Agenda
Advisory Committee on Rules of Civil Procedure

March 26, 2014
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	Jonathan Hafen
Committee membership		Jonathan Hafen
Report on meeting with Supreme Court	Tab 2	Jonathan Hafen Judge Derek Pullan
Subcommittee Report on Rule 7 and Rule 58A.	Tab 3	Cullen Battle
Transcript of deposition by certified court reporter.	Tab 4	Tim Shea
Rule 37. Discovery and disclosure motions; Sanctions.	Tab 5	Tim Shea
Rule 56. Summary judgment.	Tab 6	Tim Shea
Small Claims Rule 14. Settlement offers.	Tab 7	Tim Shea
Rule 7A. Motion for order to show cause.	Tab 8	Tim Shea

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

Meeting Schedule: Matheson Courthouse, Judicial Council Room, 4:00 to 6:00.

April 23, 2014
May 28, 2014
September 24, 2014
October 22, 2014
November 19, 2014

Tab 1

MINUTES

UTAH SUPREME COURT ADVISORY COMMITTEE ON THE RULES OF CIVIL PROCEDURE

FEBRUARY 26, 2014

PRESENT: Jonathan Hafen, Chair, Sammi V. Anderson, W. Cullen Battle, Hon. John L. Baxter, Scott S. Bell, Frank Carney, Hon. Evelyn J. Furse, Terrie T. McIntosh, Leslie W. Slaugh, Trystan B. Smith, Hon. Kate Toomey, Barbara L. Townsend, Lori Woffinden

TELEPHONE: Hon. Lyle R. Anderson, Hon. Derek Pullan, David W. Scofield

STAFF: Timothy M. Shea, Nathan Whittaker

EXCUSED: Hon. James T. Blanch, Prof. Lincoln Davies, Steven Marsden, David H. Moore, Hon. Todd M. Shaughnessy

I. APPROVAL OF MINUTES

Mr. Hafen opened the meeting and entertained comments from the committee concerning the January 22, 2014 minutes. Ms. Townsend noted that she was in attendance at January's meeting and asked that the minutes be amended to reflect that. The committee agreed to the amendment. It was moved and seconded to approve the minutes as amended. The motion carried unanimously on voice vote.

II. PUBLIC COMMENT ON PROPOSED REVISIONS TO RULES

Mr. Shea presented and summarized the public comments to the proposed revisions to Rules 6, 10, 58B, 74, and 75, which were published on the Utah Courts Website for public comment pursuant to UCJA 11-103 on November 26, 2013. The committee proceeded to consider the public comments and to determine final action on the proposed revisions.

A. Rule 6

The committee proceeded to consider the proposed revision to Rule 6. Mr. Shea summarized the public comments as raising the question of the definition of

mail under subdivision (c) and the changes to the number of days in specific rules to conform to the 7/14/21/28 day convention.

Three Days for Mail Rule. First, Mr. Shea brought up the "three days for mail" rule. Under the current rule, if a deadline is calculated by reference to a certain amount of time after serving a paper, three days are added to that deadline if the paper is served by mail. The proposed revision retains that provision. Mr. Shea noted that some comments had suggested that the term "mail" was ambiguous—one commenter asked whether email and e-filing were considered "mail" under the rule, and another commenter suggested that the rule should be restricted to U.S. mail in order to exclude delivery by commercial courier services such as FedEx and UPS.

Mr. Shea opined that he did not believe the term "mail" was particularly ambiguous and includes courier services and excludes email and e-filing. Nevertheless, if the committee wished to remove all doubt, Mr. Whittaker had proposed amending the rule to refer specifically to Rule 5(b)(1)(A)(iv), which provides that "a party shall serve a paper under this rule . . . by mailing it to the person's last known address." Mr. Slaugh agreed with Mr. Whittaker's amendment, and pointed out that it would also serve the function of clarifying that Rule 6(c) did not apply to service by certified mail under Rule 4. Members suggested retaining the words "by mail" along with the reference to the rule so that casual readers would not have to look up the cross-reference to understand the provision. The committee agreed with that suggestion and adopted the amendment.

Ten-Day Summons. Mr. Shea next directed the committee's attention to the changes in time for the procedures regarding a ten-day summons under Rules 3(a) and 4(c)(2). Currently, the rules allow for a complaint to be served on a defendant before filing with the court by means of a "ten-day" summons. The plaintiff has ten days after serving the defendant to file the complaint with the court. If the complaint is not filed within that amount of time, the defendant need not answer the complaint. The rule directs the defendant to contact the court "at least 13 days after service" to determine if the complaint has been filed.

Mr. Shea noted that under the convention adopted by the committee that periods of time that are 30 days or less should be changed to a multiple of seven, both the requirement to file within ten days after service and the direction to contact the court at least 13 days after service would be changed to 14 days. As

there needs to be a period of time between the deadline for filing the complaint and the time to check whether a complaint has been filed, one of the periods needs to be shorter than the other.

Compounding this problem is the 21-day time limit to file an answer after service. The purpose of the ten-day summons is to encourage a debtor to contact and reach a settlement with a creditor without incurring the expense of a filing fee. Thus, there must be adequate time to allow the parties to settle the claim before the complaint must be filed. At the same time, there must be adequate time to give the defendant notice that the complaint has been filed before it is required to file its answer, and adequate time between the two deadlines to allow the clerk's office to process the complaint. Given these constraints, the committee concluded that keeping the current periods of ten and 13 days would be appropriate.

Motion Practice Before Domestic Relations Commissioners. Mr. Shea next asked the committee to look at the comment addressing the time provisions of Rule 101. Rule 101 deals with the deadlines for submitting responses and replies in hearings before domestic relations commissioners. It currently provides that—

- a response to a motion must be served "at least 5 business days before the hearing;"
- a reply supporting a motion and a response to a countermotion must be served "at least 3 business days before the hearing;"
- a reply supporting a countermotion must be served "at least 2 business days before the hearing;" and
- a failure to serve appropriate attachments with a motion or response must be remedied "within 2 business days after notice of the defect or at least 2 business days before the hearing, whichever is earlier."

The commenter noted that there was disagreement among the domestic relations commissioners as to whether the term "business day" meant that the filing had to be entered before 5:00 p.m. or midnight and recommended defining business days as ending at 5:00 p.m. Mr. Shea noted that the entire purpose of the proposed revision to Rule 6 was to eliminate the distinction between business days and calendar days and so recommended against adopting the commenter's proposal. However, because the periods of time in the rule were so short, he suggested stating the period in hours rather than days.

Members pointed out another problem with applying the "days are days" approach to this rule: when two deadlines are being calculated backward from one event and those two deadlines are less than four days apart, there is a good chance that those two deadlines can fall on the same day, meaning a response or reply would be due at the same time as the paper it was supposed to respond or reply to. This effect would occur under the proposed revision whether the time was expressed in days or hours.

Mr. Shea pointed out that there were proposed revisions in the family rules currently being examined by a family-law working group, and suggested that the committee exempt Rule 101 from the changes to Rule 6 for now and take the issue back up when the working group makes its recommendations. Because Rule 101 currently states time in "business days," the language would not need to be changed in order to exempt it from Rule 6. Several members suggested that if the committee exempted Rule 101, there should be an advisory committee note published stating as such, so readers would know that the committee's action was intentional. The committee agreed with both suggestions.

Other Items. While the committee was looking at changes in time periods under the rules, several members proposed extending the deadline to file a bill of costs under 54(d) to 14 days and extending the time to file post-judgment motions under Rules 50(b) & (c), 52(b), and 59(b), (d), & (e) to 28 days. While the committee generally agreed that these deadlines should probably be extended, it was the consensus of the committee that extending these deadlines would require sending the rule out for further comment. Moreover, as Mr. Carney had previously introduced a proposal revising all of these rules, these proposals could be included for consideration in Mr. Carney's proposal. Therefore, the committee tabled these proposals for further consideration concurrently with Mr. Carney's proposal.

Committee Action. It was moved and seconded that Rule 6 be revised as per the proposed revisions contained in pages 31–35 of the meeting materials, incorporating the following amendments:

- Line 93: after the word "mail," insert "under Rule 5(b)(1)(A)(iv)."
- Page 35: on the Deadline Changes Table, strike:
    - the change to Rule 3(a);

- both changes to Rule 4(c)(2); and
- the changes to Rule 101(c), (d), & (g).

- Add an advisory committee note after Rule 101 explaining the retention of the term "business days."

The motion carried unanimously on voice vote. The proposed revision of Rule 5 was thereby approved for presentation to the Supreme Court pursuant to UCJA 11-105(a) on March 26, 2014.

B. Rule 10

Discussion. The committee proceeded to consider public comments to the proposed revision to Rule 10. Mr. Shea explained that most of the comments with regard to this rule were objections to the provision that prohibited graphic signatures on the grounds that the provision would prohibit graphic signatures on documents such as affidavits and declarations. He further noted that while the prohibition of graphic signatures had only been intended to apply to pleadings and papers signed by the filer, the language of the provision swept broader than that. Mr. Shea pointed out that part of the proposed revision to Rule 5 deals with the question of filing documents signed by a person other than the filer and suggested that it would be better if the prohibition on the graphic signature of the filer should be enacted along with those provisions. The committee agreed with Mr. Shea's suggestion.

The committee then looked at the language to be restored in lines 44–45 of the proposed revision in the meeting materials. Mr. Shea pointed out that the original purpose of the revision had been to remove the reference to a graphic signature in order to help the clerks enforce the general requirement that papers be filed as native PDFs. Therefore, rather than just restoring the previous language, he suggested taking out the reference to graphic signatures entirely and ending the sentence after the word "signer." Members of the committee pointed out that without the reference to a graphic signature, the sentence was redundant with the previous sentence. The committee generally agreed that the sentence added nothing and so should be deleted in its entirety.

Committee Action. It was moved and seconded that Rule 10 be revised as per the proposed revisions contained in pages 36–39 of the meeting materials, incorporating the following amendment:

- Lines 44–45: delete the words "If a paper is electronically signed, the paper shall contain the typed or printed name of the signer with or without a graphic signature."

The motion carried unanimously on voice vote. The proposed revision of Rule 10 was thereby approved for presentation to the Supreme Court pursuant to UCJA 11-105(a) on March 26, 2014.

C. Rule 58B

The committee proceeded to consider public comments to the proposed revision to Rule 58B. One comment had suggested the 28-day deadline for filing a satisfaction was too short and suggested that it be extended to 90 days. The commenter argued that the timeline was too short and could "contribute to defendants fraudulently cancelling payments after a satisfaction is obtained." He added that "90 days would be a better outside deadline in order to allow for all payments to clear, communication between clients to occur, and then documents to be submitted to the court."

Members of the committee pointed out in response that a judgment cannot be said to be satisfied until the funds are actually received by the creditor. A judgment paid by personal check would not be satisfied until that check clears. Further, while a debtor could conceivably dispute a credit card payment after obtaining a satisfaction of judgment, a debtor is not entitled to a chargeback as of right, and there is more than adequate protections for the creditor in such a circumstance.

Mr. Slaugh pointed out that under Utah Code Ann. § 57-1-38(3), a lender must release its security interest on property within 90 days after the receipt of the final payment of a loan. He added that while he did not agree with the commenter, there was at least precedent for the 90-day period. Judge Anderson asked whether there was any substantial amount of communication that needed to take place between an attorney and client in order to determine whether a judgment is satisfied. Other members indicated that there was not. After discussing the issue, the committee concluded that requiring that a satisfaction be filed within 28 days of the judgment being satisfied was not unduly burdensome to creditors.

Committee Action. It was moved and seconded that Rule 58B be revised as per the proposed revisions contained in page 40 of the meeting materials. The motion carried unanimously on voice vote. The proposed revision of Rule 58B

was thereby approved for presentation to the Supreme Court pursuant to UCJA 11-105(a) on March 26, 2014.

D. Rules 74 & 75

The committee proceeded to consider public comments to the proposed revision to Rules 74 and 75. Mr. Shea directed the committee's attention to a comment that suggested that the phrase "if permitted by the judge" in the proposed revisions is ambiguous—the commenter suggested that it was not clear this phrase gave the district court discretion to deny withdrawal by oral notice or to deny withdrawal altogether. Mr. Shea noted that the purpose of the language was to give discretion to allow a volunteer lawyer who appears on behalf of a client for one hearing to withdraw at the end of that hearing, which would cut down on paperwork and facilitate pro bono representation. As the rule still allowed withdrawal by filing a notice of withdrawal, Mr. Shea did not believe that the provision was ambiguous.

Judge Pullan observed that the discretion is important to allow a judge to ensure that the *pro bono* client's case is handled fully. For example, the judge may want to require the volunteer lawyer to prepare an order before withdrawing. Having that discretion allows the judge to allow withdrawal by oral notice to be effective after the proposed order is submitted and approved. The committee concluded that no changes were needed.

Committee Action. It was moved and seconded that Rules 74 and 75 be revised as per the proposed revisions contained in pages 41–42 of the meeting materials. The motion carried unanimously on voice vote. The proposed revision of Rules 74 and 75 was thereby approved for presentation to the Supreme Court pursuant to UCJA 11-105(a) on March 26, 2014.

III. RULE 37

The committee next considered the proposed revision to Rule 37. A version of this proposed revision was previously approved for public comment at the November 20, 2013 meeting. However, after determining that there were too many items that were left unclear, the committee agreed to recall the proposed revision for further consideration.

Discussion. Mr. Shea explained the changes to the proposed revision made since the November meeting. As approved in the November meeting, the draft was amended as follows:

- the language stating that a response must "address the issues raised in the motion" was adopted in lieu of detailed instructions for the response;

- the provisions directing that disputes regarding nonparty discovery were to be heard by the court in the county where the nonparty was located were removed, and an advisory committee note explaining the removal was added;

- the draft was reordered so that the grounds for bringing an expedited discovery motion were in (a), while the procedure for bringing the motion was in (b); and

- the language of the draft was changed to clarify that expenses and attorney fees under (d) applied to an expedited motion, but sanctions under (e) were only available for failure to follow a court order.

After reviewing the draft, members of the committee raised the following concerns:

First, some members felt that the statement of grounds in subdivision (a) was not inclusive enough and suggested adding "catch-all" language to clarify that the expedited procedures apply to all discovery disputes.

Second, some members expressed a concern that the provision for expenses and attorney fees in subdivision (d) raised the stakes of the motion unacceptably high given the expedited and summary nature of the discovery procedure. Others responded that it is important that a judge has discretion to punish bad faith, dilatory and frivolous behavior. It was observed that subdivision (d) only allowed for expenses and attorney fees to the prevailing party "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." The suggestion was made to emphasize that requirement by adding the words "but only if" before the quoted language.

Third, some members noted that there was no language in subdivision (e) authorizing bringing a motion for sanctions for failure to comply with an order, and asked whether that language was necessary.

Fourth, some members were concerned that the prohibition on bringing a motion for sanctions in paragraph (b)(6) would prohibit a party from asking for sanctions in a circumstance where the opposing party did not violate an order and there is no cause to compel the party to submit to further discovery, but

rather acted in an outrageous and objectively unreasonable manner that would justify sanctions against that party.

Fifth, Mr. Battle observed that there were several references regarding compelling disclosures in Rule 37. He raised the concern that this confuses the issue of whether the Rule 26(d)(4) prohibition against using "the undisclosed witness, document or material at any hearing or trial" applied without first having to bring a motion to compel. Other members responded that in some circumstances where the party is required to disclose information that does not support its claims or defenses, the automatic exclusion is not an adequate remedy for the party's failure to comply.

Sixth, Mr. Battle also noted that subdivision (h) contained the following language that was missing from Rule 26(b)(4): "In addition to or in lieu of this sanction, the court on motion may take any action authorized by paragraph (e)." He thought that to avoid confusion, 37(h) and 26(b)(4) should be substantively identical.

Seventh, some members added that it was unclear whether the automatic exclusion applied to a party who supplemented a disclosure without stating "why the additional or correct information was not previously provided" as required in Rule 26(d)(5), and if not, what a party needed to do to raise the issue.

Eighth, Some members expressed a concern regarding changing the name of the expedited discovery procedure from a "Statement of Discovery Issues" to a motion. They felt that the names "motion to compel," "motion for protective order" "motion for extraordinary discovery," "motion to quash subpoena," etc., were too associated with the pre-"statement of discovery issues" idea of motion practice and that it would be confusing, and that the language of Rule 37 should follow more closely the existing language in UCJA 4-502. Others responded that as the party making use of the expedited discovery procedures was applying to the court for relief, it was appropriate to call that application a motion. Further, the language in the UCJA that "the parties should [file and serve on all parties a statement of discovery issues] before filing with the court any discovery motion" caused confusion as to whether a motion to compel or for protective order had to be filed after the end of the statement of discovery issues process. Calling the expedited discovery procedures a motion would clarify that confusion.

Committee Action. It was moved and seconded that the proposed revision be tabled until the next meeting to allow a draft addressing these concerns to be prepared for review, suggesting alternate language as appropriate. The motion carried unanimously on voice vote.

IV. ADJOURNMENT

The meeting adjourned at 6:03 p.m. The next meeting will be held on March 26, 2014 at 4:00 p.m. at the Administrative Office of the Courts.

Tab 2

Summary of attorney opinions about discovery rules[1]

Statement	Percent Disagree or Strongly Disagree						Percent Neutral						Percent Agree or Strongly Agree					
	Q1	Q2	Q3	Q4	Q5	Q6	Q1	Q2	Q3	Q4	Q5	Q6	Q1	Q2	Q3	Q4	Q5	Q6
(1) The opposing party complied with the automatic disclosure provisions.	33	34	37	32	43	43	40	24	24	27	18	25	28	43	38	41	39	32
(2) The amount of disclosure and standard discovery provided sufficient information to inform assessments of the claims.	25	22	24	23	25	26	45	37	25	28	34	24	30	42	52	50	41	51
(3) The amount of discovery undertaken in this case was proportional to the legal and factual complexity of the case and the amount in controversy.	11	12	14	8	17	21	53	41	40	33	40	25	36	48	47	59	42	55
Compared to similar cases filed before November 1, 2011 …																		
(4) discovery was completed more quickly due to the restrictions imposed by the Rule 26 revisions.	37	38	34	39	51	44	45	41	38	34	38	32	17	22	28	27	12	24
(5) this case was resolved more quickly due to the restrictions imposed by the Rule 26 revisions.	43	46	37	41	52	47	48	37	42	38	38	37	10	18	21	21	10	15
(6) the discovery costs were lower due to the restrictions imposed by the Rule 26 revisions.	43	45	36	44	52	45	48	34	40	34	34	39	10	22	23	23	14	15

[1] Survey conducted over 6 successive quarters. Two more will follow. Respondents' comments are available but have not yet been reviewed.

Observations about statement number …

(1) Increasing perception that the other party is not complying with disclosure.

(2) Increasing perception that initial disclosure and standard discovery are sufficient.

(3) Increasing perception that actual discovery is proportional to the case.

(4) Mixed results. Increasing perception that discovery is faster than before, but also an increasing perception that it is not. There are more people in the latter category.

(5) Mixed results. More people believe that the new rules do not improve the time to disposition than believe they do, but both categories fluctuate.

(6) Mixed results. More people believe that the new rules do not reduce costs than believe they do, but both categories fluctuate.

Opinions started low and improved in nearly all categories over the first 4 quarters. Opinions declined in all categories from the 4th to the 5th quarter and have rebounded some in the 6th quarter. There appears to be a perception that the default disclosure and discovery are suitable for the cases, but that they do not have a significant impact on the cost and length of litigation.

Summary of National Center for State Courts' findings (memo follows)

- The final lists [of attorneys in each batch] include 95% or more of the attorneys who were on the original dataset. To be included in the survey, a case had to have at least one party represented, had to have an answer filed, and had to have been resolved.
- Attorney response rates for the survey have averaged 22% with approximately 31% of the cases reflected in the survey dataset.
- Restrictions on the scope of discovery are not unduly limiting the parties from achieving a satisfactory resolution to the case.
- We are not seeing a lot of discovery disputes associated with Rule 26 or motions or stipulations related to the discovery tiers.
    - Attorneys reported 20 cases with a stipulation for extraordinary discovery.
    - Attorneys reported 4 cases with a motion for extraordinary discovery.
    - Motions to compel discovery were filed in only 22 cases (granted in 12).
    - Motions for a protective order were only filed in 9 cases (granted in 8).
- Attorneys in cases that involved discovery disputes who used the expedited process to address those issues reported mixed views about the efficacy of those procedures. Less than one-third (31%) agreed with the statement that discovery disputes were resolved in a timely fashion (31% were neutral and 39% disagreed).
- All of the survey questions seeking opinions about the impact of Rule 26 are significantly correlated—that is, attorneys who agreed with any one statement about the impact of the rule tended to express similar levels of agreement with the other five questions.
- Attorneys in cases resolved later in the litigation process have more favorable opinions about automatic disclosure compliance.
- Attorneys in cases resolved later in the litigation process tended to agree more strongly with the statement concerning the sufficiency of information provided under Rule 26.
- Attorneys representing the defendant agreed more strongly (3.45) with the statement [that the discovery undertaken in the case was proportional to case complexity and amount in controversy] than attorneys representing the plaintiff (3.31). Note that both are on the "agreement" side of "neutral."
- Attorneys representing the plaintiff expressed stronger agreement (2.75) [with statements concerning speed of discovery and case resolution] than those representing the defendant (2.54). (Note that both are on the "disagreement" side of "neutral."
- Although some cases complete discovery within the requisite timeframes, most are exceeding those timeframes by a wide margin. If these reports from the attorney survey are representative of all cases, it does not bode well for expectations that Rule 26 will ultimately result in overall reduced filing-to-disposition times. See Table 5 on page 10.

To: Tim Shea

From: Paula Hannaford-Agor

Date: February 26, 2014

Re: NCSC Evaluation of Rule 26 revisions

This memorandum documents preliminary findings about the Attorney Survey component of the NCSC evaluation of the revisions to Rule 26 of the Utah Rules of Civil Procedure. The Attorney Survey collects supplemental case-level information and solicits opinions about the Rule 26 revisions from the attorneys of record for eligible cases filed between Jan. 1, 2012 and June 30, 2012. A total of 59,554 civil cases were filed during this period. Eligible cases for the purpose of the Attorney Survey are those in which (1) at least one party was represented by counsel; (2) an Answer was filed; and (3) the case has been fully resolved.

Survey Samples

Table 1 documents the impact of the cleaning process on the CMS data to develop the distribution list for the Attorney Survey and the resulting response rates for those surveys. The cleaning process involves first removing records in which the attorney information (e.g., name and email address) is missing and for attorneys who have responded to three previous surveys. To ensure that attorneys who are counsel of record for multiple cases in the original dataset do not receive a survey for each case, NCSC staff randomly selects one case per attorney. As a result of the cleaning process, the final distribution lists generally include 95% or more of the attorneys who were listed on the original dataset. The proportion of cases reflected on the distribution list varies considerably from batch to batch depending on the number of cases per attorney. Attorney response rates for the survey have averaged 22% with approximately 31% of the cases reflected in the survey dataset.

Table 1: Attorney Survey

Batch	Disposition Dates	Original Sample			Distribution List		Survey Responses			
		Total Records	Cases	Attorneys	Cases	Attorneys	Cases	%	Attorneys	%
1	July 1, 2012 to Sept. 30, 2012	11,576	3,445	888	595	845	167	28%	178	21%
2	Oct. 1, 2012 to Dec. 31, 2012	10,572	1,185	724	453	714	124	27%	139	19%
3	Jan. 1, 2013 to March 31, 2013	4,267	425	674	420	674	129	31%	146	22%
4	April 1, 2013 to June 30, 2013	3,891	1,036	373	264	372	125	47%	136	37%
5	July 1, 2013 to Sept. 30, 2013	4,313	505	543	302	536	60	20%	72	13%
6	Oct. 1, 2013 to Dec. 31, 2013	9,435	403	359	243	466	53	22%	71	15%

Table 2 shows the caseload composition for civil cases filed during the evaluation period, cases disposed between July 1, 2012 and December 31, 2013, and cases in which at least one attorney responded to the survey. The cleaning process used to select attorneys and cases to receive surveys has significantly distorted the caseload composition of the attorney survey dataset. This distortion will be taken into account during data analysis when interpreting Rule 26's impact on different types of cases.

Table 2: Caseload Composition for Filings, Dispositions, and Survey Respondents						
Case Type	Cases filed 1/1/2012 to 6/30/2012		Eligible cases disposed between 1/1/2012 and 12/31/2013		Attorney Survey Responses	
Asbestos	1	0.0%	0	0.0%	0	0.0%
Civil Rights	11	0.0%	0	0.0%	0	0.0%
Condemnation	89	0.1%	6	0.1%	7	1.0%
Contracts	2,719	4.6%	410	6.3%	124	17.8%
Custody/Support	764	1.3%	148	2.3%	18	2.6%
Debt Collection	42,701	71.7%	3939	60.6%	152	21.9%
Divorce/Annulment	9,624	16.2%	1365	21.0%	173	24.9%
Malpractice	234	0.4%	14	0.2%	8	1.2%
Paternity	1,055	1.8%	211	3.2%	33	4.7%
Personal Injury	1,575	2.6%	306	4.7%	138	19.9%
Property Damage	282	0.5%	42	0.6%	14	2.0%
Property Rights	374	0.6%	43	0.7%	24	3.5%
Water Rights	40	0.1%	3	0.0%	1	0.1%
Wrongful Lien	59	0.1%	7	0.1%	1	0.1%
Wrongful Termination	16	0.0%	3	0.0%	2	0.3%
TOTAL	59,544		6,497		695	

Table 3 shows how the cases in the survey were disposed. The vast majority of cases reported by attorneys resolved through settlement (73%), and 52% resolved even before discovery was complete. This suggests that restrictions on the scope of discovery are not unduly limiting the parties from achieving a satisfactory resolution to the case.

Table 3: Disposition Type		
	Number of cases	(%)
Case withdrawn by plaintiff/petitioner	22	3%
Case dismissed by court	25	4%
Default judgment for defendant/respondent	15	2%
Settlement by parties before discovery completed	328	52%
Settlement by parties after discovery completed	135	21%
Summary judgment	48	8%
Bench trial	8	1%
Other disposition	52	8%
Total	633	

Discovery Disputes

Thus far in the survey responses, we are not seeing a lot of case activity attempting to challenge the restrictions imposed by Rule 26 by motions or stipulations related to the discovery tiers. Attorneys reported only 6 cases in which a party motioned to amend the pleadings to adjust the discovery tier (4 of which were granted). Attorneys in only 20 cases entered a stipulation for extraordinary discovery (only 4 of which were granted). Attorneys reported only 4

cases in which a motion for extraordinary discovery was entered (3 of which were granted). Similarly, we are not seeing evidence of a lot of discovery disputes associated with Rule 26. Motions to compel discovery were filed in only 22 cases (granted in 12) and motions for a protective order were only filed in 9 cases (granted in 8). However, attorneys in cases that involved discovery disputes and used the expedited process to address those issues reported mixed views about the efficacy of those procedures. Less than one-third (31%) agreed with the statement that discovery disputes were resolved in a timely fashion (31% were neutral and 39% disagreed) and 38% agreed that the Statement of Discovery Issues and Statement in Opposition provided sufficient information for the court to decide discovery disputes (25% were neutral and 38% disagreed).

Attorney Opinions about Rule 26

Table 4 shows initial opinions about various aspects of the Rule 26 revisions. These reflect mixed views about the revisions, but more respondents have settled on either agreement or disagreement as the neutral responses have decreased. Over time, there were small gains in positive alignment and noticeable increases in disagreement for questions asking respondents to compare the impact of the rules to cases filed before Nov. 1, 2011.

Table 4: Respondent Opinions About the Impact of Rule 26 Revisions (539 responses)

	Percentage Responding				
	Strongly disagree	Disagree	Neutral	Agree	Strongly Agree
The opposing party complied with the automatic disclosure provisions.	18%	18%	28%	33%	4%
The amount of disclosure and standard discovery provided sufficient information to inform assessments of the claims.	10%	13%	34%	39%	4%
The amount of discovery undertaken in this case was proportional to the legal and factual complexity of the case and the amount in controversy.	5%	8%	41%	40%	7%
Compared to similar cases filed before November 1, 2011 …					
discovery was completed more quickly due to the restrictions imposed by the Rule 26 revisions.	18%	22%	39%	18%	3%
this case was resolved more quickly due to the restrictions imposed by the Rule 26 revisions.	20%	24%	41%	12%	4%
the discovery costs were lower due to the restrictions imposed by the Rule 26 revisions.	20%	23%	39%	14%	3%

With the first six batches of surveys completed, it is possible to start examining the aggregate data to determine if any patterns are emerging with respect to attorney opinion about the impact of Rule 26. First, we find that all six of the survey questions seeking opinions about the impact of Rule 26 are significantly correlated – that is, attorneys who agreed with any one statement about the impact of the rule tended to express similar levels of agreement with the other five questions. Views about the impact of Rule 26 on the speed with which discovery was completed and the case was resolved were the most highly correlated.[2] Similarly high correlations existed

[2] Pearson χ^2=0.865, p<.001.

for views about the relationship of discovery costs with the speed of discovery completion[3] and case resolution.[4] Interestingly, the level of agreement with each of the statements did not differ based on the length of time to disposition (as indicated by the survey batch number). That is, there is no clear evidence at this point to indicate that as attorneys become more acclimated to the Rule 26 provisions, their opinions about the impact of the rule have improved – at least in the cases that were the focus of the survey questions.

Attorney Opinion Concerning Opposing Counsel Compliance with Automatic Disclosure Requirements

A number of case and attorney characteristics correlated with attorney opinions about the impact of Rule 26 in small, but significant, ways. For example, the extent to which attorneys agreed that opposing counsel complied with the automatic disclosure requirements of Rule 26 differed based on the type of case[5] and the manner of disposition.[6] The survey response was ranked on a 1-5 scale, 5 being the most agreeable. For general civil cases, attorneys in property rights cases had the highest level of agreement with the statement about automatic disclosure compliance (mean=3.63) followed by attorneys in personal injury cases (3.25), contract cases (2.91), property damage cases (2.50) and debt collection cases (2.48).[7] For domestic relations cases, attorneys in divorce/annulment cases had the highest level of agreement (2.94) followed by attorneys in paternity cases (2.73), and custody/support cases (1.86).[8] In spite of differences by case type, there was no measurable difference between general civil (mean=2.89) and domestic case (2.82) categories overall.[9]

With respect to disposition type, it appears that attorneys involved in cases that survive to later stages of the litigation process have more favorable opinions about automatic disclosure compliance. Cases in which the parties settled after discovery was completed had the highest level of agreement with the statement concerning automatic disclosure compliance (3.19) followed by cases resolved by bench trial (3.00), cases in which the parties settled before discovery was completed (2.90), cases resolved by default judgment (2.67), cases withdrawn by the plaintiff/petitioner (2.63), cases resolved by summary judgment (2.61), and cases dismissed by the court (2.18).[10]

Attorney Opinions Concerning the Sufficiency of Information Provided under Rule 26

Attorneys in domestic relations cases were marginally more likely to agree with the statement that standard disclosure and discovery under Rule 26 provided sufficient information to assessments of claims (mean=3.25) than attorneys in civil cases (3.08).[11] There was no significant difference by case type for attorneys in domestic relations cases,[12] but there was a

[3] Pearson χ^2=0.760, p<.001.
[4] Pearson χ^2=0.796, p<.001.
[5] Case types with fewer than 10 cases were excluded from the analysis.
[6] Cases that the attorney reported were still pending and other dispositions were omitted from the anlaysis.
[7] F=9.188, p<.001.
[8] F=5.865, p=.003.
[9] F=0.378, p=.539.
[10] F=3.325, p=.003.
[11] F=3.375, p=.067.
[12] F=1.775, p=.172.

marginal difference among attorneys in civil cases based on case type.[13] Attorneys in property rights cases had the highest level of agreement (3.58) followed by attorneys in personal injury cases and contracts cases (both types 3.14), property damage cases (2.90), and debt collection cases (2.89).[14]

Again, attorneys in cases that resolved later in the litigation process tended to agree more strongly with the statement concerning the sufficiency of information provided under Rule 26. Overall, the agreement rate was 3.12; attorneys in cases in which the parties settled after discovery was completed had the highest agreement rate (3.36) followed by cases that resolved by default judgment (3.17), cases in which the parties settled before discovery was completed (3.09), cases resolved by summary judgment (3.05), cases withdrawn by the plaintiff/petitioner (2.75), and cases dismissed by the court (2.59).[15]

Attorney Opinions Concerning the Proportionality of Discovery

Attorney agreement with the statement that the discovery undertaken in the case was proportional to case complexity and amount in controversy differed based on the party that the attorney represented and the manner of disposition. Overall, attorney agreement was higher (mean=3.36) on this statement than on any of the other opinion questions in the attorney survey (all equal to or less than 3.13). Attorneys representing the defendant/respondent agreed more strongly with the statement (3.45) than attorneys representing the plaintiff/petitioner (3.31).[16]

For manner of disposition, attorneys in cases that resolved by bench trial had the highest level of agreement (3.75) followed by cases in which the parties settled after discovery was completed (3.61), cases resolved by summary judgment (3.51), cases in which the parties settled before discovery was completed (3.28), cases withdrawn by the plaintiff/petitioner (3.25), cases resolved by default judgment (3.08), and cases dismissed by the court (3.05).[17]

Attorney Opinions Concerning Speed of Discovery, Speed of Case Resolution, and Discovery Costs

Three of the opinion statements focused on the speed with which discovery was completed, the case was resolved, and the costs of discovery. On average, respondents generally disagreed that the Rule 26 provisions accomplished their intended effect (speed of discovery=2.68, speed of case resolution=2.57, lower discovery costs=2.57). For the statements concerning speed of discovery and case resolution, however, attorneys in domestic relations cases expressed marginally stronger agreement (speed of discovery=2.79, speed of case resolution=2.69) than attorneys in civil cases (speed of discovery=2.63, speed of case resolution=2.51).[18]

There was no significant difference in attorney agreement rates on these statements based on the underlying case types, but litigant type was related to attorney agreement rates concerning speed of discovery completion. Attorneys representing the plaintiff/petitioner expressed stronger agreement (2.75) than those representing the defendant/petitioner (2.54).[19] Attorneys in

[13] F=2.195, p=.069.
[14] F=1.807, p=.075.
[15] F=2.614, p=.017.
[16] F=4.485, p=.035.
[17] F=2.858, p=.010.
[18] Speed of discovery F=2.932, p=.087; Speed of case resolution F=3.615, p=.058.
[19] F=4.485, p=.035.

domestic relations cases expressed significantly higher agreement with the statement concerning discovery costs (2.70) compared to attorneys in civil cases (2.50).[20] Attorneys in civil cases differed in their agreement rate concerning discovery costs based on the underlying case type; attorneys in contracts cases expressed the highest agreement rate (2.74) followed by attorneys in property rights cases (2.68), personal injury cases (2.43), debt collection cases (2.38), and property damage cases (2.10).[21]

Overall Compliance with Rule 26 Restrictions on the Scope of Discovery

Aggregating survey responses from the six batches also now provides enough reports about the scope of discovery undertaken in those cases to get a preliminary sense about whether attorneys are, in fact, complying with the restrictions imposed by each of the discovery tiers. Table 5 documents the extent of compliance with Rule 26 discovery restrictions. Overall, the vast majority of attorneys – 90% or more for all discovery tiers and for all types of discovery – report that they are complying with Rule 26. In the 13 cases in which attorneys reported that discovery exceeded the Rule 26 requirements, nearly half (6) either entered a motion or stipulated to extraordinary discovery, which was accepted by the trial courts. In the remaining 7 cases, however, the attorneys either moved for or stipulated to extraordinary discovery, but the motion was denied by the trial court, and the attorneys nevertheless reported exceeding the scope of discovery permitted by Rule 26. In several of these cases, it was apparent from the attorney comments on the survey that they had agreed to exchange documents outside of the Rule 26 restrictions, regardless of whether the judge gave leave to do so. Other comments suggests that judges were not enforcing the limitations strongly enough.

[20] F=4.083, p=.044.
[21] F=2.252, p=.063.

Table 5: Compliance with Rule 26 Scope of Discovery Provisions			
		Percent Compliance	
	Rule 26	Petitioner	Respondent
Tier 1 (n=181)			
Average Number of Fact Witnesses		1.8	1
Interrogatories	0	90%	92%
Requests for Admission	5	97%	99%
Requests for Production	5	94%	98%
Deposition Hours for Fact Witnesses	3	98%	95%
Days to Completion of Fact Discovery*	120	48%	
Tier 2 (n=159)			
Average Number of Fact Witnesses		1.6	1.2
Interrogatories	10	95%	95%
Requests for Admission	10	99%	95%
Requests for Production	10	97%	87%
Deposition Hours for Fact Witnesses	15	99%	99%
Days to Completion of Fact Discovery*	180	24%	
Tier 3 (n=29)			
Average Number of Fact Witnesses		3.4	2.8
Interrogatories	20	86%	94%
Requests for Admission	20	100%	100%
Requests for Production	20	97%	95%
Deposition Hours for Fact Witnesses	30	97%	97%
Days to Completion of Fact Discovery*	210	9%	
* Calculated for cases in which parties settled after discovery completion, bench trials, and summary judgment only.			

With respect to Rule 26 provisions concerning expert discovery, attorneys reported that these cases rarely involved expert witnesses. For Tier 1 cases, only 9% of 168 cases reported having petitioner expert witnesses; only 8% of Tier 2 cases (150), and 32% of Tier 3 cases (27) reported having petitioner expert witnesses. The rates were only slightly higher for respondents: 11% of Tier 1 (122 cases), 11% of Tier 2 (96 cases), and 20% of Tier 3. Nearly two-thirds (64%) of attorneys in cases involving expert witnesses reported that they accepted the expert report while only 15% took expert depositions instead; all depositions conformed to the Rule 26 limit of no more than four hours per expert.

Determining the extent of compliance with the discovery timeframes established by Rule 26 is somewhat more challenging due to logical inconsistencies in the data. For example, 15 attorneys reported the date on which fact discovery was completed (which was used to calculate the amount of time from filing to completion of fact discovery) for cases in which they also reported that the case was settled BEFORE discovery was completed; the average time for filing to fact discovery completion for these 15 cases was 308 days regardless of discovery tier. Ironically, for those 15 cases, Tier 1 cases had the longest average time for filing to fact discovery completion (339 days) compared to Tier 2 (301 days) and Tier 3 cases (249 days). It

is not clear whether the attorneys simply reported discovery completion dates in error or whether some of these cases simply languished on the court's docket after the parties had agreed to settle, but failed to notify the court in a timely way.

To minimize the potential for skewed analysis on this measure, we focused instead on cases in which the attorneys reported settlement AFTER discovery was completed or another form of disposition on the merits (bench trial or summary judgment). For these cases, the compliance with discovery timeframes was 48% of Tier 1 cases completing discovery within 120 days of filing (average = 173 days), 24% of Tier 2 cases within 180 days of filing (average = 251 days), and just 9% of Tier 3 cases within 210 days of filing (average = 336 days). Although it is clear that some cases are completing discovery within the requisite timeframes, most are exceeding those timeframes by a wide margin. If these reports from the attorney survey are representative of all cases, it does not bode well for expectations that Rule 26 will ultimately result in overall reduced filing-to-disposition times.

Next Steps

Two survey batches remain to be distributed before the completion of the data collection period on June 30, 2014 – one in April for cases disposed between January 1 and March 31, 2014, and one in July for cases disposed between April 1 and June 30, 2014. I will prepare a memo updating the survey results following the next batch, but for the last batch will incorporate all of the findings with the final report. In early July, I will request updated CMS data for all of the cases in the evaluation sample as well as follow-up data on the baseline sample and more detailed filing data for the decade leading up to implementation of Rule 26 that will permit us to determine whether the rule itself has affected filing rates for different types of cases.

As you know, Thomas Langhorne and I have discussed having me present the evaluation findings at the judicial education conference in September. To be able to do that, it will be important to receive all of the CMS data in a timely manner so we have adequate time to clean and format the data, integrate the attorney data, and complete our analyses. If possible, I'd like to start working with you and Kim Allard in early June on the exact data specifications so that her staff will be able to run those extractions as soon as possible after June 30. Please let me know if you have questions about any of this information.

Best wishes,

Paula Hannaford-Agor

Project Director

Committee efforts at outreach and fact gathering

- 2009-2011: 43 presentations to various sections, councils, committees, boards, inns, law firms, CLE classes, etc.
- Rules effective November 1, 2011.
- FAQs about disclosure and discovery
- New Utah Rule 26: A Blueprint for Proportionality under the Federal Rules of Civil Procedure By Philip J. Favro & The Honorable Derek P. Pullan. 2012 Mich. St. L. Rev.
- Focus group discussion conducted by Frank Carney September 2013.
- National Center for State Court's survey of attorneys.
- In addition to the analysis of case processing events and times mentioned in Paula Hannaford's letter, she will conduct a focus group with approximately 20 district court judges during the April conference.

Committee efforts at mid-course corrections

- Rule 26.2 added. Disclosure in personal injury actions.
- Rule regulating disclosure in employment cases proposed but not pursued by the proponent.
- Rule regulating disclosure in probate cases proposed and being developed by the proponent.
- Rule 26 amended. Changed the trigger date for automatic disclosures to the date of the defendant's answer, which can be established much more firmly. Provided for disclosure of rebuttal experts which was not included in the original revisions.
- Rule 4-502 added. Expedited procedures for resolving discovery disputes. The committee is working to move the substance of this rule into Rule 37.

Things to consider

- Tier 4. Conduct a case management conference and enter a case management order in select cases rather than impose the Tier 3 discovery defaults.

Tab 3

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To: Civil Procedures Committee
From: Tim Shea
Date: March 20, 2014
Re: "Completeness" (Rule 7) and "finality" (Rule 58A)

After much sifting, the subcommittee has concluded that there are two critical questions, and we are seeking the full committee's preferences, which should enable us to build the remainder of the rules.

- When is an order complete?
- When is an order a judgment?

When is an order complete?

In four cases over the last six years, the Supreme Court has established a policy favoring a clear indication of whether some further document is required from a party after a judge's decision. That is sound policy. The parties should not be required to guess about what, if anything, should come next.

Under the caselaw there were two ways to meet the test: prepare the order in one of the three ways described by Rule 7(f)(2); or expressly state in the order that nothing further is required from the parties. The problem, essentially, is when an order is prepared in some manner other than the three described in the rule, yet the order does not expressly state that nothing further is required. The order technically is not complete, but everyone proceeds as if it is. Problems develop later.

The caselaw imposes a requirement that may not be apparent from reading the rule, making the current circumstance untenable. To reduce the likelihood of surprise, Rule 7 should continue the policy of a bright-line test for a completed decision, and whatever test is adopted should be clearly stated in the rule itself.

The subcommittee believes that the rule should move away from treating the manner in which the order is prepared as a means of satisfying the test. There are too many ways in which an order can be prepared for an exhaustive list of when nothing further is required. Whether an order is prepared in one of the approved ways is sometimes difficult to determine, and reliance on that conclusion is risky.

The subcommittee offers two approaches—approximately 180 degrees apart—and requests the committee's direction before drafting a rule around either. Both would establish a bright-line test for when an order is complete. Neither would completely eliminate the risk of surprise.

- An order signed by the judge is not complete unless there is an express direction that nothing further is required.
- An order signed by the judge is complete unless there is an express direction for some further action.

The first option is an extension of the caselaw. The second reverses the presumption of that caselaw.

Benefits and risks of the first option

The rule would be an extension of the current caselaw.

If there is no express direction that nothing further is required—making the order incomplete—the order cannot be appealed. Although it has not yet been reported, an incomplete order might not be enforceable. These implications would come to light when the appeal is dismissed for lack of finality (An order cannot be final if it is not complete.) or when a defense to enforceability is raised upon application for a writ or supplemental order. The party seeking to appeal or enforce the order would have to prepare for the judge's signature an order expressly stating that nothing further is required.

Benefits and risks of the second option

The one condition that can be counted on is the judge's signature. If that signature imposes completeness by operation of law, most of the problems of the first opinion are avoided. The order can be enforced as permitted by the rules. A party may seek permission to appeal an interlocutory order, and, if the order meets the tests for a judgment, it can be appealed.

However, by avoiding one set of problems, this approach creates another that is perhaps even more significant than those under the first option. If there is no express direction that something further is required, the order is complete upon signing. If the parties do not realize the significance of that and spend the next 30 days trading draft orders, the parties will lose the right to appeal a final order and to seek permission to appeal an interlocutory order. The time for appeal being jurisdictional, there may be no way to remedy this risk.

When is an order a judgment?

A judgment is any order from which an appeal lies. Rule 54(a). Which orders can be appealed? In essence, orders that resolve all issues as to all parties. Rule 54(b):

> "In the absence of [an express direction for the entry of judgment], any order or other form of decision, however designated, that adjudicates fewer than all the claims or the rights and liabilities of fewer than all the parties shall not terminate the action as to any of the claims or parties, and the order or other form of decision is subject to revision at any time before the entry of judgment adjudicating all the claims and the rights and liabilities of all the parties."

On this point, the state rule is nearly identical to the federal rule. However, the state rule is different from the federal rule on how to enter a judgment.

URCP 58A	FRCP 58
(a) Unless the court otherwise directs and subject to Rule 54(b), the clerk shall promptly sign and file the judgment upon the verdict of a jury. If there is a special verdict or a general verdict accompanied by answers to interrogatories returned by a jury, the court shall direct the appropriate judgment, which the clerk shall promptly sign and file. (b) Except as provided in paragraphs (a) and (f) and Rule 55(b)(1), all judgments shall be signed by the judge and filed with the clerk. (c) A judgment is complete and shall be deemed entered for all purposes, except the creation of a lien on real property, when it is signed and filed as provided in paragraphs (a) or (b). The clerk shall immediately record the judgment in the register of actions and the register of judgments.	Every judgment and amended judgment [with some exceptions] must be set out in a separate document. The clerk must, without awaiting the court's direction, promptly prepare, sign, and enter the judgment when: (A) the jury returns a general verdict; (B) the court awards only costs or a sum certain; or (C) the court denies all relief. The court must promptly approve the form of the judgment, which the clerk must promptly enter, when: (A) the jury returns a special verdict or a general verdict with answers to written questions; or (B) the court grants other relief not described in this subdivision (b). Judgment is entered at the following times: (1) if a separate document is not required, when the judgment is entered in the civil docket under Rule 79(a); or (2) if a separate document is required, when the judgment is entered in the civil docket under Rule 79(a) and the earlier of these events occurs: (A) it is set out in a separate document; or (B) 150 days have run from the entry in the civil docket.

Summary of the differences

- A federal judgment must be set out in a separate document. The purpose of the separate document is to help distinguish judgments from other orders. There is no counterpart in the state rule governing judgments, but under Rule 7(f)(3) an order must be in a separate document, and a judgment is a special type of order. Rule 7(f)(1) casts confusion on this point by saying “An order includes every direction of the court … not included in a judgment.”
    - This discrepancy needs to be fixed. Should the judgment be a special type of order? Or should a judgment be different from an order. The federal rules follow the former model. The state rules have features of both. Requiring a separate document as under the

federal rules has advantages, but it appears that even the federal courts have a difficult time defining finality.

- The federal court clerk and the state court clerk sign judgments under different circumstances.
    - This difference likely does not add to the analysis. Under the state rules and traditions, the judges sign orders, and the clerks record them. Clerks can sign some documents with a judge's signature stamp, but this is exercising delegated authority. The clerk has authority to sign certain writs and orders in her own right, but the list is limited.
- Under the state rule, all judgments are entered when signed and filed. The clerk is directed to record the judgment immediately, but the rule does not assign any consequences to the recording. Under the federal rule when a judgment is entered depends on whether the judgment has to be in a separate document. If the judgment has to be in a separate document (all instances except orders on post-judgment motions), then the judgment is entered when the clerk enters it in the civil docket and either: the judgment is set out in a separate document; or 150 days have passed since the clerk made that entry. If a separate document is not required, then the judgment is entered when the clerk enters it in the civil docket.
    - The line marking entry of an order (including a judgment) in the state courts is when the judge signs the order and it is filed with the clerk. The line marking entry of an order in federal court is when the clerk enters that order in the docket, unless the order is a judgment requiring a separate document. In the latter case, the line marking entry is the combination of entry by the clerk and the approval of the separate document, or the combination of entry by the clerk and passage of 150 days from whatever document was signed and entered in the first instance.
    - The federal rule imposes completeness and finality by operation law after 150 days, regardless of errors or omissions. This is, in essence, the second option under the first question above, but the federal rule adds 150 days so that anyone caught unaware that the appeal clock is ticking has less reason to complain.

The subcommittee recommends amending Utah Rule 58A to track Federal Rule 58 as closely as possible. This will apply the separate document requirement to judgments only, helping to distinguish them from non-appealable orders. Confusion may still result from the fact that the separate document will be signed by the judge, whereas under the federal rules the separate document is either signed and entered by the clerk, or prepared and entered by the clerk after the court has approved the form of the judgment. The subcommittee will continue to look at ways to alleviate the problem of distinguishing judgments from other orders, but some confusion may be an unavoidable consequence of our state system.

Tab 4

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To: Civil Procedures Committee
From: Tim Shea
Date: March 20, 2014
Re: Requiring transcriptions by a certified court reporter

I've attached excerpts of several rules and statutes that currently govern recording depositions and transcribing that record. *State v. Menzies*, 845 P.2d 220, 225 (Utah 1992) may also be relevant.

I recommend that the committee amend Rule 30(b)(2) to require a certified court reporter when a deposition is recorded by stenographic means. It appears from the discussion that this is the universal practice, so the change should have no practical impact.

> (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, by sound-and-visual, or by stenographic means by a certified court reporter as defined by Utah Code Section 58-74-102, 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.

If the committee wants to require that a published deposition be transcribed by a certified court reporter, I recommend amending Rule 32(e) instead of Rule 30(f)(3) as was suggested in the January meeting. However, the committee should delete the last sentence of Rule 30(f)(3) regardless.

> (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).~~

The deleted sentence makes no sense in the context of a deposition. URAP 11(e) governs requests for transcripts of the trial court record, and that transcription process is not available for recordings not made on the district court or juvenile court audio recording systems.

If the committee wants to require that a published deposition be transcribed by a certified court reporter, I recommend amending Rule 32(e).

> (e) Except as otherwise directed by the court, a party offering deposition testimony pursuant to this rule may offer it in stenographic or non-stenographic form, but, if in non-

> stenographic form, the party shall also provide the court with a transcript of the portions so offered transcribed by a certified court reporter as defined by Utah Code Section 58-74-102.

Given the current Rule 32(e) and the holding in *Menzies* (see attachment), it appears that the Utah courts have not required transcripts from certified court reporters for many years. So, unlike the suggested change to Rule 30(b)(2), this amendment would be a significant change to Utah law.

If the committee wants to consider this course of action, I recommend hearing from representatives of businesses who video record depositions and then transcribe that record. If there is not sufficient support for requiring that a published deposition be transcribed by a certified court reporter, then the committee might amend Rule 30(b) and (f) as proposed without hearing from others.

Deposition and transcript laws

(1) URCP Rule 28. Persons before whom depositions may be taken.

(a) Within the United States. Within the United States or within a territory or insular possession subject to the jurisdiction of the United States, depositions shall be taken before an officer authorized to administer oaths by the laws of the United States or of the place where the examination is held, or before a person appointed by the court in which the action is pending. A person so appointed has power to administer oaths and take testimony. The term "officer" as used in Rules 30, 31, and 32 includes a person appointed by the court or designated by the parties under Rule 29.

….

(2) URCP Rule 30. Depositions upon oral questions.

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

….

(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, by sound-and-visual, or by stenographic means by a certified court reporter as defined by Utah Code Section 58-74-102, 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.

….

(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).~~

….

(3) URCP Rule 32. Use of depositions in court proceedings.

(a) Use of depositions. At the trial or upon the hearing of a motion or an interlocutory proceeding, any part or all of a deposition, so far as admissible under the rules of evidence applied as though the witness were then present and testifying, may be used against any party who was present or represented at the taking of the deposition or who had reasonable notice thereof, in accordance with any of the following provisions:

….

(d) Publication of deposition. Use of a deposition under Subsection (a) of this rule shall have the effect of publishing the deposition unless the court orders otherwise in response to objections.

(e) Except as otherwise directed by the court, a party offering deposition testimony pursuant to this rule may offer it in stenographic or nonstenographic form, but, if in nonstenographic form, the party shall also provide the court with a transcript of the portions so offered transcribed by a certified court reporter as defined by Utah Code Section 58-74-102.

(4) State v. Menzies, 845 P.2d 220, 225 (Utah 1992)

II. QUALIFICATIONS OF THE COURT REPORTER

At the trial level, Menzies argued that because Lee was not licensed in Utah, the transcript she prepared could not be used on appeal. The trial court rejected this argument, ruling that Lee's licensure status did not affect the validity of the transcript because Lee was "de facto" qualified. On appeal, Menzies claims that this ruling constitutes abuse of discretion.

Menzies' argument is based on Utah Code Ann. § 78–56–15, which provides that "no person may be appointed to the position of shorthand reporter nor act in that capacity ... unless he has received a certificate from the Division of Occupational and Professional Licensing," and on Utah Code Ann. § 76–3–206(2) and Utah Rule of Criminal Procedure 26(10), which provide for mandatory review of the "entire record" in every case in which a sentence of death is imposed. Menzies asserts that these statutes and rule 26(10) implicitly provide that only a transcript prepared by a certified reporter may be used to review a capital case. In the alternative, he argues that even if the transcript can be used, the presumption that the record is correct, provided in Utah Code Ann. § 78–56–6, should not apply to a transcript that was not prepared by a certified reporter.

However, section 78–56–15, section 76–3–206(2), and rule 26(10) neither prohibit the use of transcripts prepared by an uncertified reporter nor revoke the presumption of correctness for transcripts prepared by uncertified reporters. Furthermore, although section 78–56–15 requires a Utah license for the position of court reporter, section 78–56–17 provides for unlicensed court reporters under certain conditions. The rules of statutory construction require that these sections be read together, harmonizing their provisions so that neither section negates a part of the other. Given this rule of construction, section 78–56–15 cannot be read as a total prohibition against the use of transcripts prepared by uncertified reporters. Nor can this section be read as providing that transcripts prepared by uncertified reporters are not entitled to the presumption of correctness. Therefore, Menzies' statutory argument is not compelling.

(5) Section 58-74-102. Definitions.

….

(3) "Certified court reporter" means any person who engages in the practice of court reporting who is:

(a) a shorthand reporter certified by the National Court Reporters Association; or

(b) a voice reporter certified by the National Verbatim Reporters Association.

….

(7) "Practice of court reporting" means the making of a verbatim record of any … deposition … or other sworn testimony given under oath.

(6) Section 58-74-301. Licensure required.

(1) A license is required to engage in the practice of court reporting.

(2) The division shall issue to any person who qualifies under this chapter a license to practice as a certified court reporter.

(7) Section 58-74-501. Unlawful conduct.

(1) It is unlawful for any person not licensed in accordance with this chapter to assume the title or use the abbreviation C.S.R. or C.V.R. or any other similar words, letters, figures, or abbreviation to indicate that the person using that title or abbreviation is a certified court reporter.

….

(8) Section 58-1-501. Unlawful and unprofessional conduct.

(1) "Unlawful conduct" means conduct, by any person, that is defined as unlawful under this title and includes:

(a) practicing or engaging in, representing oneself to be practicing or engaging in, or attempting to practice or engage in any occupation or profession requiring licensure under this title if the person is:

(i) not licensed to do so or not exempted from licensure under this title; or

….

MEMORANDUM

To: Tim Shea
From: Frank Carney
Date: February 26, 2014
Subject: Video/Audio Deposition Transcripts

I note that the Wright & Miller text on federal practice states:

"*Moreover, the written transcription thus prepared need not be "official" in any sense; the Committee Note acknowledges that "counsel often utilize their own personnel to prepare transcripts from audio or video tapes."*[FN25]

8A Fed. Prac. & Proc. Civ. § 2117 (3d ed.)

Fn. 25 refers us to the Committee Note to Rule 26(a)(3), 146 F.R.D. at 636:

"A party expecting to use at trial a deposition not recorded by stenographic means is required by revised Rule 32 to provide the court with a transcript of the pertinent portions of such depositions. This rule requires that copies of the transcript of a nonstenographic deposition be provided to other parties in advance of trial for verification, an obvious concern ***since counsel often utilize their own personnel to prepare transcripts from audio or video tapes****. By order or local rule, the court may require that parties designate the particular portions of stenographic depositions to be used at trial.*"

So it seems that the authors of this august text (and the federal committee) saw no requirement that an official court reporter transcribe video/audio depositions.

FWIW.

FJC

Federal Practice & Procedure
Database updated April 2013

Federal Rules Of Civil Procedure
The Late Charles Alan Wright[FNa105], Arthur R. Miller[FNa106], Mary Kay Kane[FNa107], Richard L. Marcus[FNa108], Adam N. Steinman[FNa109]

Chapter
6. Depositions And Discovery
Richard L. Marcus[FNa457]

Rule
30. Depositions By Oral Examination

Link to Monthly Supplemental Service

§ 2117 Transcript of Record

Primary Authority

Fed. R. Civ. P. 30

Forms

West's Federal Forms §§ 3329 to 3400

The means by which a deposition is recorded have been discussed earlier.[FN1] Problems have arisen in a few cases about the cost of transcription of the deposition. Typewritten transcripts can be very expensive.[FN2] In most cases, however, there has been no difficulty and it has been the general, if not the universal, practice for the party taking the deposition to pay for having it transcribed.[FN3] The 1993 amendments, however, suggested that this practice could be modified due to the advent of nonstenographically recorded depositions.

The 1970 amendments made it normally, but not invariably, true that the party taking the deposition must pay. As the rules stood prior to 1970, there were three provisions relevant to transcription. Rule 30(c) required that the testimony be transcribed unless the parties agreed otherwise. As will be seen later, it was changed in 1970, and the question after the 1993 amendments was whether they effected a further change, and if so to what regime. Rule 30(e), which was changed in 1993,[FN4] directed that the transcript be submitted to the witness when the transcription was completed.[FN5] Finally, what is now Rule 30(f)(3), which was not changed in 1970, but was slightly modified in 1993,[FN6] said:

> Upon payment of reasonable charges therefore, the officer shall furnish a copy of the deposition to any party or to the deponent.

In four reported cases prior to 1970 the party who had initiated the taking of the deposition did not wish to have it transcribed but the opponent did. The question arose whether a reasonable charge for the transcript was the cost of a copy or whether the party who wished the transcript had to bear the charge for transcribing the deposition. The difference could be quite significant. In one of the cases it was estimated that the original transcription would cost $1200 to $1400 while a copy after it had once been transcribed would cost only $250.[FN7] A similar ratio, if higher costs, could be expected today.

The four cases in point laid down four different rules. One case held that the party noticing the deposition has the option of having it transcribed and filed or not as it saw fit.[FN8] A second said that it has an obligation in all cases to pay for the transcription.[FN9] The third case regarded the matter as discretionary with the court, though in the particular case it ordered the party who noticed the deposition to have it transcribed and filed so that the opponent could get a copy.[FN10] The last of these cases, Kolosci v. Lindquist,[FN11] held that ordinarily the person initiating the deposition must pay for its transcription and filing and that it is only in extraordinary cases that the court has discretion to relieve him from this obligation. The court explained what it meant by extraordinary cases:

> Primarily the exception should be confined to cases where the discovery process has been abused by the opposing party. Rule 30(b) [now Rule 26(c)] and (d) is designed to give relief from such abuse, but the enforcement may be difficult in a given case. For example, if a deposition is being taken a long distance from the locale of the case and no federal judge is immediately available, relief from a prolonged and harassing cross–examination designed to build up the cost of the deposition may not be practical. Another situation might be where a deposition turned out to be of no value to any of the litigants but opposing counsel insists on it being transcribed and filed nevertheless, just to build up costs.[FN12]

In 1955, the Advisory Committee proposed to amend Rule 30(c) to add the following: “where transcription is requested by another party other than the one taking the deposition, the court may order the expense of transcription or a portion thereof paid by the party making the request.”[FN13] This would have made the matter entirely discretionary with the court, along the lines suggested by the third of the four cases discussed above. Like all of the amendments proposed in that year, no action was taken on it by the Supreme Court.[FN14]

The Advisory Committee proceeded in a different way in the 1970 amendments. The portions of Rules 30(e) and 30(f) dealing with the transcript were left unchanged. The language of former Rule 30(c) that the testimony shall be “transcribed unless the parties agree otherwise” was deleted and the following sentence was substituted: “If requested by one of the parties, the testimony shall be transcribed.” The Committee Note to this change assumed that the court had discretion about the cost of transcription and suggested that the fact of making a request should be relevant in deciding how to exercise that discretion.[FN15]

In view of this change in language and the supporting Note, it was clear that the rules no longer compelled the party who initiated the taking of the deposition to pay for transcription and that the court had discretion in the matter.[FN16] Under the 1970 version, it was not appropriate that a court limit its discretion as narrowly as the Kolosci case suggested. The fact, for example, that the party initiating the deposition has no funds with which to pay for transcription and does not desire a transcript would seem to be good reason to put the financial burden on the party requesting the transcript.[FN17] An apportionment of the cost would seem appropriate if prolonged cross–examination has greatly increased the expense.[FN18] But it was still expected that most depositions will be transcribed and that the party who noticed the taking of the deposition will bear the cost of

transcription.[FN19]

The 1993 amendment to Rule 30 introduced some possible confusion into this situation by deleting a sentence central to the above analysis. As part of the changes designed to accommodate provisions of Rule 30(b) fostering nonstenographic recording of depositions,[FN20] the sentence "If requested by one of the parties the testimony shall be transcribed" was deleted. But the Committee Note provided no insight into whether this change was meant to affect the handling of the question at issue; to the contrary, it only stated that "[m]inor changes" were made in Rule 30(b),[FN21] suggesting no intention to make a change of substance.

The Committee Note also pointed out that "a transcript will be required by Rule 26(a)(3)(B)[FN22] and Rule 32(c)[FN23] if the deposition is later to be offered at trial or on a dispositive motion under Rule 56."[FN24] Seemingly in service to that goal, Rule 30(b)(3)(A) provides that "[a]ny party may arrange to transcribe a deposition." As noted above, Rule 30(f)(2) has also directed since 1970 that, upon payment of a reasonable charge, the officer shall furnish a copy of the transcript to any party or to the deponent if the deposition was recorded stenographically. But there is no explicit provision addressing the question whether the party that noticed the deposition should foot the bill for the preparation of a transcript on request by another party.

At least where the method of recording selected by the party taking the deposition is nonstenographic, it seems clear that there is no duty to provide the other parties with a written transcription. Rule 30(b)(3)(B) allows any other party to choose to record the deposition by stenographic means and says that the party that exercises this option "bears the expense of the additional record or transcript unless the court orders otherwise." Nothing says that the party that decides upon this additional method is required to prepare a transcription, and there is some uncertainty about whether a reporter's transcript so prepared could be considered "the deposition" in preference to the version made by other means at the behest of the noticing party. It is relatively clear that there is no requirement that a party who records a deposition by nonstenographic means need prepare a written transcription of the entire deposition even if it is to be used at trial; Rules 26(a)(3) and 32(c) only require transcription as to the portions to be used at trial, and Rule 32(c) expresses a preference for use of a nonstenographic version at trial, if it is available. Moreover, the written transcription thus prepared need not be "official" in any sense; the Committee Note acknowledges that "counsel often utilize their own personnel to prepare transcripts from audio or video tapes."[FN25] In sum, except for Rules 26(a)(3) and 32(c) there seems to be no duty at all to prepare a typewritten transcription of a nonstenographically recorded deposition.

The remaining question, then, is whether a party that notices a deposition and uses a traditional court reporter must pay for preparation of a typewritten transcript if it would prefer not to do so. Under Rule 30(b) before the amendment, this party was obliged to do so if requested by any party. Rule 30(f)(1) says that the officer must, unless otherwise ordered by the court, seal the deposition in an envelope and submit it to the attorney who arranged for the transcription.

Particularly in view of the preference in Rule 32(c) for use at trial of nonstenographic recordings where they are available, it hardly seems that the drafters intended to command preparation of typewritten transcriptions not desired by the parties. Indeed, even if the method selected by the noticing party is stenographic recording, it would seem that a nonstenographic recording made by another party pursuant to Rule 30(b)(3)(B) would be preferred for use at trial absent some good cause to use the court reporter's transcript instead. Moreover, as amended in 1993 Rule 30(e) does not require submission of the transcript to the witness if one is prepared unless that is requested during the deposition. And since 2000, Rule 5(d)(1) has forbidden filing the deposition

transcript in court unless it is used in the action.

It would certainly have been helpful had the drafters indicated which of the four options mentioned above[FN26] they wished courts to employ. It seems most reasonable to conclude that they would gravitate toward making the preparation of a typewritten transcript entirely optional to the parties, with the party that desires one paying for it, or at least leaving the matter to the discretion of the court.

The 1970 amendment did clearly resolve one other question, and there is no reason to conclude that this was meant to be affected by the 1993 revisions. Suppose that none of the parties desires transcription but that the deponent, a nonparty, wishes to have a copy of the transcript.[FN27] Concern that the witness needs the transcript to refute impeachment at the trial[FN28] seems misplaced if no party has a transcript with which to impeach the witness. The 1970 amendment, by removing any obligation to transcribe a deposition unless a party requests it, made it clear that in this circumstance the deponent must pay and at the same time protect the witness. This eminently sensible rule could be undermined if the removal of the pertinent sentence from Rule 30(b) in 1993 mandates preparation of a transcript in all cases, or on demand of any interested person. For the reasons mentioned above, it would be more sensible to conclude that the 1993 amendment was not intended to effect any change in this regard.

A final point is that discovery itself does not exist to enable a litigant to circumvent the obligation to pay for a transcript of a deposition; a Rule 34 request for production of a copy of the transcript cannot be used as a vehicle to avoid purchasing it from the reporter pursuant to Rule 30(f)(3).[FN29]

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[FNa107] John F. Digardi Distinguished Professor of Law, Chancellor and Dean Emeritus, University of California, Hastings College of the Law.

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[FNa109] Professor of Law and Michael J. Zimmer Fellow Seton Hall Law School.

[FNa457] Horace O. Coil (’57) Chair in Litigation, University of California, Hastings College of the Law.

[FN1]

Means of recording

See § 2115.

[FN2]

Transcripts expensive

It is difficult to state with certainty the ordinary cost of a deposition transcript, in part because that depends on the length of the deposition. Based on a survey conducted in the mid–1960's, it was reported that the median payment for transcripts was $112 for plaintiffs and $100 for defendants. Glaser, Pretrial Discovery and the Adversary System, 1968, p. 169.

Ten years later, Professor Graham reported on the costs of typewritten deposition transcripts based on a telephone survey. He reported that 30 to 35 pages per hour of testimony was thought to be average, and that the cost could be expected to amount to about $100 per hour of deposition time. Graham, Nonstenographic Recording of Depositions: The Empty Promise of Federal Rule 30(h)(4), 72 Nw.L.Rev. 566, 572–573 (1977).

More recent surveys of this sort do not seem to exist, but caselaw supports the conclusion that costs have not decreased. See, e.g., Beres v. Village of Huntley, Illinois, 1994 WL 369628 (N.D. Ill. 1994) (claim of $3.25 per page reduced to $3.00 per page); First City Secs., Inc. v. Shaltiel, 1993 WL 408370 (N.D. Ill. 1993) (actual cost exceeded $3.00 per page, but court limited cost to $3.00 per page); Bryant v. Whalen, 1992 WL 198946 (N.D. Ill. 1992) ($3.00 per page an equitable rate).

[FN3]

General practice

While requirement for filing deposition is routinely dispensed with by local rules or stipulation, rules necessarily contemplate that depositions will be transcribed, absent special circumstances, court order, or stipulation with the consent of the witness whose interests may also be affected. It is general rule that party noticing and conducting deposition is proper party to bear transcription costs. Bogan v. Northwestern Mut. Life Ins. Co., 152 F.R.D. 9 (S.D. N.Y. 1993).

Green v. Williams, 90 F.R.D. 440, 441 (E.D. Tenn. 1981), **citing Wright & Miller**.

Kolosci v. Lindquist, 47 F.R.D. 319, 321 (N.D. Ind. 1969).

“Ninety–five per cent of the lawyers in our interviews reported they had stenographic transcripts made of every deposition they conducted. Eighty–seven per cent charged the full costs to their own side instead of working out a sharing with their adversaries.” Glaser, Pretrial Discovery and the Adversary System, 1968, p. 169.

See also

Statutory provision pertaining to filing of a motion to proceed in forma pauperis does not extend to cost of taking and transcribing a deposition. Sturdevant v. Deer, 69 F.R.D. 17 (E.D. Wis. 1975).

[FN4]

1993 amendment

See § 2118.

[FN5]

1970 version

After the 1970 amendments, Rule 30(e) states: "When the testimony is fully transcribed the deposition shall be submitted to the witness for examination and shall be read to or by him, unless such examination and reading are waived by the witness and by the parties."

[FN6]

Slight modification

The 1993 amendments added the words "transcript or other recording of the" before "deposition to any party."

[FN7]

Difference in cost

Burke v. Central–Illinois Secs. Corp., 9 F.R.D. 426, 427 (D. Del. 1949).

[FN8]

Has option

Odum v. Willard Stores, Inc., 1 F.R.D. 680 (D. D.C. 1941).

[FN9]

Obligation in all cases

Burke v. Central–Illinois Secs. Corp., 9 F.R.D. 426 (D. Del. 1949).

Accord:

This principle was applied also in Saper v. Long, 17 F.R.D. 491 (S.D. N.Y. 1955). In that case plaintiff, who had initiated the deposition, wanted a transcript but he argued unsuccessfully that defendant should bear part of the cost of transcription since plaintiff had examined the witness for only half a day while defendant had cross–examined for a day and a half.

But see

"As a matter of policy this result seems undesirable, since it tends to increase the cost of taking depositions and also gives the nonexamining party an opportunity to exert financial pressure on his adversary and thereby to inhibit his legitimate use of discovery." Developments in the Law—Discovery, 74 Harv.L.Rev. 940, 973 (1961).

[FN10]

Discretionary with court

Dall v. Pearson, 34 F.R.D. 511 (D. D.C. 1963).

[FN11]

Kolosci case

47 F.R.D. 319 (N.D. Ind. 1969).

[FN12]

Extraordinary cases

47 F.R.D. at 321 (per Beamer, J.).

[FN13]

1955 proposal

1955 Report of the Advisory Committee, p. 35. See Developments in the Law—Discovery, 74 Harv.L.Rev. 940, 974 (1961).

[FN14]

No action taken

See § 1006.

[FN15]

Request relevant

The Committee Note to the 1970 amendment of Rule 30(c) said in part: "The present rule provides that transcription shall be carried out unless all parties waive it. In view of the many depositions taken from which nothing useful is discovered, the revised language provides that transcription is to be performed if any party requests it. The fact of the request is relevant to the exercise of the court's discretion in determining who shall pay for transcription." 48 F.R.D. at 515.

[FN16]

Court has discretion

Once party instigating deposition has made satisfactory showing of extenuating circumstances which would relieve that party from duty of paying for transcription of deposition, the court may then exercise its discretion to order some other party to pay for transcription or to allocate costs among the various parties. Caldwell v. Wheeler, 89 F.R.D. 145, 147 (D. Utah 1981), **citing Wright & Miller.**

[FN17]

No funds

Williams v. St. Joseph Hosp., 629 F.2d 448, 455 (7th Cir. 1980) (dissent), **citing Wright & Miller**.

This was the situation in Odum v. Willard Stores, Inc., 1 F.R.D. 680 (D. D.C. 1941), in which the court required the party requesting the transcript to pay for transcription.

[FN18]

Prolonged cross–examination

Compare Saper v. Long, 17 F.R.D. 491 (S.D. N.Y. 1955), in which the court held it was powerless under the former rule to apportion the cost in this situation.

[FN19]

Initiating party bears cost

The amended rule could well be read as suggesting that ordinarily the party who requests transcription shall pay for it, but it does not say so, and it is unlikely that an ambiguous change in the rule will change the almost universal practice of lawyers. See note 3 above.

[FN20]

Fostering nonstenographic recording

The Committee Note indicated that "minor changes" to Rule 30(c) were made "to reflect those made in subdivision (b)." 146 F.R.D. at 664.

[FN21]

Minor changes

146 F.R.D. at 664.

[FN22]

Rule 26(a)(3)(B)

See § 2054. This is now Rule 26(a)(3)(A)(ii).

[FN23]

Rule 32(c)

See § 2152.1.

[FN24]

Advisory Committee Notes

146 F.R.D. at 663.

Defendant's decision not to attach all deposition exhibits to the deposition transcript but only to submit

the relevant portion in order to make the summary judgment record less voluminous complied with a local rule and was acceptable. Zhu v. Countrywide Realty, Co., Inc., 165 F. Supp. 2d 1181 (D. Kan. 2001).

[FN25]

Counsel utilize own personnel

Committee Note to Rule 26(a)(3), 146 F.R.D. at 636.

[FN26]

Four options

See text accompanying notes 8–12 above.

[FN27]

Deponent desires copy

Commentators on the Maine Rules of Civil Practice have put the issue well: "Despite the fact that the deponent has an obvious interest in the content of his own sworn testimony, it does not seem fair that he should be able to insist upon a transcription which no one else wants and be required to pay only the cost of a copy. Rule 30(f)(2) ought to be construed as allowing the deponent a copy upon payment of reasonable charges only if the original has been transcribed. If it has not, a 'reasonable charge' for the deponent to pay for this copy would include the cost of the original transcription." 1 Field, McKusick & Wroth, Maine Civil Practice, 2d ed. 1970, p. 492.

[FN28]

Concern about impeachment

See the dictum in Burke v. Central-Illinois Secs. Corp., 9 F.R.D. 426, 428–429 (D. Del. 1949).

[FN29]

Discovery not available to circumvent

Plaintiff was not entitled to compel defendant to produce copies of the transcripts of depositions by using Rule 34. Neither could plaintiff require defendant to file the depositions with the court in circumstances not justifying their filing under Rule 5(d). Schroer v. U.S., 250 F.R.D. 531 (D. Colo. 2008).

See also

Defendant was not required to provide plaintiff with a copy of his deposition free of charge. Rule 30 requires that a party be given a copy of a deposition upon payment of a reasonable fee, not free of charge. Brant v. Principal Life and Disability Ins. Co., 195 F. Supp. 2d 1100 (N.D. Iowa 2002), aff'd, 50 Fed. Appx. 330 (8th Cir. 2002).

FPP § 2117

END OF DOCUMENT

disclosure when such persons are testifying or being deposed.

***635** Revised subdivision (b)(4)(A) authorizes the deposition of expert witnesses. Since depositions of experts required to prepare a written report may be taken only after the report has been served, the length of the deposition of such experts should be reduced, and in many cases the report may eliminate the need for a deposition. Revised subdivision (e)(1) requires disclosure of any material changes made in the opinions of an expert from whom a report is required, whether the changes are in the written report or in testimony given at a deposition.

For convenience, this rule and revised Rule 30 continue to use the term "expert" to refer to those persons who will testify under Rule 702 of the Federal Rules of Evidence with respect to scientific, technical, and other specialized matters. The requirement of a written report in paragraph (2)(B), however, applies only to those experts who are retained or specially employed to provide such testimony in the case or whose duties as an employee of a party regularly involve the giving of such testimony. A treating physician, for example, can be deposed or called to testify at trial without any requirement for a written report. By local rule, order, or written stipulation, the requirement of a written report may be waived for particular experts or imposed upon additional persons who will provide opinions under Rule 702.

Paragraph (3). This paragraph imposes an additional duty to disclose, without any request, information customarily needed in final preparation for trial. These disclosures are to be made in accordance with schedules adopted by the court under Rule 16(b) or by special order. If no such schedule is directed by the court, the disclosures are to be made at least 30 days before commencement of the trial. By its terms, rule 26(a)(3) does not require disclosure of evidence to be used solely for impeachment purposes; however, disclosure of such evidence—as well as other items relating to conduct of trial—may be required by local rule or a pretrial order.

Subparagraph (A) requires the parties to designate the persons whose testimony they may present as substantive evidence at trial, whether in person or by deposition. Those who will probably be called as witnesses should be listed separately from those who ***636** are not likely to be called but who are being listed in order to preserve the right to do so if needed because of developments during trial. Revised Rule 37(c)(1) provides that only persons so listed may be used at trial to present substantive evidence. This restriction does not apply unless the omission was "without substantial justification" and hence would not bar an unlisted witness if the need for such testimony is based upon developments during trial that could not reasonably have been anticipated—e.g., a change of testimony.

Listing a witness does not obligate the party to secure the attendance of the person at trial, but should preclude the party from objecting if the person is called to testify by another party who did not list the person as a witness.

Subparagraph (B) requires the party to indicate which of these potential witnesses will be presented by deposition at trial. A party expecting to use at trial a deposition not recorded by stenographic means is required by revised Rule 32 to provide the court with a transcript of the pertinent portions of such depositions. This rule requires that copies of the transcript of a nonstenographic deposition be provided to other parties in advance of trial for verification, an obvious concern since counsel often utilize their own personnel to prepare transcripts from audio or video tapes. By order or local rule, the court may require that parties designate the particular portions of stenographic depositions to be used at trial.

Subparagraph (C) requires disclosure of exhibits, including summaries (whether to be offered in lieu of other documentary evidence or to be used as an aid in understanding such evidence), that may be offered as substantive evidence. The rule requires a separate listing of each such exhibit, though it should permit voluminous items of a similar or standardized character to be described by meaningful categories. For example, unless the court has otherwise directed, a series of vouchers might be shown collectively as a single exhibit

2012 WL 5473134
Only the Westlaw citation is currently available.
United States District Court,
D. Utah,
Central Division.

Blake SLAUGHTER, an individual and James Starr, an individual, Plaintiffs,
v.
The BOEING COMPANY, a Delaware Corporation, Defendant.

No. 2:11–cv–537–DN–BCW. | Nov. 9, 2012.

Attorneys and Law Firms

April L. Hollingsworth, Hollingsworth Law Office LLC, Salt Lake City, UT, Hubert A. Grissom, Olympic Law Group PLLP, Tampa, FL, for Plaintiffs.

Mary Anne Q. Wood, Aaron M. Pacini, Wood Balmforth LLC, Salt Lake City, UT, for Defendant.

Opinion

MEMORANDUM DECISION AND ORDER GRANTING IN PART AND DENYING IN PART PLAINTIFFS' MOTION TO OVERRULE DEFENDANT'S OBJECTIONS TO PLAINTIFFS' TAKING AND TRANSCRIPTION OF DEPOSITIONS OF TRACY GERTINO AND JEREMY FOX

BROOKE C. WELLS, United States Magistrate Judge.

***1** This matter was referred to Magistrate Judge Brooke C. Wells by District Judge David Nuffer pursuant to 28 U.S.C. § 636(b)(1)(A).[1] Before the Court is Plaintiffs' Motion to Strike Objections or Overrule Defendant's Objections to Plaintiffs' Taking and Transcription of Depositions of Tracy Gertino and Jeremy Fox.[2] The Court has carefully reviewed the objection, motion and memoranda submitted by the parties. Pursuant to civil rule 7–1(f) of the United States District Court for the District of Utah Rules of Practice, the court elects to determine the motion on the basis of written memoranda and finds that oral argument would not be helpful or necessary.[3]

1 Docket No. 32.

2 Docket No. 31.

3 *See* DUCivR 7–1(f).

BACKGROUND

At issue are the depositions of two of Defendant's employees, Tracy Gertino and Jeremy Fox. The deposition notices for these two individuals stated, in pertinent part:

> PLEASE TAKE NOTICE that Plaintiffs ... will take the deposition of TRACY GERTINO [and JEREMY FOX] before a certified court reporter, notary public or some other official authorized by law to administer oaths ... [.] The oral examination will be videotaped ... [.] The videotaped deposition is taken for use at trial and all other purposes permitted by the Federal Rules of Civil Procedure.[4]

4 Exh. A., docket no. 30.

Plaintiffs employed Lee Richan of AVLawDepot, LLC to administer, videotape, transcribe and certify the depositions. Mr. Richan is notary, licensed by the State of Utah. Defendant objects to the notice and the method of taking the depositions because the notice did not clarify exactly how the deposition was to be taken. Defendant further objects to the deposition because Defendant alleges that the Mr. Richan is not certified to prepare transcriptions in state or federal courts. Defendant requests that the depositions be stricken and not be available for use in the proceedings.

Conversely, Plaintiffs contend that the use of videotape and notaries in Utah are proper methods for recording and transcribing depositions under the Federal Rules

of Civil Procedure. Plaintiffs also point to the use of video recording being allowed in both Utah state courts and administrative procedures. Further, Plaintiffs are requesting attorney's fees and costs in having to file the motion to overrule Defendant's objections.

ANALYSIS

I. *Deposition Notices*

Rule 30 of the Federal Rules of Civil Procedure states, in relevant part, that "[t]he party who notices the deposition must state in the notice the method for recording the testimony. Unless the court orders otherwise, testimony may be recorded by audio, audiovisual, or stenographic means [and] any party may arrange to transcribe a deposition." [5] Rule 30 further states that "[w]ith prior notice to the deponent and other parties, any party may designate another method for recording the testimony in addition to that specified in the original notice." [6] Plaintiffs have met the requirements of these provisions. In the notice of depositions, Plaintiffs indicated that the depositions would be taken "... before a certified court reporter, notary public or some other official authorized by law to administer oaths ... [.] The oral examination will be videotaped ..." The depositions were taken as noticed in the deposition notices sent to the Defendant. Further, the rules regarding notice contemplate that if counsel for the Defendant had objections to the method of recording or were concerned that they would not be recorded to its satisfaction, Defendant could have arranged for another method of recording or transcription. Here, counsel for the Defendant did not arrange for another means of recording or transcription and the deposition notices were proper.

5 Fed.R.Civ.P. 30(b)(3)(A).

6 Fed.R.Civ.P. 30(b)(3)(B).

II. *The Use of Videotape and a Notary Publics during Depositions.*

***2** Next, Defendant argues that Mr. Richan, a notary, who videotaped and later transcribed and certified the deposition transcript is not qualified to prepare a transcript of the deposition and therefore such transcripts should be striken and not allowed for use in these proceedings.

First, under the Federal Rules of Civil Procedure, videotaped depositions are al lowed. [7] Rule 28 provides that a deposition may be taken before "an officer authorized to administer oaths either by federal law or by the law in the place of examination." [8]

7 *See* Fed.R.Civ.P. 30(b)(3)

8 Fed.R.Civ.P. 28; *see generally*, *Meacham v. Church*, No. 2:08–cv–535, 2010 WL 1576711, at *4 (D.Utah 2010)(concluding [t]he plain language of [Rule 30] is clear: absent a waiver, "a deposition must be conducted before an officer appointed or designated under Rule 28.")

Here, as stated in the notice, the depositions at issue took place in Salt Lake City, Utah. In Utah, notaries are statutorily authorized to administer oaths. [9] Although there is statutory support for notaries taking depositions, Utah case law with regard to this subject is virtually silent. However, in dicta to *Wooley v.. Wight*, the Utah Supreme Court applying Utah law stated that "[a] deposition may be taken before an officer authorized to administer oaths. A notary public is such an officer." [10]

9 Utah Code Ann. § 46–1–6(4)(providing that "the following notarial acts may be performed by a notary within the state: (1) acknowledgements; (2) copy certifications; (3) jurats; and (4) oaths or affirmations.")

10 *Wooley v. Wight*, 238 P. 1114, 1116 (Utah, 1925), *overruled on other grounds by Olson v. District of Salt Lake County*, 71 P.2d 529, 533 (Utah, 1937).

Moreover, it appears that neither the 10th Circuit or courts within this District have ruled on this specific issue regarding the nonstenographic video recording of a deposition which is administered and later certified by a notary. However, in looking to other states, it appears that at least both Colorado and Texas statutorily allows notaries to take depositions. [11] Further, an opinion issued by the Attorney General of Texas has explicitly found that "notaries public have authority to take written depositions in non-stenographic form." [12]

11 *See* COLO.REV.STAT. ANN. § 12–55–110(1)(b),(d)("[e]very notary public is empowered to: (b) administer oaths & affirmations; (d) take depositions, affidavits, verifications, and other sown testimony or statements[.]"); TEX. GOV'T CODE ANN. § 406.016(a)(4)-(5) ("a notary public has the same authority as the county clerk to (4) take depositions; (5) certify copies of documents not recordable in the public records ...").

12 Op. Tex. Atty. Gen. JM–110 (1983)

In addition, the Federal Rules of Civil Procedure provide additional safeguards for depositions that are taken non-stenographically. Under Rule 30(b)(5)(B), "[i]f the deposition is recorded non-stenographically, the officer must repeat the items in Rule 30(b)(5)(A)(i)-(iii) [the officer's name and place of business; the date, time and place of the deposition; and the deponent's name]. Further, Rule 30(5)(B) requires that "[t]he deponent's and attorney's appearance or demeanor must not be distorted through recording techniques." Here, at least from the deposition transcript excerpt provided as an exhibit to Defendant's objection, it appears that Mr. Richan did comply with the requirements of Rule 30(b)(5(A)(i)-(iii).[13] Mr. Richan provided his name, place of business, time and place of deposition and the deponent's name.[14] The videotape, provided it is of good quality (which there has been no argument that it is not) ensures the accuracy contemplated by the Federal Rules.[15] Moreover, if the Defendant was truly concerned about the accuracy of the transcript of the depositions could have hired their own certified court reporter to transcribe the depositions from the videotape as contemplated by the Federal Rules of Civil Procedure. Thus, although Utah does not explicitly spell out within a statute that notaries can take depositions as in other states, the language of the statute and the Federal Rules of Civil Procedure together allow for a notary to videotape and certify a transcript.

13 *See* Exh. D, docket no. 30.

14 *Id.*

15 *See Clark v. Schaller*, No. 06–C–242, 2006 WL 288296, at *1(E.D.Wis., 2006) (holding that an *in forma pauperis* Plaintiff who wished to have an individual authorized to administer oaths take the Defendant's deposition is not entitled to court assistance for the recording of such a deposition. In so holding, the Court stated, "[a]bsent audio(visual) recording, then, [the Plaintiff] must provide a court reporter or other competent stenographer.")

III. *Attorney's Fees & Costs*

***3** Rule 30(d)(3)(C) of the Federal Rules of Civil Procedure directs that "Rule 37(a)(5) applies to the award of expenses."[16] Generally, Rule 37 governs the awarding of sanctions for failure to cooperate in discovery and/or the award of expenses for protective orders. It provides in relevant part:

16 Fed.R.Civ.P.30(d)(3)(C).

> [i]f the motion is granted—or if the disclosure or requested discovery is provided after the motion was filed—the court must, after giving an opportunity to be heard, require the party or deponent upon whose conducted necessitated the motion, the party or attorney advising that conduct, or both to pay the movant's reasonable expenses incurred in making the motion, including attorney's fees. *But the court must not order this payment if:* (i) the movant filed the motion before attempting in good faith to obtain the disclosure or discovery without court action; (ii) the opposing part's nondisclosure, response, or objection was substantially justified; or (iii) other circumstances make an award of expenses unjust.[17]

17 Fed.R.Civ.P. 37(a)(5)(A)(emphasis added).

Upon review of the motion and memoranda, (i) the Court concludes that the present motion was filed by Plaintiffs in response to an objection that was filed by Defendant. It does not appear that the parties attempted to "meet and confer" other than during the deposition itself when counsel for Defendant objected to the form of the depositions; (ii) Defendant's response to the Plaintiff's motion was substantially justified as it appears that this issue has not been previously decided by a Court in this district and (iii) based on the court's conclusion to the second factor, an award of expenses would be unjust. Therefore, the Court denies Plaintiffs' request for attorney's fees and expenses.

CONCLUSION

For the foregoing reasons, it is HEREBY ORDERED that the Plaintiff's Motion to Strike Objections, or Overrule Defendant's Objections to Plaintiffs' Taking and Transcription of Depositions of Tracy Gertino and Jeremy Fox[18] is HEREBY GRANTED. The depositions as well as the notices were proper under both the Federal and Utah Rules of Civil Procedure. Accordingly, the oral depositions of Tracy Gertino and Jeremy Fox were appropriately conducted and as such the testimonies of both witnesses will not be stricken. However, as stated above, the Court is not inclined to award attorney's fees and costs and therefore DENIES Plaintiffs' request for attorney's fees and costs.

[18] Docket no. 31.

Appellate History (2)

Direct History (1)

1. Slaughter v. Boeing Co.
2012 WL 5473134 , D.Utah , Nov. 09, 2012

Related References (1)

2. Slaughter v. Boeing Co.
2013 WL 65462 , D.Utah , Jan. 04, 2013

Tab 5

Rule 37. ~~Discovery and disclosure motions~~ Expedited statement of discovery issues; Sanctions; Failure to admit, to attend deposition or to preserve evidence.

~~(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) 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)(2).~~

~~(b) **Motion for protective order.**~~

~~(b)(1) A party or the person from whom disclosure is required or discovery is sought may move for an order of protection. 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)(2), the party seeking the discovery has the burden of demonstrating that the information being sought is proportional.~~

(a) **Expedited statement of discovery issues.**

(a)(1) A party or the person from whom discovery is sought may request that the judge enter an order regarding any discovery issue, including:

(a)(1)(A) failure to disclose under Rule 26;

(a)(1)(B) extraordinary discovery under Rule 26;

(a)(1)(C) a subpoena under Rule 45;

(a)(1)(D) protection from discovery; or

(a)(1)(E) compelling discovery from a party who fails to make full and complete discovery.

(a)(2) **Statement of discovery issues length and content.** The statement of discovery issues must be no more than 4 pages, not including permitted attachments, and must include in the following order:

(a)(2)(A) the relief sought and the grounds for the relief sought stated succinctly and with particularity;

(a)(2)(B) a certification that the requesting party has in good faith conferred or attempted to confer with the other affected parties in an effort to resolve the dispute without court action;

(a)(2)(C) a statement regarding proportionality under Rule 26(b)(2); and

(a)(2)(D) if the statement requests extraordinary discovery, a statement certifying that the party has reviewed and approved a discovery budget.

(a)(3) **Objection length and content.** No more than 7 days after the statement is filed, any other party may file an objection to the statement of discovery issues. The objection must be no more than 4 pages, not including permitted attachments, and must address the issues raised in the statement.

(a)(4) **Attachments.** Unless other attachments are required by law, the party filing the statement must attach to the statement only a copy of the request for discovery or the response at issue. Any party objecting to the statement must attach to the objection any required attachments that were omitted by the party filing the statement.

(a)(5) **Proposed order.** Each party must file a proposed order concurrently with its statement or objection.

(a)(6) **Decision.** Upon filing of the objection or expiration of the time to do so, either party may and the party filing the statement must file a Request to Submit for Decision under Rule 7(d). The court will promptly:

(a)(6)(A) decide the issues on the pleadings and papers;

(a)(6)(B) conduct a hearing by telephone conference or other electronic communication; or

(a)(6)(C) order additional briefing and establish a briefing schedule.

~~(c)~~ (a)(7) **Orders.** The court may ~~make~~ enter orders regarding 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)(2)~~, including one or more of the following:

~~(c)(1)~~ (a)(7)(A) that the discovery not be had or that additional discovery be had;

~~(c)(2)~~ (a)(7)(B) that the discovery may be had only on specified terms and conditions, including a designation of the time or place;

~~(c)(3)~~ (a)(7)(C) that the discovery may be had only by a method of discovery other than that selected by the party seeking discovery;

~~(c)(4)~~ (a)(7)(D) that certain matters not be inquired into, or that the scope of the discovery be limited to certain matters;

~~(c)(5)~~ (a)(7)(E) that discovery be conducted with no one present except persons designated by the court;

~~(c)(6)~~ (a)(7)(F) that a deposition after being sealed be opened only by order of the court;

~~(c)(7)~~ (a)(7)(G) that a trade secret or other confidential information not be disclosed or be disclosed only in a designated way;

~~(c)(8)~~ (a)(7)(H) that the parties simultaneously ~~file~~ deliver specified documents or information enclosed in sealed envelopes to be opened as directed by the court;

~~(c)(9)~~ (a)(7)(I) 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)~~ (a)(7)(J) that the costs, expenses and attorney fees of discovery be allocated among the parties as justice requires~~.~~; or

~~(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 denied, 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~~ (a)(7)(H) the reasonable ~~expenses~~ costs and attorney fees incurred on account of the ~~motion~~ statement of discovery issues if the relief requested is granted or denied, or if a party provides discovery or withdraws a discovery request after a statement of discovery issues is filed and 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. ~~A motion to compel or for a protective order does not suspend or toll the time to complete standard discovery.~~

(a)(8) **Request for sanctions prohibited.** A statement of discovery issues or an objection may include a request for costs and attorney fees but not a request for sanctions.

(a)(9) **Statement of discovery issues does not toll discovery time.** A statement of discovery issues does not suspend or toll the time to complete standard discovery.

~~(e) **Failure to comply with order**~~(b) **Motion for sanctions**.

~~(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 impose appropriate sanctions for the failure to follow its orders, including the following~~ If a party fails to follow a court order or engages in outrageous behavior during discovery, any other party may file a motion for sanctions, including the following:

~~(e)(2)(A)~~ (b)(1) 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)~~ (b)(2) prohibit the disobedient party from supporting or opposing designated claims or defenses or from introducing designated matters into evidence;

~~(e)(2)(C)~~ (b)(3) stay further proceedings until the order is obeyed;

~~(e)(2)(D)~~ (b)(4) 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)~~ (b)(5) order the party or the attorney to pay the reasonable expenses, including attorney fees, caused by the failure;

~~(e)(2)(F)~~ (b)(6) 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)~~ (b)(7) instruct the jury regarding an adverse inference.

~~(f) **Expenses**~~ (c) **Motion for attorney fees and expenses on failure to admit.** If a party fails to admit the genuineness of ~~any~~ a document or the truth of ~~any~~ a 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~~ file a motion for an order requiring the other party to pay the reasonable attorney fees and expenses incurred in making that proof~~, including reasonable attorney fees~~. The court ~~shall make~~ must enter the order unless it finds that:

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

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

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

~~(f)(4)~~ (c)(4) that the request ~~is~~ was not proportional under Rule 26(b)(2); or

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

~~(g) **Failure**~~ **(d) Motion for sanctions for failure of party to attend ~~at own~~ deposition.** The ~~court on motion may take any action authorized by paragraph (e)(2) if~~ 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, any other party may file a motion for sanctions under paragraph (b). The failure to ~~act described in this paragraph~~ appear may not be excused on the ground that the discovery sought is objectionable unless the party failing to ~~act~~ appear has ~~applied for a protective order~~ filed a statement of discovery issues under paragraph ~~(b)~~ (a).

~~(h) **Failure to disclose.** If a party fails to disclose a witness, document or other material, or to amend a prior response to discovery as required by Rule 26(d), 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)~~ (e) **Failure to preserve evidence.** Nothing in this rule limits the inherent power of the court to take any action authorized by paragraph ~~(e)(2)~~ (b) 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

[Add to existing notes]

2014 Amendment.

Paragraph (a) adopts the expedited procedures for statements of discovery issues formerly found in Rule 4-502 of the Code of Judicial Administration. Statements of discovery issues replace discovery motions, and paragraph (a) governs unless the judge orders otherwise.

Former paragraph (a)(2), which directed a motion for a discovery order against a nonparty witness to be filed in the judicial district where the subpoena was served or deposition was to be taken, has been deleted. A statement of discovery issues related to a nonparty must be filed in the court in which the action is pending.

Former paragraph (h), which prohibited a party from using at a hearing information not disclosed as required, was deleted because the effect of non-disclosure is adequately governed by Rule 26(d) and the process for resolving disclosure issues is included in paragraph (a).

THE UTAH COURT OF APPEALS

THE TOWNHOMES AT POINTE MEADOWS OWNERS ASSOCIATION,
Plaintiff and Appellant,
v.
POINTE MEADOWS TOWNHOMES, LLC; AMERICAN HOUSING PARTNERS, INC.; AHP-LEHI, LLC; ARMANDO J. ALVAREZ; SERGIO S. ALVAREZ; AND PAULA B. ALVAREZ,
Defendants, Third-party Plaintiffs, and Appellees,
v.
CONCRETE CONCRETE, INC.; HADCO CONSTRUCTION, LLC; DYNASTY GROUP REALTY, LLC; DEXCOR, LLC; SHAUN HARDY; ACADIAN BUILDERS, INC.; WORTHINGTON CONSTRUCTION, INC.; RUSSELL J. CLARK; MOUNTAIN LANDS DEVELOPMENT, INC.; RALPH BRODERICK PLUMBING, LLC; UNLIMITED SIDING AND RAINGUTTERS, INC.; ROOF DESIGN, LLC; VAN TASSELL ROOFING, INC.; HEARTH AND HOME DISTRIBUTORS OF UTAH, LLC; UNIQUE PLASTERING AND CUSTOM EXTERIORS, INC.; AND ADVANTAGE MANAGEMENT & REAL ESTATE SERVICES, LLC,
Third-party Defendants and Appellees.

Memorandum Decision
No. 20120813-CA
Filed March 6, 2014

Fourth District Court, American Fork Department
The Honorable Christine S. Johnson
No. 080101706

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JUDGE MICHELE M. CHRISTIANSEN authored this Memorandum Decision, in which JUDGE JAMES Z. DAVIS and SENIOR JUDGE PAMELA T. GREENWOOD concurred.[1]

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1. The Honorable Pamela T. Greenwood, Senior Judge, sat by special assignment as authorized by law. *See generally* Utah Code Jud. Admin. R. 11-201(6).

CHRISTIANSEN, Judge:

¶1 The Townhomes at Pointe Meadows Owners Association (the Association) challenges the district court's denial of the Association's motion to extend discovery deadlines, exclusion of the Association's untimely disclosed experts, and ultimate grant of summary judgment against the Association on all of its claims. We affirm.

¶2 This case arises from alleged defects in the construction of the Townhomes at Pointe Meadows, a multi-unit townhome development in Lehi, Utah (the Development). The Association was established to provide for maintenance and repair of the common areas of the Development. In July 2008, the Association filed and served a complaint against Pointe Meadows Townhomes, LLC; American Housing Partners, Inc.; AHP-Lehi, LLC; Armando J. Alvarez; Sergio S. Alvarez; and Paula B. Alvarez (collectively, the Developer) as the developer and general contractor of the Development and as the initial manager of the Association. The complaint alleged the existence of various construction defects in the common areas of the Development, breaches of various warranties and covenants, and breach of the Developer's fiduciary duties in its capacity as manager of the Association by failing to adequately respond to reports of such defects.

¶3 In January 2009, the district court signed an initial case management order. That order established a November 30, 2009 deadline to complete fact discovery, amend pleadings, and add new parties. At that time, the Association provided the Developer with a preliminary report prepared by Western Architectural, a consultant the Association had hired to assess the condition of the Development's building exteriors and to identify construction defects. On September 14, 2009, the Developer filed a third-party complaint against approximately twenty subcontractors whose work was implicated by the Association's construction defect claims. In January 2010, the Association provided the third-party defendants with the preliminary report.

¶4 In July 2010, the Association, the Developer, and the third-party defendants met to discuss amending the initial case management order. All parties agreed to an amendment of the case management order, and the district court entered the stipulated amended order in October 2010. The amended case management order provided for amended pleadings to be filed by October 1, 2010, and for the Association's final expert disclosures to be completed by August 15, 2011. The amended case management order also contemplated that the parties would enter into mediation in early 2011. To facilitate mediation, the amended case management order provided that all preliminary reports exchanged for purposes of the contemplated mediation, including the preliminary report already provided by the Association, were protected as part of settlement discussions and would be inadmissible at trial under Utah Rule of Evidence 408. The Association ultimately filed its second amended complaint on January 12, 2011, alleging additional claims based on the Utah Supreme Court's 2009 decision in *Davencourt at Pilgrims Landing Homeowners Ass'n v. Davencourt at Pilgrims Landing, LC*, 2009 UT 65, 221 P.3d 234.

¶5 On July 27, 2011, the Association contacted the Developer in an attempt to extend the August 15 deadlines established in the amended case management order for disclosure of expert witnesses and production of final expert reports. While the Developer agreed to an extension of the deadlines, a proposed case management order reflecting the extension was not approved by the Developer until October 12, 2011. After the Developer had signed the proposed case management order, the proposal was forwarded to the third-party defendants, none of whom agreed to the proposed extension. On October 25, two of the third-party defendants moved for summary judgment, arguing that neither the Association nor the Developer had produced evidence of defects in their work as subcontractors.

¶6 In response to the third-party defendants' motions for summary judgment, the Association filed on October 28 a motion

to extend the discovery deadlines. On November 7, the Developer filed a motion opposing the third-party defendants' motion for summary judgment against the Developer and joining in the third-party defendants' motion for summary judgment against the Association. The Developer argued that because the Association had failed to formally disclose any expert witnesses by the August 15 deadline, the Association could not establish its claims at trial and summary judgment against the Association was appropriate.

¶7 The Association filed its opposition to the defendants' motions for summary judgment on December 6, 2011. The Association supported its memorandum with affidavits from its attorneys regarding its attempt to modify the amended case management order and an affidavit from one of Western Architectural's consultants giving his opinion as to the alleged construction defects. The consultant also filed with his affidavit an "amended preliminary report" of the alleged construction defects in the Development. The Developer moved to strike the report and the affidavit of the Association's consultant as untimely disclosed expert testimony.

¶8 The district court held a hearing on all pending motions on January 25, 2012. The court entered a ruling and order denying the Association's motion to extend discovery deadlines and striking the reports and affidavit of the Western Architectural consultant. The district court then granted summary judgment to the Developer, concluding that all of the Association's claims required expert testimony to prevail. The district court also granted summary judgment to the third-party defendants by stipulation of the Developer. The Association filed a motion to reconsider the district court's ruling, which the district court denied. The Association appeals.

¶9 The Association first challenges the district court's denial of its motion to extend the discovery deadlines established by the amended case management order. "Trial courts have broad discretion in managing the cases before them and we will not

interfere with their decisions absent an abuse of discretion." *A.K. & R. Whipple Plumbing & Heating v. Aspen Constr.*, 1999 UT App 87, ¶ 11, 977 P.2d 518. When reviewing a district court's exercise of discretion, we will reverse only if there is no reasonable basis for the district court's decision. *Langeland v. Monarch Motors, Inc.*, 952 P.2d 1058, 1061 (Utah 1998).

¶10 The Association argues that the district court abused its discretion in denying the Association's motion to extend the discovery deadlines because the Association had a reasonable basis for failing to comply with the deadlines—that the Developer's counsel had agreed to an extension of the deadlines. However, the Association's argument ignores that the Developer is not the only other party to this litigation. As the district court observed in denying the Association's motion, each of the numerous third-party defendants in this case had also signed and agreed to be bound by the amended case management order that the Association sought to modify. Yet the Association did not receive or even seek a stipulation from any of these third-party defendants to modify the amended case management order until two months after the discovery deadlines had expired. We agree with the district court that it was not reasonable for the Association to rely on the stipulation of only some of the defendants in this complex, multi-party litigation in choosing to let its obligations under the amended case management order lapse.

¶11 Moreover, the district court found that the Association had exhibited "a pattern of delay and inaction" in prosecuting this litigation. In addition to the Association's failure to timely disclose its experts, the district court observed that the Association had failed to comply with the amended case management order's deadline for filing amended pleadings, having filed its amended complaint more than three months late. The district court also noted that the Association had failed to file timely and complete responses to some of the defendants' discovery requests and had failed to timely file its opposition to the Developer's motion to strike. Our review of the record supports the district court's

observations. And while the Association argues that such delays are commonplace in civil litigation, the district court's conclusion that, in this case, these delays amounted to a pattern of "procrastination and delay" that did not justify further extension of the discovery period is not unreasonable on the record before this court.

¶12 Ultimately, the district court concluded that the "discovery period in this case has afforded the parties a fair and reasonable opportunity to prepare for trial and should therefore have an end." Given the pattern of delay identified by the district court and the Association's failure to demonstrate a reasonable justification for its failure to comply with the amended case management order, we cannot say that it was an abuse of discretion for the district court to decline to extend the discovery deadlines and to deny the Association's motion to that effect.

¶13 The Association next challenges the district court's exclusion of the Association's untimely disclosed expert witness. Disclosure of an expert witness requires the disclosing party to submit a written report that contains specific information, such as the expert's qualifications and the basis for and substance of the expert's opinion. Utah R. Civ. P. 26(a)(3)(B). "If a party fails to disclose a witness . . . as required by Rule 26(a) . . . , that party *shall not* be permitted to use the witness . . . at any hearing unless the failure to disclose is harmless or the party shows good cause for the failure to disclose." Utah R. Civ. P. 37(f) (emphasis added).[2] Thus, "Utah law mandates that a trial court exclude an expert witness

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2. Rules 26 and 37 of the Utah Rules of Civil Procedure were amended in 2011, subsequent to the filing of this case. However, these amendments are effective only as to cases filed on or after November 1, 2011, and are therefore not applicable to this case. *Hull v. Wilcock*, 2012 UT App 223, ¶ 36 n.5, 285 P.3d 815; *Liston v. Liston*, 2011 UT App 433, ¶ 14 n.3, 269 P.3d 169. Accordingly, we refer to the pre-amendment version of those rules throughout this decision.

report disclosed after expiration of the established deadline" unless the district court, in its discretion, determines that "good cause excuses tardiness" or that the failure to disclose was harmless. *See Posner v. Equity Title Ins. Agency, Inc.*, 2009 UT App 347, ¶¶ 8, 23, 222 P.3d 775. We therefore review the district court's exclusion of the Association's expert for an abuse of discretion. *Id.* ¶ 8.

¶14 The Association argues that the district court abused its discretion because it failed to "sufficiently outline the bad faith, willfulness, or persistent dilatory conduct that is required to impose sanctions upon a party." However, the Association's argument confuses the requirements for an affirmative sanction by the district court under rule 37(b)(2) with the exclusion of untimely disclosed experts by operation of law, as mandated by rule 37(f). *See id*. The Association does not dispute that it failed to file an expert witness report that complied with the requirements of rule 26(a) by the deadline established in the amended case management order. Accordingly, the proper inquiry is whether the district court abused its discretion in determining that the Association's failure to disclose was not harmless and that good cause did not excuse its failure.

¶15 The Association's argument that good cause existed for its failure to comply with the deadline is premised upon its agreement with the Developer to modify the amended case management order. However, as discussed above, *see supra* ¶ 10, the district court concluded that the Association's reliance on an agreement with only some of the many defendants was unreasonable and did not justify extension of the discovery deadlines. The district court further concluded that these circumstances did not provide good cause to excuse the Association's failure to disclose. The Association has not shown that the district court's determinations on this issue exceeded the court's discretion.

¶16 With respect to whether the failure to disclose was harmless, the Association argues that any prejudice suffered by the many defendants was merely delay, which is "insufficient to constitute

true prejudice" because the opinions expressed in the Association's final expert report would be "largely identical" to those contained in its preliminary report and "all parties had notice of the major defects" in the Development. However, the preliminary report does not provide the information required by rule 26 and was designated as preliminary and inadmissible by the amended case management order. The report is also signed by two different individuals, neither of whom was formally designated as an expert. Morever, the Association's amended report—submitted after the deadline had passed—more than doubled the length of the report from 193 to 533 pages. The substantial increase in the size of this amended, yet still preliminary, report contradicts the Association's claim that any final report would express opinions "largely identical" to those contained in the preliminary report.

¶17 "Formal disclosure of experts is not pointless. Knowing the identity of the opponent's expert witnesses allows a party to properly prepare for trial . . . ." *Brussow v. Webster*, 2011 UT App 193, ¶ 8, 258 P.3d 615. The preliminary report failed to properly identify the Association's expert in such a way as to enable the defendants to depose the expert, attempt to disqualify the expert, or retain rebuttal experts to respond. *See id.* And the preliminary report does not appear to have addressed the scope of the Association's claimed damages but instead recommended that a "project repair manual" be prepared to solicit bids for remediation of the issues identified in the report. Such a report does not "serve the purpose of an expert disclosure." *See Spafford v. Granite Credit Union*, 2011 UT App 401, ¶ 19, 266 P.3d 866. The district court noted that at least two of the third-party defendants had retained and disclosed their own experts and would likely be compelled to revise their reports to respond to the Association's amended or final report. And a substantial amount of discovery would need to be revisited or performed in the first instance in response to the Association's disclosure, well after the deadline for completing these steps had passed. Under these circumstances, the district court could reasonably conclude that the Association's failure to timely disclose its expert was not harmless. The district court

therefore did not abuse its discretion in declining to relieve the Association from the automatic exclusion of its expert under rule 37(f).

¶18 Finally, the Association contends that the district court erroneously concluded that all of the Association's causes of action "hinge upon" the alleged construction defects and therefore require expert testimony. The Association thus claims that the district court erred in granting summary judgment to the defendants on all of the Association's claims even if its expert was properly excluded. "Summary judgment is appropriate only where there are no genuine issues of material fact and the moving party is entitled to judgment as a matter of law." *Basic Research, LLC v. Admiral Ins. Co.*, 2013 UT 6, ¶ 5, 297 P.3d 578. "A plaintiff's failure to present evidence that, if believed by the trier of fact, would establish any one of the [elements] of the prima facie case justifies a grant of summary judgment to the defendant." *Niemela v. Imperial Mfg., Inc.*, 2011 UT App 333, ¶ 7, 263 P.3d 1191 (alteration in original) (citation and internal quotation marks omitted).

¶19 The Association argues that many of its claims do not require expert witness testimony to prevail, because the elements of their claim are not "beyond the common scope and experience of lay persons." *See Spafford*, 2011 UT App 401, ¶ 30. By way of example, the Association claims that its allegations of negligence against the Developer in its role as the initial manager of the owners association do not require expert testimony. The Association asserts that no technical knowledge is necessary to decide if the Developer failed to respond reasonably to reports of defective construction or failed to set aside sufficient reserve funds to provide for repair of the defects.[3] A homeowners association

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3. The Association states that the same reasoning applies to eight additional claims that it asserts are not directly related to construction defects. However, the Association does not provide any argument to support such an assertion and has thus failed to (continued...)

may bring a negligence action against a developer on the basis of, among other things, the developer's failure to use reasonable care in managing and maintaining the common property or its failure to establish a sound fiscal basis for the homeowners association by imposing and collecting assessments and establishing reserves for the maintenance of the common property. *See Davencourt at Pilgrims Landing Homeowners Ass'n v. Davencourt at Pilgrims Landing, LC*, 2009 UT 65, ¶ 39, 221 P.3d 234. The Association argues that because such duties require the developer to exercise only "basic financial planning" of the sort that is "delegated to every homeowner in America," no expert testimony is necessary to establish the standard of care a developer must observe in discharging these duties.

¶20 We are not convinced, however, that the Association's negligence claim does not "hinge upon" its construction defect claims such that expert testimony was not necessary. "Ordinarily, the standard of care in a trade or profession must be determined by testimony of witnesses in the same trade or profession." *Wessel v. Erickson Landscaping Co.*, 711 P.2d 250, 253 (Utah 1985). And expert testimony is generally necessary in cases that involve trades or professions that require specialized knowledge, "such as medicine, architecture, and engineering." *Ortiz v. Geneva Rock Prods., Inc.*, 939 P.2d 1213, 1217 n.2 (Utah Ct. App. 1997). The district court therefore concluded that the Association could not establish its construction defect claims without expert testimony. The Association has not demonstrated that this determination was

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3. (...continued)
adequately brief its argument on these remaining claims. "It is well established that Utah appellate courts will not consider claims that are inadequately briefed." *State v. Garner*, 2002 UT App 234, ¶ 8, 52 P.3d 467. As a result, the Association has not met its burden of demonstrating error in the district court's determination that expert witness testimony was required to establish these claims against the Developer.

erroneous.[4] Thus, to the extent that the Association's negligence claim requires the Association to prove the existence or extent of construction defects, that claim must fail because the Association did not timely disclose an expert to prove its construction defect claims.

¶21 The Association's negligence claim relies, in part, on its allegation that the Developer failed to reasonably identify and repair the construction defects once they arose. This allegation would require the Association to prove the existence and nature of the alleged defects in order to establish that the Developer was negligent in its maintenance of the common areas in light of such defects. Without expert testimony on the nature and extent of the alleged construction defects, it is difficult to see how a jury could evaluate whether the Developer's response to such defects was reasonable or determine the proper measure of damages resulting from the Developer's alleged failure to properly respond to the defect—as distinct from those damages resulting from the initial defect.

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4. The Association briefly argues that no expert testimony was necessary to establish its construction defect claims because direct evidence of the defects would have been available through the testimony of homeowners or subcontractors if the case proceeded to trial. However, a party cannot oppose summary judgment on the basis of testimony that may be elicited at trial but must put forward admissible evidence and "set forth specific facts showing that there is a genuine issue for trial." *See* Utah R. Civ. P. 56(e). The Association did not present the district court with any such testimony through affidavits or deposition testimony in support of its opposition to summary judgment, and that evidence is accordingly not in the record before this court. Absent a showing that the Association presented to the district court evidence sufficient to survive summary judgment without expert testimony, we are not convinced that the district court erred in concluding that expert testimony was necessary in this case.

¶22 The Association also asserts that the Developer was negligent in failing to set aside adequate reserve funds to address the alleged defects. Again, we do not see how a jury could assess the reasonableness of the Developer's financial planning in the face of any alleged construction defects, or the damages resulting from any negligence, without the Association first establishing the existence and nature of these defects. We therefore agree with the district court that the Association's negligence claim required proof of construction defects to survive summary judgment.

¶23 Because the Association has failed to demonstrate that any of its claims could prevail absent admissible expert witness testimony, the Developer was entitled to judgment as a matter of law. *See Niemela v. Imperial Mfg., Inc.*, 2011 UT App 333, ¶ 7, 263 P.3d 1191. Accordingly, we affirm the district court's grant of summary judgment to the Developer.

¶24 The district court did not abuse its discretion in denying the Association's motion to extend the discovery deadlines or in declining to relieve the Association from the mandatory exclusion of its expert under rule 37(f). The Association has failed to demonstrate that the district court erred in concluding that expert testimony was required to establish its claims against the Developer and has therefore not shown that the district court's grant of summary judgment was erroneous.

¶25 Affirmed.

Tab 6

Rule 56. Summary judgment.

(a) **Motion for summary judgment or partial summary judgment.** A party may move for summary judgment, identifying each claim or defense—or the part of each claim or defense—on which summary judgment is sought. The court ~~shall~~ must grant summary judgment if the moving party shows that there is no genuine dispute as to any material fact and the moving party is entitled to judgment as a matter of law. The court should state on the record the reasons for granting or denying the motion. The motion and memoranda must follow Rule 7 as supplemented below.

(a)(1) Instead of a statement of the facts under Rule 7(c)(2), a motion for summary judgment must contain a statement of material facts claimed not to be genuinely disputed. Each fact must be separately stated in numbered paragraphs and supported by citing to materials in the record under paragraph (c)(1) of this rule.

(a)(2) Instead of a statement of the facts under Rule 7(d)(2), a memorandum opposing the motion must include a verbatim restatement of each of the moving party's facts that is disputed with an explanation of the grounds for the dispute supported by citing to materials in the record under paragraph (c)(1) of this rule. The memorandum may contain a separate statement of additional facts in dispute, which must be separately stated in numbered paragraphs and similarly supported.

(a)(3) The motion and the memorandum opposing the motion may contain a concise statement of facts and allegations for the limited purpose of providing background and context for the case, dispute, and motion. The statement of facts or allegations may cite supporting evidence.

(a)(4) Each fact set forth in the motion or in the memorandum opposing the motion that is not disputed is deemed admitted for the purposes of the motion.

(b) **Time to file a motion.** A party may file a motion for summary judgment at any time until 30 days after the close of all discovery.

(c) **Procedures.**

(c)(1) **Supporting factual positions**. A party asserting that a fact cannot be genuinely disputed or is genuinely disputed must support the assertion by:

(c)(1)(A) citing to particular parts of materials in the record, including depositions, documents, electronically stored information, affidavits or declarations, stipulations (including those made for purposes of the motion only), admissions, interrogatory answers, or other materials; or

(c)(1)(B) showing that the materials cited do not establish the absence or presence of a genuine dispute, or that an adverse party cannot produce admissible evidence to support the fact.

(c)(2) **Objection that a fact is not supported by admissible evidence**. A party may object that the material cited to support or dispute a fact cannot be presented in a form that would be admissible in evidence.

(c)(3) **Materials not cited**. The court need consider only the cited materials, but it may consider other materials in the record.

(c)(4) **Affidavits or declarations**. An affidavit or declaration used to support or oppose a motion must be made on personal knowledge, must set out facts that would be admissible in evidence, and must show that the affiant or declarant is competent to testify on the matters stated.

(d) **When facts are unavailable to the non-moving party.** If a non-moving party shows by affidavit or declaration that, for specified reasons, it cannot present facts essential to justify its opposition, the court may:

(d)(1) defer considering the motion or deny it;

(d)(2) allow time to obtain affidavits or declarations or to take discovery; or

(d)(3) issue any other appropriate order.

(e) **Failing to properly support or address a fact.** If a party fails to properly support an assertion of fact or fails to properly address another party's assertion of fact as required by Rule 56(c), the court may:

(e)(1) give an opportunity to properly support or address the fact;

(e)(2) consider the fact undisputed for purposes of the motion;

(e)(3) grant summary judgment if the motion and supporting materials—including the facts considered undisputed—show that the moving party is entitled to it; or

(e)(4) issue any other appropriate order.

(f) **Judgment independent of the motion.** After giving notice and a reasonable time to respond, the court may:

(f)(1) grant summary judgment for a non-moving party;

(f)(2) grant the motion on grounds not raised by a party; or

(f)(3) consider summary judgment on its own after identifying for the parties material facts that may not be genuinely in dispute.

(g) **Failing to grant all the requested relief.** If the court does not grant all the relief requested by the motion, it may enter an order stating any material fact—including an item of damages or other relief—that is not genuinely in dispute and treating the fact as established in the case.

(h) **Affidavit or declaration submitted in bad faith.** If satisfied that an affidavit or declaration under this rule is submitted in bad faith or solely for delay, the court—after notice and a reasonable time to respond—may order the submitting party to pay the other party the reasonable expenses, including attorney's fees, it incurred as a result. ~~An~~ The court may also hold an offending party or attorney ~~may also be held~~ in contempt or ~~subjected to~~ order other appropriate sanctions.

Advisor Committee Notes

The objective of the 2014 amendment is to adopt the style of Federal Rule of Civil Procedure 56 without changing the substantive Utah law. The 2014 amendment also moves to this rule the special briefing requirements of motions for summary judgment formerly found in Rule 7.

Nothing in these changes should be interpreted as changing the line of Utah cases that the party with the burden of proof on an issue must meet its initial burden to present materials in the record establishing that no genuine issue of material fact exists and that the party with the burden of proof is entitled to judgment as a matter of law. Only then must the party without the burden of proof demonstrate that there is a genuine dispute as to a material fact. Orvis v. Johnson, 2008 UT 2, Harline v. Barker, 912 P.2d 433 (Utah 1996), K & T, Inc. v. Koroulis, 888 P.2d 623, (Utah 1994)—contrary to the holding in Celotex Corp. v. Catrett, 477 U.S. 317, 106 S. Ct. 2548, 91 L. Ed. 2d 265 (1986).

Tab 7

Rule 14. Settlement offers.

(a) Unless otherwise specified, an offer made under this rule is an offer to resolve all claims in the action between the parties to the date of the offer, including costs, interest and, if attorney fees are permitted by law or contract, attorney fees.

(b) If the adjusted award is not more favorable than the offer, the offeror is not liable for costs, prejudgment interest or attorney fees incurred by the offeree after the offer, and the offeree must pay the offeror's costs incurred after the offer. The court may suspend the application of this rule to prevent manifest injustice.

(c) An offer made under this rule must:

(c)(1) be in writing;

(c)(2) expressly refer to this rule;

(c)(3) be made after the judgment and before the notice of appeal;

(c)(4) remain open for at least 10 days; and

(c)(5) be served on the offeree under Rule 5 of the Rules of Civil Procedure.

(d) Acceptance of the offer must be in writing and served on the offeror under Rule 5 of the Rules of Civil Procedure. Upon acceptance, either party may file the offer and acceptance with a proposed judgment.

(e) "Adjusted award" means the amount awarded by the judge after trial de novo and, unless excluded by the offer, the offeree's costs and interest incurred before the offer, and, if attorney fees are permitted by law or contract and not excluded by the offer, the offeree's reasonable attorney fees incurred before the offer. If the offeree's attorney fees are subject to a contingency fee agreement, the court shall determine a reasonable attorney fee for the period preceding the offer.

(f) The offeror’s costs includes the filing fee and other costs for an appeal to a trial de novo.

Tab 8

Timothy M. Shea
Appellate Court Administrator

Andrea R. Martinez
Clerk of Court

Supreme Court of Utah

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Appellate Clerks' Office
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To: Civil Procedures Committee
From: Tim Shea
Date: March 20, 2014
Re: Process for motion for order to show cause

The Board of District Court Judges has proposed a rule within the code of judicial administration, Rule 10-1-602, to govern the process for orders to show cause. The draft rule has been published for comment. As with the expedited process for discovery motions, the Board's and the Judicial Council's intent is to have this process ultimately included within the rules of civil procedure and repeal the provision from the code of judicial administration.

I have used as the baseline the rule proposed by the Board. I recommend several amendments to simplify the text. Whatever draft is approved by the committee would of course be entirely new text.

Rule 7A. Motion for order to show cause.

(a) **Motion.** ~~A party who seeks to~~ To enforce an order or a judgment ~~of a court against an opposing~~ a party may file an ex parte motion for an order to show cause following the procedures of this rule. ~~The motion must be filed with the same court and in the same case in which that order or judgment was entered. The motion shall be made only on an ex parte basis, and the procedures of Rule 7 of the Utah Rules of Civil Procedure shall not apply.~~

(b) **Affidavit.** The motion ~~for an order to show cause~~ must be accompanied by at least one ~~supporting~~ affidavit or declaration under Utah Code Section 78B-5-705. ~~Each supporting affidavit must be~~ based on personal knowledge and ~~must~~ setting forth admissible facts and not mere conclusions sufficient to show cause to believe a party has violated an order or judgment. At least one ~~supporting~~ affidavit or declaration must state the title and date of entry of the order or judgment which the moving party seeks to enforce.

(c) **Order to show cause.** The motion ~~for an order to show cause~~ must be accompanied by ~~the~~ a proposed order to show cause, which ~~shall~~ must:

(c)(1) state the title and date of entry of the order or judgment which the moving party seeks to enforce;

(c)(2) ~~specify~~ state the relief sought by the moving party;

(c)(3) state whether the moving party has requested that the ~~opposing~~ non-moving party be held in contempt and, if ~~such a request has been made~~ so, ~~recite~~ state that the ~~sanctions~~ penalties for contempt may include, but are not limited to, a fine of up to $1000 ~~or less~~ and ~~a~~ confinement in jail ~~commitment of~~ for up to 30 days ~~or less~~.

(c)(4) order the ~~opposing~~ non-moving party to ~~make a first appearance in court~~ appear personally or through counsel at a ~~specific~~ stated date, time and place ~~and, then and there,~~ to explain ~~why or~~ whether the ~~opposing~~ non-moving party acted or failed to act in compliance with ~~such~~ the order or judgment;

~~(c)(4) order the opposing party to appear personally or through legal counsel at the first appearance;~~

(c)(5) state that no written response ~~to the motion and order to show cause~~ is required;

(c)(6) state that the ~~first appearance shall not be the~~ hearing is not an evidentiary hearing, but ~~shall be~~ is for the purpose of determining:

(c)(6)(A) whether the ~~opposing~~ non-moving party ~~contests~~ denies the ~~allegations~~ claims made by the moving party;

(c)(6)(B) whether an evidentiary hearing is ~~necessary~~ needed;

(c)(6)(C) the ~~specific~~ issues ~~to be resolved through an evidentiary hearing~~ on which evidence may be submitted; and

(c)(6)(D) the estimated length of ~~any such~~ an evidentiary hearing.

(d) **Service.** If the court ~~grants the motion and issues~~ enters an order to show cause, the moving party must have the order, the motion and all ~~supporting~~ affidavits and declarations served upon the ~~opposing~~ non-moving party~~. Service shall be made~~ in the manner ~~prescribed~~ for service of a summons and complaint at least 7 days before the hearing.~~, unless the moving party shows~~ For good cause ~~for~~ the court may order that service ~~to~~ be made ~~by mailing or delivery to the opposing party's~~ on the non-moving party's counsel of record ~~and the court so orders~~. The ~~date of the opposing party's first appearance on the order to show cause may not be sooner than five days after service thereof, unless~~ court may order less than 7 days notice of the hearing if:

(d)(1) the motion requests an earlier ~~first appearance~~ date; and

(d)(2) it clearly appears from specific facts shown by the declarations or affidavits that immediate and irreparable ~~injury, loss, or damage~~ harm will result to the moving party if the ~~first appearance~~ hearing is not held sooner ~~than five days after service of the order to show cause; and~~

~~(d)(3) the court agrees to an earlier first appearance date~~.

(e) **First ~~appearance~~ hearing.** ~~The opposing party's first appearance on the order to show cause, at the date, time and place stated therein, shall not be the evidentiary hearing.~~ At the ~~first appearance~~ hearing, the court ~~shall~~ will determine:

(e)(1) whether the ~~opposing~~ non-moving party ~~contests~~ denies the ~~allegations~~ claims made by the moving party;

(e)(2) whether an evidentiary hearing is ~~necessary~~ needed;

(e)(3) the ~~specific~~ issues ~~to be resolved through an evidentiary hearing~~ on which evidence may be submitted; and

(e)(4) the estimated length of ~~any such~~ an evidentiary hearing.

The court may enter an order regarding any claim that the non-moving party does not deny. The court may order the parties to file memoranda on legal issues before the evidentiary hearing. Memoranda must follow the requirements of Rule 7. ~~If the opposing party does not contest the allegations made by the moving party, the court may proceed at the first appearance as the circumstances require.~~

(f) **Evidentiary hearing.** ~~At the evidentiary hearing on a contested order to show cause, the moving party shall~~ The moving party bears the burden of proof on all ~~allegations which are~~ claims made in ~~support of~~ the ~~order~~ motion.

(g) **Limitations.** An motion for an order to show cause may not be ~~requested in order to obtain an original order or judgment; for example, an order to show cause may not be~~ used to obtain a temporary restraining order or ~~to establish~~ a temporary order~~s~~ in a divorce case or any other original order or judgment. ~~This rule shall apply only in civil actions, and shall not be applied to orders to show cause in criminal actions.~~ This rule does not apply to an order to show cause issued by ~~a~~ the court on its own initiative. This rule does not apply to a motion for an order to show cause from a court commissioner.