

Agenda

Advisory Committee on Rules of Civil Procedure

November 18, 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

Approval of minutes	Tab 1	Fran Wikstrom
Rule 65C. Final recommendations.	Tab 2	Fran Wikstrom
Rule 64D. Writ of garnishment. Filing garnishee's answers with the court.	Tab 3	Lori Woffinden
Rule 58B. Satisfaction of judgment.	Tab 4	Tim Shea
Simplified Civil Procedures	Tab 5	Fran Wikstrom

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

Meeting Schedule

January 27, 2010
February 24, 2010
March 24, 2010
April 28, 2010
May 26, 2010
June 23, 2010
September 22, 2010
October 27, 2010
November 17, 2010

Tab 1

MINUTES

UTAH SUPREME COURT ADVISORY COMMITTEE ON THE RULES OF CIVIL PROCEDURE

**Wednesday, September 23, 2009
Administrative Office of the Courts**

Francis M. Wikstrom, Presiding

PRESENT: Francis M. Wikstrom, Trystan B. Smith, Francis J. Carney, Barbara L. Townsend, Honorable Reuben J. Renstrom, Leslie W. Slaugh, Terrie T. McIntosh, David W. Scofield, Lori Woffinden, Honorable Derrek P. Pullan, Honorable Lyle R. Anderson, Jonathan O. Hafen, Steven Marsden, James T. Blanch, Lincoln L. Davies, Todd M. Shaughnessy, W. Cullen Battle

ABSENT: Thomas R. Lee, Judge David O. Nuffer, Judge Anthony B. Quinn, Anthony W. Scofield, Janet H. Smith

STAFF: Timothy M. Shea, Sammi V. Anderson

GUESTS: Angela Fonnesbeck (Family Law Section), Stewart Ralphs (Family Law Section)

Ms. Fonnesbeck and Mr. Ralphs attended the meeting to discuss a potential rule requiring basic financial disclosures at the outset of family law cases.

Tom Brunker (AG's Office), Rick Schwermer (AOC), Kirk Torgensen (AG's Office), Mark Fields (AOC)

Mr. Brunker, Mr. Schwermer, Mr. Torgensen and Mr. Fields attended the meeting to discuss proposed changes to Rule 65C (Post-Conviction Reviews in Capital Cases).

I. APPROVAL OF MINUTES.

Mr. Wikstrom called the meeting to order at 4:00 p.m., and entertained comments from the committee concerning the June 24, 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. INTRODUCTION OF NEW MEMBERS AND SAMMI ANDERSON.

Mr. Wikstrom introduced Judge Reuben Renstrom and Trystan Smith as new members of the committee. The new members made the appropriate disclosures as required by the Supreme Court Rules. Mr. Wikstrom also introduced Sammi Anderson as the new secretary for the committee.

III. RULE 108. DISCLOSURES IN DOMESTIC RELATIONS PROCEEDINGS.

Ms. Fonnesebeck, current chair of the Family Law Section, and Mr. Stewart Ralphs represented the Family Law Section in a discussion regarding the need for basic initial disclosures in domestic proceedings. Proposed Rule 108 is the product of discussion and comment from the Family Law Section over the course of the last 18 months.

Ms. Fonnesebeck and Mr. Ralphs emphasized the prevalence of pro se litigants and mandatory mediation in domestic proceedings. They expressed the view that basic mandatory disclosures regarding income and assets would facilitate early resolution of many domestic cases.

Mr. Slaugh and Mr. Scofield noted that disclosures regarding one party's ownership interest in a business entity require special treatment so that the interest of the entity in safeguarding confidential business information is also protected. Mr. Slaugh proposed compromise language based on whether the party to the proceeding has control over the entity. Mr. Wikstrom asked that any language changes be sent to Tim Shea. Mr. Shea suggested the Rule be called Rule 26(a) rather than Rule 108.

IV. RULE 65C. POST-CONVICTION REVIEWS IN CAPITAL CASES.

Mr. Wikstrom introduced the proposed amendment to Rule 65C governing post-conviction relief. Reference was made to a September 14, 2009 letter to the committee from Representative Kay L. McIff. Mr. Wikstrom discussed efforts, led by the Attorney General's office, to amend the Utah State Constitution to provide that post-conviction remedies be governed by statute, notwithstanding any other law. It was ultimately decided that an amendment to Rule 65C, in conjunction with statutory amendments to the Post-Conviction Remedies Act ("PCRA"), would be a more prudent alternative. The proposed amendment is the compromise effort of an informal task force including members of the Attorney General's office, the defense bar, Representative McIff, academics, representatives from the Administrative Office of the Courts and Mr. Wikstrom as Chair of the committee.

Mr. Wikstrom reported that the compromise in the proposed amendment has been approved by the Attorney General's office and participating defense counsel. Mr. Slaugh questioned the necessity of a sentence in subparagraph (a) to summarize the PCRA. Mr. Bruner from the Attorney General's office responded the language is included to ensure this area of law is governed by statute, the PCRA, not older common law.

Mr. Wikstrom noted Representative McIff's desire to preserve some undefined, limited area where the Court reserves the right to exercise its discretion in this area. Judge Pullan questioned representatives from the Attorney General's office whether the Attorney General is taking the position that Courts have no common law authority to set aside a conviction. Judge Pullan sought assurances that the Court's discretion to act in egregious circumstances is preserved under the proposed amendment. Mr. Brunker and Mr. Torgeson assured Judge Pullan that it was not the intention of the Attorney General to foreclose the Court from granting relief outside the PCRA in appropriate circumstances. Judge Pullan emphasized his view that the courts must have the ability to correct egregious injustices through the writ process and indicated his support for the proposed amendment only so long as that ability is preserved to the judiciary. Judge Pullan was assured by those representatives of the Attorney General's office present that courts would retain that ability.

Mr. Slauch moved the approval of the amendment. Mr. Battle seconded. The motion was unanimously approved. Publication will happen on an expedited basis.

V. FINAL ACTION ON RULES 58A (ABSTRACT OF JUDGMENT) AND RULE 63A (CHANGE OF JUDGE AS A MATTER OF RIGHT).

Mr. Shea indicated that both of these proposed amendments have been published for comment. The changes to Rule 58A are intended to clarify existing language and the process for creating an abstract of judgment. Mr. Carney asked Ms. Woffinden whether there was any need to have the abstract attested under oath. Ms. Woffinden indicated there is no need, that the Clerk can sign under seal of the court. The committee unanimously approved the amendment to the Rule with the change to allow the Clerk to sign under the seal of the court.

As for Rule 63A, the Committee considered comments that the Rule should apply to one-party actions. Mr. Shea and Mr. Wikstrom explained that the amendment is intended to clarify that parties in one-action proceedings, such as probate matters or adoptions, are not permitted to unilaterally change judges as a matter of right. The amendment is intended to eliminate the possibility of judge shopping in one-party actions. The Committee approved the proposed amendment as written notwithstanding the comment.

VI. SIMPLIFIED CIVIL PROCEDURES.

Mr. Wikstrom introduced the topic and expressed a desire that the committee reach consensus on a cogent, non-final set of proposed rules as the foundation for future discussions. As an overview, the point of the simplified procedures is to have significant disclosure at the outset. Mr. Wikstrom expressed his belief that many cases would be trial-ready just upon the basis of initial disclosures, and without need of follow-up discovery. If not, the parties would meet and try to agree on a discovery plan. Lawyers would be charged with preparing and presenting to their clients a proposed budget for discovery, and with obtaining client approval for that budget. If the parties agree on the discovery schedule, the court shall approve. If the parties cannot agree, they would go to the court to set a discovery plan and schedule. Judge Pullan and Judge Anderson expressed the view that it is best for the court to have the benefit of the early disclosures for purposes of this conference.

The committee first discussed depositions. Mr. Slaugh expressed the view that many cases require fewer depositions than are taken and approved of the concept that depositions be limited by number of hours, rather than by number of separate depositions. Mr. Hafen expressed caution in setting the deposition hour limit too low and emphasized the need to let lawyers handle their cases efficiently and as they see fit. Mr. Hafen advocated to allow the parties and lawyers decide how to divide up the total number of deposition hours, with the caveat that party depositions are limited to 7 hours and non-party depositions to 4 hours. The committee was unanimous that each side should have 20 hours for depositions, to be divided up as the sides so choose, with party depositions limited to 7 hours and non-party depositions limited to 4 hours.

Mr. Wikstrom next raised the topic of interrogatories. Discussion followed as to the usefulness of contention interrogatories and whether they should be prohibited. Mr. Slaugh indicated that contention interrogatories are useful to flesh out affirmative defenses identified by the other side. Mr. Hafen suggested limiting interrogatories to 15 per side and allowing parties to use those interrogatories as contention interrogatories if they are so inclined. Mr. Shea emphasized that the default limits proposed by the committee are not binding. If the parties and lawyers believe they require additional discovery, and if the budget for that discovery has been presented to and approved by the parties, the court should permit discovery beyond the default limits. The committee was unanimous that each side should get 15 interrogatories, to be used as contention interrogatories or otherwise.

The committee then considered requests for production. Ms. Townsend expressed a desire to maintain consistency. Mr. Wikstrom responded there is currently no limit on requests for production. The committee discussed various proposed limits and concerns associated with drafting and interpreting requests for production too narrowly or too broadly. Mr. Scofield expressed a concern regarding whether responsive documents must be identified as responsive to particular requests for production. Mr. Smith discussed concern regarding how requests for production would be divided among multiple parties on the same side. Judge Anderson noted the court's role in determining whether parties "on the same side" are sufficiently adverse that they warrant separate discovery limits. The committee decided that each side should have 25 requests for production. The committee declined to add any language as to requiring that responsive documents be made to correspond with particular requests for production.

The committee next turned to requests for admission. Mr. Slaugh indicated requests for admission are useful for authenticating documents and Judge Anderson noted his observation that requests for admission are used effectively in collections cases. Mr. Hafen suggested a limit of 25. The committee unanimously approved a limit of 25 requests for admission per side.

Mr. Wikstrom then introduced the topic of timing for the requisite disclosures. Mr. Shea suggested that Plaintiff be required to make the requisite disclosures 14 days after Defendant files an Answer. The committee approved this suggestion. Mr. Shea discussed keying the deadline for Defendant's disclosures to Plaintiff's disclosures. The committee agreed. Defendant's disclosures will be due 28 days after Plaintiff's disclosures are made. Ms. Townsend raised the issue as to what will happen when multiple defendants are served at different times. Judge Anderson was not troubled by this as later served defendants always have these kinds of issues to address. Mr. Wikstrom proposed that Defendant's disclosures be due 28

days after Plaintiff makes disclosures or 28 days after that Defendant has answered, whichever is later. The committee agreed.

Judge Pullan inquired as to whether Plaintiff would suffer a penalty if Plaintiff failed to make disclosures within 14 days. The committee discussed several options, including dismissal without prejudice, Rule 37 sanctions, allowing a motion to dismiss by Defendant, etc. Mr. Wikstrom and Mr. Marsden proposed that no party be permitted to take additional discovery until after their own disclosures filed. The committee approved this suggestion.

The committee then discussed what would happen once the parties' requisite disclosures are made. Mr. Wikstrom raised the possibility of requiring attorneys to meet and confer to agree on additional discovery. The committee expressed concerns that attorneys don't generally meet and confer. Mr. Hafen suggested that the default assumption be that the matter is trial ready and no additional discovery is needed *unless* parties stipulate otherwise or one party requests additional discovery. The committee agreed. Absent stipulation or motion for additional discovery, courts should expect a pre-trial order and set a trial date. The committee agreed that 150 days after first Defendant's disclosures, fact discovery will be presumed closed absent stipulation or request for additional discovery. A pre-trial conference and trial date can be initiated by the court or on request of the parties.

Significant discussion regarding the scope of discovery followed. Judge Pullan emphasized access to justice, especially for smaller cases, and expressed a need to educate the judiciary on the proportionality of cases, *ie*, amount in controversy vis a vis costs of discovery, so that courts are more willing to cut discovery off in low value cases. Multiple committee members expressed their opinion that the scope of discovery issue will depend entirely on courts' willingness to enforce the restrictions.

Mr. Wikstrom then asked what role Rule 35 examinations should have in the initial phase of discovery. Mr. Carney addressed the different perspectives held by the plaintiff and defense bars. Mr. Smith discussed the significant costs associated with the examination. Judge Pullan suggested that once fact discovery is closed, judges be involved in a proportionality review before expert discovery, including the Rule 35 examination, is undertaken. The committee further discussed whether Rule 35 should be revised to treat the independent medical examination just as other experts are treated. Mr. Carney expressed his opinion that independent medical examinations are treated differently by the rules only because they evolved at a time when expert practice other than independent medical examination was not extensive.

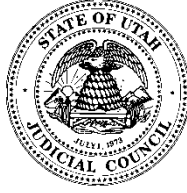
Mr. Wikstrom emphasized that the first two phases, requisite disclosures and targeted discovery, are confined to fact discovery. The committee turned to expert discovery. Mr. Carney suggested that the party bearing the burden of proof have 30 days after the close of fact discovery to submit expert report(s). Rebuttal reports will be due 30 days later. The committee agreed. The committee further agreed that there be no expert depositions and that experts not be permitted to exceed the scope of their reports at trial.

Mr. Shea raised the issue of exemptions from Rule 26(a) disclosures. The committee agreed that the exemption for pro se litigants and amounts in controversy under \$20,000 must be abolished. Mr. Shea raised the possibility of limiting subpoenas duces tecum. The committee declined to impose any limit in this regard. Mr. Shea then raised the issue of electronically stored information and queried whether the rules should require a meeting to discuss preservation of this information. Mr. Wikstrom suggested that if one party believes the other party should be obligated to preserve evidence, that the onus is on the party believing electronic evidence exists to notify the other side. Mr. Shaughnessy suggested that the rule state that parties are under no obligation to alter existing document storage/destruction policies unless and until notified by the other side. The committee decided that, after a complaint is filed, if one party wants to preserve electronic evidence, that party must seek a meeting and try to reach an agreement as to scope of preservation. If the parties are unable to agree, that party can file a motion for preservation with the court.

VII. ADJOURNMENT.

The meeting adjourned at 8:00 p.m. The October meeting is cancelled. The next meeting will be held at 4:00 p.m. on Wednesday, November 18, 2009, at the Administrative Office of the Courts.

Tab 2



Administrative Office of the Courts

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

MEMORANDUM

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

To: Civil Procedures Committee
From: Tim Shea *TS*
Date: November 13, 2009
Re: Rules for final action

The comment period for the following rules has closed, and they are ready for your final recommendations.

URCP 065C. Post-conviction relief. Amend Recognizes Utah's Post-Conviction Remedies Act as the law governing post-conviction relief.

We received one comment as of this date. The comment period closes November 17, and if there are any more comments, I will bring them to the meeting. This comment suggests that this should be a rule of criminal procedure. Although the case being reviewed under this rule is a criminal case, the review itself is a civil process.

Encl. Draft rules
Comments

Rule 65C. Post-conviction relief.

(a) Scope. This rule ~~shall~~ governs proceedings in all petitions for post-conviction relief filed under the Post-Conviction Remedies Act, Utah Code Title 78B, Chapter 9, ~~Post-Conviction Remedies Act~~. The Act sets forth the manner and extent to which a person may challenge the legality of a criminal conviction and sentence after the conviction and sentence have been affirmed in a direct appeal under Article I, Section 12 of the Utah Constitution, or the time to file such an appeal has expired.

(b) Procedural defenses and merits review. Except as provided in paragraph (h), if the court comments on the merits of a post-conviction claim, it shall first clearly and expressly determine whether that claim is independently precluded under Section 78B-9-106.

~~(b)-(c)~~ Commencement and venue. The proceeding shall be commenced by filing a petition with the clerk of the district court in the county in which the judgment of conviction was entered. The petition should be filed on forms provided by the court. The court may order a change of venue on its own motion if the petition is filed in the wrong county. The court may order a change of venue on motion of a party for the convenience of the parties or witnesses.

~~(c)-(d)~~ Contents of the petition. The petition shall set forth all claims that the petitioner has in relation to the legality of the conviction or sentence. Additional claims relating to the legality of the conviction or sentence may not be raised in subsequent proceedings except for good cause shown. The petition shall state:

~~(c)(1)-(d)(1)~~ whether the petitioner is incarcerated and, if so, the place of incarceration;

~~(c)(2)-(d)(2)~~ the name of the court in which the petitioner was convicted and sentenced and the dates of proceedings in which the conviction was entered, together with the court's case number for those proceedings, if known by the petitioner;

~~(c)(3)-(d)(3)~~ in plain and concise terms, all of the facts that form the basis of the petitioner's claim to relief;

~~(c)(4)-(d)(4)~~ whether the judgment of conviction, the sentence, or the commitment for violation of probation has been reviewed on appeal, and, if so, the number and title of the appellate proceeding, the issues raised on appeal, and the results of the appeal;

~~(e)(5)~~ (d)(5) whether the legality of the conviction or sentence has been adjudicated in any prior post-conviction or other civil proceeding, and, if so, the case number and title of those proceedings, the issues raised in the petition, and the results of the prior proceeding; and

~~(e)(6)~~ (d)(6) if the petitioner claims entitlement to relief due to newly discovered evidence, the reasons why the evidence could not have been discovered in time for the claim to be addressed in the trial, the appeal, or any previous post-conviction petition.

~~(d)~~ (e) Attachments to the petition. If available to the petitioner, the petitioner shall attach to the petition:

~~(d)(1)~~ (e)(1) affidavits, copies of records and other evidence in support of the allegations;

~~(d)(2)~~ (e)(2) a copy of or a citation to any opinion issued by an appellate court regarding the direct appeal of the petitioner's case;

~~(d)(3)~~ (e)(3) a copy of the pleadings filed by the petitioner in any prior post-conviction or other civil proceeding that adjudicated the legality of the conviction or sentence; and

~~(d)(4)~~ (e)(4) a copy of all relevant orders and memoranda of the court.

~~(e)~~ (f) Memorandum of authorities. The petitioner shall not set forth argument or citations or discuss authorities in the petition, but these may be set out in a separate memorandum, two copies of which shall be filed with the petition.

~~(f)~~ (g) Assignment. On the filing of the petition, the clerk shall promptly assign and deliver it to the judge who sentenced the petitioner. If the judge who sentenced the petitioner is not available, the clerk shall assign the case in the normal course.

~~(g)(1)~~ (h)(1) Summary dismissal of claims. The assigned judge shall review the petition, and, if it is apparent to the court that any claim has been adjudicated in a prior proceeding, or if any claim in the petition appears frivolous on its face, the court shall forthwith issue an order dismissing the claim, stating either that the claim has been adjudicated or that the claim is frivolous on its face. The order shall be sent by mail to the petitioner. Proceedings on the claim shall terminate with the entry of the order of dismissal. The order of dismissal need not recite findings of fact or conclusions of law.

~~(g)(2)~~ (h)(2) A petition claim is frivolous on its face when, based solely on the allegations contained in the pleadings and attachments, it appears that:

~~(g)(2)(A)~~ ~~(h)(2)(A)~~ the facts alleged do not support a claim for relief as a matter of law;

~~(g)(2)(B)~~ ~~(h)(2)(B)~~ the claims ~~have~~ has no arguable basis in fact; or

~~(g)(2)(C)~~ ~~(h)(2)(C)~~ the petition-claim challenges the sentence only and the sentence has expired prior to the filing of the petition.

~~(g)(3)~~ ~~(h)(3)~~ If a petition-claim is not frivolous on its face but is deficient due to a pleading error or failure to comply with the requirements of this rule, the court shall return a copy of the petition with leave to amend within 20 days. The court may grant one additional 20 day period to amend for good cause shown.

~~(g)(4)~~ ~~(h)(4)~~ The court shall not review for summary dismissal the initial post-conviction petition in a case where the petitioner is sentenced to death.

~~(h)~~ (i) Service of petitions. If, on review of the petition, the court concludes that all or part of the petition should not be summarily dismissed, the court shall designate the portions of the petition that are not dismissed and direct the clerk to serve a copy of the petition, attachments and memorandum by mail upon the respondent. If the petition is a challenge to a felony conviction or sentence, the respondent is the state of Utah represented by the Attorney General. In all other cases, the respondent is the governmental entity that prosecuted the petitioner.

~~(i)~~ (j) Answer or other response. Within 30 days (plus time allowed under these rules for service by mail) after service of a copy of the petition upon the respondent, or within such other period of time as the court may allow, the respondent shall answer or otherwise respond to the portions of the petition that have not been dismissed and shall serve the answer or other response upon the petitioner in accordance with Rule 5(b). Within 30 days (plus time allowed for service by mail) after service of any motion to dismiss or for summary judgment, the petitioner may respond by memorandum to the motion. No further pleadings or amendments will be permitted unless ordered by the court.

~~(j)~~ (k) Hearings. After pleadings are closed, the court shall promptly set the proceeding for a hearing or otherwise dispose of the case. The court may also order a prehearing conference, but the conference shall not be set so as to delay unreasonably the hearing on the merits of the petition. At the prehearing conference, the court may:

~~(j)(1)~~(k)(1) consider the formation and simplification of issues;
~~(j)(2)~~(k)(2) require the parties to identify witnesses and documents; and
~~(j)(3)~~(k)(3) require the parties to establish the admissibility of evidence expected to be presented at the evidentiary hearing.

~~(k)~~(l) Presence of the petitioner at hearings. The petitioner shall be present at the prehearing conference if the petitioner is not represented by counsel. The prehearing conference may be conducted by means of telephone or video conferencing. The petitioner shall be present before the court at hearings on dispositive issues but need not otherwise be present in court during the proceeding. The court may conduct any hearing at the correctional facility where the petitioner is confined.

~~(l)~~(m) Discovery; records. Discovery under Rules 26 through 37 shall be allowed by the court upon motion of a party and a determination that there is good cause to believe that discovery is necessary to provide a party with evidence that is likely to be admissible at an evidentiary hearing. The court may order either the petitioner or the respondent to obtain any relevant transcript or court records.

~~(m)~~(n) Orders; stay.

~~(m)(1)~~(n)(1) If the court vacates the original conviction or sentence, it shall enter findings of fact and conclusions of law and an appropriate order. If the petitioner is serving a sentence for a felony conviction, the order shall be stayed for 5 days. Within the stay period, the respondent shall give written notice to the court and the petitioner that the respondent will pursue a new trial, pursue a new sentence, appeal the order, or take no action. Thereafter the stay of the order is governed by these rules and by the Rules of Appellate Procedure.

~~(m)(2)~~(n)(2) If the respondent fails to provide notice or gives notice that no action will be taken, the stay shall expire and the court shall deliver forthwith to the custodian of the petitioner the order to release the petitioner.

~~(m)(3)~~(n)(3) If the respondent gives notice that the petitioner will be retried or resentenced, the trial court may enter any supplementary orders as to arraignment, trial, sentencing, custody, bail, discharge, or other matters that may be necessary and proper.

~~(n)~~(o) Costs. The court may assign the costs of the proceeding, as allowed under Rule 54(d), to any party as it deems appropriate. If the petitioner is indigent, the court may direct the costs to be paid by the governmental entity that prosecuted the petitioner. If the petitioner is in the custody of the Department of Corrections, Utah Code Title 78A, Chapter 2, Part 3 governs the manner and procedure by which the trial court shall determine the amount, if any, to charge for fees and costs.

~~(o)~~(p) Appeal. Any final judgment or order entered upon the petition may be appealed to and reviewed by the Court of Appeals or the Supreme Court of Utah in accord with the statutes governing appeals to those courts.

Advisory Committee Notes

This rule replaces former paragraph (b) of Rule 65B. It governs proceedings challenging a conviction or sentence, regardless whether the claim relates to an original commitment, a commitment for violation of probation, or a sentence other than commitment. Claims relating to the terms or conditions of confinement are governed by paragraph (b) of the Rule 65B. This rule, as a general matter, simplifies the pleading requirements and contains two significant changes from procedure under the former rule. First, the paragraph requires the clerk of court to assign post-conviction relief to the judge who sentenced the petitioner if that judge is available. Second, the rule allows the court to dismiss frivolous claims before any answer or other response is required. This provision is patterned after the federal practice pursuant to 28 U.S.C. § 2254. The advisory committee adopted the summary procedures set forth as a means of balancing the requirements of fairness and due process on the one hand against the public's interest in the efficient adjudication of the enormous volume of post-conviction relief cases.

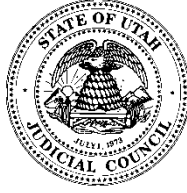
The requirement in paragraph ~~(l)~~(m) for a determination that discovery is necessary to discover relevant evidence that is likely to be admissible at an evidentiary hearing is a higher standard than is normally used in determining motions for discovery.

The 2009 amendments embrace Utah's Post-Conviction Remedies Act as the law governing post-conviction relief. It provides an independent and adequate procedural basis for dismissal without the necessity of a merits review. See Gardner v. Galetka, 568 F.3d 862, 884-85 (10th Cir. 2009). It is the committee's view that the added

155 restrictions which the Act places on post-conviction petitions do not amount to a
156 suspension of the writ of habeas corpus. See Felker v. Turpin, 518 U.S. 651, 664
157 (1996) (relying on McCleskey v. Zant, 499 U.S. 467, 489 (1991)).

158

Tab 3



Administrative Office of the Courts

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

MEMORANDUM

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

To: Civil Procedures Committee
From: Tim Shea *TS*
Date: November 13, 2009
Re: Filing answers to interrogatories with the court

Rule 64D(g)(4) requires that the garnishee file the answers to interrogatories with the court. The requirement has been there since statehood. (1898 Code §3095. You may be interested to know that in 1905, the Legislature added a \$2 fee paid to the garnishee. Calculations using the CPI suggest the equivalent fee today should be \$47. Currently the garnishee's fee is either \$15 for a single garnishment or \$25 for a continuing garnishment.)

As part of a larger effort to eliminate purposeless requirements, the clerks of court have identified this one. The courts dutifully process these documents, but never use them. The answers are discovery and should fall under Rule 26(i), which provides that discovery requests and responses are not filed with the court.

The only time a court might refer to the answers is if they are challenged. Since the answers are almost never challenged, the answers are almost never used. Researching the court's database shows that the clerks process about 100,000 pages of garnishee answers per year.

The clerks of court request that Rule 64D be amended to eliminate the requirement that the answers be filed with the court. If answers are challenged, the challenger would include a copy of the answers under Rule 26(i).

Encl. Rule 64D(g)

Rule 64D(g)

(g) Garnishee's responsibilities. The writ shall direct the garnishee to complete the following within seven business days of service of the writ upon the garnishee:

(g)(1) answer the interrogatories under oath or affirmation;

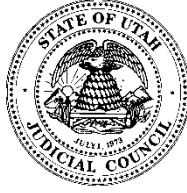
(g)(2) serve the answers on the plaintiff; and

(g)(3) serve the writ, answers, notice of exemptions and two copies of the reply form upon the defendant and any other person shown by the records of the garnishee to have an interest in the property; and

~~(g)(4) file the answers with the clerk of the court.~~

The garnishee may amend answers to interrogatories to correct errors or to reflect a change in circumstances by serving and filing the amended answers in the same manner as the original answers.

Tab 4



Administrative Office of the Courts

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

MEMORANDUM

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

To: Civil Procedures Committee
From: Tim Shea *TS*
Date: November 13, 2009
Re: Satisfaction of judgment

Last Spring, I raised with the Committee several issues regarding Rule 58B. Basically, the rule offers no express remedy for a debtor to initiate entry of a satisfaction, and the rule makes several distinctions for which there appears to be no sound policy.

At your suggestion, I circulated draft changes among some members of the collections bar, who in turn circulated it more widely. I have made some further changes in response to their observations. Generally, they appear to support the proposal.

Encl. URCP 58B

Rule 58B. Satisfaction of judgment.

(a) Satisfaction by owner or attorney. A judgment may be satisfied, ~~in whole or in part, as to any or all of the judgment debtors,~~ by the owner ~~thereof,~~ or ~~by~~ the owner's attorney of record of the judgment creditor where no assignment of the judgment has been filed and such attorney executes such satisfaction within eight years after the entry of the judgment, in the following manner: (1) by written instrument, duly acknowledged by such owner or attorney; or (2) by filing an acknowledgment of ~~such~~ satisfaction signed by the owner or attorney and entered on the docket of the judgment in the county where court in which the judgment was first docketed entered, with the date affixed and witnessed by the clerk within a reasonable time after payment of the judgment. ~~Every~~ If the satisfaction ~~of a~~ is for part of the judgment, or ~~as to one or more for fewer than all~~ of the judgment debtors, it shall state the amount paid ~~thereon~~ or ~~for name~~ the debtors who are released ~~of such debtors, naming them.~~

(b) Satisfaction by order of court. ~~When a judgment shall have been fully paid and not satisfied of record, or when the satisfaction of judgment shall have been lost, the~~ The court in which ~~such the~~ judgment was ~~recovered first entered~~ may, upon motion and satisfactory proof, ~~authorize the attorney of the judgment creditor to satisfy the same, or may~~ enter an order declaring the ~~same judgment~~ satisfied ~~and direct satisfaction to be entered upon the docket.~~

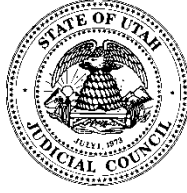
(c) Entry by clerk. Upon receipt of a satisfaction of judgment, duly executed and acknowledged, the clerk shall file the same with the papers in the case, and enter it on the register of actions. He shall also enter a brief statement of the substance thereof, including the amount paid, on the margin of the judgment docket, with the date of filing of such satisfaction.

~~(d)~~ (c) Effect of satisfaction. ~~When a judgment shall have been satisfied, in whole or in part, or as to any judgment debtor, and such satisfaction entered upon the docket by the clerk, such~~ Satisfaction of a judgment, whether by acknowledgement or order, shall, ~~to the extent of such satisfaction, be~~ discharged the judgment, and the judgment shall cease to be a lien as to the debtors named and to the extent of the amount paid. ~~In case of partial satisfaction, if any~~ A writ of execution shall thereafter be issued on the judgment, ~~such execution or a writ of garnishment issued after partial satisfaction~~ shall

~~be endorsed with a memorandum of such~~ include the partial satisfaction and shall direct the officer to collect only the ~~residue thereof~~ balance of the judgment, or to collect only from the judgment debtors remaining liable ~~thereon~~.

~~(e)-(d)~~ Filing ~~transcript certificate~~ of satisfaction in other counties. ~~When any After~~ satisfaction of a judgment ~~shall have~~, whether by acknowledgement or order, has been entered ~~on the judgment docket of the county where such in the court in which the~~ judgment was first ~~docketed entered~~, ~~a certified transcript of satisfaction, or~~ a certificate by the clerk showing ~~such the~~ satisfaction, may be filed with the clerk of the district court in any other county where the judgment ~~may have~~ has been ~~docketed entered~~. ~~Thereupon a similar entry in the judgment docket shall be made by the clerk of such court; and such entry shall have the same effect as in the county where the same was originally entered.~~

Tab 5



Administrative Office of the Courts

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

MEMORANDUM

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

To: Civil Procedures Committee
From: Tim Shea *TS*
Date: November 13, 2009
Re: Simplified Rules

The disclosure and discovery model the committee developed at the last meeting and draft rules are attached. I have some challenges for the committee that go beyond the earlier drafts suggested by the Institute.

1) Better integrate the proposed discovery limits. I think we can do better than simply slapping the proposed limits onto the existing rules. One provision suggested by the Institute is nearly identical to an existing paragraph.

2) Improve the readability of whatever rules we include in the package. The rules do not come close to the "simple, short and plain" statements we expect of parties and lawyers. I mean by this much, much more than the style amendments to the federal rules. We have several paragraphs with a Flesch readability index of zero. (The Flesch scale is 0 – 100, with 100 being the simplest to read.) One paragraph has a grade (not index) 54 reading level. I don't know anyone with a grade 54 education, but I'm pretty sure it comes well after law school. One way to make this stuff simpler is to make it more understandable. There is no need to propound an interrogatory when you can ask a question.

3) Look to simplify in small ways. One reason this stuff is so complex is because there are exceptions upon conditions upon exceptions; make things more uniform. We have large and small variations in wording for the same concept: one time it's "possession or control;" another it's possession, custody or control." Sometimes the reasons for an objection have to be stated with "particularity," other times with "specificity," and other times merely "stated." Apparently, the concept that an organization can act only through its officers and agents is an important concept in answering interrogatories, but not in answering requests for admission. Depending on the rule, the standard for disclosure or responding to a discovery request is what is "known," what is "reasonably available," what is "known or reasonably available," or what is "known or readily obtainable."

The mission of the Utah judiciary is to provide the people an open, fair,
efficient, and independent system for the advancement of justice under the law.

4) Look to simplify in big ways. So far we have been looking at doing the same thing, but less of it. Consider all of the written discovery mechanisms: written depositions, interrogatories, requests for admissions. They are, in the end, different ways to ask a question. Oral depositions appear to be the work horse of discovery. Consider eliminating the written mechanisms, and ask oral questions in a deposition.

Summary of Changes

The main objective that motivated this effort is lost in the myriad amendments, so I've summarized below the changes that are topical (suggested by the committee or the Institute), substantive (my suggestions as a result of poking around, but not yet discussed), or organizational (also my suggestions, but not a substantive change from existing rules). I may have missed some of the changes in the summary, especially the organizational changes, but most of the changes are to make the rules easier to read. Line references are to the redline version.

Rule 1. The topical amendment is in line 6.

Rule 3. The topical amendment is deletion of lines 3 – 9 and deletion of the committee note, which would no longer be relevant.

Rule 4.

TOPICAL AMENDMENTS

Deletion of lines 23 – 28

OTHER SUBSTANTIVE AMENDMENTS

- Lines 29-31 and 139-147. I am working with the Board of District Court Judges to develop forms and procedures to make better use of electronic service, principally an internet web page maintained by the Utah Press Association and recognized by statute. Publishing a PDF file of the summons and complaint would eliminate the need to describe special content for the summons. A defendant might be notified of the publication by email, Twitter, Facebook, etc.
- Line 48. Rule 17 requires a minor to appear by means of a guardian, so I propose changing “infant” to “minor, someone under 18.”
- Lines 53-58, requiring plaintiff to serve a protected person’s guardian or conservator.

Rule 8.

TOPICAL AMENDMENTS

Lines 3-7, 9, 25-29

OTHER SUBSTANTIVE AMENDMENTS

Line 16 says that if an averment is not material, the responding party does not need to worry about it. Is that correct? I've changed this to “important” in Line 11.

Rule 16. The topical amendment is in line 2, requiring the parties to attend a pretrial conference. It appears that the parties already have to attend the final pretrial conference.

Rule 26.

TOPICAL AMENDMENTS

- Lines 2-3, allowing special rules.
- Lines 11-14, requiring early disclosure of witnesses.
- Line 28, requiring production of documents mentioned in pleadings, although this may cover a lot of the same ground as paragraph (a)(1)(B).
- Lines 33-36, establishing the timing for initial disclosures.
- Lines 46-47, removing the exemption for small contract cases.
- Lines 54-55, removing the exemption for pro se cases.
- Lines 66-67, limiting the scope of expert testimony to the expert's report.
- Lines 115-126, changing the scope of discovery. Uncertain how "subject matter of the action" is different from "relevant to a claim or defense," but this is part of the federal discovery standard. The committee seemed to be leaning towards leaving the standard as is, but Judge Pullan expressed reservations at the end of the meeting.
- Lines 173-191, eliminating provisions about expert witnesses that are contrary to the proposed limits.
- Lines 211-233 and line 243, about proportionality.
- Lines 272-295, establishing the limits of the initial discovery and the process for extended discovery.
- Lines 317-324, requiring an explanation to accompany a supplemental disclosure or response.
- Lines 330-373, eliminating the pre-discovery meeting.

OTHER SUBSTANTIVE AMENDMENTS

- Line 15, conforming the method for disclosure of these documents with the method of disclosure for other documents: follow Rule 34.
- Lines 24-27. Treats all agreements to indemnify the defendant the same.
- Lines 29-30, disclose statement previously made by a party rather than require a request. See lines 160-161.
- Line 320. Does the phrase "during the discovery process or in writing" add value?
- Lines 378-396. Current provision sounds suspiciously like Rule 11. Instead, apply Rule 11 to disclosure and discovery signatures.

ORGANIZATIONAL AMENDMENTS

- Line 5, “except as otherwise stipulated or directed ...” Here and throughout this and other rules I’ve deleted this phrase. Covered by Rule 29.
- Lines 39-42. Integrated to paragraph (e).
- Lines 105-107. Integrated to paragraph (f).
- Lines 108-112. Not needed. Covered by the rules to which it refers.
- Lines 138-148. Integrated with paragraph (c).
- Lines 248-250. Mentioned in some discovery rules, not others.
- Lines 304-308. Provisions gathered from other discovery rules. Mentioned in some, not others.

Rule 29.

Currently and as proposed this rule lets the parties develop whatever limits and procedures they can agree to. Adds the procedure for stipulating to extended discovery. See also Rule 26, Lines 271-293.

Rule 30.

TOPICAL AMENDMENTS

- Lines 5-7, limiting depositions of nonparty witnesses.
- Lines 7-9, prohibiting deposing an expert witness.
- Lines 139-145, establishing deposition limits.

OTHER SUBSTANTIVE AMENDMENTS

- Lines 162-170. Once filed, depositions are a court record and subject the open record laws. *Carter v. Utah Power & Light Company*, 800 P.2d 1095 (Utah 1990). Requiring pro se depositions to be filed puts them on a different footing from deposition records held by lawyers.

ORGANIZATIONAL AMENDMENTS

- Lines 10-19. Integrate these limitations into paragraph (a).
- Lines 20-24. Covered in Rule 29 and Lines 6-7.
- Lines 77-78. Integrated into Rule 26(e).
- Lines 86-95. Incorporate Rule 31 here. Consider eliminating written depositions.
- Lines 116-119. First sentence comes from paragraph (d)(4). Second sentence comes from Rule 37(a)(2)(B). They are contrary to each other.
- Lines 128-138. Integrate with Rule 26(c), protective orders, and Rule 37, motion to compel.

Rule 33.

TOPICAL AMENDMENTS

- Lines 3-4, establishing the maximum number of questions.

ORGANIZATIONAL AMENDMENTS

- Lines 5-7. Covered by Rule 26(e).
- Lines 34-38. Covered by Rule 26(c).

Rule 34. The topical amendment is in lines 23-24, establishing the maximum number of requests.

ORGANIZATIONAL AMENDMENTS

- Lines 57-59. Covered by Rule 45?

Rule 35.

TOPICAL AMENDMENTS

- Lines 12-14, permitting the exam to be recorded.
- Lines 15-27 and 36-46, eliminating provisions that treat medical examiners differently from other experts.
- Consider whether Lines 28-33 express the policy we want.

Rule 36. The topical amendment is in Lines 8-9, establishing the maximum number of requests.

OTHER SUBSTANTIVE AMENDMENTS

- Line 52. This standard is different from the standard in line 35. This is the standard found in Rule 26, Lines 38-39 and Rule 30, Line 77 and redrafted as Rule 26 Lines 302-303.

ORGANIZATIONAL AMENDMENTS

- Lines 60-69. From Rule 37. These sanctions appear to be available at any time without a motion to compel.
- Line 72. Rule 16 has no provision for amending the pretrial order.

Rule 37.

There are no topical amendments. The one paragraph the Institute suggested adding is essentially the same as an existing paragraph.

ORGANIZATIONAL AMENDMENTS

I have moved from the individual discovery rules to this rule all of the provisions for a motion to compel. I have moved from this rule and into the individual discovery rules, the sanctions for discovery misuse that do not require an order to compel.

- Lines 93-101 are integrated into Rule 36.

- Lines 102-113. Failure to attend own deposition is not mentioned in the paragraph; only in the title. The topic is covered in Rule 26 with a different sanction. Paragraph 37(d) is contrary to Paragraph 37(b). Paragraph (b) requires failure to follow an order (essentially contempt of court) to impose certain sanctions; paragraph (d) says those same sanctions can be imposed for the initial discovery failure.
- Lines 114-117. If there is no more discovery plan, there would be no more sanctions for failure to cooperate in forming one.
- Lines 118-124. Moved to Rule 26(e).
- Lines 122-124. Contrary to Paragraph 37(b).
- Consider moving protective orders from Rule 26(c) to Rule 37 and making it the “judge-tell-us-what-to-do” rule.

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~~ achieve the just, speedy, and inexpensive determination of every action.

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

Advisory Committee Notes

Rule 3. Commencement of action.

(a) How commenced. A civil action is commenced ~~(1) by filing a complaint with the court, or (2) by service of a summons together with a copy of the complaint in accordance with Rule 4. If the action is commenced by the service of a summons and a copy of the complaint, then the complaint, the summons and proof of service, must be filed within ten days of such service. If, in a case commenced under paragraph (a)(2) of this rule, the complaint, summons and proof of service are not filed within ten days of service, the action commenced shall be deemed dismissed and the court shall have no further jurisdiction thereof. The court has jurisdiction from the time the complaint is filed.~~

(b) Payment dishonored. If a check or other form of payment tendered as a filing fee is dishonored, the party shall pay the fee by cash or cashier's check within 10 days after notification by the court. Dishonor of a check or other form of payment does not affect the validity of the filing, but may be grounds for such sanctions as the court deems appropriate, which may include dismissal of the action and the award of costs and attorney fees.

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

Advisory Committee Notes

~~Rule 3 constitutes a significant change from the prior rule. The rule retains service of the ten-day summons as one of two means to commence an action, but the rule requires that the summons together with a copy of the complaint be served on the defendant pursuant to Rule 4. In so doing, the rule eliminates the requirement that a copy of the complaint be deposited with the clerk for the defendant whose address is unknown. The changes in Rule 3 must be read and should be interpreted in conjunction with coordinate changes in Rule 4 and with a change in Rule 12(a) that begins the running of the defendant's 20-day response time from the service of the summons and complaint.~~

~~Paragraph (a). This paragraph eliminates the requirement that a copy of the complaint be deposited with the clerk for the defendant whose address is unknown. Paragraph (b) of the former rule, which permitted the plaintiff to deposit copies of the complaint with the clerk for defendants not otherwise served with a copy at the time of~~

32 ~~the service of the summons, has also been eliminated. The rule requires, in effect, that~~
33 ~~both the summons and the complaint be served pursuant to Rule 4. Under a coordinate~~
34 ~~change in Rule 12(a), the defendant's time for answering or otherwise responding to the~~
35 ~~complaint does not begin to run until service of the summons and complaint pursuant to~~
36 ~~Rule 4.~~

37 ~~Paragraph (b). This paragraph is substantially identical to paragraph (c) of the~~
38 ~~former rule.~~

Rule 4. Process.

(a) Signing of summons. The summons shall be signed ~~and issued~~ and issued by the ~~plaintiff~~ Clerk of Court or the plaintiff's attorney. Separate summonses may be signed ~~and served~~.

(b)(i) ~~Time of s~~Service. ~~In an action commenced under Rule 3(a)(1), the~~ The summons ~~together with~~ and a copy of the complaint shall be served no later than 120 days after ~~the filing of~~ the complaint is filed unless the court allows a longer period of time for good cause ~~shown~~. If the summons and complaint are not timely served, the action shall be dismissed, without prejudice on application of any party or upon the court's own initiative.

(b)(ii) In any action ~~brought~~ against two or more defendants, ~~on which if~~ service has been timely ~~obtained~~ made upon one of them,

(b)(ii)(A) the plaintiff may proceed against those served, and

(b)(ii)(B) the others may be served or appear at any time ~~prior to~~ before trial.

(c) Contents of summons.

(c)(1) The summons shall contain the name of the court, the address of the court, the names of the parties to the action, and the county in which it is brought. It shall be directed to the defendant, state the name, address and telephone number of the plaintiff's attorney, if any, and otherwise the plaintiff's address and telephone number. It shall state the time within which the defendant ~~is required to~~ must answer the complaint in writing, and shall notify the defendant that ~~in case of failure to do so,~~ judgment by default will be rendered against the defendant for failure to answer the complaint in writing. ~~It shall state either that the complaint is on file with the court or that the complaint will be filed with the court within ten days of service.~~

~~(c)(2) If the action is commenced under Rule 3(a)(2), the summons shall state that the defendant need not answer if the complaint is not filed within 10 days after service and shall state the telephone number of the clerk of the court where the defendant may call at least 13 days after service to determine if the complaint has been filed.~~

~~(c)(3)~~ (c)(2) If service is made by publication of the summons without the complaint, the summons shall briefly state the subject matter ~~and of the action,~~ the ~~sum of money~~ or other relief demanded, and that the complaint is on file with the court.

(d) Method of Service. Unless waived ~~in writing under paragraph (f)~~, service of the summons and complaint shall be by one of the following methods:

(d)(1) Personal service. The summons and complaint may be served in any state or judicial district of the United States by the sheriff or constable or by the deputy of either, by a United States Marshal or by the marshal's deputy, or by ~~any other~~ person 18 years of age or older at the time of service and not a party to the action or a party's attorney. ~~If the person to be served refuses to accept a copy of the process, service shall be sufficient if the person serving the same shall state the name of the process and offer to deliver a copy thereof.~~ Personal service shall be made as follows:

(d)(1)(A) Upon any individual other than one covered by ~~sub~~paragraphs (B), (C) or (D) ~~below~~, by delivering ~~a copy of a copy of~~ the summons and ~~the~~ complaint to the individual personally, or by ~~leaving a copy delivering them to a person of suitable age and discretion residing at the individual's dwelling house or usual place of abode with some person of suitable age and discretion there residing,~~ or by delivering ~~a copy of the summons and the complaint them~~ to an agent authorized by appointment or by law to receive service of process;

(d)(1)(B) Upon ~~an infant (being a person under 14 years)~~ a minor, by delivering ~~a copy of a copy of~~ the summons and ~~the~~ complaint to the infant minor and ~~also~~ to the ~~infant's father, mother minor's parent~~ or guardian ~~or, if none can be found within the state, then to any and the~~ person having the care and control of the infant minor, or with whom the infant minor resides, ~~or in whose service the infant is employed;~~

(d)(1)(C) Upon ~~an individual a protected person~~ judicially declared ~~to be of unsound mind or incapable of conducting the person's own affairs~~ incapacitated, by delivering ~~a copy of a copy of~~ the summons and ~~the~~ complaint to the protected person and to the person's ~~legal representative if one has been appointed and in the absence of such representative, to the individual, if any, who has care, custody or control of the person~~ guardian or conservator;

(d)(1)(D) Upon an individual incarcerated or committed at a facility operated by the state or any of its political subdivisions, by delivering ~~a copy of a copy of~~ the summons and ~~the~~ complaint to the person's guardian or conservator, if one has been appointed, or to the person who has the care, custody, or control of the individual to be served, or

to that person's designee ~~or to the guardian or conservator of the individual to be served if one has been appointed, who shall, in any case, promptly deliver the process to the individual served;~~

(d)(1)(E) Upon ~~any~~ corporation not ~~herein~~ otherwise provided for, upon a partnership or upon an unincorporated association which is subject to suit under a common name, by delivering a copy of a copy of the summons and ~~the~~ complaint to an officer, a managing ~~or agent,~~ general agent, or other agent authorized by appointment or by law to receive service of process and, ~~if the agent is one authorized by statute to receive service and the statute so requires, by also mailing a copy of the summons and the complaint to the defendant~~ any other person required by statute to be served. If no such officer or agent can be found within the state, and the defendant has, ~~or advertises or holds itself out as having,~~ an office or place of business ~~within the state or elsewhere, or does business within this state or elsewhere,~~ then upon the person in charge of such office or place of business;

(d)(1)(F) Upon an incorporated city or town, by delivering a copy of a copy of the summons and ~~the~~ complaint to the recorder;

(d)(1)(G) Upon a county, by delivering a copy of a copy of the summons and ~~the~~ complaint to the county clerk ~~of such county;~~

(d)(1)(H) Upon a school district or board of education, by delivering a copy of a copy of the summons and ~~the~~ complaint to the superintendent or business administrator ~~of the board;~~

(d)(1)(I) Upon an irrigation or drainage district, by delivering a copy of a copy of the summons and ~~the~~ complaint to the president or secretary ~~of its board;~~

(d)(1)(J) Upon the state of Utah, ~~in such cases as by law are authorized to be brought against the state,~~ by delivering a copy of a copy of the summons and ~~the~~ complaint to the attorney general and any other person or agency required by statute to be served; and

(d)(1)(K) Upon a department or agency of the state of Utah, or upon any public board, commission or body, ~~subject to suit,~~ by delivering a copy of a copy of the summons and ~~the~~ complaint to any member of its governing board, or to its executive employee or secretary.

(d)(1)(L) If the person to be served refuses to accept the summons and complaint, the person serving the same shall state the name of the process and offer to deliver it.

(d)(2) Service by mail or commercial courier service.

(d)(2)(A) The summons and complaint may be served upon an individual other than one covered by paragraphs (d)(1)(B) or (d)(1)(C) by mail or commercial courier service ~~in any state or judicial district of the United States provided if~~ the defendant signs a document indicating receipt.

(d)(2)(B) The summons and complaint may be served upon an entity covered by paragraphs (d)(1)(E) through (d)(1)(I) by mail or commercial courier service ~~in any state or judicial district of the United States provided if the~~ defendant's agent ~~authorized by appointment or by law to receive service of process~~ signs a document indicating receipt.

(d)(2)(C) Service by mail or commercial courier service ~~shall be is~~ complete on the date the receipt is signed ~~as provided by this rule~~.

(d)(3) Service in a foreign country. Service of the summons and complaint in a foreign country shall be made as follows:

(d)(3)(A) by any internationally agreed means reasonably calculated to give notice, such as those means authorized by the Hague Convention on the Service Abroad of Judicial and Extrajudicial Documents;

(d)(3)(B) if there is no internationally agreed means of service or the applicable international agreement allows other means of service, provided that service is reasonably calculated to give notice:

(d)(3)(B)(i) in the manner prescribed by the law of the foreign country for service in that country in an action in any of its courts of general jurisdiction;

(d)(3)(B)(ii) as directed by the foreign authority in response to a ~~letter rogatory or~~ letter of request; or

(d)(3)(B)(iii) unless prohibited by the law of the foreign country, by delivery to the individual personally ~~of a copy of the summons and the complaint~~ or by any form of mail requiring a signed receipt, to be addressed and dispatched by the clerk of the court to the party to be served; or

(d)(3)(C) by other means not prohibited by international agreement as may be directed by the court.

(d)(4) Other service.

(d)(4)(A) ~~Where the identity or whereabouts of~~ If the person to be served ~~are unknown and cannot be ascertained cannot be served~~ through reasonable diligence, ~~where or if~~ service upon all of the ~~individual~~ parties is impracticable under the circumstances, ~~or where there exists good cause to believe that the person to be served is avoiding service of process~~, the party seeking service ~~of process~~ may file a motion supported by affidavit requesting an order allowing service by ~~publication or by some~~ other means. The supporting affidavit shall set forth the efforts made to identify, locate or serve the party ~~to be served~~, or the circumstances which make it impracticable to serve all of the ~~individual~~ parties.

(d)(4)(B) If the motion is granted, the court shall order service ~~of process by publication or~~ by other means, ~~provided that the means of notice employed shall be reasonably calculated,~~ under all the circumstances, to ~~advise~~ advise the ~~interested parties of the pendency party~~ of the action ~~to the extent reasonably possible or practicable~~. The ~~court's~~ order shall ~~also~~ specify the content of the process to be served and the event ~~or events as of which that constitutes completion of~~ service ~~shall be deemed complete. Unless service is by publication, a copy of the court's order shall be served upon the defendant with the process specified by the court.~~

~~(d)(4)(C) In any proceeding where summons is required to be published, the court shall, upon the request of the party applying for publication, designate the newspaper in which publication shall be made. The newspaper selected shall be a newspaper of general circulation in the county where such publication is required to be made and shall be published in the English language.~~

(e) Proof of Service.

(e)(1) ~~If service is not waived, the~~ The person effecting service shall file proof with the court. The proof of service must state the date, place, and manner of service. Proof of service made pursuant to paragraph (d)(2) shall include a receipt signed by the defendant or defendant's agent ~~authorized by appointment or by law to receive service of process~~. If service is made by a person other than by an attorney, the sheriff or constable, or by the deputy of either, by a United States Marshal or by the marshal's deputy, the proof of service shall be made by affidavit.

(e)(2) Proof of service in a foreign country shall be made as ~~prescribed~~ provided in these rules ~~for service within this state~~, or by the law of the foreign country, or by order of the court. ~~When service is made pursuant to paragraph (d)(3)(C), proof~~ Proof of service ~~under paragraph (d)(3)(B)(iii)~~ shall include a receipt signed by the addressee or other evidence of delivery to the addressee satisfactory to the court.

(e)(3) Failure to make proof of service does not affect the validity of the service. The court may allow proof of service to be amended.

(f) Waiver of Service; Payment of Costs for Refusing to Waive.

(f)(1) A plaintiff may request a ~~defendant subject to service under paragraph (d)~~ person other than a minor or a protected person to waive service of ~~a the~~ summons and complaint. The request ~~to waive service and the summons and complaint~~ shall be mailed, e-mailed or delivered to the person upon whom service is authorized under paragraph (d). ~~It shall include a copy of the complaint, The request~~ shall allow the defendant at least ~~20-21~~ days from the date on which the request is sent to return the waiver, or ~~30-28~~ days if addressed to a defendant person outside of the United States, and shall be substantially in the form of the Notice of Lawsuit and Request for Waiver of Service of Summons set forth in the Appendix of Forms attached to these rules.

(f)(2) A defendant who timely returns a waiver ~~is not required to~~ must respond to the complaint ~~until 45~~ within 42 days after the date on which the request for waiver of service was mailed, e-mailed or delivered ~~to the defendant~~, or ~~60-56~~ days after that date if addressed to a defendant person outside of the United States.

(f)(3) A defendant who waives service of ~~a the~~ summons and complaint does not thereby make any other waiver ~~any objection to venue or to the jurisdiction of the court over the defendant~~.

(f)(4) If a defendant person refuses a request for waiver of service ~~submitted in accordance with~~ made according this rule, the court shall impose upon the defendant the costs subsequently incurred in effecting service.

Advisory Committee Notes

Rule 8. General rules of pleadings.

(a) Claims for relief. ~~A pleading which sets forth a claim for relief, whether an~~ An original claim, counterclaim, cross-claim or third-party claim, shall contain in reasonable detail ~~(1)-a~~ simple, short and plain:

(a)(1) statement of the claim showing that the pleader-party is entitled to relief;

(a)(2) statement of the time, place, participants, and events; and

~~(2)-a (a)(3) demand for judgment for the specified relief to which he deems himself entitled.~~ Relief in the alternative or of several different types may be demanded.

(b) Defenses; form of denials. A party shall state in simple, short and plain terms ~~his~~ any defenses to each claim asserted and shall admit or deny the ~~averments upon which the adverse party relies~~ important statements in the claim. ~~If he is~~ A party without knowledge or information sufficient to form a belief as to about the truth of ~~an averment, he a statement~~ shall so state, and this has the effect of a denial. Denials shall fairly meet the substance of the ~~averments~~ statements 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.~~ A party may deny all of the statements in a claim by general denial. A party may specify the statement or part of a statement that is admitted and deny the rest. A party may specify the statement or part of a statement that is denied and admit the rest.

(c) Affirmative defenses. An affirmative defense shall contain in reasonable detail a simple, short and plain:

(c)(1) statement of the defense showing that the party avoids liability;

(c)(2) statement of the time, place, participants, and events; and

(c)(3) a demand for judgment for specified relief.

~~In pleading to a preceding pleading, a~~ A party shall set forth affirmatively in a responsive pleading 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-If~~ a party ~~has~~ mistakenly ~~designated-designates~~ a defense as a counterclaim or a counterclaim as a defense, the court, on terms, ~~if justice so requires, shall may~~ treat the pleadings as if ~~there-the~~ ~~defense or counterclaim~~ had been ~~a properly designation designated~~.

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

(e) ~~Pleading to be concise and direct; c~~Consistency.

~~(e)(1) 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 state~~ a claim or defense alternately or hypothetically, either in one count or defense or in separate counts or defenses. ~~When two or more-If~~ statements are made in the alternative and one of them ~~if made independently would be is~~ sufficient, the pleading is not made insufficient by the insufficiency of ~~one or more of the an~~ alternative statements. A party may ~~also-state as~~ ~~many-separate-legal and equitable~~ claims or ~~legal and equitable~~ defenses ~~as-he-has~~ regardless of consistency ~~and whether based on legal or on equitable grounds or on both. All statements shall be made subject to the obligations set forth in Rule 11.~~

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

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

(a) Pretrial conferences. ~~In any action, the~~ 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 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)-(a)(7) establishing the time~~ to join other parties and to amend the pleadings;

~~(b)(2)-(a)(8) establishing the time~~ to file motions; ~~and~~

~~(b)(3)-(a)(9) establishing the time~~ 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 (a)(10) extending fact discovery;~~

~~(b)(5)-(a)(11) the date or dates for conferences before trial, a pretrial and final pretrial conferences;~~ and trial; ~~and~~

~~(b)(6)-(a)(12) provisions for preservation, disclosure or discovery of electronically stored information;~~

~~(b)(7)-(a)(13) any agreements the parties reach for asserting claims of privilege or of protection as trial-preparation material after production; and~~

31 ~~(b)(8)-(a)(14)~~ any other appropriate matters ~~appropriate in the circumstances of the~~
32 ~~case.~~

33 (b) Unless ~~the an~~ order sets the trial date ~~of trial~~, any party may and the plaintiff
34 shall, at the close of all discovery, certify to the court that the case is ready for trial. The
35 court shall schedule the trial as soon as mutually convenient to the court and parties.
36 The court shall notify parties of the trial date ~~of trial~~ and of any final pretrial conference.

37 (c) Final pretrial ~~or settlement~~ conferences. ~~In any action where a final pretrial~~
38 ~~conference has been ordered, it~~ The court, in its discretion or upon motion, may direct
39 the attorneys and the parties to appear for such purposes as settlement and trial
40 management. The conference shall be held as close to the time of trial as reasonable
41 under the circumstances. ~~The conference shall be attended by at least one of the~~
42 ~~attorneys who will conduct the trial for each of the parties, and the attorneys attending~~
43 ~~the pretrial, unless waived by the court, shall have available, either in person or by~~
44 ~~telephone, the appropriate parties who have authority to make binding decisions~~
45 ~~regarding settlement.~~

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

52 Advisory Committee Notes
53

Rule 26. General provisions governing disclosure and discovery.

(a) ~~Required disclosures; Discovery methods.~~ This rule applies unless changed or supplemented by a rule governing disclosure and discovery in a practice area.

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

(a)(1)(A) the name and, if known, the address and telephone number of:

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

(a)(1)(A)(ii) each fact witness the party may call in its case in chief supporting its claims or defenses, unless solely for impeachment, separately identifying witnesses the party will call and witnesses the party may call, and a summary of the expected testimony;

(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~~ that the party may offer in its case in chief;

(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 and a copy of~~ all discoverable documents or ~~other~~ evidentiary material on which such computation is based, including materials ~~bearing on about~~ the nature and extent of injuries suffered; ~~and~~

(a)(1)(D) ~~for inspection and copying as under Rule 34 a copy of~~ 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;

(a)(1)(E) a copy of all documents to which a party refers in its pleadings; and

(a)(1)(F) any statement or admission concerning the action or its subject matter previously made by the party to whom disclosure is made.

31 ~~Unless otherwise stipulated by the parties or ordered by the court, the (a)(1)(G) The~~
32 disclosures required by subdivision paragraph (a)(1) shall be made:

33 (a)(1)(G)(i) by the plaintiff within 14 days after service of ~~the meeting of the parties~~
34 ~~under subdivision (f) first answer to the complaint;~~ and

35 (a)(1)(G)(ii) by the defendant within 28 days after the plaintiff's first disclosure or
36 after that defendant's appearance, whichever is later.

37 ~~Unless otherwise stipulated by the parties or ordered by the court, a party joined~~
38 ~~after the meeting of the parties shall make these disclosures within 30 days after being~~
39 ~~served. A party shall make initial disclosures based on the information then reasonably~~
40 ~~available and is not excused from making disclosures because the party has not fully~~
41 ~~completed the investigation of the case or because the party challenges the sufficiency~~
42 ~~of another party's disclosures or because another party has not made disclosures.~~

43 (a)(2) Exemptions.

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

46 ~~(a)(2)(A)(i) based on contract in which the amount demanded in the pleadings is~~
47 ~~\$20,000 or less;~~

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

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

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

52 ~~(a)(2)(A)(v) (a)(2)(A)(iv)~~ for water rights general adjudication under Title 73, Chapter
53 4; and

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

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

58 (a)(3) Disclosure of expert testimony.

59 (a)(3)(A) A party shall, disclose without waiting for a discovery request, provide to
60 other parties the identity of any person who may be used at trial to present evidence
61 under Rules 702, 703, or 705 of the Utah Rules of Evidence. and a copy of

~~(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. An expert witness may not testify in a party's case-in-chief concerning any matter not contained in the report. 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 (a)(3)(B) Disclosure~~ required by ~~subdivision paragraph~~ (a)(3) shall be made within ~~30-28~~ days after the expiration of fact discovery as provided by ~~subdivision paragraph~~ (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)~~ (a)(3)(A), within ~~60-56~~ days after ~~the~~ disclosure ~~made~~ by the other party.

(a)(4) Pretrial disclosures. A party shall, without waiting for a discovery request, 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, unless solely for impeachment, separately identifying witnesses the party ~~expects to present will call~~ and witnesses the party may call ~~if the need arises~~;

(a)(4)(B) ~~the designation the name~~ of witnesses whose testimony is expected to be presented by means transcript of a deposition and, ~~if not taken stenographically,~~ a copy of the 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, unless solely for impeachment, separately identifying

those which the party ~~expects to will~~ 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 (A)(4)(D) Disclosure required by subdivision paragraph (a)(4) shall be made at least 30 28 days before trial. Within 14 days thereafter, unless a different time is specified by the court, At least 14 days before trial, a party may shall serve and file a list disclosing (i) any objections and grounds for the 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) exhibits. Objections not so disclosed, other Other than objections under Rules 402 and 403 of the Utah Rules of Evidence, shall be deemed objections not listed are waived unless excused by the court for good cause shown.~~

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

~~(a)(6) Methods to discover additional matter. Parties may obtain discovery by one or more of the following methods: depositions upon oral examination or written questions; written interrogatories; production of documents or things or permission to enter upon land or other property, for inspection and other purposes; physical and mental examinations; and requests for admission.~~

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

~~(b)(1) In general. Parties may obtain discovery regarding discover 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 any 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 grounds 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~~ is relevant to the claim or defense of a party. For good cause, the court may order discovery of any matter relevant to the subject matter of the action. A party is not entitled to discover information merely because it appears calculated to lead to the discovery of admissible evidence.

(b)(2) A party need not provide discovery of electronically stored information from sources that the party identifies as not reasonably accessible because of undue burden or cost. The party shall expressly make any claim that the source is not reasonably accessible, describing the source, the nature and extent of the burden, the nature of the information not provided, and any other information that will enable other parties to ~~assess~~ evaluate the claim. On motion to compel discovery or for a protective order, the party from whom discovery is sought must show that the information is not reasonably accessible because of undue burden or cost. If that showing is made, the court may order discovery from such sources if the requesting party shows good cause, ~~considering the limitations of subsection (b)(3).~~ The court may specify conditions for the discovery.

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

~~(b)(3)(A) the discovery sought is unreasonably cumulative or duplicative, or is obtainable from some other source that is more convenient, less burdensome, or less expensive;~~

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

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

~~(b)(4) (b)(3) Trial preparation: Materials. Subject to the provisions of Subdivision (b)(5) of this rule, a party may obtain discovery of discoverable 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 to prepare the case and that the party is unable without undue hardship to obtain ~~the~~ substantially 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. (b)(4) Statement previously made about the action.~~ Upon request, a person not a party may obtain ~~without the required showing~~ a statement concerning about 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 under Rule 37(a)(4) apply to the award of expenses incurred in relation to the motion. For purposes of this paragraph, a~~ 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 contemporaneously recorded~~ oral statement by the person making it ~~and contemporaneously recorded or a transcript thereof~~.

~~(b)(5) Trial preparation: Experts.~~

~~(b)(5)(A) A party may depose any person who has been identified as an expert whose opinions may be presented at trial. If a report is required under subdivision (a)(3)(B), any deposition shall be conducted within 60 days after the report is provided.~~

~~(b)(5)(B) A party may discover facts known or opinions held by an expert who has been retained or specially employed by another party in anticipation of litigation or preparation for trial and who is not expected to be called as a witness at trial, only as provided in Rule 35(b) or upon a showing of exceptional circumstances under which it is impracticable for the party seeking discovery to obtain facts or opinions on the same subject by other means.~~

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

~~(b)(5)(C)(i) The court shall require that the party seeking discovery pay the expert a reasonable fee for time spent in responding to discovery under Subdivision (b)(5) of this rule; and~~

~~(b)(5)(C)(ii) With respect to discovery obtained under Subdivision (b)(5)(A) of this rule the court may require, and with respect to discovery obtained under Subdivision (b)(5)(B) of this rule the court shall require, the party seeking discovery to pay the other party a fair portion of the fees and expenses reasonably incurred by the latter party in obtaining facts and opinions from the expert.~~

~~(b)(6)-(b)(5)~~ Claims of Privilege or Protection of Trial Preparation Materials.

~~(b)(6)(A)-(b)(5)(A)~~ Information withheld. ~~When-If~~ a party withholds discoverable information ~~otherwise discoverable under these rules~~ by claiming that it is privileged or subject to protection as trial preparation material prepared in anticipation of litigation or for trial, 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 the information itself ~~privileged or protected~~, will enable other parties to ~~assess the applicability of the privilege or protection~~ evaluate the claim.

~~(b)(6)(B)-(b)(5)(B)~~ Information produced. If a party produces information ~~is produced in discovery that is subject to a~~ the party ~~claims~~ of is ~~privileged~~ or ~~of protection as trial preparation material prepared in anticipation of litigation or for trial~~, the producing party ~~making the claim~~ may notify any receiving party ~~that received the information~~ of the claim and the basis for it. After being notified, a receiving 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) Proportionality; Pprotective orders.

(c)(1) Discovery must be proportional to the case. The court and parties may allocate the costs, expenses and attorney fees of discovery to achieve proportionality. The court and parties shall try to achieve proportionality considering:

(c)(1)(A) the amount in controversy;

(c)(1)(B) the complexity of the case;

(c)(1)(C) the importance of the issues;

(c)(1)(D) the importance of the information;

(c)(1)(E) the relevance of the information;

(c)(1)(F) the parties' relative access to the information;

(c)(1)(G) the discovery already had in the case;

(c)(1)(H) the expense of the discovery;

(c)(1)(I) the burden on the party requesting discovery;

(c)(1)(J) the burden on the party providing discovery;

(c)(1)(K) the needs of the case;

(c)(1)(L) whether the discovery limits allow a fair opportunity for the discovery of discoverable information;

(c)(1)(M) whether the discovery is available from another source that is more convenient, less burdensome, or less expensive;

(c)(1)(N) whether the discovery is cumulative of disclosures or other discovery;

(c)(1)(O) whether the party seeking discovery has had ample opportunity to discover the information sought; and

(c)(1)(P) any other factor identified by the court.

~~Upon motion by a (c)(2) A party or by the person from whom discovery is sought,~~
~~accompanied by~~ may move for an order of protection from discovery. The movant shall
attach to the motion a copy of the request for discovery or the response which is at
issue and 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~~ 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
discovery being conducted in bad faith or from annoyance, embarrassment, oppression,
or undue burden or expense, or to achieve proportionality, including one or more of the
following:

~~(c)(1)-(c)(2)(A)~~ that the discovery not be had;

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

~~(c)(2)(C)~~ that a question about a statement or opinion of fact or the application of law to fact not be answered until after designated discovery has been completed or until a pretrial conference or other later time;

~~(e)(3)–(c)(2)(D)~~ that the discovery may be had only by a method of discovery other than that selected by the party seeking discovery;

~~(e)(4)–(c)(2)(E)~~ that certain matters not be inquired into, or that the scope of the discovery be limited to certain matters;

~~(e)(5)–(c)(2)(F)~~ that discovery be conducted with no one present except persons designated by the court;

~~(e)(6)–(c)(2)(G)~~ that a deposition after being sealed be opened only by order of the court;

~~(e)(7)–(c)(2)(H)~~ that a trade secret or other confidential research, development, or commercial information not be disclosed or be disclosed only in a designated way;

~~(c)(2)(I)~~ that the costs, expenses and attorney fees of discovery be allocated among the parties as ordered by the court; and

~~(e)(8)–(c)(2)(J)~~ that the parties simultaneously file specified documents or information enclosed in sealed envelopes to be opened as directed by the court.

~~(c)(3)~~ If the order terminates a deposition, it shall be resumed only upon the order of the court in which the action is pending.

~~(c)(4)~~ 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~~ies to the award of expenses incurred in relation to the motion.

(d) Sequence and timing of discovery.

~~(d)(1)~~ Discovery shall be in two stages. Initial fact discovery shall be completed within 150 days after the defendant's first disclosure is made and the parties shall follow the limits established in Rules 30, 33, 34 and 36. Methods of discovery may be used in any sequence and the fact that a party is conducting discovery shall not delay any other party's discovery. Except for cases exempt under ~~subdivision paragraph~~ (a)(2), ~~except~~

~~as authorized under these rules, or unless otherwise stipulated by the parties or ordered by the court, a party may not seek discovery from any source before the parties have met and conferred as required by subdivision (f). Unless otherwise stipulated by the parties or ordered by the court, fact discovery shall be completed within 240 days after the first answer is filed. Unless the court upon motion, for the convenience of parties and witnesses and in the interests of justice, orders otherwise, methods of discovery may be used in any sequence and the fact that a party is conducting discovery, whether by deposition or otherwise, shall not operate to delay any other party's discovery that party's initial disclosure obligations are satisfied.~~

(d)(2) To obtain discovery beyond the limits established by these rules, a party shall file:

(d)(2)(A) before the close of the initial fact discovery, a stipulated notice of extended discovery and a statement signed by the parties and lawyers that the additional discovery is necessary and proportionate and that the parties each party has have reviewed and approved a discovery budget; or

(d)(2)(B) before the close of the initial fact discovery and after reaching the limits of initial discovery imposed by these rules, a motion for extended discovery and a statement signed by the party and lawyer that the additional discovery is necessary and proportionate and that the party has reviewed and approved a discovery budget.

~~(e) Supplementation of responses. Standard for disclosure or response; disclosure or response by an organization; failure to disclose; initial and supplemental disclosures and 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~~

(e)(1) A party shall make disclosures and responses to discovery based on the information then known or reasonably available to the party.

(e)(2) If the party providing disclosure or responding to discovery is a corporation, partnership, association, or governmental agency, the party shall act through one or more officers, directors, managing agents, or other persons.

(e)(3) A party is not excused from making disclosures or responses because the party has not completed investigating the case or because the party challenges the sufficiency of another party's disclosures or responses or because another party has not made disclosures or responses.

(e)(4) If a party fails to disclose or to timely supplement a disclosure or response to discovery, that party may not use the undisclosed witness, document or material at any hearing or trial unless the failure is harmless or the party shows good cause for the failure.

(e)(5) If a party learns that in some material respect the information disclosed a disclosure or response is incomplete or incorrect and if in some important way, the party must timely provide the additional or corrective information if it 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. The supplemental disclosure or response must state why the additional or correct information was not previously provided.

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

~~(f) Discovery and scheduling conference.~~

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

~~(f)(1) The parties shall, as soon as practicable after commencement of the action, meet in person or by telephone to discuss the nature and basis of their claims and defenses, to discuss the possibilities for settlement of the action, to make or arrange for the disclosures required by subdivision (a)(1), to discuss any issues relating to~~

~~preserving discoverable information and to develop a stipulated discovery plan. Plaintiff's counsel shall schedule the meeting. The attorneys of record shall be present at the meeting and shall attempt in good faith to agree upon the discovery plan.~~

~~(f)(2) The plan shall include:~~

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

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

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

~~(f)(2)(D) any issues relating to claims of privilege or of protection as trial-preparation material, including - if the parties agree on a procedure to assert such claims after production - whether to ask the court to include their agreement in an order;~~

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

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

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

~~(f)(3) Plaintiff's counsel shall submit to the court within 14 days after the meeting and in any event no more than 60 days after the first answer is filed a proposed form of order in conformity with the parties' stipulated discovery plan. The proposed form of order shall also include each of the subjects listed in Rule 16(b)(1)-(8), except that the date or dates for pretrial conferences, final pretrial conference and trial shall be scheduled with the court or may be deferred until the close of discovery. If the parties are unable to agree to the terms of a discovery plan or any part thereof, the plaintiff shall and any party may move the court for entry of a discovery order on any topic on which the parties are unable to agree. Unless otherwise ordered by the court, the presumptions established by these rules shall govern any subject not included within the parties' stipulated discovery plan.~~

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

~~(f)(5) A party joined after the meeting of the parties is bound by the stipulated discovery plan and discovery order, unless the court orders on stipulation or motion a modification of the discovery plan and order. The stipulation or motion shall be filed within a reasonable time after joinder.~~

~~(g)-(f)~~ Signing ~~of~~ discovery requests, responses, and objections. Every disclosure, request for discovery, ~~or~~ response to a request for discovery or and objection ~~thereto made by a party to a request for discovery~~ shall be in writing and 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 is 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 under Rule 11.~~ If a request, or 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~~ does not need 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~~ may take any action authorized by Rule 11 or Rule 37(b)(2).

~~(h)-(g)~~ Deposition where in 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.~~ Notice of the 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.~~ Matters required to be submitted to the court shall be
submitted to the court in the county where the deposition is being taken.

~~(i)-(h)~~ Filing.

~~(i)(1) Unless otherwise~~ Except as required by these rules or ordered by the court, a
party shall not file with the court a disclosures, ~~or a~~ requests for discovery ~~with the court~~
or a response to a request for discovery, but shall file only the ~~original~~ certificate of
service stating that the disclosures, ~~or~~ requests for discovery have or response has
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

Suggested by the Institute. Statement of concept only.

Rule 26B. Disclosure and discovery in personal injury actions.

In actions claiming damages for personal injuries, the claimant shall disclose the
names and addresses of health care providers who have provided care for 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.

Rule 26C. Disclosure and discovery in employment actions.

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;

Rule 26D. Disclosure and discovery in nnnnn.

1 **Rule 26A. Disclosure in domestic relations actions.**

2 (a) Scope. This rule applies to domestic relations actions, including divorce,
3 temporary separation, separate maintenance, parentage and modification. This rule
4 does not apply to adoptions, enforcement of prior orders, cohabitant abuse protective
5 orders, child protective orders and civil stalking injunctions.

6 (b) Time for disclosure. Without waiting for a discovery request, petitioner in all
7 domestic relations actions shall disclose to respondent the documents required in this
8 rule within 40 days after service of the petition unless respondent defaults or consents
9 to entry of the decree. The respondent shall disclose to petitioner the documents
10 required in this rule within 40 days after respondent's answer is due.

11 (c) Financial Declaration. Each party shall disclose to all other parties a fully
12 completed court-approved Financial Declaration and attachments. Each party shall
13 attach to the Financial Declaration the following:

14 (c)(1) For every item and amount listed in the Financial Declaration, excluding
15 monthly expenses, the producing party shall attach copies of statements verifying the
16 amounts listed on the Financial Declaration that are reasonably available to the party.

17 (c)(2) All federal and state income tax returns filed by that party, on behalf of that
18 party, and any returns in which that party has a business, corporate, partnership or trust
19 interest including all W-2s, 1099s, K-1s and all supporting tax schedules for the two tax
20 years before the petition was filed.

21 (c)(3) Pay stubs and other evidence of all earned and un-earned income for the 12
22 months before the petition was filed.

23 (c)(4) All loan applications and financial statements prepared or used by the party
24 within the 12 months before the petition was filed.

25 (c)(5) Documents verifying the value of all real estate in which the party has an
26 interest, including, but not limited to, the most recent appraisal, tax valuation and
27 refinance documents.

28 (c)(6) All statements for the 3 months before the petition was filed for all financial
29 accounts, including, but not limited to checking, savings, money market funds,
30 certificates of deposit, brokerage, investment, retirement, regardless of whether the
31 account has been closed including those held in that party's name, jointly with another

person or entity, or as a trustee or guardian, or in someone else's name on that party's behalf.

(c)(7) If the foregoing documents are not reasonably available or are in the possession of the other party, the party disclosing the Financial Declaration shall estimate the amounts entered on the Financial Declaration, the basis for the estimation and an explanation why the documents are not available.

(d) Certificate of Service. Each party shall file a Certificate of Service with the court certifying that he or she has provided the Financial Declaration and attachments to the other party in compliance with this rule.

(e) Exempted agencies. Agencies of the State of Utah are not subject to these disclosure requirements.

(f) Sanctions. Failure to fully disclose all assets and income in the Financial Declaration and attachments may subject the non-disclosing party to sanctions under Rule 37 including an award of non-disclosed assets to the other party, attorney's fees or other sanctions deemed appropriate by the court.

(g) Failure of a party to comply with this rule does not preclude any other party from obtaining a default judgment, proceeding with the case, or seeking other relief from the court.

(h) Notice of the requirements of this rule shall be served on the Respondent and all joined parties with the initial petition.

Advisory Committee Notes

(c)(3): Refer to statutory definition

Rule 29. Stipulations regarding disclosure and discovery procedure.

~~Unless the court orders otherwise, the~~ 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 any provision of~~ these rules for disclosure and discovery, ~~except that stipulations by filing, before the close of the initial fact discovery, a stipulated notice of extended discovery and a statement signed by the parties and lawyers that the additional discovery is necessary and proportionate and that the parties have each party has reviewed and approved a discovery budget. Stipulations~~ extending the time for or limits of disclosure or discovery require ~~the court~~ approval ~~of the court~~ if ~~they the extension~~ would interfere with ~~the time set a court order~~ for completion of discovery or with the date of a hearing or trial.

Advisory Committee Notes

Rule 30. Depositions ~~upon oral examination.~~

(a) When depositions may be taken; ~~When leave required; no deposition of expert witnesses. A party may depose a party or witness by oral or written questioning. A witness may not be deposed more than once. A party witness may be deposed without a court order. A nonparty witness may be deposed without a court order to produce documents and tangible things and to establish the foundation for evidence. Other nonparty witnesses may be deposed only by court order. A person who may present evidence under Rules 702, 703, or 705 of the Utah Rules of Evidence may not be deposed.~~

~~(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). 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), 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 deposition; general requirements; special notice; non-stenographic recording; production of documents and things; deposition of organization; deposition by telephone; written questions.

(b)(1) ~~A~~ The party ~~desiring to take the deposition of any person upon oral examination deposing a witness~~ shall give reasonable notice in writing to every other party ~~to the action~~. The notice shall state the date, time and place for ~~taking~~ the deposition and the name and address of each ~~person to be examined witness~~, if

known, and, if the name of a witness is not known, a general description sufficient the notice shall describe the witness sufficiently to identify the person or state 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. The notice shall designate any documents and tangible things to be produced by a witness. The notice shall designate the officer who will conduct the deposition.~~

(b)(2) The ~~party taking the deposition shall state in the~~ notice shall designate the method by which the ~~testimony shall deposition will~~ be recorded. ~~Unless the court orders otherwise, it~~ With prior notice to the officer, witness and other parties, any party may designate a recording method in addition to the method designated in the notice. Depositions may be recorded by sound, sound-and-visual, or stenographic means, and the party ~~taking the deposition designating the recording method~~ shall bear the cost of the recording. The appearance or demeanor of witnesses or attorneys shall not be distorted through recording techniques.

~~(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 (b)(3)~~ 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 witness; (D) the administration of the oath or affirmation to the deponent witness; 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 the~~ 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~~ state any stipulations ~~made by~~

~~counsel concerning the custody of the transcript or recording and the exhibits, or concerning other pertinent matters.~~

~~(b)(5)-(b)(4)~~ The notice to a party ~~deponent~~ witness may be accompanied by a request ~~made in compliance with~~ under 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. The attendance of a nonparty witness may be compelled by subpoena under Rule 45. Documents and tangible things to be produced shall be stated in the subpoena.

~~(b)(6)-(b)(5)~~ A party may ~~in the notice and in a subpoena~~ name as the ~~deponent~~ witness a ~~public or private~~ corporation, a partnership, an association, or a governmental agency, ~~and~~ describe with reasonable particularity the matters on which examination questioning is requested. ~~In that event,~~ and direct the organization ~~so named shall to~~ designate one or more officers, directors, managing agents, or other persons ~~who consent~~ to testify on its behalf ~~and may set forth.~~ The organization shall state, 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 ~~(b)(6)~~ A deposition may be taken by remote electronic means. ~~For the purposes of this rule and Rules 28(a), 37(b)(1), and 45(d), a~~ A deposition taken by remote electronic means is considered to be taken at the place where the ~~deponent witness~~ is to answers questions.

~~(b)(7)~~ A party taking a deposition using written question shall include the written questions with the notice or subpoena and serve them on:

(b)(7)(A) the parties;

(b)(7)(B) the witness if that person is not a party; and

(b)(7)(C) the officer.

(b)(7)(D) Within 14 days after the questions are served, a party may serve cross questions. Within 7 days after being served with cross questions, a party may serve

redirect questions. Within 7 days after being served with redirect questions, a party may serve recross questions.

(b)(7)(E) The officer shall ask any written questions.

(c) Examination and cross-examination; ~~record of examination; oath;~~ objections.

(c)(1) Examination and cross-examination Questioning 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.~~

(c)(2) 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 recorded,~~ but the ~~examination questioning~~ shall proceed, with and 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 may instruct a ~~deponent witness~~ not to answer only ~~when necessary~~ to preserve a privilege, to enforce a limitation on evidence directed by the court, or to present a motion for a protective order under ~~paragraph (4) Rule 26(c).~~ Upon demand of the objecting party or witness, the deposition shall be suspended for the time necessary to make a motion. The party taking the deposition may complete or adjourn the deposition before moving for an order to compel discovery under Rule 37.

~~(d)(2) Unless otherwise authorized by the court or stipulated by the parties, a deposition is limited to one day of seven hours. The court must allow additional time consistent with Rule 26(b)(2) 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.~~

(d) Limits. During initial fact discovery, each side (plaintiffs collectively, defendants collectively, and third-party defendants collectively) may not take more than is limited to 20 hours of deposition by oral questioning. Oral questioning of a nonparty shall not exceed four hours, and oral questioning of a party shall not exceed seven hours. A deposition by written questioning shall not cumulatively exceed 15 questions, including discrete subparts, by the plaintiffs collectively, by the defendants collectively or by third-party defendants collectively.

~~(e) Submission to witness; changes; signing. If requested by the deponent or a party before completion of the deposition, the deponent shall have 30~~ Within 28 ~~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 a witness may~~ sign a statement reciting such of changes to the form or substance of the transcript or recording and the reasons given by the deponent for making them for the changes. ~~The officer shall indicate in the certificate prescribed by subdivision (f)(1) whether any review was requested and, if so, shall append any changes~~ timely ~~made by the deponent during the period allowed~~ witness.

(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 record the deposition or direct another person present to record the deposition. The officer shall sign a certificate, to accompany the record of the deposition, that the witness was duly sworn under oath or affirmation and that the transcript or other recording record is a true record of the testimony given by the witness deposition. Unless otherwise ordered by the court, the~~ The officer shall keep a copy of the record. The officer shall securely seal the record ~~of the deposition in an envelope~~ endorsed with the title of the action and marked "Deposition of (name). Do not open." and shall promptly send the sealed record ~~of the deposition~~ to the attorney or the party who ~~arranged for the transcript or other record to be made~~ designated the recording method. ~~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 or party receiving the record ~~of the deposition~~ shall store it under conditions that will protect it against loss, destruction, tampering, or deterioration.

(f)(2) ~~Documents~~ Every party may inspect and copy documents and things produced for inspection ~~during the examination of the witness shall, upon and must have a fair opportunity to compare copies and originals. Upon~~ the request of a party, documents and things produced for inspection shall be marked for identification and annexed added to the record ~~of the deposition and may be inspected and copied by any party,~~ ~~except that, if~~ If the ~~person producing the materials desires~~ witness wants to retain ~~them the originals~~, that person ~~may (A) shall~~ offer ~~copies the originals~~ to be copied, marked for identification and annexed added 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.~~

186 (f)(3) ~~Unless otherwise ordered by the court or agreed by the parties, the officer shall~~
187 ~~retain stenographic notes of any depositions taken stenographically or a copy of the~~
188 ~~recording of any deposition taken by another method.~~ Upon payment of reasonable
189 charges ~~therefor~~, the officer shall furnish a copy of the record ~~of the deposition~~ to any
190 party or to the ~~deponent~~ witness. ~~Any party or the deponent may arrange for a~~
191 ~~transcription to be made from the recording of a deposition taken~~ An official transcript of
192 a recording made by non-stenographic means shall be prepared under Utah Rule of
193 Appellate Procedure 11(e).

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

195 ~~(g)(1)~~ If the party giving the notice of ~~the taking of~~ a deposition fails to attend ~~and~~
196 ~~proceed therewith or fails to serve a subpoena upon a witness who fails to attend,~~ and
197 another party attends in person or by attorney ~~pursuant to the notice~~, the court may
198 order the party giving the notice to pay to ~~such the~~ other party the reasonable costs,
199 expenses ~~incurred by him and his attorney in attending, including reasonable attorney's~~
200 fees and attorney fees incurred.

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

207 Advisory Committee Notes

~~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). an opposing yThe 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), 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~~

31 ~~30(c), (e), and (f), attaching to the deposition the copy of the notice and the questions~~
32 ~~received.~~

33 ~~Advisory Committee Notes~~

34

Rule 33. Interrogatories Written questions to parties.

(a) Availability; procedures for use. ~~Without leave of court or written stipulation, During initial fact discovery, any party may serve upon any other party up to 15 written interrogatories, not exceeding 25 in number questions, 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). Without leave of court or written stipulation, interrogatories may not be served before the time specified in Rule 26(d).~~

(b) Answers and objections.

~~(b)(1) Each interrogatory question shall be answered separately and fully in writing under oath, or affirmation unless it is objected to, in which event the objecting If a question is objected to, the party shall state the reasons for the objection and. Any reason not stated is waived unless excused by the court for good cause. The party shall answer to the extent the interrogatory any part of a question that is not objectionable. A question is not objectionable merely because an answer involves an opinion or argument that relates to fact or the application of law to fact.~~

~~(b)(2) The answering party shall serve the answers are to be signed by the person making them, and the objections signed by the attorney making them and objections within 28 days after service of the questions.~~

~~(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 Questions may relate to any discoverable matters ~~which can be inquired into under Rule 26(b), and the answers.~~ Answers may be used ~~to the extent as~~ 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 If~~ the answer to ~~an interrogatory a~~ question may be ~~derived or ascertained from~~ found by inspecting the answering party's 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 finding~~ the answer is substantially the same for ~~the party serving the interrogatory as for the party served~~ both parties, ~~it is a sufficient answer to such interrogatory to specify the answering party may identify~~ the records from which the answer may be ~~derived or ascertained and to afford to found.~~ The answering party must give the asking party ~~serving the interrogatory~~ reasonable opportunity to ~~examine, audit, or inspect such inspect the~~ records and to make copies, compilations, ~~abstracts,~~ or summaries. ~~A specification shall be~~ The answering party must identify the records in sufficient detail to permit the ~~interrogating asking~~ party to locate and to identify; them as readily as ~~can~~ the answering party ~~served, the records from which the answer may be ascertained.~~

Advisory Committee Notes

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) ~~Any party may serve on any other party a request~~ to produce and permit the ~~requesting~~ party ~~making the request, or someone acting on his behalf,~~ to inspect, copy, test or sample any designated discoverable documents, ~~or~~ electronically stored information or tangible things (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 responding party upon whom the request is served; or.~~

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

(b) Procedure and limitations.

(b)(1) The request shall ~~set forth~~ identify the items to be inspected ~~either~~ by individual item or by category, and describe each item and category with reasonable particularity. During initial fact discovery, the request shall not cumulatively include more than 25 distinct items or categories of items. The request shall specify a reasonable date, time, place, and manner of making the inspection and performing the related acts. The request may specify the form or forms in which electronically stored information is to be produced. ~~Without leave of court or written stipulation, a request may not be served before the time specified in Rule 26(d).~~

(b)(2) The responding party ~~upon whom the request is served~~ shall serve a written response within 30-28 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 acts will be permitted as requested, ~~unless or that~~ the request is objected to, ~~including an objection to the requested form or forms for producing electronically stored information, stating~~ If the party objects to a request, the party must state 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~~ Any reason not stated is waived unless excused by the court for good cause. The party shall identify and permit inspection of any part of a request that is not objectionable. If the party objects 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:~~

~~(c) Form of documents and electronically stored information.~~

~~(b)(3)(A) a~~ (c)(1) 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~~ (c)(2) 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~~ (c)(3) 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

Rule 35. Physical and mental examination of persons.

(a) Order for examination. When the mental or physical condition ~~(including the blood group) or attribute~~ of a party or of a person in the custody or ~~under the legal~~ control of a party is in controversy, the court ~~in which the action is pending~~ may order the party or person to submit to a physical or mental examination by a suitably licensed or certified examiner or to produce for examination the person in the party's custody or ~~legal~~ control, unless the party is unable to produce the person for examination. The order may be made only on motion for good cause shown, ~~and upon notice to the person to be examined and to all parties and~~ All papers related to the motion and notice of any hearing shall be served on a nonparty to be examined. The order shall specify the time, place, manner, conditions, and scope of the examination and the person ~~or persons~~ by whom ~~it the examination~~ is to be made. The person being examined may record the examination unless the party requesting the examination shows that the recording would unduly interfere with the examination.

~~(b) Report of examining physician.~~

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

~~(b)(2)~~ (b) Waiver of privilege. By requesting and obtaining ~~a report of the examination so ordered or by taking the deposition of the examiner the examiner's report~~, the party examined waives any privilege the party may have in that action or any other involving the same controversy, regarding the testimony of every other person

32 who has examined or may thereafter examine the party in respect of about the same
33 mental or physical condition. Question: Does this paragraph fit with the model that
34 expert reports must be disclosed? Seems like the person examined necessarily waives
35 the privilege.

36 ~~(b)(3) This subdivision applies to examinations made by agreement of the parties,~~
37 ~~unless the agreement expressly provides otherwise. This subdivision does not preclude~~
38 ~~discovery of a report of any other examiner or the taking of a deposition of an examiner~~
39 ~~in accordance with the provisions of any other rule.~~

40 ~~(c) Right of party examined to other medical reports. At the time of making an order~~
41 ~~to submit to an examination under Subdivision (a), the court shall, upon motion of the~~
42 ~~party to be examined, order the party seeking such examination to furnish to the party to~~
43 ~~be examined a report of any examination previously made or medical treatment~~
44 ~~previously given by any examiner employed directly or indirectly by the party seeking~~
45 ~~the order for a physical or mental examination, or at whose instance or request such~~
46 ~~medical examination or treatment has previously been conducted.~~

47 ~~(d)(c)~~ Sanctions.

48 ~~(d)(1)~~ If a party or a person in the custody or under the legal control of a party fails to
49 obey an order entered under Subdivision paragraph (a), the court on motion may take
50 any action authorized by Rule 37(b)(2), except that the failure cannot be treated as
51 contempt of court.

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

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 to admit~~ the truth of any discoverable matters
~~within the scope of Rule 26(b)~~ set forth in the request ~~that, including the genuineness of~~
any document. The matter must 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. Each matter shall be separately stated. During initial fact discovery, a party~~
~~may not request admission of more than 25 matters. A copy of the document shall be~~
~~served with the request unless it has already been furnished or made available for~~
~~inspection and copying.~~ The request ~~for admission shall contain a notice advising notify~~
the responding party ~~to whom the request is made that, pursuant to Rule 36, the~~
matters shall will be deemed admitted unless ~~said request is responded to the party~~
responds within 30-28 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).~~

(b) Answer or objection.

~~(b)(1) (a)(2)~~ Each matter of which an admission is requested shall be separately set
~~forth.~~ The matter is admitted unless, within thirty-28 days after service of the request, ~~or~~
~~within such shorter or longer time as the court may allow,~~ the responding party ~~to whom~~
~~the request is directed~~ serves upon the requesting 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)(2) Unless the answering party objects to a matter, the party must admit or deny the matter or state in detail the reasons why the party cannot truthfully admit or deny. A party may identify the part of a matter which is true and deny the rest. A denial shall fairly meet the substance of the request. Lack of information is not a reason for failure to admit or deny unless the information known or reasonably available is insufficient to form an admission or denial. If the truth of a matter is a genuine issue for trial, the answering party may deny the matter or state the reasons for the failure to admit or deny.

(b)(3) If the party objects to a matter, the party shall state the reasons for the objection. Any reason not stated is waived unless excused by the court for good cause. The party shall admit or deny any part of a matter that is not objectionable. It is not grounds for objection that the truth of a matter is a genuine issue for trial.

(c) Sanctions for failure to admit. If a party fails to admit the truth of any discoverable matter set forth in the request, and if the requesting party proves the truth of the matter, the requesting party may move for an order requiring the other party to pay the

reasonable expenses of proving the matter, including reasonable attorney fees. The court shall enter the order unless it finds that:

(c)(1) the request was held objectionable;

(c)(2) the admission sought was not substantially important;

(c)(3) the responding party had reason to believe the truth of the matter was a genuine issue for trial; or

(c)(4) there were other good reasons for the failure to admit.

~~(b)-(d)~~ 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~~ The court may permit withdrawal or amendment ~~when if~~ the presentation of the merits of the action will be ~~subverted thereby promoted~~ and ~~the party who obtained the admission fails to satisfy the court that~~ withdrawal or amendment will not prejudice ~~him in maintaining his action or defense on the merits the requesting party~~. Any admission ~~made by a party~~ under this rule is for the purpose of the pending action only. ~~and It~~ is not an admission ~~by him~~ for any other purpose, nor may it be used ~~against him~~ in any other ~~proceeding action~~.

Advisory Committee Notes

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

(a) Motion for order compelling disclosure or 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)-(a)(1)~~ Motion.

~~(a)(2)(A) If a party fails to make a disclosure required by Rule 26(a), any other A~~ party may move to compel disclosure or discovery and for appropriate sanctions if another party:

~~(a)(1)(A) makes an evasive, incomplete or insufficient disclosure or response to a request for discovery;~~

~~(a)(1)(B) fails to disclose, fails to respond to a discovery request, fails to supplement a disclosure or response or makes a supplemental disclosure or response without an adequate explanation of why the additional or correct information was not previously provided;~~

~~(a)(1)(C) objects to a request for discovery;~~

~~(a)(1)(D) impedes, delays, or frustrates the fair examination of a witness; or~~

~~(a)(1)(E) otherwise fails to make full and complete disclosure or discovery.~~

~~(a)(2) Appropriate court. A motion 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. A motion for an order to a nonparty witness shall be made to the court in the district where the deposition is being taken.~~

~~(a)(3) The motion must include movant must attach a copy of the request for discovery or the response at issue and~~ a certification that the movant has in good faith conferred or attempted to confer with the party not making the disclosure or discovery in an effort to secure the disclosure or discovery without court action.

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

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

(a)(4) Expenses and sanctions.

(a)(4)(A) If the motion is granted, or if the disclosure or ~~requested~~ discovery is provided after the motion was filed, the court shall, after opportunity for ~~hearing~~ response, require the party or deponent witness 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 did not make 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~~ response, require the moving party or the attorney or both of them to pay to the party or deponent witness 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~~ response, 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~~ Failure to follow an order of the court in the district in which the deposition is being taken, ~~the failure may be considered a~~ is 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~~ 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 to follow its orders 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 to evidence;

(b)(2)(C) ~~strike pleadings or parts thereof~~, stay further proceedings until the order is obeyed;

(b)(2)(D) dismiss all or part of the action ~~or proceeding or any part thereof~~, strike all or part of the pleadings, or render judgment by default ~~against the disobedient party on all or part of the action~~;

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

~~(b)(2)(E)~~ (b)(2)(F) 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)~~ (b)(2)(G) 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. 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).~~

~~(g)-(c)~~ Failure to preserve evidence. Nothing in this rule limits the inherent power of the court to take any action authorized by Subdivision paragraph (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