Agenda
Advisory Committee on Rules of Civil Procedure

September 29, 2010
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
Introduction of David Moore and Robert Shelby		Fran Wikstrom
Correction to Rule 64D	Tab 2	Tim Shea
Simplified disclosure and discovery rules	Tab 3	Fran Wikstrom
Correction to disclosure and discovery rules	Tab 4	Tim Shea
Expert discovery	Tab 5	Cullen Battle

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

Meeting Schedule

October 27, 2010
November 17, 2010
January 26, 2011
February 23, 2011
March 23, 2011
April 27, 2011
May 25, 2011
June 22, 2011
September 28, 2011
October 26, 2011
November 16, 2011
January 25, 2012

Tab 1

MINUTES

UTAH SUPREME COURT ADVISORY COMMITTEE OF THE RULES OF CIVIL PROCEDURE

Wednesday, June 23, 2010
Administrative Office of the Courts

Francis M. Wikstrom, Presiding

PRESENT: Francis M. Wikstrom, Francis J. Carney, W. Cullen Battle, Barbara L. Townsend, Terrie T. McIntosh, Trystan B. Smith, David W. Scofield, James T. Blanch, Honorable Lyle R. Anderson, Todd M. Shaughnessy, Jonathan O. Hafen, Lincoln L. Davies

PHONE: Lori Woffinden

EXCUSED: Honorable Derek P. Pullan, Honorable Kate A. Toomey, Honorable David O. Nuffer, Leslie W. Slaugh, Janet H. Smith

STAFF: Timothy M. Shea, Sammi V. Anderson

GUESTS: Clark W. Sabey

I. APPROVAL OF MINUTES.

Mr.Wikstrom called the meeting to order at 4:00 p.m., and Mr. Wikstrom entertained comments from the committee concerning the May 26, 2010 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. WELCOME TO CHIEF JUSTICE DURHAM AND RECOGNITION OF JUSTICE THOMAS LEE.

Chief Justice Durham presented Justice Thomas Lee with a certificate of thanks and appreciation for ten years of service on the committee. Mr. Wikstrom expressed the committee's deepest thanks for Mr. Lee's tremendous efforts and contributions to the committee's work. Mr. Wikstrom and the committee offered heartfelt congratulations on Justice Lee's confirmation to the Utah Supreme Court.

III. REPORT ON MEETING WITH THE UTAH SUPREME COURT.

Mr. Wikstrom reported on his meeting with the justices of the Utah Supreme Court regarding the simplified rules. The proposed changes were enthusiastically received and appreciated. Mr. Wikstrom proposed a roll-out period and educational process targeted to

conclude on or around November 30, 2010. Chief Justice Durham echoed Mr. Wikstrom's comments and offered the support of the Court during that roll-out process. The Chief Justice complimented the committee on the scope of its work and expressed appreciation.

IV. DISCUSSION ON SIMPLIFIED RULES.

Mr. Wikstrom directed the committee's attention to the "Process for Consideration of the Proposed Rules," which he has prepared and shared with the Utah Supreme Court. The committee reviewed that document along with the "Proposed Rules Governing Civil Discovery". Mr. Wikstrom indicated a willingness and inclination to send the new rules to the Bar membership via e-mail within the next week. Mr. Wikstrom then indicated his hope that committee members would speak and advocate on behalf of the revised rules, listen for feedback and report back to the committee.

Mr. Battle suggested the committee affirmatively offer, as opposed to waiting for a request, to present on the new rules to each of the major firms. Ms. McIntosh noted that it would be helpful to create a forum for committee members to report back on concerns shortly after presenting. Mr. Battle suggested that all the concerns be collected in one central location. Mr. Wikstrom agreed that contemporaneous reporting is important.

The committee further discussed how to get the word out at various events and Bar functions, and among firms and law schools. Mr. Shea identified and discussed judicial events for which the simplified rules are already on the agenda. Mr. Wikstrom asked committee members to look for opportunities to get the word out and to volunteer on behalf of the committee as needed at upcoming presentations.

The committee approved for circulation the "Proposed Rules Governing Civil Discovery". Mr. Wikstrom asked for comments back on his proposed power point quickly so that it can be finalized for presentations to begin shortly. The committee discussed anticipated questions from the Bar and judiciary and discussed responses to those questions.

Mr. Wikstrom then turned the discussion to the Advisory Committee Notes. Mr. Battle volunteered to draft a Note for Rule 1.

Rule 8 - The committee reviewed Mr. Davies' draft of the Rule 8 Committee Note. A motion to approve was made, seconded and unanimously approved.

Rule 35 - The committee reviewed Mr. Carney's draft of the Rule 35 Committee Note. Mr. Shaughnessy noted a concern on p. 43, line 45 with the language "[t]his proposal was deemed impractical, and the committee leaves such matters to the courts' discretion..." Mr. Carney proposed striking lines 44-46. The committee decided to strike everything in lines 44-46 except "This proposal was deemed impractical."

The committee discussed whether the language beginning at line 42 regarding the "independence" element is necessary. Mr. Schofield proposed was made to strike lines 42,

beginning at “the committee considered,” through line 46 and “nevertheless” at the beginning of line 47. So moved, seconded and unanimously approved.

Changes to lines 80-81. The committee noted that, “as with other experts,” the use of subpoenas to obtain prior reports remains an option for the practitioner in appropriate circumstances, “subject to the proportionality standards set forth in Rule 26.” Moved, seconded and unanimously approved.

Subject to these changes, the committee unanimously approved the Advisory Committee Note for Rule 35.

Rule 37 - The committee reviewed the proposed Note for Rule 37 and revised line 125 to read “a” protective order.

Rule 26 - The committee reviewed the proposed Note for Rule 37 and agreed to remove the examples included in the draft. The committee agreed to circulate the Note for Rule 26 as amended, including Mr. Carney’s proposed changes regarding clarification as to non-retained experts.

Mr. Wikstrom said that the notes would be finalized and circulated once more. Any response would be required quickly.

V. 10-DAY SUMMONS.

Mr. Wikstrom reported on his discussion with the Utah Supreme Court regarding his suggestion to table the 10-day summons issue for the immediate future. Mr. Wikstrom reasoned that it distracts from the bulk of the revisions, and the issues it raises will be largely neutralized by the roll out of e-filing in state courts. Mr. Wikstrom suggested segregating the 10 day summons issue from the simplified rule revisions. So moved, seconded and unanimously approved by the Committee.

VI. ADJOURNMENT.

The meeting was adjourned at 6:15 p.m. The next meeting will be held at 4:00 p.m. on Wednesday, September 29, 2010, 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

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

MEMORANDUM

To: Civil Procedures Committee
From: Tim Shea
Date: September 21, 2010
Re: Correction to Rule 64D

After it had been approved and published, one of the clerks pointed out that in eliminating the requirement to file the garnishee's answers with the court, we made the change in the paragraph dealing with a writ of garnishment but not the paragraph dealing with the writ of continuing garnishment.

I ask that the committee recommend to the Supreme Court that the correction be made in paragraph (l) and that it be approved as an expedited amendment, effective immediately, under Rule 11-105.

(l) Writ of continuing garnishment.

(l)(1) After final judgment, the plaintiff may obtain a writ of continuing garnishment against any non exempt periodic payment. All provisions of this rule apply to this subsection, but this subsection governs over a contrary provision.

(l)(2) A writ of continuing garnishment applies to payments to the defendant from the effective date of the writ until the earlier of the following:

(l)(2)(A) 120 days;

(l)(2)(B) the last periodic payment;

(l)(2)(C) the judgment is stayed, vacated or satisfied in full; or

(l)(2)(D) the writ is discharged.

(l)(3) Within seven days after the end of each payment period, the garnishee shall with respect to that period:

(l)(3)(A) answer the interrogatories under oath or affirmation;

(l)(3)(B) serve the answers to the interrogatories on the plaintiff, the defendant and any other person shown by the records of the garnishee to have an interest in the property; and

~~(l)(3)(C) file the answers to the interrogatories with the clerk of the court; and~~

~~(l)(3)(D)~~ (l)(3)(C) deliver the property as provided in the writ.

(l)(4) Any person served by the garnishee may reply as in subsection (g), but whether to grant a hearing is within the judge's discretion.

(l)(5) A writ of continuing garnishment issued in favor of the Office of Recovery Services or the Department of Workforce Services of the state of Utah to recover overpayments:

(l)(5)(A) is not limited to 120 days;

(l)(5)(B) has priority over other writs of continuing garnishment; and

(l)(5)(C) if served during the term of another writ of continuing garnishment, tolls that term and preserves all priorities until the expiration of the state's writ.

Tab 3

Points raised at presentations

1-- We need to clarify how the disclosure obligations for family law cases in Rule 26A dovetails with the initial disclosures in Rule 26(a); ie, is 26A in addition to or in lieu of 26(a) disclosures (and, parenthetically, I wonder whether the practice group specific rules should be 26.1, 26.2, or some other convention to avoid confusion). I noticed this issue as I was preparing for the meeting and raised it with them because it's unclear. The committee wasn't entirely sure either. I recommended that they decide how the disclosures in 26A should work with the rules generally and let us know. Following the meeting, they also wondered whether they shouldn't go back to 26A and see if additional changes may be warranted in light of the changes we are proposing.

2-- Concern that requiring the additional disclosures of Rule 26(a) could make these cases more costly than they need to be.

3-- Resistance to elimination of expert depositions (once again). One issue they did raise that seemed to merit further consideration is child custody evaluators who (i) typically don't include in their reports all of the information they are relying on (for privacy reasons, as I understand it), and (ii) are frequently questioned, often by the court, on matters outside of their written report in an effort to make sure all pertinent matters have been considered in this context.

4-- Minor resistance to limiting interrogatories to 15; though I believe this was isolated. Question whether 150 days for standard discovery is enough.

5-- Good news (I thought) was that they believed 90-95% of domestic cases could be resolved with the disclosures they contemplate in Rule 26A, and some additional portion probably could be resolved with standard discovery. Extraordinary discovery would be pretty rare in this context.

See comments submitted online at http://www.utcourts.gov/cgi-bin/mt3/mt-comments.cgi?entry_id=1329

PROPOSED RULES GOVERNING CIVIL DISCOVERY

by

The Utah Supreme Court Advisory Committee on the Rules of Civil Procedure

Background

For many years the Civil Rules Committee has been concerned with the increased expansion and cost of discovery and the impact of this on our civil justice system. Rule 1 states that the rules "shall be liberally construed to secure the just, speedy, and inexpensive determination of every action." The discovery rules may have contributed to "just" results in the sense that they provide parties of sufficient means with the ability to discover all facts relevant to the litigation, but modern, expansive discovery has had a decidedly negative impact on the "speedy" and "inexpensive" resolution of civil disputes. Current civil discovery practice fosters one of the goals of Rule 1 at the expense of the other two.

Discovery has become the focus and the most expensive part of modern litigation. Discovery is viewed also as a primary contributor to delay.

The committee's observations have been borne out by recent empirical research. A 2008 survey of the most experienced trial lawyers in the country conducted by the American College of Trial Lawyers Task Force on Civil Discovery and the Institute for the Advancement of the American Legal System at Denver University found that our civil justice system takes too long and costs too much. Discovery was seen as the primary problem. *See*, AM. COLL. OF TRIAL LAWYERS TASK FORCE ON DISCOVERY & INST. FOR THE ADVANCEMENT OF THE AM. LEGAL SYS., FINAL REPORT (2009). These results were corroborated by similar surveys conducted by the Litigation Section of the ABA and the National Employment Lawyers Association. More than 80% of the respondents in the ACTL, ABA, and NELA surveys said that they or their firms turned down cases because the amount at issue did not justify the expense. The most commonly cited amount-in-controversy threshold, below which a case cannot be economically handled, was $100,000.

These surveys were directed to the federal discovery rules, which are virtually the same as the Utah Rules. Indeed, during the past 30 years or more, the Utah Rules have evolved to be increasingly consistent with the federal rules and their amendments. It was perceived that consistency with the federal rules, along with the extensive case-law interpreting them, would provide a positive benefit. The federal discovery rules are now being seriously questioned as well, but the committee has come to question the very premise upon which Utah adopted those rules. The federal rules were designed for complex cases with large amounts in controversy that typify the federal system. The vast majority of cases filed in Utah courts are not those types of cases. As a result, our state civil justice system has become unavailable to many people because they cannot afford it.

The concepts underlying the federal discovery rules were sound when they were first adopted—a time before copy machines, computers, and massive electronic data storage. Electronic information is expanding at a staggering rate. Discovery has become the most expensive part of civil litigation and, unless changes are made, discovery will continue to become more problematic as the amount of electronic information expands.

Another problem of our modern world is the need for expert witnesses. As science and technology expand, so does the need for expert witnesses to explain them. Consequently, expert discovery has become an increasingly integral part of litigation and a very expensive part of discovery.

The committee has spent the last three years studying these problems and drafting a new set of discovery rules designed to achieve all three goals of Rule 1. The changes are fundamental and will require a change of mind-set by judges, lawyers, and litigants. Specifically, the change in mind-set is *away* from a system in which discovery is the predominant aspect of litigation (in which every party has a right or obligation to incur or bear the cost of almost any request for discovery) and *toward* a system in which each request for discovery must be justified by its proponent, and the focus is on moving quickly and efficiently to the disposition of the merits of the case (through settlement, summary judgment, or trial).

Proportionality Is the Key Principle Underlying the Proposed Discovery Rules

Under the existing rules, the scope of discovery is governed by "relevance" or the "likelihood to lead to discovery of admissible evidence." UT.R.CIV.P. 26(b)(1). As the information pool expands, so expands the universe of discoverable information.

Proportionality will govern the scope of discovery under the proposed rules. Simply stated, it means that the cost of discovery should be proportional to what is at stake in the litigation. The concept of proportionality is not new. It has existed since 1987 (not as "proportionality" *per se*) in Rule 26(b)(3) ("The frequency or extent of the use of the discovery methods … shall be limited by the court if it determines that: … (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.") But proportionality has been largely overlooked by all of us who have operated for decades under the principle that a party who has relevant information must produce it. Under the proposed rules, proportionality will become the controlling factor for all discovery.

Proportionality exists if the following standards are met:

1. the likely benefits of the proposed discovery outweigh the burden or expense;
2. the discovery is consistent with the overall case management and will further the just, speedy and inexpensive determination of the case;
3. the discovery is reasonable, considering the needs of the case, the amount in controversy, the complexity of the case, the parties' resources, the importance of the issues, and the importance of the discovery in resolving the issues;
4. the discovery is not unreasonably cumulative or duplicative;
5. the information cannot be obtained from another source that is more convenient, less burdensome or less expensive; and
6. the party seeking discovery has not had sufficient opportunity to obtain the information by discovery or otherwise, taking into account the parties' relative access to the information.

The second significant change in the proposed rules involves the burden of demonstrating entitlement to discovery. In the past, the operative presumption has been that a party is entitled

to discovery within the broad parameters of relevance unless the other party can persuade a court to the contrary. Under the proposed rules, this presumption would be changed to require the party seeking discovery to demonstrate, in every case, that the requested discovery is relevant ***and*** proportional with respect to the amount and issues in controversy.

Another concept that existed in theory, but was rarely used, is cost-shifting. Presently the recipient of the discovery request bears the cost of producing the information. Under the proposed rules, a court may require the requesting party to pay some or all of the costs of producing the information to achieve proportionality.

Disclosures

The proposed rules seek to reduce discovery costs by requiring each party to produce, at a very early stage and without a discovery request, all of the documents and physical evidence the party may offer in its case-in-chief and the names of all witnesses the party may call in its case-in-chief with a description of expected testimony. The duty is a continuing one, and disclosures must be supplemented as new evidence and witnesses become known. The penalty for failure to make timely disclosure is that the evidence may not be used in the party's case-in-chief. These proposed new disclosures are in addition to the disclosures presently required under Rule 26.

Disclosure is staggered. Since the plaintiff controls when it brings the action, plaintiffs are required to make to make their disclosures within 14 days after service of the first answer. A defendant is required to make its disclosures within 28 days after the plaintiff's first disclosure or after that defendant's appearance, whichever is later.

The purpose of early disclosure is to get each party to "lay on the table" the evidence it expects to use to prove its claims or defenses. The opposing party will then be better able to evaluate the case and to decide what further discovery is necessary. If parties anticipate wanting to use evidence at trial, they will be liberal in disclosing it because of the penalty for failure to do so. The goal of the proposed new disclosure rules is to prevent "sandbagging."

Standard Discovery

After initial disclosures are made, each party may engage in what the proposed rules term "standard discovery." Since each party will automatically receive disclosures of what the opponent expects to use in its case-in-chief, it is expected that standard discovery will be used to find those documents and other evidence that are harmful, rather than helpful, to the opponent's case.

Standard discovery is limited. Each party may take up to 16 hours of depositions, with the proviso that a deposition of a party may not exceed seven hours and a deposition of any other witness may not exceed four hours. The number of interrogatories is limited to 15, and requests for production, and requests for admission are also limited to 25 each.

The expectation is that, for most state cases, standard discovery and the required disclosures will be more than adequate. A presumptive time limit of 150 days is imposed. After 150 days of discovery, the case will be presumed ready for trial.

Extraordinary Discovery

The committee recognizes that there will be some cases for which standard discovery is not sufficient or appropriate. For those cases, the proposed rules provide two avenues to obtain additional discovery. The first is by stipulation. The parties may stipulate to as much additional

discovery as they desire PROVIDED that they stipulate that the additional discovery is proportional to what is at stake in the litigation and EACH party certifies that it has reviewed and approved a discovery budget for the additional discovery. If these conditions are met, then the court will not second-guess the parties and their counsel and must approve the stipulation. But it is not sufficient for the lawyers to get together and agree to millions of dollars of additional discovery. Each lawyer must also privately discuss the cost of the additional discovery with the client, and the client must certify that a discovery budget has been reviewed and approved.

The second means of obtaining additional discovery is by motion. The committee anticipates there will be cases in which there is a significant disparity between the parties' resources or access to information. To prevent a party from taking advantage in this situation, the proposed rules allow any party to move for additional discovery. Counsel must demonstrate that the additional discovery is proportional and the client must certify that the it has reviewed and approved a discovery budget.

Whether by motion or stipulation, the parties will not be "shooting in the dark" because they will have received the mandatory continuing disclosures from the other party and will have had the opportunity to conduct standard discovery. This should allow them both to better focus any requests for additional discovery and to better demonstrate proportionality.

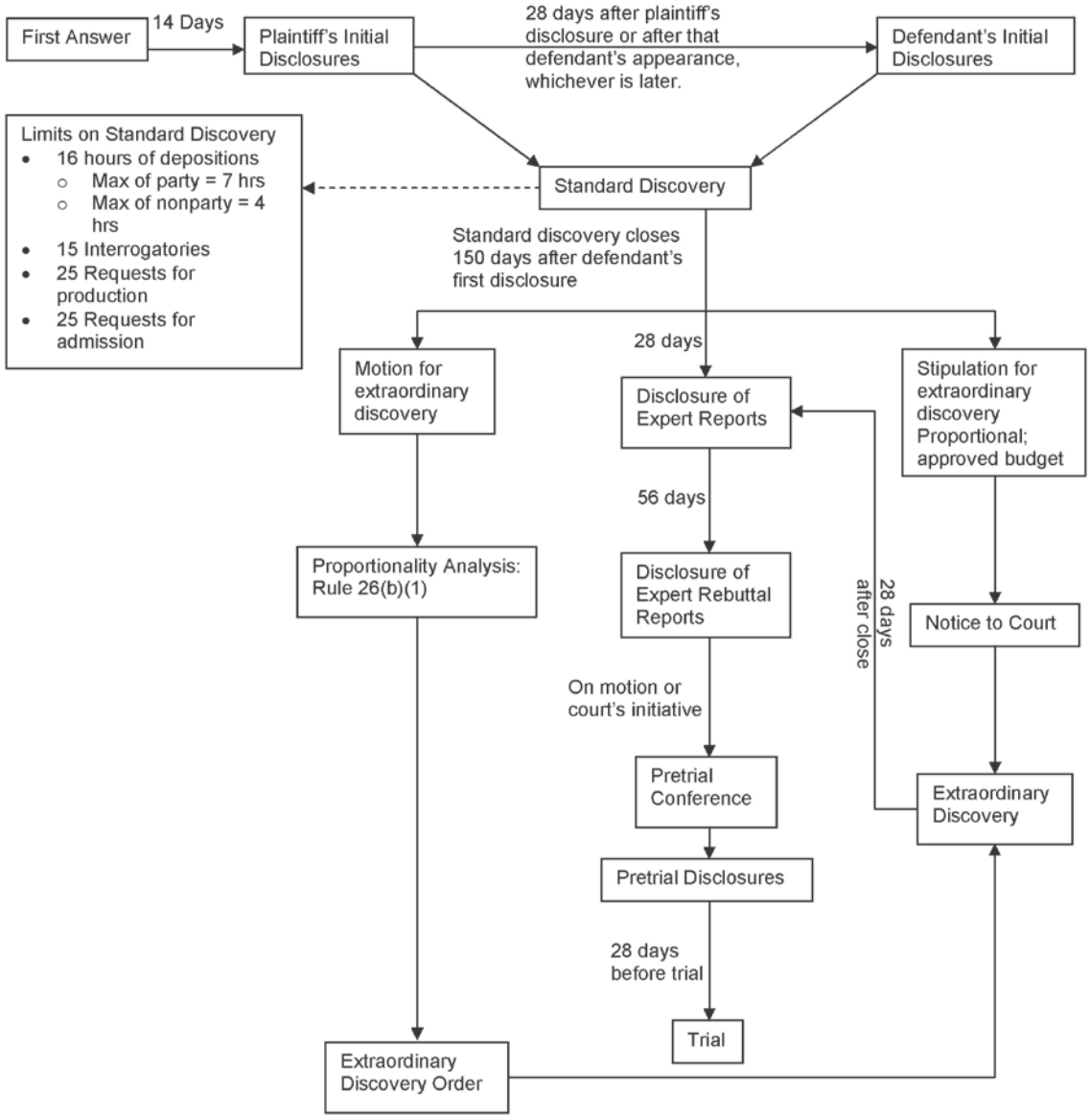
Expert Discovery

Expert discovery has become an ever-increasing component of discovery cost. If an expert's testimony is limited to what is fairly disclosed in the required expert disclosure, then there should be no need to take the expert's deposition. So the proposed rules do just that. Depositions of retained experts are not allowed in the proposed rules, but the expert cannot testify beyond what is fairly disclosed in the report. This will allow the opposing party to prepare knowing that the expert will not be able to offer surprise testimony at trial.

Disclosure and Discovery Flowsheet

The following chart demonstrates how disclosure and discovery will proceed under the proposed rules.

Disclosure and Discovery under Proposed Rules



Rule 1. General provisions.

Scope of rules. These rules govern the procedure in the courts of the state of Utah in all actions of a civil nature, whether cognizable at law or in equity, and in all 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 achieve the just, speedy, and inexpensive determination of every action. These rules govern all actions brought after they take effect and all further proceedings in actions then pending. If, in the opinion of the court, applying a rule in an action pending when the rule takes effect would not be feasible or would be unjust, the former procedure applies.

Rule 8. General rules of pleadings.

(a) Claims for relief. An original claim, counterclaim, cross-claim or third-party claim shall contain a simple, short and plain:

(a)(1) statement of facts showing that the party is entitled to relief;

(a)(2) statement of the legal theory on which the claim rests; and

(a)(3) demand for judgment for specified relief. 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 any defenses to each claim asserted and shall admit or deny the statements in the claim. A party without knowledge or information sufficient to form a belief about the truth of a statement shall so state, and this has the effect of a denial. Denials shall fairly meet the substance of the statements denied. 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 a simple, short and plain:

(c)(1) statement of facts establishing the affirmative defense;

(c)(2) statement of the legal theory on which the defense rests; and

(c)(3) a demand for relief.

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. If a party mistakenly designates a defense as a counterclaim or a counterclaim as a defense, the court, on terms, may treat the pleadings as if the defense or counterclaim had been properly designated.

(d) Effect of failure to deny. Statements in a pleading to which a responsive pleading is required, other than statements of the amount of damage, are admitted if not denied

in the responsive pleading. Statements in a pleading to which no responsive pleading is required or permitted are deemed denied or avoided.

(e) Consistency. A party may state a claim or defense alternately or hypothetically, either in one count or defense or in separate counts or defenses. If statements are made in the alternative and one of them is sufficient, the pleading is not made insufficient by the insufficiency of an alternative statement. A party may state legal and equitable claims or legal and equitable defenses regardless of consistency.

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

Advisory Committee Notes

The 2010 amendments remove from Rule 8 prior language requiring a statement of the party's "claim." Instead, the rule now requires a short and plain statement of both (1) "facts showing that the party is entitled to relief" and (2) "the legal theory on which the claim rests." The purpose of this amendment is twofold. First, the amendment clarifies that parties must give notice of both the facts and the law that support their claim. The amendment thus reconfirms longstanding case law that courts, on a Rule 12 motion, will "accept the plaintiff's description of facts alleged in the complaint to be true, but . . . need not accept extrinsic facts not pleaded nor . . . legal conclusions in contradiction of the pleaded facts." Allred v. Cook, 590 P.2d 318, 319 (Utah 1979). "[M]ere conclusory allegations in a pleading . . . are insufficient . . . ." Chapman v. Primary Children's Hosp., 784 P.2d 1181, 1186 (Utah 1989). Second, by clarifying that parties should plead facts, this amendment to Rule 8 incentivizes further and earlier disclosure of facts, consistent with the general approach of Utah's new "simplified rules" and other changes made by the 2010 amendments, including those to Rule 26's disclosure requirements. To facilitate access to justice, the committee intends that all pleadings—both complaints and defenses—provide more and earlier notice of the facts alleged with less reliance on discovery. However, by requiring parties to plead "facts," this amendment expressly does not resurrect any prior requirement of technical or "code" pleading. Nor does the amendment seek to import any heightened pleading requirement, including interpretations of the United States Supreme Court's decisions in Bell Atlantic Corp. v. Twombly, 550 U.S. 544 (2007), and Ashcroft v. Iqbal, 129 S. Ct. 1937 (2009), as

mandating a heightened standard of “plausibility” pleading under the Federal Rules of Civil Procedure. Rather, the longstanding “liberal” standard of notice pleading remains in effect in Utah. E.g., Canfield v. Layton City, 2005 UT 60, ¶ 14, 122 P.3d 622. Accord Adam N. Steinman, The Pleading Problem, 62 Stanford L. Rev. 1293 (2010).

Rule 16. Pretrial conferences.

(a) Pretrial conferences. The court, in its discretion or upon motion, may direct the attorneys and, when appropriate, the parties to appear 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;

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

(a)(7) establishing the time to join other parties and to amend the pleadings;

(a)(8) establishing the time to file motions;

(a)(9) establishing the time to complete discovery;

(a)(10) extending fact discovery;

(a)(11) the date for pretrial and final pretrial conferences and trial;

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

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

(a)(14) any other appropriate matters.

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

(c) Final pretrial conferences. The court, in its discretion or upon motion, may direct the attorneys and, when appropriate, the parties to appear for such purposes as settlement and trial management. The conference shall be held as close to the time of trial as reasonable under the circumstances.

(d) Sanctions. If a party or a party's attorney fails to obey an order, if a party or a party's attorney fails to attend a conference, if a party or a party's attorney is substantially unprepared to participate in a conference, or if a party or a party's attorney

fails to participate in good faith, the court, upon motion or its own initiative, may take any action authorized by Rule 37(b)(2).

Advisory Committee Notes

Rule 26. General provisions governing disclosure and discovery.

(a) Disclosure. 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 paragraph (a)(2), a party shall, without waiting 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 and a summary of the expected testimony.

(a)(1)(B) a copy of all documents, data compilations, electronically stored information, and tangible things in the possession or control of the party that the party may offer in its case in chief;

(a)(1)(C) a computation of any damages claimed and a copy of all discoverable documents or evidentiary material on which such computation is based, including materials about the nature and extent of injuries suffered;

(a)(1)(D) a copy of any agreement under which any person may be liable to satisfy part or all of a judgment or to indemnify or reimburse for payments made to satisfy the judgment; and

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

(a)(1)(F) The disclosures required by paragraph (a)(1) shall be made:

(a)(1)(F)(i) by the plaintiff within 14 days after service of the first answer to the complaint; and

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

(a)(2) Exemptions.

(a)(2)(A) Unless otherwise ordered by the court or agreed to by the parties, the requirements of paragraph (a)(1) do not apply to actions:

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

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

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

(a)(2)(A)(iv) for water rights general adjudication under Title 73, Chapter 4.

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

(a)(3) Disclosure of expert testimony.

(a)(3)(A) A party shall, without waiting for a discovery request, provide to other parties a copy of a written report of any person who may be used at trial to present evidence under Rules 702, 703, or 705 of the Utah Rules of Evidence and 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. The report shall be signed by the expert and contain: a complete statement of all opinions the witness will express and the basis and reasons for them; the data or other information relied upon by the witness in forming them; any exhibits that will be used to summarize or support them; the qualifications of the expert, including a list of all publications authored within the preceding ten years; the compensation to be paid for the study and testimony; and a list of any other cases in which the expert has testified as an expert at trial or by deposition within the preceding four years. Such an expert may not testify in a party's case-in-chief concerning any matter not fairly disclosed in the report.

(a)(3)(B) If the expert witness is not required to provide a written report, the party shall disclose the subject matter on which the witness is expected to present evidence under Rule of Evidence 702, 703 or 705 and a summary of the facts and opinions to which the witness is expected to testify.

(a)(3)(C) Disclosure required by paragraph (a)(3) shall be made within 28 days after the expiration of fact discovery as provided by paragraph (c) or, if the evidence is intended solely to contradict evidence under paragraph (a)(3)(A), within 56 days after disclosure by the other party.

(a)(4) Pretrial disclosures. A party shall, without waiting for a discovery request, provide to other parties:

(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 will call and witnesses the party may call;

(a)(4)(B) the name of witnesses whose testimony is expected to be presented by transcript of a deposition and a copy of the transcript; and

(a)(4)(C) identification of each exhibit, including summaries of other evidence, unless solely for impeachment, separately identifying those which the party will offer and those which the party may offer.

(a)(4)(D) Disclosure required by paragraph (a)(4) shall be made at least 28 days before trial. At least 14 days before trial, a party shall serve and file objections and grounds for the objections to the use of a deposition and to the admissibility of exhibits. Other than objections under Rules 402 and 403 of the Utah Rules of Evidence, objections not listed are waived unless excused by the court for good cause.

(b) Discovery scope.

(b)(1) In general. Parties may discover any matter, not privileged, which is relevant to the claim or defense of any party if the discovery satisfies the standards of proportionality set forth below. Discovery and discovery requests are proportional if:

(b)(1)(A) the likely benefits of the proposed discovery outweigh the burden or expense;

(b)(1)(B) the discovery is consistent with the overall case management and will further the just, speedy and inexpensive determination of the case;

(b)(1)(C) the discovery is reasonable, considering the needs of the case, the amount in controversy, the complexity of the case, the parties' resources, the importance of the issues, and the importance of the discovery in resolving the issues;

(b)(1)(D) the discovery is not unreasonably cumulative or duplicative;

(b)(1)(E) the information cannot be obtained from another source that is more convenient, less burdensome or less expensive; and

(b)(1)(F) the party seeking discovery has not had sufficient opportunity to obtain the information by discovery or otherwise, taking into account the parties’ relative access to the information.

(b)(2) The party seeking discovery has the burden of showing proportionality. To ensure proportionality, the court may enter orders under Rule 37.

(b)(3) A party claiming that electronically stored information is not reasonably accessible because of undue burden or cost shall describe the source of the electronically stored information, the nature and extent of the burden, the nature of the information not provided, and any other information that will enable other parties to evaluate the claim.

(b)(4) Trial preparation materials. A party may obtain otherwise discoverable documents and tangible things 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 and that the party is unable without undue hardship to obtain substantially equivalent materials by other means. In ordering discovery of such materials, the court shall protect against disclosure of the mental impressions, conclusions, opinions, or legal theories of an attorney or other representative of a party.

(b)(5) Statement previously made about the action. A party may obtain without the showing required in paragraph (b)(4) a statement concerning the action or its subject matter previously made by that party. Upon request, a person not a party may obtain without the required showing a statement 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 under Rule 37. A statement previously made is (A) a written statement signed or approved by the person making it, or (B) a stenographic, mechanical, electrical, or other recording, or a transcription thereof, which is a substantially verbatim recital of an oral statement by the person making it and contemporaneously recorded.

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

(b)(6)(A) Information withheld. If a party withholds discoverable information by claiming that it is privileged or 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 in a manner that, without revealing the information itself, will enable other parties to evaluate the claim.

(b)(6)(B) Information produced. If a party produces information that the party claims is privileged or prepared in anticipation of litigation or for trial, the producing party may notify any receiving party 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) Sequence and timing of discovery.

(c)(1) Standard discovery. Standard discovery as set by the limits established in Rules 30, 33, 34 and 36 shall be completed within 150 days after the defendant's first disclosure is made. 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 paragraph (a)(2), a party may not seek discovery from any source before that party's initial disclosure obligations are satisfied.

(c)(2) Extraordinary discovery. To obtain discovery beyond the limits established in Paragraph (c)(1), a party shall file:

(c)(2)(A) before the close of standard discovery, a stipulation of extraordinary discovery and a statement signed by the parties and attorneys that extraordinary discovery is necessary and proportional under paragraph (b)(1) and that each party has reviewed and approved a discovery budget; or

(c)(2)(B) before the close of the standard discovery and after reaching the limits of standard discovery imposed by these rules, a motion for extraordinary discovery and a statement signed by the party and attorney that the extraordinary discovery is necessary and proportional under paragraph (b)(1) and that the party has reviewed and approved a discovery budget.

(d) Requirements for disclosure or response; disclosure or response by an organization; failure to disclose; initial and supplemental disclosures and responses.

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

(d)(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.

(d)(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.

(d)(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.

(d)(5) If a party learns that a disclosure or response is incomplete or incorrect in some important way, the party must timely provide the additional or correct information if it has not been made known to the other parties. The supplemental disclosure or response must state why the additional or correct information was not previously provided.

(e) Signing discovery requests, responses, and objections. Every disclosure, request for discovery, response to a request for discovery and objection 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. The signature of the attorney or party is a certification under Rule 11. If a request or response is not signed, the receiving party does not need to take any action with respect to it. If a certification is made in violation of the rule, the court, upon motion or upon its own initiative, may take any action authorized by Rule 11 or Rule 37(b)(2).

(f) Filing. Except as required by these rules or ordered by the court, a party shall not file with the court a disclosure, a request for discovery or a response to a request for discovery, but shall file only the certificate of service stating that the disclosure, request for discovery or response has been served on the other parties and the date of service.

Advisory Committee Notes

Disclosure Requirements and Timing. Rule 26(a)(1). The 2010 amendments seek to reduce discovery costs by requiring each party to produce, at an early stage in the

case and without a discovery request, all of the documents and physical evidence the party may offer in its case-in-chief and the names of witnesses the party may call in its case-in-chief with a description of their expected testimony. In this respect, the amendments build on the initial disclosure requirements of the prior rules. In addition to the disclosures required by the prior version of Rule 26(a)(1), a party must disclose each fact witness the party may call in its case-in-chief and a summary of the witness's expected testimony, a copy of all documents the party may offer in its case-in-chief, and all documents to which a party refers in its pleadings. The duty to provide this information is a continuing one, and disclosures must be supplemented as new evidence and witnesses become known. The penalty for failing to make timely disclosures is that the evidence may not be used in the party's case-in-chief.

The amendments also change the time for making these required disclosures. Because the plaintiff controls when it brings the action, plaintiffs must make their disclosures within 14 days after service of the first answer. A defendant is required to make its disclosures within 28 days after the plaintiff's first disclosure or after that defendant's appearance, whichever is later. The purpose of early disclosure is to have all parties present the evidence they expect to use to prove their claims or defenses, thereby giving the opposing party the ability to better evaluate the case and determine what additional discovery is necessary.

Finally, the 2010 amendments eliminate two categories of actions that previously were exempt from the mandatory disclosure requirements. Specifically, the amendments eliminate the prior exemption for contract actions in which the amount claimed is $20,000 or less, and actions in which any party is proceeding pro se. In the committee's view, these types of actions will benefit from the early disclosure requirements and the overall reduced cost of discovery.

Expert Disclosures and Timing. Rule 26(a)(3). Expert discovery has become an ever-increasing component of discovery cost. The prior rules sought to eliminate some of these costs by requiring the written disclosure of the expert's opinions and other background information. However, because the expert was not required to sign these disclosures, and because experts often were allowed to deviate from the opinions disclosed, attorneys typically would take the expert's deposition to ensure the expert

would not offer any "surprise" testimony at trial, thereby increasing rather than decreasing the overall cost. The 2010 amendments seek to remedy this by requiring more comprehensive written disclosures, making clear that experts will be held to these disclosures, and eliminating expert depositions. In addition to the materials required under the prior rules, the amended rules make clear that an expert must provide a complete statement of all opinions the witness will express and the basis and reasons for them, as well as the data or other information upon which the expert relies in forming the opinions, and exhibits that will be used to summarize or support those opinions. They further provide that an expert may not testify in a party's case-in-chief concerning any matter not "fairly disclosed" in the report. The intent is not to require a verbatim transcript of exactly what the expert will say at trial; instead, the expert must fairly disclose the substance of each opinion the expert will offer.

Formal expert reports as described above are required only for experts who are retained or specially employed to provide expert testimony, or whose duties as an employee of the party regularly involve giving expert testimony. For other types of experts, such as treating physicians, police officers, or accident investigators, the party who intends to offer that expert must disclose the subject matter on which the expert is expected to present expert testimony and a summary of the facts and opinions to which the witness is expected to testify.

Expert disclosures must be provided within 28 days after expiration of fact discovery, unless the expert is intended solely to contradict evidence presented by another party's expert, in which case it must be disclosed within 56 days after disclosure by the other party.

Scope of Discovery—Proportionality. Rule 26(b). Proportionality is the principle governing the scope of discovery. Simply stated, it means that the cost of discovery should be proportional to what is at stake in the litigation.

In the past, the scope of discovery was governed by "relevance" or the "likelihood to lead to discovery of admissible evidence." These broad standards may have secured just results by allowing a party to discover all facts relevant to the litigation. However, they did little to advance two equally important objectives of the rules of civil procedure—the speedy and inexpensive resolution of every action. Accordingly, the

former standards governing the scope of discovery have been replaced with the proportionality standards in subpart (b)(1).

The concept of proportionality is not new. The prior rule permitted the Court to limit discovery methods if it determined that "the discovery was 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 Federal Rules of Civil Procedure contains a similar provision. See Fed. R. Civ. P. 26(b)(2)(C). This method of limiting discovery, however, was rarely invoked either under the Utah or federal rules. But because it embodies the same basic principles as the proportionality standard we now adopt, cases applying Fed. R. Civ. P. 26(b)(2)(C) may provide helpful guidance to lawyers and judges.

Under the prior rule and the federal rule, the party objecting to the discovery request had the burden of proving that a discovery request was not proportional. The new rule changes the burden of proof. Today, the party seeking discovery beyond the scope of "standard" discovery has the burden of showing that the request is "relevant to the claim or defense of any party" and that the request satisfies the standards of proportionality. The trial court has broad discretion in deciding whether a discovery request is proportional and the standards of proportionality in subpart (b)(1) are intended to guide the exercise of that discretion. Over time, the proper application of these standards will be defined by trial and appellate courts.

Standard and Extraordinary Discovery. Rule 26(c). As a counterpart to requiring more detailed disclosures under Rule 26(a), the 2010 amendments place new limitations on additional discovery the parties may conduct. Because the committee expects the enhanced disclosure requirements will automatically permit each party to learn the witnesses and evidence the opposing side will offer in its case-in-chief, additional discovery should serve the more limited function of permitting parties to find witnesses, documents, and other evidentiary materials that are harmful, rather than helpful, to the opponent's case.

Rule 26(c) provides for limited, "standard" discovery that is presumed to be proportional to the amount and issues in controversy in the action, which the parties may conduct as a matter of right. Standard discovery is limited. Each party may take up

to 16 hours of depositions. No deposition of a party may exceed seven hours, and no deposition of a non-party witness may exceed four hours. The number of interrogatories is limited to 15; the number of document requests is limited to 25; and the number of requests for admission is limited to 25. The time for standard discovery is limited to 150 days, after which the case is presumed to be ready for trial. The committee determined these limitations based on the observation that the majority of cases filed in the Utah State Courts involve disputes that are relatively modest in magnitude and lack significant factual complexity. Accordingly, the 2010 amendments provide an opportunity for standard discovery that the committee believes should be sufficient for the typical state court case.

Despite the expectation that standard discovery should be adequate in the typical case, the 2010 amendments contemplate there will be cases for which standard discovery is not sufficient or appropriate. In such cases, parties may conduct additional discovery that is shown to be consistent with the principle of proportionality. There are two ways to obtain such additional discovery. The first is by stipulation. If the parties can agree additional discovery is necessary, they may stipulate to as much additional discovery as they desire, provided they stipulate the additional discovery is proportional to what is at stake in the litigation and each party certifies that it has reviewed and approved a budget for additional discovery. The certification must confirm that the actual party in question, and not merely counsel, has reviewed and approved the budget. If these conditions are met, the Court will not second-guess the parties and their counsel and must approve the stipulation.

The second method to obtain additional discovery is by motion. The committee recognizes there will be cases in which additional discovery is appropriate, but the parties cannot agree to the scope of such additional discovery. These would include, among other categories, large and factually complex cases and cases in which there is a significant disparity in the parties' access to information, such that one party legitimately has a greater need than the other party for additional discovery in order to prepare properly for trial. To prevent a party from taking advantage of this situation, the 2010 amendments allow any party to move the Court for additional discovery. The party making such a motion must demonstrate that the additional discovery is proportional

and certify that the party has reviewed and approved a discovery budget. The burden to show the need for additional discovery, and to demonstrate proportionality, always falls on the party seeking additional discovery. However, cases in which such additional discovery is appropriate do exist, and it is important for Courts to recognize they can and should permit additional discovery in appropriate cases, commensurate with the complexity and magnitude of the dispute.

Protective Order Language Moved to Rule 37. The 2010 amendments delete in its entirety the prior language of Rule 26(c) governing motions for protective orders. The substance of that language is now found in Rule 37. The committee determined it was preferable to cover all discovery motions through a single rule, rather than through two separate rules. Accordingly, Rule 37 now governs all discovery motions and orders, including protective orders as well as orders compelling discovery or imposing sanctions.

Consequences of Failure to Disclose. Rule 26(d). If a party fails to disclose or to supplement timely its discovery responses, that party cannot use the undisclosed witness, document, or material at any hearing or trial, absent proof that non-disclosure was harmless or justified by good cause. More complete disclosures increase the likelihood that the case will be resolved justly, speedily, and inexpensively. Not being able to use evidence that a party fails properly to disclose provides a powerful incentive to make complete disclosures. This is true only if trial courts hold parties to this standard. Accordingly, although a trial court retains discretion to determine how properly to address this issue in a given case, the usual and expected result should be exclusion of the evidence.

Proposed Rule 26A was developed by the Family Law Section of the Utah State Bar. It represents the type of discovery or disclosure rule that the advisory committee anticipated when drafting proposed Rule 26(a).

Rule 26A. Disclosure in domestic relations actions.

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

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

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

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

(c)(2) For the two tax years before the petition was filed, complete federal and state income tax returns, including Form W-2 and supporting tax schedules and attachments, filed by or on behalf of that party or by or on behalf of any entity in which the party has a majority or controlling interest, including, but not limited to, Form 1099 and Form K-1 with respect to that party.

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

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

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

(c)(6) All statements for the 3 months before the petition was filed for all financial accounts, including, but not limited to checking, savings, money market funds, certificates of deposit, brokerage, investment, retirement, regardless of whether the 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.

Rule 29. Stipulations regarding disclosure and discovery procedure.

The parties may modify these rules for disclosure and discovery by filing, before the close of standard discovery, a stipulated notice of extraordinary discovery and a statement signed by the parties and lawyers that the extraordinary discovery is necessary and proportional under Rule 26(b)(1) and that each party has reviewed and approved a discovery budget. Stipulations extending the time for or limits of disclosure or discovery require court approval if the extension would interfere with a court order for completion of discovery or with the date of a hearing or trial.

Rule 30. Depositions upon oral questions.

(a) When depositions may be taken; when leave required; no deposition of expert witnesses. A party may depose a party or witness by oral questions. A witness may not be deposed more than once in standard discovery. An expert who has prepared a report disclosed under Rule 26(a)(3) may not be deposed.

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

(b)(1) The party deposing a witness shall give reasonable notice in writing to every other party. The notice shall state the date, time and place for the deposition and the name and address of each witness. If the name of a witness is not known, the notice shall describe the witness sufficiently to identify the person or state the class or group to which the person belongs. 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 notice shall designate the method by which the deposition will be recorded. 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 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) 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 witness; (D) the administration of the oath or affirmation to the 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 the recording medium. At the end of the deposition, the officer shall state on the record that the deposition is complete and shall state any stipulations.

(b)(4) The notice to a party witness may be accompanied by a request under Rule 34 for the production of documents and tangible things at 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)(5) A deposition may be taken by remote electronic means. A deposition taken by remote electronic means is considered to be taken at the place where the witness answers questions.

(b)(6) A party may name as the witness a corporation, a partnership, an association, or a governmental agency, describe with reasonable particularity the matters on which questioning is requested, and direct the organization to designate one or more officers, directors, managing agents, or other persons to testify on its behalf. 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.

(c) Examination and cross-examination; objections.

(c)(1) Questioning of witnesses may proceed as permitted at the trial under the Utah Rules of Evidence, except Rules 103 and 615.

(c)(2) All objections shall be recorded, but the questioning shall proceed, and the testimony taken subject to the objections. Any objection shall be stated concisely and in a non-argumentative and non-suggestive manner. A person may instruct a witness not to answer only to preserve a privilege, to enforce a limitation on evidence directed by the court, or to present a motion for a protective order under 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) Limits. During standard discovery, each side (plaintiffs collectively, defendants collectively, and third-party defendants collectively) is limited to 16 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.

(e) Submission to witness; changes; signing. Within 28 days after being notified by the officer that the transcript or recording is available, a witness may sign a statement of

changes to the form or substance of the transcript or recording and the reasons for the changes. The officer shall append any changes timely made by the witness.

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

(f)(1) 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, that the witness was under oath or affirmation and that the record is a true record of the deposition. The officer shall keep a copy of the record. The officer shall securely seal the record endorsed with the title of the action and marked "Deposition of (name). Do not open." and shall promptly send the sealed record to the attorney or the party who designated the recording method. An attorney or party receiving the record shall store it under conditions that will protect it against loss, destruction, tampering, or deterioration.

(f)(2) Every party may inspect and copy documents and things produced for inspection 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 added to the record. If the witness wants to retain the originals, that person shall offer the originals to be copied, marked for identification and added to the record.

(f)(3) Upon payment of reasonable charges, the officer shall furnish a copy of the record to any party or to the witness. An official transcript of a recording made by non-stenographic means shall be prepared under Utah Rule of Appellate Procedure 11(e).

(g) Failure to attend or to serve subpoena; expenses. If the party giving the notice of a deposition fails to attend or fails to serve a subpoena upon a witness who fails to attend, and another party attends in person or by attorney, the court may order the party giving the notice to pay to the other party the reasonable costs, expenses and attorney fees incurred.

(h) Deposition in action pending in another state. Any party to an action 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 were pending in this state. 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. Matters

required to be submitted to the court shall be submitted to the court in the county where the deposition is being taken.

Rule 31. Depositions upon written questions.

(a) A party may depose a party or witness by written questions. Rules 30 and 45 apply to depositions upon written questions, except insofar as by their nature they are clearly inapplicable.

(b) A party taking a deposition using written questions shall serve on the parties a notice which includes the name or description and address of the deponent, the name or descriptive title of the officer before whom the deposition will be taken, and the questions to be asked.

(c) 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 re-cross questions.

(d) A copy of the notice and copies of all questions served shall be delivered by the party taking the deposition to the designated officer who shall proceed promptly to ask the questions and prepare a record of the responses.

(e) During standard discovery, 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.

Rule 33. Interrogatories to parties.

(a) Availability; procedures for use. During standard discovery, any party may serve upon any other party up to 15 written interrogatories, including all discrete subparts.

(b) Answers and objections. The responding party shall serve a written response within 28 days after service of the interrogatories. The responding party shall restate the interrogatory before responding to it. Each interrogatory shall be answered separately and fully in writing under oath or affirmation, unless it is objected to. If an interrogatory is objected to, the party shall state the reasons for the objection. Any reason not stated is waived unless excused by the court for good cause. An interrogatory is not objectionable merely because an answer involves an opinion or argument that relates to fact or the application of law to fact. The party shall answer any part of an interrogatory that is not objectionable.

(c) Scope; use at trial. Interrogatories may relate to any discoverable matter. Answers may be used as permitted by the Rules of Evidence.

(d) Option to produce business records. If the answer to an interrogatory may be found by inspecting the answering party's business records, including electronically stored information, and the burden of finding the answer is substantially the same for both parties, the answering party may identify the records from which the answer may be found. The answering party must give the asking party reasonable opportunity to inspect the records and to make copies, compilations, or summaries. The answering party must identify the records in sufficient detail to permit the asking party to locate and to identify them as readily as the answering party.

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

(a) Scope.

(a)(1) Any party may serve on any other party a request to produce and permit the requesting party to inspect, copy, test or sample any designated discoverable documents, 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) in the possession or control of the responding party .

(a)(2) Any party may serve on any other party a request to permit entry upon designated property in the possession or control of the responding party for the purpose of inspecting, measuring, surveying, photographing, testing, or sampling the property or any designated discoverable object or operation on the property.

(b) Procedure and limitations.

(b)(1) The request shall identify the items to be inspected by individual item or by category, and describe each item and category with reasonable particularity. During standard 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.

(b)(2) The responding party shall serve a written response within 28 days after service of the request. The responding party shall restate the request before responding to it. The response shall state, with respect to each item or category, that inspection and related acts will be permitted as requested, or that the request is objected to. If the party objects to a request, the party must state the reasons for the objection. 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.

(c) Form of documents and electronically stored information.

(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.

(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.

(c)(3) A party need not produce the same electronically stored information in more than one form.

Rule 35. Physical and mental examination of persons.

(a) Order for examination. When the mental or physical condition or attribute of a party or of a person in the custody or control of a party is in controversy, the court may order the party 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 control. The order may be made only on motion for good cause shown. 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 by whom the examination is to be made. The person being examined may record the examination by audio or video means unless the party requesting the examination shows that the recording would unduly interfere with the examination.

(b) Report. The party requesting the examination shall disclose a detailed written report of the examiner, setting out the examiner's findings, including results of all tests made, diagnoses and conclusions. If the party requesting the examination wishes to call the examiner as a witness, the party shall disclose an expert report as required by Rule 26(a)(3).

(c) Sanctions. If a party or a person in the custody or under the legal control of a party fails to obey an order entered under paragraph (a), the court on motion may take any action authorized by Rule 37(c)(2), except that the failure cannot be treated as contempt of court.

Advisory Committee Notes

Rule 35 has been substantially revised. Few rules have generated such an extensive motions practice and disputes as the previous version of Rule 35. The battles typically raged over the production of reports of prior examinations by the examining physician, and whether the examination could be recorded or witnessed by a third party.

It is also doubtful that any rule under consideration for change has been as thoroughly studied as Rule 35. A subcommittee of the advisory committee has spent several years collecting information from both sides of the personal-injury bar and from the trial courts. While no rule amendment will please everyone, the committee is of the opinion that making recording the default for medical examinations, and removing the

requirement for automatic production of prior reports, will best resolve the issues that have bedeviled the trial courts and counsel.

The Committee re-emphasizes that a medical examination is not a matter of right, but should only be permitted by the trial court upon a showing of good cause. Rule 35 has always provided, and still provides, that the proponent of an examination must demonstrate good cause for the examination. And, as before, the motion and order should detail the specifics of the proposed examination.

The committee is concerned about the rise of the so-called "professional witness" in the area of medical examinations. This phenomenon is not limited to Utah. See, A World of Hurt: Exams of Injured Workers Fuel Mutual Mistrust, By N. R. Kleinfield, New York Times, April 4, 2009. The committee recognizes that there is often nothing "independent" about a Rule 35 examiner. Therefore, the trial court should refrain from the use of the phrase "independent medical examiner," using instead the neutral appellation "medical examiner," "Rule 35 examiner," or the like.

As noted, a major source of controversy has been requests by plaintiffs' counsel to audio- or video-record examinations. The Committee has determined that the benefits of recording generally outweigh the downsides in a typical case. The new rule therefore provides that recording shall be permitted as a matter of course unless the person moving for the examination demonstrates the recording would unduly interfere with the examination. See, Boswell v. Schultz, 173 P.3d 390, 394 (OK 2007) ("A video recording would be a superior method of providing an impartial record of the physical examination.")

Nothing in the rule requires that the recording be conducted by a professional, and it is not the intent of the committee that this extra cost should be necessary. The committee also recognizes that recording may require the presence of a third party to manage the recording equipment, but this must be done without interference and as unobtrusively as possible.

The former requirement of Rule 35(c) providing for the production of prior reports on other examinees by the examiner was a source of great confusion and controversy. This provision does not exist in the federal version of the rule, nor is the Committee aware of any other similar state court rule. After much deliberation and discussion, it is

the Committee's view that this provision is better eliminated, and in the new rule there is no longer an automatic requirement for the production of prior reports of other examinations. Medical examiners will be treated as other expert witnesses are treated, with the requirement of a report under Rule 26. The Committee notes that, as with other experts, the use of subpoenas to obtain prior reports remains an option for the practitioner in appropriate circumstances, subject to Rule 26 proportionality standards.

Rule 36. Request for admission.

(a) Request for admission. A party may serve upon any other party a written request to admit the truth of any discoverable matter set forth in the request, including the genuineness of any document. The matter must relate to statements or opinions of fact or of the application of law to fact. Each matter shall be separately stated. During standard 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 shall notify the responding party that the matters will be deemed admitted unless the party responds within 28 days after service of the request.

(b) Answer or objection.

(b)(1) The matter is admitted unless, within 28 days after service of the request, the responding party serves upon the requesting party a written response.

(b)(2) The responding party shall restate the request before responding to it. 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. The party shall restate the request before answering. 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.

(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. The court may permit withdrawal or amendment if the presentation of the merits of the action will be promoted and withdrawal or amendment will not prejudice the requesting party. Any admission under this rule is for the purpose of the pending action only. It is not an admission for any other purpose, nor may it be used in any other action.

Rule 37. Discovery and disclosure motions; Sanctions.

(a) Motion for order compelling disclosure or discovery.

(a)(1) A party may move to compel disclosure or discovery and for appropriate sanctions if another party:

(a)(1)(A) fails to disclose, fails to respond to a discovery request, or makes an evasive or incomplete 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 discovery request ;

(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 or a document subpoena, to the court in the district where the deposition is being taken or where the subpoena was served. A motion for an order to a nonparty witness shall be made to the court in the district where the deposition is being taken or where the subpoena was served.

(a)(3) The moving party must attach a copy of the request for discovery, the disclosure, or the response at issue. The moving party must also attach a certification that the moving party has in good faith conferred or attempted to confer with the other affected parties in an effort to secure the disclosure or discovery without court action and that the discovery being sought is proportional under Rule 26(b)(1).

(b) Motion for protective order.

(b)(1) A party or the person from whom discovery is sought may move for an order of protection from discovery. The moving party shall attach to the motion a copy of the request for discovery or the response at issue. The moving party shall also attach a certification that the moving party has in good faith conferred or attempted to confer with other affected parties to resolve the dispute without court action.

(b)(2) If the motion raises issues of proportionality under Rule 26(b)(1), the party seeking the discovery has the burden of demonstrating that the information being sought is proportional.

(c) Orders. The court may make any order to require disclosure or discovery or 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 under Rule 26(b)(1), including one or more of the following:

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

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

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

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

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

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

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

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

(c)(9) 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; or

(c)(10) that the costs, expenses and attorney fees of discovery be allocated among the parties as justice requires.

(c)(11) If a protective order terminates a deposition, it shall be resumed only upon the order of the court in which the action is pending.

(d) Expenses and sanctions for motions. If the motion to compel or for a protective order is granted, or if a party provides disclosure or discovery or withdraws a disclosure or discovery request after a motion is filed, the court may order the party, witness or

attorney to pay the reasonable expenses and attorney fees incurred on account of the motion if the court finds that the party, witness, or attorney did not act in good faith or asserted a position that was not substantially justified.

(e) Failure to comply with order.

(e)(1) Sanctions by court in district where deposition is taken. Failure to follow an order of the court in the district in which the deposition is being taken or where the document subpoena was served is contempt of that court.

(e)(2) Sanctions by court in which action is pending. 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:

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

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

(e)(2)(C) stay further proceedings until the order is obeyed;

(e)(2)(D) dismiss all or part of the action, strike all or part of the pleadings, or render judgment by default on all or part of the action;

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

(e)(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

(e)(2)(G) instruct the jury regarding an adverse inference.

(f) 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 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:

(f)(1) the request was held objectionable pursuant to Rule 36(a);

(f)(2) the admission sought was of no substantial importance;

(f)(3) there were reasonable grounds to believe that the party failing to admit might prevail on the matter;

(f)(4) that the request is not proportional under Rule 26(b)(1); or

(f)(5) there were other good reasons for the failure to admit.

(g) Failure of party to attend at own deposition. The court on motion may take any action authorized by paragraph (e)(2) 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 appear before the officer taking the deposition, after proper service of the notice. The failure to act described in this paragraph 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 under paragraph (b).

(h) 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 paragraph (e)(2).

(i) Failure to preserve evidence. Nothing in this rule limits the inherent power of the court to take any action authorized by paragraph (e)(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

The 2010 amendments to Rule 37 make two principal changes. First, the amended Rule 37 consolidates provisions for motions for a protective order (formerly set forth in Rule 26(c)) with provisions for motions to compel. By consolidating the standards for these two motions in a single rule, the Advisory Committee sought to highlight some of

the parallels and distinctions between the two types of motions and to present them in a single rule.

Second, the amended Rule 37 incorporates the new Rule 26 standard of "proportionality" as a principal criterion on which motions to compel or for a protective order should be evaluated. As to motions to compel, Rule 37(a)(3) requires that a party moving to compel discovery certify to the court "that the discovery being sought is proportional under Rule 26(b)(1)." Rule 37(b) makes clear that a lack of proportionality may be raised as ground for seeking a protective order, indicating that "the party seeking the discovery has the burden of demonstrating that the information being sought is proportional."

Tab 4

Administrative Office of the Courts

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

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

MEMORANDUM

To: Civil Procedures Committee
From: Tim Shea
Date: September 21, 2010
Re: Correction to draft rules

One of the lawyers reviewing the proposed amendments pointed out that Rule 36(c) is nearly identical to Rule 37(f). Do we need both, and if not, which should we retain?

Rule 36(c)

(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.

Rule 37(f)

(f) 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 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:

(f)(1) the request was held objectionable pursuant to Rule 36(a);

(f)(2) the admission sought was of no substantial importance;

(f)(3) there were reasonable grounds to believe that the party failing to admit might prevail on the matter;

(f)(4) that the request is not proportional under Rule 26(b)(1); or

(f)(5) there were other good reasons for the failure to admit.

Tab 5

From: Cullen Battle
Sent: July 29, 2010
To: Civil Procedures Committee
Subject: Should we adopt the federal amendments re expert discovery?

I would like to add to our next agenda a discussion of whether we should adopt the latest federal rules amendments on expert discovery, and whether they should be included in our discovery reform package, assuming it goes out this fall.

Essentially, the federal amendments protect from discovery 1) draft expert reports, and 2) communications between counsel and the expert other than those relating to compensation, assumptions or limitations on the expert analysis, or facts the expert is to consider. The idea is to cut down on the amount of collateral discovery, and to remove the chilling effect that wide open discovery has on communications between counsel and expert.

In my state court practice, I have been entering into agreements with opposing counsel to follow the federal amendments. I know a number of other lawyers are doing the same thing. It seems to be something that benefits all sides equally.

A copy of the federal amendments is appended at the end of this message. I believe they take effect in December.

In my view, these amendments are consistent with the goals of our discovery reform proposal and should be included in it.

that recites substantially verbatim the person's oral statement.

(4) ***Trial Preparation: Experts.***

(A) *Deposition of an Expert Who May Testify.* A party may depose any person who has been identified as an expert whose opinions may be presented at trial. If Rule 26(a)(2)(B) requires a report from the expert, the deposition may be conducted only after the report is provided.

(B) *Trial-Preparation Protection for Draft Reports or Disclosures.* Rules 26(b)(3)(A) and (B) protect drafts of any report or disclosure required under Rule 26(a)(2), regardless of the form in which the draft is recorded.

(C) *Trial-Preparation Protection for Communications Between a Party's Attorney and Expert Witnesses.* Rules 26(b)(3)(A) and (B) protect communications between the party's attorney and any witness required to provide a report under Rule 26(a)(2)(B), regardless of the form of the communications, except to the extent that the communications:

(i) relate to compensation for the expert's study or testimony;

(ii) identify facts or data that the party's attorney provided and that the expert considered in forming the opinions to be expressed; or

(iii) identify assumptions that the party's attorney provided and that the expert

relied on in forming the opinions to be expressed.

(D) *Expert Employed Only for Trial Preparation.* Ordinarily, a party may not, by interrogatories or deposition, discover facts known or opinions held by an expert who has been retained or specially employed by another party in anticipation of litigation or to prepare for trial and who is not expected to be called as a witness at trial. But a party may do so only:

(i) as provided in Rule 35(b); or

(ii) on showing exceptional circumstances under which it is impracticable for the party to obtain facts or opinions on the same subject by other means.

The proposed amendments to Rule 26 apply work-product protection to the discovery of draft reports by testifying expert witnesses and, with three important exceptions, communications between those witnesses and retaining counsel. The proposed amendments also address witnesses who will provide expert testimony but who are not required to provide a Rule 26(a)(2)(B) report because they are not retained or specially employed to provide such testimony, or they are not employees who regularly give expert testimony. Under the amendments, the lawyer relying on such a witness must disclose the subject matter and summarize the facts and opinions that the witness is expected to offer.

The proposed amendments address the problems created by extensive changes to Rule 26 in 1993, which were interpreted to allow discovery of all communications between counsel and expert witnesses and all draft expert reports and to require reports from all witnesses offering expert testimony. More than 15 years of experience with the rule has shown significant practical problems. Both sets of amendments to Rule 26 are broadly supported by lawyers and bar organizations, including the American Bar Association, the Council of the American Bar Association Section on Litigation, the American College of Trial Lawyers, the American Association for Justice (formerly ATLA), the Federal Magistrate Judges' Association, the Lawyers for Civil Justice, the Federation of Defense & Corporate Counsel, the International Association of Defense Counsel, and the United States Department of Justice.

Experience with the 1993 amendments to Rule 26, requiring discovery of draft expert reports and broad disclosure of any communications between an expert and the retaining lawyer, has shown that lawyers and experts take elaborate steps to avoid creating any discoverable record and at the same time take elaborate steps to attempt to discover the other side's drafts and communications. The artificial and wasteful discovery-avoidance practices include lawyers hiring two sets of experts – one for consultation, to do the work and develop the opinions, and

one to provide the testimony – to avoid creating a discoverable record of the collaborative interaction with the experts. The practices also include tortuous steps to avoid having the expert take any notes, make any record of preliminary analyses or opinions, or produce any draft report. Instead, the only record is a single, final report. These steps add to the costs and burdens of discovery, impede the efficient and proper use of experts by both sides, needlessly lengthen depositions, detract from cross-examination into the merits of the expert's opinions, make some qualified individuals unwilling to serve as experts, and can reduce the quality of the experts' work.

Notwithstanding these tactics, lawyers devote much time during depositions of the adversary's expert witnesses attempting to uncover information about the development of that expert's opinions, in an often futile effort to show that the expert's opinions were shaped by the lawyer retaining the expert's services. Testimony and statements from many experienced plaintiff and defense lawyers presented to the advisory committee before and during the public comment period showed that such questioning during depositions was rarely successful in doing anything but prolonging the questioning. Questions that focus on the lawyer's involvement instead of on the strengths or weaknesses of the expert's opinions do little to expose substantive problems with those opinions. Instead, the principal and most successful means to discredit an expert's opinions are by cross-examining on the substance of those opinions and presenting evidence showing why the opinions are incorrect or flawed.

The advisory committee's analysis of practice under the 1993 amendments to Rule 26 showed that many experienced lawyers recognize the inefficiencies of retaining two sets of experts, imposing artificial record-keeping practices on their experts, and wasting valuable deposition time in exploring every communication between lawyer and expert and every change in the expert's draft reports. Many experienced lawyers routinely stipulate at the outset of a case

that they will not seek draft reports from each other's experts in discovery and will not seek to discover such communications. In response to persistent calls from its members for a more systematic improvement of discovery, the American Bar Association issued a resolution recommending that federal and state procedural rules be amended to prohibit the discovery of draft expert reports and limit discovery of attorney-expert communications, without hindering discovery into the expert's opinions and the facts or data used to derive or support them. The State of New Jersey did enact such a rule and the advisory committee obtained information from lawyers practicing on both sides of the "v" and in a variety of subject areas about their experiences with it. Those practitioners reported a remarkable degree of consensus in enthusiasm for and approval of the amended rule. The New Jersey practitioners emphasized that discovery had improved since the amended rule was promulgated, with no decline in the quality of information about expert opinions.

The proposed amendments to Rule 26 recognize that discovery into the bases of an expert's opinion is critical. The amendments make clear that while discovery into draft reports and many communications between an expert and retaining lawyer is subject to work-product protection, discovery is not limited for the areas important to learning the strengths and weaknesses of an expert's opinion. The amended rule specifically provides that communications between lawyer and expert about the following are open to discovery: (1) compensation for the expert's study or testimony; (2) facts or data provided by the lawyer that the expert considered in forming opinions; and (3) assumptions provided to the expert by the lawyer that the expert relied upon in forming an opinion.

In considering whether to amend the rule, the advisory committee carefully examined the views of a group of academics who opposed the amendments. These academics expressed concern that the amendments could prevent a party from learning and showing that the opinions

of an expert witness were unduly influenced by the lawyer retaining the expert's services. These concerns were not borne out by the practitioners' experience. After extensive study, the advisory committee was satisfied that the best means of scrutinizing the merits of an expert's opinion is by cross-examining the expert on the substantive strength and weaknesses of the opinions and by presenting evidence bearing on those issues. The advisory committee was satisfied that discovery into draft reports and all communications between the expert and retaining counsel was not an effective way to learn or expose the weaknesses of the expert's opinions; was time-consuming and expensive; and led to wasteful litigation practices to avoid creating such communications and drafts in the first place.

Establishing work-product protection for draft reports and some categories of attorney-expert communications will not impede effective discovery or examination at trial. In some cases, a party may be able to make the showings of need and hardship that overcome work-product protection. But in all cases, the parties remain free to explore what the expert considered, adopted, rejected, or failed to consider in forming the opinions to be expressed at trial. And, as observed in the Committee Note, nothing in the Rule 26 amendments affects the court's gatekeeping responsibilities under *Daubert v. Merrell Dow Pharm., Inc.*, 509 U.S. 579 (1993).

The proposed amendments to Rule 56 are intended to improve the procedures for presenting and deciding summary-judgment motions, to make the procedures more consistent across the districts, and to close the gap that has developed between the rule text and actual practice. The proposed amendments are not intended to change the summary-judgment standard or burdens.

The text of Rule 56 has not been significantly changed for over 40 years. During this time, the Supreme Court has developed the contemporary summary-judgment standards in a trio

Rule 26(b)(6) ***Trial Preparation: Experts.***

(A) *Trial-Preparation Protection for Draft Reports or Disclosures.* Rule 26(b)(4) protects drafts of any report or disclosure required under Rule 26(a)(3), regardless of the form in which the draft is recorded.

(B) *Trial-Preparation Protection for Communications Between a Party's Attorney and Expert Witnesses.* Rule 26(b)(4) protects communications between the party's attorney and any witness required to provide a report under Rule 26(a)(3)(A), regardless of the form of the communications, except to the extent that the communications:

(i) relate to compensation for the expert's study or testimony;

(ii) identify facts or data that the party's attorney provided and that the expert considered in forming the opinions to be expressed; or

(iii) identify assumptions that the party's attorney provided and that the expert relied on in forming the opinions to be expressed.

(C) *Expert Employed Only for Trial Preparation.* Ordinarily, a party may not, by interrogatories or otherwise, discover facts known or opinions held by an expert who has been retained or specially employed by another party in anticipation of litigation or to prepare for trial and who is not expected to be called as a witness at trial. But a party may do so only:

(i) as provided in Rule 35(b); or

(ii) on showing exceptional circumstances under which it is impracticable for the party to obtain facts or opinions on the same subject by other means.