the expected testimony for that witness.

(3) A copy of all documents within that party's possession or control that relate to another party's claim or defense.

(4) In actions claiming damages for personal or emotional injuries, the claimant shall disclose the names and addresses of health care providers who have provided care with respect to the condition for which damages are sought within five years prior to the

date of injury, and shall produce all records from those providers OR shall provide a waiver allowing the opposing party to obtain those records, subject to automatic protective provisions that restrict the use of the materials to the litigation only. The defending party shall provide copies of all applicable insurance policies, and any insurance claims documents that address the facts of the case

(5) In actions seeking damages for loss of employment, the claimant shall disclose the names and addresses of employers for five years prior to the date of disclosure, all documents reflective of claimant's efforts to find employment following departure from the defending party's employ; and written waivers allowing the defending party to obtain the claimant's personnel files from each such employer, subject to automatic protective provisions that restrict the use of the materials to the litigation only. The defending party shall produce the claimant's personnel files and all applicable personnel policies and employee handbooks.

B. Each party shall have a continuing obligation to supplement these disclosures.

R. TRANSNAT'L CIV. P. Comment R-22F: Rule 22.1 requires the parties to make the disclosures required by Rule 21 prior to demanding production of evidence from an opposing party.

IAALS Commentary Section (b)

This section was amended to limit the scope of discovery. The amendments limit relevant information for the purpose of discovery to the facts set forth in the pleadings. The amendment borrows from the Transnational Rules and reverses the existing discovery mind-set by stating that parties are not entitled to information that merely appears reasonably calculated to lead to the discovery of admissible evidence. The section was also amended to reflect the requirement that parties meet their disclosure obligations prior to being allowed further discovery. The proportionality provision of (b)(3)(C) was moved into (b)(1). The remaining section (b)(3) was deleted and replaced with a provision authorizing cost-shifting where discovery burdens are unequal. Section (b)(5), relating to expert testimony, was amended to limit expert testimony to the contents of the expert's report.

Source of Change:

Early production of documents. Parties should be required to produce, early and without request, all evidence that they might rely on to support their claims or defenses. Specialty practice areas should develop their own particular disclosure requirements.

Limits on discovery. The discovery "defaults" should be drastically limited to force parties to be more reasonable and to give "cover" to the lawyers.

Cost-shifting. Courts should consider cost-shifting or "co-pay" where the discovery burdens are not balanced.

Expert testimony. Expert testimony should be limited to the substance of the expert's report, which in turn will limit the need to depose the expert.

R. TRANSNAT'L CIV. P. Comment R-22H: According to Rule 22.1, compulsory exchange of evidence is limited to matters directly relevant to the issues in the case as they have been stated in the pleadings…. A party is not entitled to disclosure of information merely that 'appears reasonably calculated to lead to the discovery of admissible evidence,' which is permitted under Rule 26 of the Federal Rules of Civil Procedure in the United States. 'Relevant' evidence is that which supports or contravenes the allegations of one of the parties. This Rule is aimed at preventing overdiscovery or unjustified 'fishing expeditions.'

IAALS Commentary Section (c)

A cost-shifting provision was added to this section.

Source of Change:

Cost-shifting. Courts should consider cost-shifting or "co-pay" where the discovery burdens are not balanced.

Nova Scotia Rule of Civil Procedure 14.07 Expense of disclosure

(1) The party who makes disclosure must pay for the disclosure, unless the parties agree or a judge orders otherwise.

(2) A judge may order another party to provide an indemnity to the disclosing party for an expense of disclosure, if all of the following apply:

(a) considering the disclosing party's means, the indemnity is clearly necessary to achieve proportionality within the meaning of Rule 14.08(3);

(b) the expense is not the result of a system of records management that is ineffective, or otherwise unreasonable;

(3) The order may require the disclosing party to do any of the following, if it is covered by the indemnity:

(a) acquire more information about the disclosing party's records management system, the location of the party's documents and electronic information, or how they are accessed, and report to the indemnifying party or the court;

(b) perform a search for relevant documents or electronic information, report on the results to the indemnifying party or the court, and produce a copy of any relevant document or electronic information the party finds;

(c) acquire and produce a copy of a relevant document or electronic information;

(d) take other steps that may assist the indemnifying party to receive disclosure.

(4) The provisions of an indemnity must be taken into account in the assessment of cost under Rule 14.08(3).

IAALS Commentary Section (f)

A provision was added to section (f) to include a certified discovery budget among the items covered in the stipulated discovery plan.

Source of Change:

Get the parties involved. The parties should certify that they have been given a discovery budget and have approved it. If the parties and counsel agree to a discovery plan, the court should adopt it.

Rule 29. Stipulations regarding discovery procedure.

Unless the court orders otherwise, the parties may by written stipulation

(1) provide that depositions may be taken before any person, at any time or place, upon any notice, and in any manner and when so taken may be used like other depositions, and

(2) modify the procedures provided by these rules for disclosure and discovery, except that stipulations extending the time for, or presumptive limits of, disclosure or discovery require the approval of the court if they would interfere with the time set for completion of discovery or with the date of a hearing or trial.

Advisory Committee Notes

IAALS Commentary

This section was amended to establish the presumptive limits on the tools of discovery set forth in other Rules.

Source of Change:

Limits on discovery. The discovery “defaults” should be drastically limited to force parties to be more reasonable and to give “cover” to the lawyers.

Rule 30. Depositions upon oral examination.

(a) When depositions may be taken; When leave required.

(a)(1) ~~A party may take the testimony of any person, including a party, by deposition upon oral examination without leave of court except as provided in paragraph (2).~~ A party may take the testimony of an opposing partiesy ~~expected to be called~~ by deposition upon oral examination. Depositions of document custodians may be taken to secure production of documents and to establish evidentiary foundation. Depositions may be taken to preserve testimony for trial when a witness may not be available to testify in person. No other depositions shall be taken except upon: (A) agreement of all counsel and their clients or self-represented litigants; (B) an order of the court demonstrating that the additional deposition(s) satisfy the requirements of Rule 26(b)(1); or (C) an order of the court following a Rule 16(b) scheduling and management conference. The attendance of witnesses may be compelled by subpoena as provided in Rule 45.

(a)(2) A party must obtain leave of court, which shall be granted to the extent consistent with the principles stated in Rule ~~26(b)(3)~~ 26(b)(1), if the person to be examined is confined in prison or if~~, without the written stipulation of the parties~~:

(a)(2)(A) a proposed deposition would result in more than ten depositions being taken under this rule or Rule 31 by the plaintiffs, or by the defendants, or by third-party defendants;

(a)(2)(B) the person to be examined already has been deposed in the case; or

(a)(2)(C) a party seeks to take a deposition before the time specified in Rule 26(d) unless the notice contains a certification, with supporting facts, that the person to be examined is expected to leave the state and will be unavailable for examination unless deposed before that time. The party or party's attorney shall sign the notice, and the signature constitutes a certification subject to the sanctions provided by Rule 11.

(b) Notice of examination; general requirements; special notice; non-stenographic recording; production of documents and things; deposition of organization; deposition by telephone.

(b)(1) A party desiring to take the deposition of any person upon oral examination shall give reasonable notice in writing to every other party to the action. The notice shall

state the time and place for taking the deposition and the name and address of each person to be examined, if known, and, if the name is not known, a general description sufficient to identify the person or the particular class or group to which the person belongs. If a subpoena duces tecum is to be served on the person to be examined, the designation of the materials to be produced as set forth in the subpoena shall be attached to or included in the notice.

(b)(2) The party taking the deposition shall state in the notice the method by which the testimony shall be recorded. Unless the court orders otherwise, it may be recorded by sound, sound-and-visual, or stenographic means, and the party taking the deposition shall bear the cost of the recording.

(b)(3) With prior notice to the deponent and other parties, any party may designate another method to record the deponent's testimony in addition to the method specified by the person taking the deposition. The additional record or transcript shall be made at that party's expense unless the court otherwise orders.

(b)(4) Unless otherwise agreed by the parties, a deposition shall be conducted before an officer appointed or designated under Rule 28 and shall begin with a statement on the record by the officer that includes (A) the officer's name and business address; (B) the date, time and place of the deposition; (C) the name of the deponent; (D) the administration of the oath or affirmation to the deponent; and (E) an identification of all persons present. If the deposition is recorded other than stenographically, the officer shall repeat items (A) through (C) at the beginning of each unit of tape or other recording medium. The appearance or demeanor of deponents or attorneys shall not be distorted through camera or sound-recording techniques. At the end of the deposition, the officer shall state on the record that the deposition is complete and shall set forth any stipulations made by counsel concerning the custody of the transcript or recording and the exhibits, or concerning other pertinent matters.

(b)(5) The notice to a party deponent may be accompanied by a request made in compliance with Rule 34 for the production of documents and tangible things at the taking of the deposition. The procedure of Rule 34 shall apply to the request.

(b)(6) A party may in the notice and in a subpoena name as the deponent a public or private corporation, a partnership, an association, or a governmental agency and

describe with reasonable particularity the matters on which examination is requested. In that event, the organization so named shall designate one or more officers, directors, managing agents, or other persons who consent to testify on its behalf and may set forth, for each person designated, the matters on which the person will testify. A subpoena shall advise a nonparty organization of its duty to make such a designation. The persons so designated shall testify as to matters known or reasonably available to the organization. This Subdivision (b)(6) does not preclude taking a deposition by any other procedure authorized in these rules.

(b)(7) The parties may stipulate in writing or the court may upon motion order that a deposition be taken by remote electronic means. For the purposes of this rule and Rules 28(a), 37(b)(1), and 45(d), a deposition taken by remote electronic means is taken at the place where the deponent is to answer questions.

(c) Examination and cross-examination; record of examination; oath; objections. Examination and cross-examination of witnesses may proceed as permitted at the trial under the provisions of the Utah Rules of Evidence, except Rules 103 and 615. The officer before whom the deposition is to be taken shall put the witnesses on oath or affirmation and shall personally, or by someone acting under the officer's direction and in the officer's presence, record the testimony of the witness. All objections made at the time of the examination to the qualifications of the officer taking the deposition, to the manner of taking it, to the evidence presented, or to the conduct of any party and any other objection to the proceedings shall be noted by the officer upon the record of the deposition, but the examination shall proceed with the testimony being taken subject to the objections. In lieu of participating in the oral examination, parties may serve written questions in a sealed envelope on the party taking the deposition, and the party taking the deposition shall transmit them to the officer, who shall propound them to the witness and record the answers verbatim.

(d) Schedule and duration; motion to terminate or limit examination.

(d)(1) Any objection to evidence during a deposition shall be stated concisely and in a non-argumentative and non-suggestive manner. A ~~person~~ lawyer may not instruct a deponent not to answer ~~only when necessary~~except to preserve a privilege, to enforce a limitation on evidence directed by the court, or to present a motion under paragraph (4).

(d)(2) Unless otherwise authorized by the court or stipulated by the parties, a deposition ~~is limited to one day of seven hours~~ shall not exceed four hours in length. The court must allow additional time consistent with Rule ~~26(b)(2)~~ 26(b)(1) if needed for a fair examination of the deponent or if the deponent or another person, or other circumstance, impedes or delays the examination.

(d)(3) If the court finds that any impediment, delay, or other conduct has frustrated the fair examination of the deponent, it may impose upon the persons responsible an appropriate sanction, including the reasonable costs and attorney fees incurred by any parties as a result thereof.

(d)(4) At any time during the taking of the deposition, on motion of a party or of the deponent and upon a showing that the examination is being conducted in bad faith or in such manner as unreasonably to annoy, embarrass, or oppress the deponent or party, the court in which the action is pending or the court in the district where the deposition is being taken may order the officer conducting the examination to cease forthwith from taking the deposition, or may limit the scope and manner of the taking of the deposition as provided in Rule 26(c). If the order made terminates the examination, it shall be resumed thereafter only upon the order of the court in which the action is pending. Upon demand of the objecting party or deponent, the taking of the deposition shall be suspended for the time necessary to make a motion for an order. The provisions of Rule 37(a)(4) apply to the award of expenses incurred in relation to the motion.

(e) Submission to witness; changes; signing. If requested by the deponent or a party before completion of the deposition, the deponent shall have 30 days after being notified by the officer that the transcript or recording is available in which to review the transcript or recording and, if there are changes in form or substance, to sign a statement reciting such changes and the reasons given by the deponent for making them. The officer shall indicate in the certificate prescribed by subdivision (f)(1) whether any review was requested and, if so, shall append any changes made by the deponent during the period allowed.

(f) Record of deposition; certification and delivery by officer; exhibits; copies.

(f)(1) The transcript or other recording of the deposition made in accordance with this rule shall be the record of the deposition. The officer shall sign a certificate, to

accompany the record of the deposition, that the witness was duly sworn and that the transcript or other recording is a true record of the testimony given by the witness. Unless otherwise ordered by the court, the officer shall securely seal the record of the deposition in an envelope endorsed with the title of the action and marked "Deposition of" and shall promptly send the sealed record of the deposition to the attorney who arranged for the transcript or other record to be made. If the party taking the deposition is not represented by an attorney, the record of the deposition shall be sent to the clerk of the court for filing unless otherwise ordered by the court. An attorney receiving the record of the deposition shall store it under conditions that will protect it against loss, destruction, tampering, or deterioration.

(f)(2) Documents and things produced for inspection during the examination of the witness shall, upon the request of a party, be marked for identification and annexed to the record of the deposition and may be inspected and copied by any party, except that, if the person producing the materials desires to retain them, that person may (A) offer copies to be marked for identification and annexed to the record of the deposition and to serve thereafter as originals, if the person affords to all parties fair opportunity to verify the copies by comparison with the originals, or (B) offer the originals to be marked for identification, after giving to each party an opportunity to inspect and copy them, in which event the originals may be used in the same manner as if annexed to the record of the deposition. Any party may move for an order that the originals be annexed to and returned with the record of the deposition to the court, pending final disposition of the case.

(f)(3) Unless otherwise ordered by the court or agreed by the parties, the officer shall retain stenographic notes of any depositions taken stenographically or a copy of the recording of any deposition taken by another method. Upon payment of reasonable charges therefor, the officer shall furnish a copy of the record of the deposition to any party or to the deponent. Any party or the deponent may arrange for a transcription to be made from the recording of a deposition taken by non-stenographic means.

(g) Failure to attend or to serve subpoena; expenses.

(g)(1) If the party giving the notice of the taking of a deposition fails to attend and proceed therewith and another party attends in person or by attorney pursuant to the

notice, the court may order the party giving the notice to pay to such other party the reasonable expenses incurred by him and his attorney in attending, including reasonable attorney's fees.

(g)(2) If the party giving the notice of the taking of a deposition of a witness fails to serve a subpoena upon him and the witness because of such failure does not attend, and if another party attends in person or by attorney because he expects the deposition of that witness to be taken, the court may order the party giving the notice to pay to such other party the reasonable expenses incurred by him and his attorney in attending, including reasonable attorney's fees.

Advisory Committee Notes

IAALS Commentary Section (a)

This section was amended to include the limitations on depositions exceeding the presumptive limit as set forth in Arizona Rule of Civil Procedure 30(a). The provision was slightly amended to account for the Arizona-specific Comprehensive Pretrial Conference. Section (a)(2) was amended to remove the written stipulation of the parties provision.

Source of Change:

Limits on discovery. The discovery “defaults” should be drastically limited to force parties to be more reasonable and to give “cover” to the lawyers.

ARIZ. R. CIV. P. 30(a) When depositions may be taken. After commencement of the action, the testimony of parties or any expert witnesses expected to be called may be taken by deposition upon oral examination. Depositions of document custodians may be taken to secure production of documents and to establish evidentiary foundation. No other depositions shall be taken except upon: (1) agreement of all parties; (2) an order of the court following a motion demonstrating good cause, or (3) an order of the court following a Comprehensive Pretrial Conference pursuant to Rule 16(c).

IAALS Commentary Section (d)

The amendment to this section reduces the length of depositions from seven to four hours.

Source of Change:

Limits on discovery. The discovery "defaults" should be drastically limited to force parties to be more reasonable and to give "cover" to the lawyers.

ARIZ. R. CIV. P. 30(d) Length of deposition; motion to terminate or limit examination. Depositions shall be of reasonable length. They oral deposition of any party or witness, including expert witnesses, whenever taken, shall not exceed four (4) hours in length, except pursuant to stipulation of the parties, or, upon motion and a showing of good cause. The court shall impose sanctions pursuant to Rule 16(f) for unreasonable, groundless, abusive or obstructionist conduct.

Rule 31. Depositions upon written questions.

(a) Serving questions; notice.

(a)(1) ~~A party may take the testimony of any person, including a party, by deposition upon written questions without leave of court except as provided in paragraph (2). A~~ party may take the testimony of an opposing partiesy ~~expected to be called by~~ deposition upon written examination. Depositions of document custodians may be taken to secure production of documents and to establish evidentiary foundation. No other depositions shall be taken except upon: (A) agreement of all counsel and their clients; (B) an order of the court demonstrating that the additional deposition(s) satisfy the requirements of Rule 26(b)(1); or (C) an order of the court following a Rule 16(b) scheduling and management conference. The attendance of witnesses may be compelled by the use of subpoena as provided in Rule 45.

(a)(2) A party must obtain leave of court, which shall be granted to the extent consistent with the principles stated in Rule ~~26(b)(2)~~ 26(b)(1), if the person to be examined is confined in prison or if, without the written stipulation of the parties,

(a)(2)(A) a proposed deposition would result in more than ten depositions being taken under this rule or Rule 30 by the plaintiffs, or by the defendants, or by third-party defendants;

(a)(2)(B) the person to be examined has already been deposed in the case; or

(a)(2)(C) a party seeks to take a deposition before the time specified in Rule 26(d).

(a)(3) A party desiring to take a deposition upon written questions shall serve them upon every other party with a notice stating (1) the name and address of the person who is to answer them, if known, and if the name is not known, a general description sufficient to identify him or the particular class or group to which he belongs, and (2) the name or descriptive title and address of the officer before whom the deposition is to be taken. A deposition upon written questions may be taken of a public or private corporation or a partnership or association or governmental agency in accordance with the provisions of Rule 30(b)(6).

(a)(4) Within 14 days after the notice and written questions are served, a party may serve cross questions upon all other parties. Within 7 days after being served with cross questions, a party may serve redirect questions upon all other parties. Within 7 days

after being served with redirect questions, a party may serve recross questions upon all other parties. The court may for cause shown enlarge or shorten the time.

(b) Officer to take responses and prepare record. A copy of the notice and copies of all questions served shall be delivered by the party taking the deposition to the officer designated in the notice, who shall proceed promptly, in the manner provided by Rule 30(c), (e), and (f), attaching to the deposition the copy of the notice and the questions received.

Advisory Committee Notes

IAALS Commentary

Similar to Rule 30(a), the amendment in this section borrows the language from Arizona Rule of Civil Procedure 30(a); altered to reflect depositions upon written, as opposed to oral, examination.

Source of Change:

Limits on discovery. The discovery “defaults” should be drastically limited to force parties to be more reasonable and to give “cover” to the lawyers.

ARIZ. R. CIV. P. 30(a) When depositions may be taken. After commencement of the action, the testimony of parties or any expert witnesses expected to be called may be taken by deposition upon oral examination. Depositions of document custodians may be taken to secure production of documents and to establish evidentiary foundation. No other depositions shall be taken except upon: (1) agreement of all parties; (2) an order of the court following a motion demonstrating good cause, or (3) an order of the court following a Comprehensive Pretrial Conference pursuant to Rule 16(c).

Rule 33. Interrogatories to parties.

(a) Availability; procedures for use. Without leave of court ~~or written stipulation~~, any party may serve upon any other party written interrogatories, not exceeding 25 in number including all discrete subparts, to be answered by the party served or, if the party served is a public or private corporation, a partnership, an association, or a governmental agency, by any officer or agent, who shall furnish such information as is available to the party. Leave to serve additional interrogatories shall be granted to the extent consistent with the principles of Rule ~~26(b)(3)~~ 26(b)(1). Without leave of court ~~or written stipulation~~, interrogatories may not be served before the time specified in Rule 26(d). Contention interrogatories may not be served absent written stipulation of the parties or court order.

(b) Answers and objections.

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

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

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

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

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

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

An interrogatory otherwise proper is not necessarily objectionable merely because an answer to the interrogatory involves an opinion or contention that relates to fact or

the application of law to fact, but the court may order that such an interrogatory need not be answered until after designated discovery has been completed or until a pretrial conference or other later time.

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

Advisory Committee Notes

IAALS Commentary

The written stipulations provisions were removed from this section in order to provide “cover” to lawyers; allowing them to feel comfortable accepting and abiding by the presumptive limits on discovery.

Source of Change:

Limits on discovery. The discovery “defaults” should be drastically limited to force parties to be more reasonable and to give “cover” to the lawyers.

Rule 34. Production of documents and things and entry upon land for inspection and other purposes.

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

(a)(1) to produce and permit the party making the request, or someone acting on his behalf, to inspect, copy, test or sample any designated documents or electronically stored information (including writings, drawings, graphs, charts, photographs, sound recordings, images, and other data or data compilations stored in any medium from which information can be obtained, translated, if necessary, by the respondent into reasonably usable form), or to inspect, copy, test or sample any designated tangible things which constitute or contain matters within the scope of Rule 26(b) and which are in the possession, custody or control of the party upon whom the request is served; or

(a)(2) to permit entry upon designated land or other property in the possession or control of the party upon whom the request is served for the purpose of inspection and measuring, surveying, photographing, testing, or sampling the property or any designated object or operation thereon, within the scope of Rule 26(b).

(b) Procedure and limitations.

(b)(1) The request shall set forth the items to be inspected either by individual item or by category, and describe each item and category with reasonable particularity. The request shall specify a reasonable time, place, and manner of making the inspection and performing the related acts. The request may specify the form or forms in which electronically stored information is to be produced. Without leave of court or written stipulation, a request may not be served before the time specified in Rule 26(d)~~. The request shall not, without leave of court~~ or~~,~~ cumulatively include more than ten (10) distinct items or specific categories of items. If a party believes that good cause exists for more than ten (10) distinct items or categories of items. Leave to serve additional interrogatories shall be granted to the extent consistent with the principles of Rule 26(b)(1).

~~, that party shall consult with the party upon whom a request would be served and attempt to secure a written stipulation to that effect.~~

(b)(2) The party upon whom the request is served shall serve a written response within 30 days after the service of the request. A shorter or longer time may be directed

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

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

(b)(3)(A) a party who produces documents for inspection shall produce them as they are kept in the usual course of business or shall organize and label them to correspond with the categories in the request;

(b)(3)(B) if a request does not specify the form or forms for producing electronically stored information, a responding party must produce the information in a form or forms in which it is ordinarily maintained or in a form or forms that are reasonably usable; and

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

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

Advisory Committee Notes

IAALS Commentary

This section was amended to include the limitations on requests for production of documents as set forth in the Arizona Rules of Civil Procedure.

Source of Change:

Limits on discovery. The discovery “defaults” should be drastically limited to force parties to be more reasonable and to give “cover” to the lawyers.

ARIZ. R. CIV. P. 34(b) Procedure and limitations. The requests may, without leave of court, be served upon the plaintiff after commencement of the action and upon any other party with or after service of the summons and complaint upon that party. The requests shall set forth the items to be inspected either by individual item or by specific category, and describe each item and specific category with reasonable particularity. The request may specify the form or forms in which electronically stored information is to be produced. The request(s) shall not, without leave of court, cumulatively include more than ten (10) distinct items or specific categories of items. Each request shall specify a reasonable time, place, and manner of making the inspection and performing the related acts. If a party believes that good cause exists for more than ten (10) distinct items or categories of items, that party shall consult with the party upon whom a request would be served and attempt to secure a written stipulation to that effect.

Rule 36. Request for admission.

(a) Request for admission.

(a)(1) A party may serve upon any other party a written request for the admission, for purpose of the pending action only, of the truth of any matters within the scope of Rule 26(b) set forth in the request that relate to statements or opinions of fact or of the application of law to fact, including the genuineness of any documents described in the request. The request for admission shall contain a notice advising the party to whom the request is made that, pursuant to Rule 36, the matters shall be deemed admitted unless said request is responded to within 30 days after service of the request or within such shorter or longer time as the court may allow. Copies of documents shall be served with the request unless they have been or are otherwise furnished or made available for inspection and copying. Without leave of court or written stipulation, requests for admission may not be served before the time specified in Rule 26(d).

(a)(2) Each matter of which an admission is requested shall be separately set forth. The matter is admitted unless, within thirty days after service of the request, or within such shorter or longer time as the court may allow, the party to whom the request is directed serves upon the party requesting the admission a written answer or objection addressed to the matter, signed by the party or by his attorney, but, unless the court shortens the time, a defendant shall not be required to serve answers or objections before the expiration of 45 days after service of the summons and complaint upon him. If objection is made, the reasons therefor shall be stated. The answer shall specifically deny the matter or set forth in detail the reasons why the answering party cannot truthfully admit or deny the matter. A denial shall fairly meet the substance of the requested admission, and when good faith requires that a party qualify his answer or deny only a part of the matter of which an admission is requested, he shall specify so much of it as is true and qualify or deny the remainder. An answering party may not give lack of information or knowledge as a reason for failure to admit or deny unless he states that he has made reasonable inquiry and that the information known or readily obtainable by him is insufficient to enable him to admit or deny. A party who considers that a matter of which an admission has been requested presents a genuine issue for trial may not, on that ground alone, object to the request; he may, subject to the

provisions of Rule 37(c), deny the matter or set forth reasons why he cannot admit or deny it.

(a)(3) The party who has requested the admissions may move to determine the sufficiency of the answers or objections. Unless the court determines that an objection is justified, it shall order that an answer be served. If the court determines that an answer does not comply with the requirements of this rule, it may order either that the matter is admitted or that an amended answer be served. The court may, in lieu of these orders, determine that final disposition of the request be made at a pretrial conference or at a designated time prior to trial. The provisions of Rule 37(a)(4) apply to the award of expenses incurred in relation to the motion.

(b) Procedure. Each request shall contain only one factual matter or a request ~~for~~to admit the genuineness of ~~all~~specified documents ~~or categories of documents~~. ~~E~~Unless otherwise agreed by written stipulation or ordered by the court, each party ~~without leave of court~~ shall be ~~entitled to submit no more than~~limited to twenty-five (25) requests in any case ~~except upon: (1) an order of the court following a motion demonstrating good cause or (2) an order of the court following a scheduling and management conference pursuant to Rule 16(b).~~

~~(b)~~ (c) Effect of admission. Any matter admitted under this rule is conclusively established unless the court on motion permits withdrawal or amendment of the admission. Subject to the provisions of Rule 16 governing amendment of a pretrial order, the court may permit withdrawal or amendment when the presentation of the merits of the action will be subserved thereby and the party who obtained the admission fails to satisfy the court that withdrawal or amendment will prejudice him in maintaining his action or defense on the merits. Any admission made by a party under this rule is for the purpose of the pending action only and is not an admission by him for any other purpose nor may it be used against him in any other proceeding.

Advisory Committee Notes

IAALS Commentary

This section was amended to include the limitations on requests for admission as set forth in the Arizona Rules of Civil Procedure, altering the text to remove the Arizona-

specific Comprehensive Pretrial Conference. The subsections were re-numbered accordingly.

Source of Change:

Limits on discovery. The discovery "defaults" should be drastically limited to force parties to be more reasonable and to give "cover" to the lawyers.

ARIZ. R. CIV. 36(b) Procedure. Each request shall contain only one factual matter or request for genuineness of all documents or categories of documents. Each party without leave of court shall be entitled to submit no more than twenty-five (25) requests in any case except upon: (1) agreement of all parties; (2) an order of the court following a motion demonstrating good cause, or (3) an order of the court following a Comprehensive Pretrial Conference pursuant to Rule 16(c). Any interrogatories accompanying requests shall be deemed interrogatories under Rule 33.1.

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

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

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

(a)(2) Motion.

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

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

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

(a)(4) Expenses and sanctions.

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

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

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

(b) Failure to comply with order.

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

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

substantially justified, the court in which the action is pending may take such action in regard to the failure as are just, including the following:

(b)(2)(A) deem the matter or any other designated facts to be established for the purposes of the action in accordance with the claim of the party obtaining the order;

(b)(2)(B)prohibit the disobedient party from supporting or opposing designated claims or defenses or from introducing designated matters in evidence;

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

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

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

(b)(2)(F) instruct the jury regarding an adverse inference.

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

(d) Failure of party to attend at own deposition or serve answers to interrogatories or respond to request for inspection. If a party or an officer, director, or managing agent of a party or a person designated under Rule 30(b)(6) or 31(a) to testify on behalf of a party fails (1) to appear before the officer who is to take the deposition, after being served with a proper notice, or (2) to serve answers or objections to interrogatories submitted under Rule 33, after proper service of the interrogatories, or (3) to serve a written response to a request for inspection submitted under Rule 34, after proper

service of the request, the court . on motion may take any action authorized by Subdivision (b)(2).

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

(e) Failure to participate in the framing of a discovery plan. If a party or attorney fails to participate in good faith in the framing of a discovery plan by agreement as is required by Rule 26(f), the court on motion may take any action authorized by Subdivision (b)(2).

(f) Failure to disclose.

(f)(1) If a party fails to disclose a witness, document or other material as required by Rule 26(a) or Rule 26(e)(1), or to amend a prior response to discovery as required by Rule 26(e)(2), that party shall not be permitted to use the witness, document or other material at any hearing unless the failure to disclose is harmless or the party shows good cause for the failure to disclose. In addition to or in lieu of this sanction, the court on motion may take any action authorized by Subdivision (b)(2).

(f)(2) A party may not use ~~information~~ documents or things at trial that ~~was~~were not timely disclosed pursuant to these Rules, unless the failure to disclose is harmless or the party shows good cause for the failure to disclose~~the party demonstrates that the failure was justified and in good faith~~.

(g) Failure to preserve evidence. Nothing in this rule limits the inherent power of the court to take any action authorized by Subdivision (b)(2) if a party destroys, conceals, alters, tampers with or fails to preserve a document, tangible item, electronic data or other evidence in violation of a duty. Absent exceptional circumstances, a court may not impose sanctions under these rules on a party for failing to provide electronically stored information lost as a result of the routine, good-faith operation of an electronic information system.

Advisory Committee Notes

IAALS Commentary

This section was amended to require parties disclosing information relatively late in the game to prove a number of things before the information may be used at trial. It is intended to supplement the initial disclosure rules and ensure the timely disclosure of information.

Source of Change:

Early production of documents. Parties should be required to produce, early and without request, all evidence that they might rely on to support their claims or defenses. Specialty practice areas should develop their own particular disclosure requirements.

ARIZ. R. CIV. P. 37(c)(2) A party seeking to use information which that party first disclosed later than sixty (60) days before trial must obtain leave of court by motion, supported by affidavit, to extend the time for disclosure. Such information shall not be used unless the motion establishes and the court finds:

(i) that the information would be allowed under the standards of Subsection (f)(1) notwithstanding the short time remaining before trial; and

(ii) that the information was disclosed as soon as practicable after discovery.