Agenda

Advisory Committee on Rules of Civil Procedure

September 24, 2014
4:00 to 6:00 p.m.

Scott M. Matheson Courthouse
450 South State Street
Judicial Council Room
Administrative Office of the Courts, Suite N31

Welcome and introductions.		Jonathan Hafen
Rule 101. Motion practice before court commissioners.	Tab 1	Commissioner Michelle Blomquist
Case management pilot program.	Tab 2	Judge Derek Pullan
Rule 7. Pleadings allowed; motions, memoranda, hearings, orders. Rule 54. Judgments; costs. Rule 58A. Entry of judgment; abstract of judgment. Form 22. Judgment	Tab 3	Tim Shea
Consideration of comments to Rules 5, 26, 30, 37 and 45.	Tab 4	Tim Shea
Rule 63. Disability or disqualification of a judge.	Tab 5	Tim Shea
Rule 43. Evidence.	Tab 6	Tim Shea
Small Claims Rule 14. Settlement offers.	Tab 7	Tim Shea

Committee Webpage: http://www.utcourts.gov/committees/civproc/

Meeting Schedule:

September 24, 2014
October 22, 2014
November 19, 2014
January 28, 2015
February 25, 2015
March 25, 2015
April 22, 2015
May 27, 2015
September 23, 2015
October 28, 2015
November 18, 2015

Tab 1

Rule 101. Motion practice before court commissioners.

(a) **Written motion required.** An application to a court commissioner for an order shall be by motion which, unless made during a hearing, shall be made in accordance with this rule. A motion shall be in writing and state succinctly and with particularity the relief sought and the grounds for the relief sought. Any evidence necessary to support the moving party's position shall be presented by way of one or more affidavits or declarations. The moving party may also file a supporting memorandum.

(b) **Time to file and serve.** The moving party shall file the motion and ~~attachments~~ any supporting papers with the clerk of the court and obtain a hearing date and time. The moving party shall serve the responding party with the motion and ~~attachments and~~ supporting papers, together with notice of the hearing at least ~~14~~ 28 calendar days before the hearing. ~~A party may file and serve with the motion a memorandum supporting the motion.~~ If service is more than 90 days after the date of entry of the most recent appealable order, service may not be made through counsel.

(c) **Response; ~~reply~~.** The ~~responding~~ party opposing a motion may file a response, consisting of any responsive memorandum, affidavit(s) or declaration(s). The response shall ~~file~~ be filed and ~~serve~~ served on the moving party ~~with a response and attachments~~ at least ~~7~~ 14 calendar days before the hearing. ~~A party may file and serve with the response a memorandum opposing the motion. The moving party may file and serve the responding party with a reply and attachments at least 3 business days before the hearing. The reply is limited to responding to matters raised in the response.~~

(d) **Reply.** The moving party may file a reply, consisting of any reply memorandum, affidavit(s) or declaration(s). The reply shall be filed and served on the opposing party at least 7 calendar days before the hearing. The contents of the reply shall be limited to facts and argument responsive to matters raised in the response.

(e) **Counter motion.** Opposing a motion is not sufficient to grant relief to the responding party. An opposing party may request affirmative relief by way of a counter motion. A counter motion need not be limited to the subject matter of the original motion. All of the provisions of this rule apply to counter motions except that a counter motion shall be filed and served with the response. The response to the counter motion shall be filed and served no later than the reply. The reply to the response to the counter motion shall be filed and served at least 3 business days before the hearing. Any such reply must be served in a manner that will cause the reply to be actually received by the party opposing the counter motion (i.e. hand-delivery, fax or other electronic delivery as allowed by rule or agreed by the parties) at least 3 business days before the hearing. A separate notice of hearing on counter motions is not required.

~~(d) **Attachments; objection to failure to attach.**~~

~~(d)(1) As used in this rule "attachments" includes all records, forms, information and affidavits necessary to support the party's position. Attachments for motions~~(f) **Necessary documentation.** Motions and responses regarding temporary orders concerning alimony ~~shall include~~, child support, division of debts, possession or disposition of assets, or litigation expenses, shall be accompanied by verified financial declarations with documentary income verification ~~and a financial declaration.~~attached

as exhibits, unless such financial declarations and documentation are already in the court's file and remain current. Attachments for motions and responses regarding child support and child custody shall also include ~~income verification, a financial declaration and~~ a child support worksheet. ~~A financial declaration shall be verified.~~

~~(d)~~(g) **No other papers.** No moving or opposing papers other than those specified in this rule shall be permitted.

(h) **Exhibits; objection to failure to attach.**

(h)(1) Except as provided in paragraph (h)(3) of this rule, any documents such as tax returns, bank statements, receipts, photographs, correspondence, calendars, medical records, forms, or photographs shall be supplied to the court as exhibits to one or more affidavits (as appropriate) establishing the necessary foundational requirements. Copies of court papers such as decrees, orders, minute entries, motions, or affidavits, already in the court's case file, shall not be filed as exhibits. Court papers from cases other than that before the court, such as protective orders, prior divorce decrees, criminal orders, information or dockets, and juvenile court orders (to the extent the law does not prohibit their filing), may be submitted as exhibits.

(h)(2) If ~~attachments~~ papers or exhibits referred to in a motion or necessary to support the moving party's position are not served with the motion, the responding party may file and serve an objection to the defect with the response. If ~~attachments~~ papers or exhibits referred to in the response or necessary to support the ~~responding~~ opposing party's position are not served with the response, the moving party may file and serve an objection to the defect with the reply. The defect shall be cured within 2 business days after notice of the defect or at least ~~2~~ 3 business days before the hearing, whichever is earlier.

~~(e) **Courtesy copy.** Parties shall deliver to the court commissioner a courtesy copy of all papers filed with the clerk of the court within the time required for filing with the clerk. The courtesy copy shall state the name of the court commissioner and the date and time of the hearing.~~

~~(f)~~(h)(3) Voluminous exhibits which cannot conveniently be examined in court shall not be filed as exhibits, but the contents of such documents shall be presented in the form of a summary, chart or calculation under Rule 1006 of the Utah Rules of Evidence. Unless they have been previously supplied through discovery or otherwise and are readily identifiable, copies of any such voluminous documents shall be supplied to the other parties at the time of the filing of the summary, chart or calculation. The originals, or duplicates, of the documents shall be available at the hearing for examination by the parties and the commissioner. Collections of documents, such as bank statements, checks, receipts, medical records, photographs, e-mails, calendars and journal entries, that collectively exceed ten pages in length, shall be deemed to be overly voluminous and shall be presented in summary form. Individual documents with specific legal significance, such as tax returns, appraisals, financial statements and reports prepared by an accountant, wills, trust documents,

contracts, or settlement agreements, shall not be presumed to be overly voluminous, regardless of length, and should be submitted in their entirety.

(i) **Length.** Initial memoranda shall not exceed 10 pages of argument without leave of the court. Response and reply memoranda shall not exceed 5 pages of argument without leave of the court. The total number of pages submitted to the court shall not exceed 50 pages, including affidavits, attachments and summaries, but excluding financial declarations and income verification. The court commissioner may permit the party to file an over-length memorandum upon ex parte application and showing of good cause.

(j) **Late filings; sanctions.** If a party files or serves papers beyond the time required in ~~subsections (b) or (c),~~ this rule, the court commissioner may hold or continue the hearing, reject the papers, impose costs and attorney fees caused by the failure and by the continuance, and impose other sanctions as appropriate. Any documents filed, consistent with this Rule, but after 5:00 p.m., will be deemed to have been filed the following day.

~~(g) **Counter motion.** Opposing a motion is not sufficient to grant relief to the responding party. An application for an order may be raised by counter motion. This rule applies to counter motions except that a counter motion shall be filed and served with the response. The response to the counter motion shall be filed and served no later than the reply. The reply to the response to the counter motion shall be filed and served at least 2 business days before the hearing. A separate notice of hearing on counter motions is not required.~~

~~(h) **Limit on hearing.** The court commissioner shall not hold a hearing on a motion before the deadline for an appearance by the respondent under Rule 12.~~

~~(i)~~(k) **Limit on order to show cause.** An application to the court for an order to show cause shall be made only for enforcement of an existing order or for sanctions for violating an existing order. An application for an order to show cause must be supported by affidavit or other evidence sufficient to show cause to believe a party has violated a court order.

~~(j)~~(l) **Hearings.**

(l)(1) The court commissioner shall not hold a hearing on a motion for temporary relief before the deadline for an appearance by the respondent under Rule 12.

(l)(2) Unless the court commissioner specifically requires otherwise, when the statement of a person is set forth in an affidavit, declaration or other document accepted by the commissioner, that person need not be present at the hearing. The statements of any person not set forth in an affidavit, declaration or other acceptable document may not be presented by proffer unless the person is present at the hearing and the commissioner finds that fairness requires its admission.

(m) **Motions to judge.** The following motions shall be to the judge to whom the case is assigned: motion for alternative service; motion to waive 90-day waiting period; motion to waive divorce education class; motion for leave to withdraw after a case has been certified as ready for trial; and motions in limine. A court may provide that other motions be ~~to~~ considered by the judge.

(n) **Objection to court commissioner's recommendation.** A recommendation of a court commissioner is the order of the court until modified by the court. A party may object to the recommendation by filing an objection under Rule 108.

~~Committee Notes~~

~~The 2014 amendments changed the deadline in paragraph (c) from 5 business days to 7 days as part of the adoption of the federal "days-are-days" approach to calculating time. That is, intervening weekends and holidays are included in the calculation even for relatively short periods of time. The amendments also deleted "calendar" from paragraph (b), but the application of the 2014 reenactment of Rule 6 yields the same result. However, the amendments did not change the deadlines of two and three business days in paragraphs (c), (d) and (g). These remain exceptions to the general approach.~~

Tab 2

TIER 3 CASE MANAGEMENT PROGRAM

(1) SCREENING

As used in this outline, "lawyer" means "party" if the party is self-represented.

All Tier 3 cases filed on or after January 1, 2015 assigned to a participating judge. Anticipated completion date: December 31, 2016.

Participating judges

Second District

- Thomas Kay
- Brent West
- Control Group: All other Davis County and Weber County Tier 3 cases.

Third District

- Paul Parker
- Kate Toomey
- Control Group: All other Salt Lake County Tier 3 cases.

Fourth District

- David Mortensen
- Derek Pullan
- Control Group: All other Utah County Tier 3 cases.

(2) NOTICE

As soon as possible after the parties are known, the clerk will notify the parties that the case is being assigned to the pilot program; that the default discovery limits apply, but that the judge will schedule a Rule 16 conference for the purpose of entering a case management order, including discovery limits. The conference will be held approximately 28 days after the date the defendant's initial disclosures are due. (Disclosures are due 42 days after the first answer is filed.)

(3) RULE 16 CONFERENCE

Date. Schedule the conference when the first answer is filed for a date approximately 28 days after the date the defendant's initial disclosures are due. Disclosures are due 42 days after the first answer is filed. The notice scheduling the conference will describe its purpose and requirements.

Lead counsel. Require lead counsel to participate in person. Limit participation by telephone or video conference to exceptional circumstances.

Detailed statement. Require lawyers to file a written, detailed statement of the case, including the factual claims and legal theories. The pilot program website (URL) has a template statement of the case. The statement of the case may be no more than 10 pages. The purpose of the statement is not to convince the judge of the merits of any claim or defense, but rather to describe the case and what discovery is needed so that the judge can decide on a reasonable management order.

Prepare for the conference. Gather as much information about the case as the papers will provide. Use the statement of the case and the other papers to try to narrow the disputed issues.

Narrow the claims and defenses. Press counsel to reduce the number of claims in the Complaint and the number of defenses in the Answer.

Explore settlement. Explore settlement early and periodically throughout the pretrial process.

Mediation. Decide how mandatory mediation under Rule 4-510.05 will affect the schedule of events.

Proportional discovery. Encourage the lawyers to show that the amount, methods and duration of discovery are proportional to the case, and, if they are, allow what the lawyers request. Do not allow the lawyers to dictate the pace at which a case will move; encourage them to reasonably and accurately inform you of what they need, and proceed based on that information. Recognize the value of their judgment in establishing discovery and other due dates.

Prioritize discovery. Focus on where to begin discovery:

- What are the core issues?
- What information about those issues is needed (not just wanted)?
- What information is needed to make intelligent settlement negotiations possible?
- What are the best sources for that information? Who are the critical witnesses?
- What are the critical documents?
- What is a reasonable timeline for obtaining that information?
- Phased discovery. If the initial discovery does not produce settlement, proceed with further discovery, but continue to focus on priorities and proportionality. Be open to structuring discovery in a way that makes sense.

Discovery disputes. Assist the lawyers with their discovery disputes. Permit the lawyers quick and easy access to you when the case begins to deviate from the management order.

(4) CASE MANAGEMENT ORDER

The pilot program website (URL) has a template case management order.

(a) DISCOVERY

Memorialize the agreements and decisions from the case management conference.

(b) SCHEDULE DUE DATES FOR VARIOUS STAGES IN THE CASE

Status conferences. Schedule a periodic status conference (monthly, bi-monthly, quarterly, semi-annually) as needed. The court should schedule at least one conference, and may schedule as many as needed in the circumstances. The judge may ask the lawyers for their opinions about the frequency of status conferences. And the lawyers should be advised that they can request a conference outside of those that are regularly scheduled.

Keep it short and simple. By telephone is fine. Recognize that, if the case is progressing smoothly under the management order, “hands-off” is a legitimate management tool. The call itself will remind the lawyers that you are managing the case. The primary purpose of the call is to reassure yourself that the management plan is on track. A secondary purpose is to remove excuses for requests for continuances.

Amended pleadings.

Joinder.

Fact discovery. Schedule a status conference at the close of fact discovery in order to schedule a trial and a pretrial conference.

Expert discovery.

Pretrial conference.

Dispositive motions and motions in limine. Set a deadline for dispositive motions and motions in limine. This can be as effective as a firm trial date at motivating the lawyers to keep the case moving forward. And a motion deadline has the advantage of not tying up trial days. If the judge plans to rule on the motions at the final pretrial conference, the motions, including cross-motions, should be filed at least 35 days before the pretrial conference.

Trial date. Some judges may want to schedule a firm trial date at least in some cases, and this is permitted but not required.

Standards for continuances. Advise in the order that the scheduled dates are firm and that continuances—even if stipulated—will be not be granted, except for exceptional and unanticipated circumstances.

(c) PROFESSIONALISM AND CIVILITY

Professionalism among lawyers has been shown to help move the case forward and to help settlement. Advise in the order and verbally that you expect professionalism, courtesy and respect at all times. If lawyers become contentious, consider:

- an off-the-record discussion with counsel;
- an on-the-record discussion with counsel;
- refer for counseling under Standing Order 7 of the Supreme Court those who violate Rule 14-301, Standards of Professionalism and Civility; and
- sanctions, if all else fails.

(5) SETTLEMENT

Explore settlement early and periodically throughout the pretrial process. Periodically discussing settlement gives lawyers the cover needed, with clients and opposing counsel, to avoid the appearance of negotiating from a position of weakness. Ask: “What are the prospects of settlement?” “What do you need to know in order to consider settlement?”

(6) DISCOVERY DISPUTES

Require lead counsel to participate.

Follow Rule 37 (Rule 4-502), expedited statement of discovery issues.

Consider using a technique in which a party does not file any papers, but rather meets with the judge and other parties, in person or by phone, to resolve the dispute. At the conference the judge is part mediator, part decision maker: encouraging the lawyers toward an agreement where possible; but imposing a decision as needed. Consider using this technique for motions beyond discovery disputes.

Rule on the dispute promptly. Avoid taking the matter under advisement.

(7) MOTIONS

Lead counsel. Require lead counsel to participate.

Motions in limine. Motions in limine must be fully briefed and ready for argument at the final pretrial conference. Once the final pretrial date is set, the deadline for filing motions in limine can be calculated. Encourage the lawyers, instead of filing a motion, to confer and discuss how any issues might be raised and resolved during the pretrial conference. Rule on motions in limine at the pretrial conference to leave the lawyers time during which they can determine how their case is going to unfold at trial.

Motion for summary judgment. Encourage the lawyers not to file a motion for summary judgment unless the lawyer has a good faith belief that there are no relevant facts in dispute and that the moving party is entitled to judgment as a matter of law.

(8) PRETRIAL AND TRIAL

The best case management technique is a firm trial date and a ready judge. Knowing a case will go to trial will result in resolution, whether or not it is by trial.

Schedule a status conference at the close of fact discovery, and schedule a firm trial date, pretrial conference date and a deadline for dispositive motions and motions in limine.

If you need to set more than one case for trial on a particular date, partner with another judge to try the case that you cannot.

(9) TRACKING CASES

- Tickler for status conferences and other deadlines
- List of issues pending for judge's decision

(10) MEASURES OF SUCCESS

Compare Tier 3 cases assigned to the pilot program participants with cases assigned to control group judges. Perhaps only the last two measures. Judges and lawyers will be able to compare in a survey the traditional process with the case management process.

- Party satisfaction. Measure by survey.
- Lawyer satisfaction. Measure by survey.
- Judge satisfaction. Measure by survey.
- Reduced cost to reach disposition. Measure by attorney fee affidavits that happen to be filed. And/or adopt rule to encourage/require attorney in a pilot program or control group case to report to the court the amount in controversy and the total billable hours for the case. Send a notice to the attorney at the conclusion of the case with a reminder and a link to an online survey.
- Reduced time to reach disposition. Measure by comparative CORIS data.

(11) TRANSITION TO SCALE

Observe cases for indicators showing a need for case management. Consider using these indicators to screen cases for case management. For example:

- multiple parties
- multiple claims
- case type (commercial litigation, tortious injury, etc.)
- lawyers or parties known to be contentious
- self-represented parties

Observe what role staff (law clerk, case manager) can play.

Observe how well the program works for self-represented parties.

(12) RULE 1A. REPORTING HOURS.

The district court and the supreme court are conducting a pilot program of judicial case management in Tier 3 cases. To help the courts evaluate the success of the pilot program, an attorney appearing in a Tier 3 case in Weber, Davis, Salt Lake or Utah Counties must, after the conclusion of the case, report to the court the amount in controversy and the total hours worked on the case. The reported time may be an estimate if a verified time is not available. The report is anonymous and confidential and is not to be shared with the other parties or attorneys. This rule is repealed December 31, 2016.

Name

Address

City, State Zip

Phone Number

Email

In the District Court of Utah

_____ Judicial District, _____ County

_____

Court Address

	Statement of the case for Rule 16 conference
_____, Plaintiff	_____ Case Number
vs.	
_____, Defendant	_____ Judge

The statement of the case may be no more than 10 pages. The purpose of the statement is not to convince the judge of the merits of any claim or defense, but rather to describe the case and what discovery is needed so that the judge can decide on a reasonable management order.

(1) Party's factual claims.

(2) Party's legal theories.

(3) What are the core issues?

(4) What information about those issues is needed?

(5) What information is needed to make intelligent settlement negotiations possible?

(6) What are the best sources for that information?

(7) Who are the critical witnesses?

(8) What are the critical documents?

(9) What is a reasonable timeline for obtaining that information?

Sign here ►

Date

Typed or Printed Name

In the District Court of Utah

_____ Judicial District, _____ County

_____

Court Address

	Case management order
_____, Plaintiff	_____ Case Number
vs.	
_____, Defendant	_____ Judge

(1) Discovery. [Memorialize the agreements and decisions from the case management conference.]

(2) Status conferences. The court will hold a status conference on the following dates and times. (The court should set at least one status conference, and may set as many as needed in the circumstances.) Counsel may attend by telephone or other contemporaneous transmission.

Click here to enter a date. at _____

Click here to enter a date. at _____

Click here to enter a date. at _____

(3) Amended pleadings. The last day on which to file an amended pleading is Click here to enter a date..

(4) Joinder. The last day on which to join parties is Click here to enter a date..

(5) Fact discovery. Fact discovery must be completed no later than Click here to enter a date..

(6) Expert discovery. Expert discovery must be completed no later than Click here to enter a date..

(7) Final pretrial conference. Lead counsel must participate in the final pretrial conference in person unless excused by the court for exceptional and unanticipated circumstances.

[ ] The final pretrial conference will be held on Click here to enter a date. at _____.

[ ] At the conclusion of fact discovery the court will schedule a status conference to explore settlement and to schedule a trial and a pretrial conference.

(8) Trial date. (optional) The trial will begin on Click here to enter a date. and end on Click here to enter a date..

(9) Dispositive motions. The last day on which to file a dispositive motion is Click here to enter a date.. Counsel should not file a motion for summary judgment unless s/he in good faith believes that there are no relevant facts in dispute and that the moving party is entitled to judgment as a matter of law.

(10) Motions in limine. Motions in limine must be fully briefed and ready for argument at the final pretrial conference. Motions in limine must be filed no later than Click here to enter a date. (At least 35 days before the final pretrial conference.)

(11) Standards for continuances. The dates established in this order have been scheduled with counsel or parties. The dates are firm. Continuances—even if stipulated—will be not be granted, except for exceptional and unanticipated circumstances.

(12) Discovery disputes. Lead counsel must participate in any expedited statement of discovery issues under Rule 4-502 (Rule 37). Instead of an expedited statement of discovery issues, a party may schedule a meeting with the court and the other parties, in person or by phone, to resolve the dispute. Lead counsel must participate in the meeting.

(13) Professionalism and civility. The court expects professionalism, courtesy and respect among counsel and parties at all times. The court will refer for counseling under Standing Order 7 of the Utah Supreme Court those who violate Rule 14-301, Standards of Professionalism and Civility.

The judge’s electronic signature appears at the top of the first page of this order

Tab 3

Timothy M. Shea
Appellate Court Administrator

Andrea R. Martinez
Clerk of Court

Supreme Court of Utah
450 South State Street
P.O. Box 140210
Salt Lake City, Utah 84114-0210

Appellate Clerks' Office
Telephone 801-578-3900
Fax 801-578-3999

September 16, 2014

To: Civil Procedures Committee
From: Tim Shea
Re: Rule 7, 54 and 58A

Jonathan and I have been meeting with the Supreme Court to keep the justices informed of the work we have been doing on Rules 7, 54 and 58A. The court, like you, is struggling to reach a clear, reasoned conclusion. I believe we are close. The purposes of this memo are to highlight the changes made to the rules since you last saw them in April and to ask your direction on a few remaining issues.

(1) RULE 7.

The changes to Rule 7 are shown by interlineation on lines 87-95 and in the committee note. These are amendments to the draft you approved in April. If the rule moves forward, the entire proposal will repeal and reenact the current Rule 7.

The court struggled with the phrase introducing paragraph (j)(1): "Absent a direction to prepare a proposed order, or unless otherwise stated…" The court recognized the discretion of the judge to direct a party to prepare an order or to prepare one himself or herself or to state that his or her decision is not final, but felt that the proposed phrase is too obscure. The proposed final sentence of paragraph (j)(1) says essentially the same thing, so I have reversed the order of the sentences and paragraph title.

I have used the phrase "decision, however designated" on line 89 to describe the judge's ruling that gives rise to the possible subsequent order. The April draft used the term "order," which is circular. The subcommittee discussed defining "order," but decided against the attempt. There are too many variations. If written, the document might be titled "order," "ruling," "opinion," "decision," etc. The ruling might not be written; an oral directive is an order. A clerk's minute entry of an oral decision is, when signed by the judge, treated the same as a written order. The objective is to differentiate the subsequent order from the previous document that gives rise to the order, whatever that previous document might be titled. Rule 54(b) uses the phrase "decision, however designated." I believe that phrase adds value in this context as well—and in Rule 58A—thereby tying the three rules together. The draft consequently has something of a "know-it-when-you-see-it" aspect. I have further described the concept in the final paragraph of the proposed committee note.

The court is also concerned about the scope of prohibited proposed orders in paragraph (j)(6). The district judges asked for the prohibition. Proposed orders are seldom approved "as is," and the unsigned proposed orders are cluttering the file. The court is comfortable with prohibiting proposed orders, but wants to be sure that the rule does not go too far, prohibiting orders in motions that are routinely granted. The court has suggested obtaining input from the Board of District Court Judges.

Also under paragraph (j)(6), the court observes that we permit proposed orders in ex parte motions, and asks whether we mean instead motions that can be decided without waiting for a response. This concept is a hold-over from the current Rule 7. Perhaps both concepts need to be accommodated.

(2) RULE 54.

On lines 3-4, the court has added "an appeal of right." The objective is to distinguish appeal of an interlocutory order, which is appealable but is not a judgment. Otherwise, Rule 54 is essentially the same as you approved in April. Except for this further change and the proposal to define a judgment as an "order that adjudicates all claims and the rights and liabilities of all parties," the proposal is much the same as FRCP 54.

(3) RULE 58A

The court has agreed that requiring a judgment to be set out in a separate document is a sound approach to clearly mark the beginning of a party's right to appeal. The court would like add that the separate document will ordinarily be titled "Judgment"—or, as appropriate, "Decree." This will further distinguish the document by promoting to the rule itself a concept that the committee proposes for the committee note.

The court does not see a benefit to a separate document requirement if the judgment is a judgment by virtue of Rule 54(b). This is recognized in paragraph (b)(2).

On line 36, I have substituted "decision, however designated" for "adjudication" from the April draft.

The court has also asked that we update our judgment form. I have adapted the federal form to the state rule: signature by the judge rather than the clerk; no representation of how the matter was decided.

(4) COMMITTEE ON RULES OF APPELLATE PROCEDURE

The court would like the Committee on the Rules of Appellate Procedure to review these rules before they are published for comment.

Rule 7. Pleadings allowed; motions, memoranda, hearings, orders.

(a) Pleadings. Only these pleadings are allowed:

(a)(1) a complaint;

(a)(2) an answer to a complaint;

(a)(3) an answer to a counterclaim designated as a counterclaim;

(a)(4) an answer to a cross claim;

(a)(5) a third party complaint

(a)(6) an answer to a third party complaint; and

(a)(7) a reply to an answer if permitted by the court.

(b) Motions. A request for an order must be made by motion. The motion must be in writing, unless made during a hearing or trial, must state the relief requested, and must state the grounds for the relief requested. Except for the following, a motion must be made in accordance with this rule.

(b)(1) A motion made in proceedings before a court commissioner must follow the procedures of Rule 101.

(b)(2) A request under Rule 26 for extraordinary discovery must follow the expedited statement of discovery procedures of Rule 37(a).

(b)(3) A request under Rule 37 for a protective order or for an order compelling disclosure or discovery—but not a motion for sanctions—must follow the expedited statement of discovery procedures of Rule 37(a).

(b)(4) A request under Rule 45 to quash a subpoena must follow the expedited statement of discovery procedures of Rule 37(a).

(b)(5) A motion for summary judgment must follow the procedures of this rule, supplemented by the requirements of Rule 56.

(c) Form, name and content of motion. The rules governing captions and other matters of form in pleadings apply to motions and other papers. The movant must title the motion substantially as: “Motion to [short phrase describing the relief requested].” The motion, which shall include the supporting memorandum, may not exceed 15 pages, not counting relevant portions of documents cited in the motion. An approved over-length motion must include a table of contents and a table of authorities with page references. The motion must include under appropriate headings and in the following order:

(c)(1) a concise statement of the relief requested and the grounds for the relief requested;

(c)(2) one or more sections that include a concise statement of the relevant facts claimed by the movant and argument citing authority for the relief requested; and

(c)(3) relevant portions of documents cited, such as affidavits or discovery materials or opinions, statutes or rules.

(d) Name and content of memorandum responding to the motion. A nonmovant may file a memorandum responding to the motion within 14 days after the motion is filed. The nonmovant must title the memorandum substantially as: “Memorandum responding to the motion to [short phrase describing

the relief requested].” The memorandum may not exceed 15 pages, not counting objections to evidence and relevant portions of documents cited in the memorandum. An approved over-length memorandum must include a table of contents and a table of authorities with page references. The memorandum must include under appropriate headings and in the following order:

(d)(1) a concise statement of the party’s preferred disposition of the motion and the grounds supporting that disposition;

(d)(2) one or more sections that include a concise statement of the relevant facts claimed by the nonmovant and argument citing authority for that disposition;

(d)(3) objections to evidence in the motion, citing authority for the objection; and

(d)(4) relevant portions of documents cited in the memorandum, such as affidavits or discovery materials or opinions, statutes or rules.

(e) Name and content of reply memorandum. Within 7 days after the memorandum responding to the motion is filed, the movant may file a reply memorandum, which must be limited to rebuttal of new matters raised in the memorandum responding to the motion. The movant must title the memorandum substantially as “Memorandum replying to the memorandum responding to the motion to [short phrase describing the relief requested].” The memorandum may not exceed 5 pages, not counting objections to evidence, response to objections, and relevant portions of documents cited in the memorandum. The memorandum must include under appropriate headings and in the following order:

(e)(1) a concise statement of the new matter raised in the memorandum responding to the motion;

(e)(2) one or more sections that include a concise statement of the relevant facts claimed by the movant and argument citing authority rebutting the new matter;

(e)(3) objections to evidence in the memorandum responding to the motion, citing authority for the objection; and

(e)(4) response to objections made in the memorandum responding to the motion, citing authority for the response;

(e)(5) relevant portions of documents cited in the memorandum, such as affidavits or discovery materials or opinions, statutes or rules.

(f) Response to objections made in the reply memorandum. If the reply memorandum includes an objection to evidence, the nonmovant may file a response to the objection no later than 7 days after the reply memorandum is filed.

(g) Request to submit for decision. When briefing is complete or the time for briefing has expired, either party may and the movant must file a “Request to Submit for Decision.” The request to submit for decision must state the date on which the motion was filed, the date the memorandum responding to the motion, if any, was filed, the date the reply memorandum, if any, was filed, and whether a hearing has been requested. If no party files a request, the motion will not be submitted for decision.

(h) Hearings. The court may hold a hearing on any motion. A party may request a hearing in the motion, in a memorandum or in the request to submit for decision. A request for hearing must be separately identified in the caption of the document containing the request. The court must grant a request for a hearing on a motion under Rule 56 or a motion that would dispose of the action or any claim or defense in the action unless the court finds that the motion or response to the motion is frivolous or the issue has been authoritatively decided.

(i) Notice of supplemental authority. A party may file notice of citation to significant authority that comes to the party's attention after the party's motion or memorandum has been filed or after oral argument but before decision. The notice must state—without argument—citation to the authority, the page of the motion or memorandum or the point orally argued to which the authority applies, and the reason the authority is relevant. Any other party may promptly file a response, but the court may rule on the motion without a response. The response must comply with this paragraph.

(j) Orders.

(j)(1) ~~Signed order presumed final; d~~ Direction to prepare a proposed order; signed order final. ~~Absent a direction to prepare a proposed order, or unless otherwise stated, an order~~ If the court directs a party to prepare a proposed order confirming a decision, however designated, or otherwise states that the decision is not final, the decision is not final until the court signs a written order. Otherwise, a decision:

(j)(1)(A) is the court's final ruling on the matter when it is signed by the judge; and

(j)(1)(B) is entered when it is signed by the judge and recorded in the register of actions.

~~If the court directs a party to prepare a proposed order, a ruling is not final until the court signs a written order after the proposed order is filed.~~

(j)(2) Preparing and serving a proposed order. If directed by the court, a party shall within 14 days prepare a proposed written order conforming to the court's ruling and serve the proposed order on the other parties for review and approval as to form. If the party directed to prepare a proposed written order fails to timely do so, any other party may prepare a proposed written order conforming to the court's ruling and serve the proposed order on the other parties for review and approval as to form. The court may prepare and serve an order.

(j)(3) Effect of approval as to form of the order. A party's approval as to form of a proposed order certifies that the proposed order accurately reflects the court's ruling. Approval as to form does not waive objections to the substance of the order.

(j)(4) Objecting to a proposed order. A party may object to the form of the proposed order by filing an objection within 7 days after the order is served.

(j)(5) Filing proposed order. The party preparing a proposed order must file it:

(j)(5)(A) after all other parties have approved the form of the order; (The party preparing the proposed order must indicate the means by which approval was received: in person; by telephone; by signature; by email; etc.)

(j)(5)(B) after the time to object to the form of the order has expired; (The party preparing the proposed order must also file a certificate of service of the proposed order.) or

(j)(5)(C) within 2 days after a party has objected to the form of the order. (The party preparing the proposed order may also file a response to the objection.)

(j)(6) Proposed order before decision prohibited; exceptions. Except as provided, a party may not file a proposed order concurrently with a motion or a memorandum or a request to submit for decision. A proposed order must be filed with:

(j)(6)(A) a stipulated motion;

(j)(6)(B) an ex parte motion;

(j)(6)(C) an expedited statement of discovery issues under Rule 37(b); and

(j)(6)(D) the request to submit for decision a motion in which a memorandum responding to the motion has not been filed.

(j)(7) Ex parte orders. Except as otherwise provided by these rules, an order made without notice to the other parties can be vacated or modified by the judge who made it with or without notice.

(j)(8) Order to pay money. An order to pay money can be enforced in the same manner as if it were a judgment.

(k) Stipulated motions. A party seeking relief that has been agreed to by the other parties may file a stipulated motion which must:

(k)(1) be titled substantially as: “Stipulated motion to [short phrase describing the relief requested];

(k)(2) include a concise statement of the relief requested and the grounds for the relief requested;

(k)(3) include the signed stipulation in or attached to the motion; and

(k)(4) be accompanied by a proposed order that has been approved by the other parties.

(l) Ex parte motions. If a statute or rule permits a motion to be filed without serving the motion on the other parties, the party seeking relief may file a an ex parte motion which must:

(l)(1) be titled substantially as: “Ex parte motion to [short phrase describing the relief requested];

(l)(2) include a concise statement of the relief requested and the grounds for the relief requested;

(l)(3) include the statute or rule authorizing the ex parte motion; and

(l)(4) be accompanied by a proposed order.

(m) Motion in responding memorandum or reply memorandum prohibited. A party may not make a motion in a memorandum in response to a motion or in a reply memorandum. A party who objects to evidence in another party’s motion or memorandum may not move to strike that evidence. The proper procedure is to include in the subsequent memorandum an objection to the evidence.

(n) Over-length motion or memorandum. The court may permit a party to file an over-length motion or memorandum upon ex parte motion and a showing of good cause.

(o) Limited statement of facts and authority. No statement of facts and legal authorities beyond the concise statement of the relief requested and the grounds for the relief requested required in paragraph (c) is required for the following motions:

(o)(1) motion to allow an over-length motion or memorandum;

(o)(2) motion to extend the time to perform an act, if the motion is filed before the time to perform the act has expired;

(o)(3) motion to continue a hearing;

(o)(4) motion to appoint a guardian ad litem;

(o)(5) motion to substitute parties;

(o)(6) motion to refer the action to or withdraw it from alternative dispute resolution under Rule 4-510.05;

(o)(7) motion for a conference under Rule 16; and

(o)(8) motion to approve a stipulation of the parties.

Advisory Committee Notes [Add to existing notes]

The 2014 changes to Rule 7 repeal and reenact the rule. Many of the provisions from the former Rule 7 are preserved in the 2014 version, but there are many changes as well. The committee's intent is to bring more regularity to motion practice. Some of these features are found in Rule 7-1 of the U.S. District Court for the District of Utah:

- integrate the memorandum supporting a motion with the motion itself;
- describe more uniform motion titles;
- describe more uniform content in the memorandums;
- regulate the process for citing supplemental authority;
- prohibit proposed orders before a ruling, except for specified motions;
- move the special requirements for a motion for summary judgment to Rule 56;
- allow a limited statement of facts for specified motions;
- require an objection to evidence, rather than a motion to strike evidence; and
- require a counter-motion rather than a motion in the responding memorandum.

A major objective of the of the 2014 amendments is to codify the policies established in:

- Central Utah Water Conservancy District v. King, 2013 UT 13;
- Giusti v. Sterling Wentworth Corp., 2009 UT 2;
- Houghton v. Dep't of Health, 2008 UT 86; and
- Code v. Utah Dep't of Health, 2007 UT 43.

In these four cases, the Supreme Court established a policy favoring a clear indication of whether a further document would be required from the parties after a judge's decision. The parties should not be required to guess about what, if anything, should come next.

There were three ways to meet the test: sign the proposed order filed with the motion or memorandum; expressly state in the order that nothing further is required from the parties; or prepare the order in one of the three ways described by the rule. The 2014 amendments remove a proposed order from the process in most circumstances. The trend under the former rule was to include in every order an indication that nothing further was required even when the order expressly directed a party to prepare a

further order. Or orders were being prepared in some manner other than the three described in the rule, yet the order did not expressly state than nothing further was required. The order technically was not complete, but everyone proceeded as if it were.

The 2014 amendments continue the policy of a bright-line test for a completed decision but do not rely on conditions that might or might not be met. The one condition that can be counted on is the judge's signature. Under the former rule, a completed decision was imposed by operation of law when the order was prepared in one of three recognized ways. The 2014 rule imposes a completed decision by operation of law when the order is signed. Under the former rule, the judge's silence meant that something further was required, unless the order was prepared in one of the three ways described in Rule 7. The presumption in the 2014 amendments is the opposite: silence means that nothing further is required from the parties. Judges can expressly require more if more is needed in a particular case.

The committee recognizes the many different forms a judge's decision might take. The committee discussed defining "order," but decided against the attempt. There are too many variations. If written, the document might be titled "order," "ruling," "opinion," "decision," "memorandum decision," etc. The decision might not be written; an oral directive is an order. A clerk's minute entry of an oral decision is, when signed by the judge, treated the same as a written order. The committee decided instead to use a phrase of long standing from Rule 54(b)—"a decision, however designated"—in this rule and in Rule 58A, tying the three together. The judge has decided the issue at hand. Whatever that decision is titled, it is final when the judge signs the document memorializing the decision. In that document the judge might direct a party to prepare a subsequent order. Whether there is a right to appeal is determined by whether the subsequent order is a judgment. That analysis is governed by Rule 54. When the judgment is entered and consequently the time in which to appeal are governed by Rule 58A.

Rule 54. Judgments; costs.

(a) Definition; form. "Judgment" as used in these rules includes a decree and any order that adjudicates all claims and the rights and liabilities of all parties or other order from which an appeal of right lies. A judgment ~~need~~ should not contain a recital of pleadings, the report of a master, or the record of prior proceedings. ~~Judgments shall state whether they are entered upon trial, stipulation, motion or the court's initiative; and, unless otherwise directed by the court, a judgment shall not include any matter by reference.~~

(b) Judgment upon multiple claims and/or involving multiple parties. When an action presents more than one claim for relief ~~is presented in an action, whether~~ as a claim, counterclaim, cross claim, or third party claim~~,~~ and/or when multiple parties are involved, the court may ~~direct the entry of a final~~ enter judgment as to one or more but fewer than all of the claims or parties only ~~upon an express determination by~~ if the court expressly states that there is no just reason for delay ~~and upon an express direction for the entry of judgment. In the absence of such determination and direction~~ Otherwise, 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~~ does not end the action as to any of the claims or parties, and ~~the order or other form of decision is subject to revision~~ may be changed at any time before the entry of judgment adjudicating all the claims and the rights and liabilities of all the parties.

(c) Demand for judgment. A default judgment must not differ in kind from, or exceed in amount, what is demanded in the pleadings. Every other judgment should grant the relief to which each party is entitled, even if the party has not demanded that relief in its pleadings.

~~**(c)(1) Generally.** Except as to a party against whom a judgment is entered by default, and except as provided in Rule 8(a), every final judgment shall grant the relief to which the party in whose favor it is rendered is entitled, even if the party has not demanded such relief in his pleadings. It may be given for or against one or more of several claimants; and it may, when the justice of the case requires it, determine the ultimate rights of the parties on each side as between or among themselves.~~

~~**(c)(2) Judgment by default.** A judgment by default shall not be different in kind from, or exceed in amount, that specifically prayed for in the demand for judgment.~~

(d) Costs.

(d)(1) To whom awarded. ~~Except when express provision therefor is made either in a statute of this state or in these rules, costs shall be allowed as of course to the prevailing party unless the court otherwise directs; provided, however, where an appeal or other proceeding for review is taken, costs of the action, other than costs in connection with such appeal or other proceeding for review, shall abide the final determination of the cause.~~ Unless a statute, these rules, or a court order provides otherwise, costs should be allowed to the prevailing party. Costs against the state of Utah, its officers and agencies shall be imposed only to the extent permitted by law.

(d)(2) How assessed. The party who claims ~~his~~ costs must within 14 days after the entry of judgment file and serve ~~upon the adverse party against whom costs are claimed, a copy of~~ a verified memorandum of ~~the items of his~~ costs ~~and necessary disbursements in the action, and file with the court a like memorandum thereof duly verified stating that to affiant's knowledge the items are correct, and that the disbursements have been necessarily incurred in the action or proceeding~~. A party dissatisfied with the costs claimed may, within 7 days after service of the memorandum of costs, ~~file a motion to have~~ object to the bill of costs ~~taxed by the court~~.

A memorandum of costs served and filed after the verdict, or at the time of or subsequent to the service and filing of the findings of fact and conclusions of law, but before the entry of judgment, ~~shall nevertheless be considered as~~ is deemed served and filed on the date judgment is entered.

~~**(e) Interest and costs to be included in the judgment.** The clerk must include in any judgment signed by him any interest on the verdict or decision from the time it was rendered, and the costs, if the same have been taxed or ascertained. The clerk must, within two days after the costs have been taxed or ascertained, in any case where not included in the judgment, insert the amount thereof in a blank left in the judgment for that purpose, and make a similar notation thereof in the register of actions and in the judgment docket.~~

Rule 58A. Entry of judgment; abstract of judgment.

~~**(a) Judgment upon the verdict of a jury.** 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) Judgment in other cases.** 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) When judgment entered; recording.** 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.~~

(a) Separate document required. Every judgment and amended judgment must be set out in a separate document ordinarily titled "Judgment"—or, as appropriate, "Decree."

(b) Exceptions.

(b)(1) A separate document is not required for an order disposing of a motion:

(b)(1)(A) for judgment under Rule 50(b);

(b)(1)(B) to amend or make additional findings under Rule 52(b);

(b)(1)(C) for a new trial, or to alter or amend the judgment, under Rule 59; or

(b)(1)(D) for relief under Rule 60.

(b)(2) A separate document is not required for a judgment entered under Rule 54(b) that expressly states there is no just reason for delay.

(b)(3) A party may request that a judgment be set out in a separate document.

(c) Preparing a judgment. Unless the court prepares the judgment, the prevailing party must prepare and serve a proposed judgment within 14 days after the jury verdict or after the court's decision in the same manner as a proposed order under Rule 7(j).

(d) Judge's signature; judgment filed with the clerk. Except as provided in paragraph (h) and Rule 55(b)(1), all judgments must be signed by the judge and filed with the clerk. The clerk must promptly record all judgments in the register of actions.

(e) Time of entry of judgment.

(e)(1) If a separate document is not required, a judgment is complete and is entered when it is signed by the judge and recorded in the register of actions.

(e)(2) If a separate document is required, a judgment is complete and is entered at the earlier of these events:

(e)(2)(A) the judgment is set out in a separate document signed by the judge and recorded in the register of actions; or

(e)(2)(B) 150 days have run from the clerk recording the decision, however designated, that should have prompted the separate document.

~~(d)~~ (f) Notice of judgment. The party preparing the judgment shall promptly serve a copy of the signed judgment on the other parties in the manner provided in Rule 5 and promptly file proof of service with the court. Except as provided in Rule of Appellate Procedure 4(g), the time for filing a notice of appeal is not affected by this requirement.

~~(e)~~ (g) Judgment after death of a party. If a party dies after a verdict or decision upon any issue of fact and before judgment, judgment may nevertheless be entered.

~~(f)~~ (h) Judgment by confession. If a judgment by confession is authorized by statute, the party seeking the judgment must file with the clerk a statement, verified by the defendant, to the following effect:

~~(f)(1)~~ (h)(1) If the judgment is for money due or to become due, it ~~shall~~ must concisely state the claim and that the specified sum is due or to become due.

~~(f)(2)~~ (h)(2) If the judgment is for the purpose of securing the plaintiff against a contingent liability, it must state concisely the claim and that the specified sum does not exceed the liability.

~~(f)(3)~~ (h)(3) It must authorize the entry of judgment for the specified sum.

The clerk ~~shall~~ must sign ~~and file~~ the judgment for the specified sum~~, with costs of entry, if any, and record it in the register of actions and the register of judgments~~.

~~(g)~~ (i) Abstract of judgment. The clerk may abstract a judgment by a signed writing under seal of the court that:

~~(g)(1)~~ (i)(1) identifies the court, the case name, the case number, the judge or clerk that signed the judgment, the date the judgment was signed, and the date the judgment was recorded in the registry of actions and the registry of judgments;

~~(g)(2)~~ (i)(2) states whether the time for appeal has passed and whether an appeal has been filed;

~~(g)(3)~~ (i)(3) states whether the judgment has been stayed and when the stay will expire; and

~~(g)(4)~~ (i)(4) if the language of the judgment is known to the clerk, quotes verbatim the operative language of the judgment or attaches a copy of the judgment.

Advisory Committee Note

An important purpose of the 2014 amendments to Rule 58A is to adopt the requirement, found in Rule 58 of the Federal Rules of Civil Procedure, that a judgment must be set out in a separate document. In the past, problems have arisen when the district court entered a decision with dispositive language, but without other formal elements of a judgment, and the parties were unsure whether the decision started the time running for appeals or post-trial motions. This problem was compounded by uncertainty under Rule 7 over whether the decision was the court's final ruling on the matter or whether the prevailing party was expected to prepare a further order conforming to the decision.

These amendments are intended to reduce this confusion by requiring "that there be a judgment set out on a separate document—distinct from any opinion or memorandum—which provides the basis for the entry of judgment." See Advisory Committee Notes to 1963 Amendments to FED. R. CIV. P. 58. Courts and practitioners are encouraged to use appropriate titles with separate documents intended to

operate as judgments, such as "Judgment" or "Decree," and to avoid using such titles on documents that are not final and appealable. The parties should consider the form of judgment included in the Appendix of Forms described in Rule 84. On the question of what constitutes a separate document, the Committee refers courts and practitioners to existing case law interpreting Fed. R. Civ. P. 58. For example, In re Cendant Corp., 454 F.3d 235, 242-244 (3d Cir. 2006) offers three criteria:

1) the judgment must be set forth in a document that is independent of the court's opinion or decision;

2) it must contain ordering clauses stating the relief to which the prevailing party is entitled, and not merely refer to orders made in other documents or state that a motion has been granted; and

3) it must substantially omit recitation of facts, procedural history, and the reasons for disposing of the parties' claims.

While "some trivial departures" from this criterion, such as a one-sentence explanation of reasoning, a single citation to authority, or a reference to a separate memorandum decision, "must be tolerated in the name of common sense," Kidd v. District of Columbia, 206 F.3d 35, 39 (D.C. Cir. 2000), any explanation must be "very sparse"—one to two sentences at most. Id.

The concurrent amendments to Rule 7 remove the separate document requirement heretofore applicable to orders in general. Henceforward, the separate document requirement will apply only to judgments, a change that should reduce the tendency to confuse judgments with other orders. Rule 7 has also been amended to modify current rules regarding the preparation of orders. Under amended Rule 7(j), a written order signed by the court is the final ruling on the matter in question, unless the court specifically requests a party to prepare a further order. But this not be confused with the need to prepare a separate judgment if the order in question has the effect of disposing of all of the clams in the case. In such cases, whether or not a party is requested to prepare a further order, a separate judgment will always be required.

With one exception amended Rule 58A also tracks Fed. R. Civ. P. 58 in listing the instances where a separate document is not required (primarily orders denying post-trial motions) and in determining the time of entry of judgment where a separate document is required but is not prepared or entered. Fed. R. Civ. P. 58 includes an order for attorney fees as one of the orders not requiring a separate document. That particular order is omitted from the list of exceptions in the Utah rule because under Utah law a judgment does not become final for purposes of appeal until the trial court determines attorney fees. See ProMax Development Corporation v. Raile, 2000 UT 4, 998 P.2d 254.

The latter situation involves the "hanging appeals" problem that the Supreme Court asked this Committee to address in Central Utah Water Conservancy District v. King, 2013 UT 13, ¶27. In such cases, judgment will be deemed to have been entered 150 days from date of the docket entry.

Form 22. Judgment

[Caption as in Form 1]

The court has ordered that (check one):

____ plaintiff recover from defendant the amount of $ _____, which includes prejudgment interest, plus post judgment interest at the rate of ____ % per year, plus costs.

____ plaintiff recover nothing, the action be dismissed on the merits, and defendant recover costs from plaintiff.

____ other:

_____ Sign here ► _____

Date

_____

Typed or Printed Name of Judge

Tab 4

Timothy M. Shea
Appellate Court Administrator

Andrea R. Martinez
Clerk of Court

Supreme Court of Utah
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September 16, 2014

To: Civil Procedures Committee
From: Tim Shea
Re: Comments to proposed rule amendments

The following rules were published for comment. They are ready for your final recommendations to the supreme court.

(1) RULE 5. SERVICE AND FILING OF PLEADINGS AND OTHER PAPERS.

Mr. Bogart says that the e-filing system does not notify the attorneys if a private document is filed in an otherwise public case. (Lines 51-52) I have been advised by Debra Moore:

> The comment equates private with sealed, but they are treated differently in e-filing. As to private documents, only parties receive the notices, so the notices of electronic filing are still sent on private documents. Currently, one can't e-file at all on a case that's been sealed, so the NEFs aren't issued.
>
> A motion to classify can be e-filed with any document, in which case the accompanying document is treated as private (i.e., the parties can access it but others can't) unless and until the judge denies the motion. If the motion seeks to classify the case as sealed, the case wouldn't be sealed until the judge grants the motion.

Mr. Rife believes that the rule should define "conformed" signature. (Line 113)

Mr. Jensen supports permitting service by email without first obtaining the person's consent. (Lines 55-56)

Superman argues that the rule should not require that a document be served before or on the same day as it is filed. His "11:58 pm" scenario is not particularly realistic, but his description of a motion for temporary orders being served with the petition for divorce is. (Line 48)

Superman opposes service by email without prior consent. (Lines 55-56) Since all attorneys are required to e-file documents, and e-filing itself satisfies the requirement to serve the document, his arguments apply only if a self-represented party e-mails the document to him. He argues that an attorney will never be able to serve a self-represented party by email. While some self-represented parties do not have an email address, those who do are required by Rule 10(a)(3) to include it on pleadings and other papers.

Superman opposes removing the provision that service is not effective if the sender learns that it has failed. (Lines 68-70) And he wants to retain service by fax. (Lines 57-58)

Mr. Young believes that service by email should require the consent of the person being served. (Lines 55-56)

Mr. Whittaker suggests several changes to the text and includes a suggested committee note.

(2) RULE 26. GENERAL PROVISIONS GOVERNING DISCLOSURE AND DISCOVERY.

Mr. Schriever is concerned that the amendments will limit the discretion of a judge to allow additional discovery. (Lines 221-225; 451; 453; 473; 479; 480; 484; 492-494) He believes that the reference to Rule 37 will require showing misconduct or non-disclosure by the non-moving party. I believe that this conclusion is mistaken. The change to Rule 26(c)(6) refers to the statement of discovery issues under Rule 37(a). Rule 37(a) does not require misconduct, bad faith or non-disclosure, although, under paragraph (a)(7), the judge can take those circumstances into account if the case presents them.

(3) RULE 30. DEPOSITIONS UPON ORAL QUESTIONS.

We received no comments.

(4) RULE 37. EXPEDITED STATEMENT OF DISCOVERY ISSUES; SANCTIONS; FAILURE TO ADMIT, TO ATTEND DEPOSITION OR TO PRESERVE EVIDENCE.

Mr. Dahl asks whether a statement of discovery issues will eliminate a motion for a protective order under Rule 45. The committee's intent is that it does. Other commenters also note the difference between Rule 37 (statement of discovery issues) and Rule 45(e) (motion for protective order and motion for an order to compel). Rule 45 was published after Rule 37. The wording was changed by the later amendments to "request" for protective order and "request" for an order to compel under the procedures of Rule 37. Line 100 of Rule 45, as published, included a requirement that the "motion shall be served…" I have changed this to "the objection or request shall be served…" Simply changing "motion" to "request" may not be sufficient, but "statement of discovery issues" does not seem to sufficiently specify the relief being requested. I am open to suggestions.

Mr. Sipos raises several hypothetical questions and points about which he is confused. First, he asks whether only a responding party files the statement of discovery issues. Clearly not. From line 37: "A party … may request that the judge enter an order regarding any discovery issue…."

Next, he asks whether a statement of discovery issues is the sole method of asking for relief in the context of discovery. The committee's intent is that a statement of discovery issues be the sole method. Another commenter asks the same question. This will be the only method described in the rules. Apparently Rule 4-502 more expressly states that limitation.

Next, he asks whether a statement of discovery issues includes requests for extra ordinary discovery. Clearly it does. From line 40: "including … extraordinary discovery under Rule 26."

Next, he claims confusion over the requirement to file an objection within 7 days. He apparently is not familiar with the recent change to Rule 6.

Next, he claims confusion about the description of "other attachments … required by law" to be attached to the statement of discovery issues. Admittedly, this is a vague reference. It came about as a result of discussions with the judges of the Third District Court, some of whom thought that other law might dictate additional attachments, but there were no examples that I recall.

Next, he claims confusion about whether the potential orders in paragraph (a)(7) is an exhaustive list. Clearly the list is not exhaustive. From lines 74-77: "The court may enter orders regarding disclosure or discovery … including one or more of the following…."

Next, he claims confusion about when costs or fees might be requested in a statement of discovery issues. The rule is drafted so that costs and fees can be recovered in any discovery dispute but that the court will not impose sanctions without a motion for sanctions. Paragraph (a)(8), lines 113-115.

Mr. Whittaker suggests several changes to the text.

Mr. Nadesan notes the difference between Rule 26 (motion to exclude evidence) and Rule 37 (statement of discovery issues). The amendments to Rule 26 also were published for comment after the

amendments to Rule 37. The paragraph he cites, Rule 26(d)(4), does not mention a motion to exclude evidence, but it is described this way in the committee note. A motion for extraordinary discovery in paragraph (c)(6) was changed to a request under Rule 37 by the later amendment, and, in the committee note, “discovery motions” was changed to “statement of discovery issues.” (Rule 26, Lines 221-225; 451; 453; 473; 479; 480; 484; 492-494)

Mr. Nadesan argues against requiring a statement of proportionality when requesting that the court exclude evidence that was not disclosed. (Line 53) If the committee agrees, one approach is to add a condition to line 53: “unless the statement requests extraordinary discovery …”

Mr. Nadesan notes that Rule 37 does not define “permitted” attachments in paragraphs (a)(2) and (a)(3). (Lines 46 and 58) The intent was to refer to the attachments permitted by paragraph (a)(4). He also recommends that the "disclosure at issue" be a required attachment in paragraph (a)(4). As drafted “only a copy of the request for discovery or the response at issue” must be attached.

Mr. Nadesan notes that it is not clear whether the procedure for bringing spoliation to the court's attention is a statement of discovery issues under Rule 37(a). (Lines 167-173) And he observes that Rule 37 fails to state that a statement of discovery issues is the sole means for addressing discovery disputes.

Mr. Bogart notes, regarding subpoenas, that “it seems burdensome to require a nonparty to come to the forum of the parties to seek protection, or to defend objections.” (Lines 120-122) The committee decided to have the court in which the action is pending resolve all discovery issues.

(5) RULE 45. SUBPOENA.

Mr. Sanders recommends adding a minimum time for serving a third-party subpoena. (Lines 35-36) If the committee agrees, I recommend 7 days.

Rule 5. Service and filing of pleadings and other papers.

(a) ~~Service:~~ When service is required.

(a)(1) Papers that must be served. Except as otherwise provided in these rules or as otherwise directed by the court, the following papers must be served on every party:

(a)(1)(A) ~~every~~ a judgment~~,~~;

(a)(1)(B) ~~every~~ an order ~~required by its terms to~~ that states it must be served~~,~~;

(a)(1)(C) ~~every~~ a pleading ~~subsequent to~~ after the original complaint~~,~~;

(a)(1)(D) ~~every~~ a paper relating to disclosure or discovery~~,~~;

(a)(1)(E) ~~every written motion~~ a paper filed with the court other than ~~one~~ a motion that may be heard ex parte~~,~~; and

(a)(1)(F) ~~every~~ a written notice, appearance, demand, offer of judgment, ~~and~~ or similar paper ~~shall be served upon each of the parties~~.

(a)(2) Serving parties in default. No service ~~need be made on parties~~ is required on a party who is in default except that:

(a)(2)(A) a party in default ~~shall~~ must be served as ordered by the court;

(a)(2)(B) a party in default for any reason other than for failure to appear ~~shall~~ must be served ~~with all pleadings and papers~~ as provided in paragraph (a)(1);

(a)(2)(C) a party in default for any reason ~~shall~~ must be served with notice of any hearing ~~necessary~~ to determine the amount of damages to be entered against the defaulting party;

(a)(2)(D) a party in default for any reason ~~shall~~ must be served with notice of entry of judgment under Rule 58A(d); and

(a)(2)(E) ~~pleadings asserting new or additional claims for relief against~~ a party in default for any reason ~~shall~~ must be served ~~in the manner provided for service of summons in~~ under Rule 4 with pleadings asserting new or additional claims for relief against the party.

(a)(3) Service in actions begun by seizing property. ~~In~~ If an action is begun by ~~seizure of~~ seizing property~~, in which~~ and no person is or need be named as defendant, any service required ~~to be made prior to~~ before the filing of an answer,

claim or appearance ~~shall~~ must be made upon the person ~~having~~ who had custody or possession of the property ~~at the time of its seizure~~ when it was seized.

(b) ~~Service:~~ How service is made.

(b)(1) Whom to serve. If a party is represented by an attorney, ~~service shall be made~~ a paper served under this rule must be served upon the attorney unless the court orders service upon the party ~~is ordered by the court~~. ~~If an attorney has filed a Notice of Limited Appearance under Rule 75 and the papers being served relate to a matter within the scope of the Notice, service shall~~ Service must be made upon the attorney and the party if

(b)(1)(A) an attorney has filed a Notice of Limited Appearance under Rule 75 and the papers being served relate to a matter within the scope of the Notice; or

(b)(1)(B) a final judgment has been entered in the action and more than 90 days has elapsed from the date a paper was last served on the attorney.

~~**(b)(1)(A)**~~ **(b)(2) When to serve.** If a hearing is scheduled ~~5~~ 7 days or less from the date of service, ~~the~~ a party ~~shall use the method~~ must serve a paper related to the hearing by the method most likely to ~~give prompt actual notice of the hearing~~ be promptly received. Otherwise, ~~a party shall serve a paper under this rule:~~ a paper that is filed with the court must be served before or on the same day that it is filed.

(b)(3) Methods of service. A paper served under this rule may be served by:

~~(b)(1)(A)(i) upon any person with an electronic filing account who is a party or attorney in the case by~~ (b)(3)(A) submitting ~~the paper~~ it for electronic filing if the person being served has an electronic filing account;

~~(b)(1)(A)(ii) by sending it by email to the person's last known email address~~ (b)(3)(B) emailing it to the email address provided by the party or attorney or to the email address on file with the Utah State Bar, if ~~that~~ the person has agreed to accept service by email or has an electronic filing account;

~~(b)(1)(A)(iii) by faxing it to the person's last known fax number if that person has agreed to accept service by fax;~~

~~(b)(1)(A)(iv) by~~ (b)(3)(C) mailing it to the person's last known address;

~~(b)(1)(A)(v) by~~ (b)(3)(D) handing it to the person;

~~(b)(1)(A)(vi) by~~ (b)(3)(E) leaving it at the person's office with a person in charge or, if no one is in charge, leaving it in a receptacle intended for receiving deliveries or in a conspicuous place; or

~~(b)(1)(A)(vii) by~~ (b)(3)(F) leaving it at the person's dwelling house or usual place of abode with a person of suitable age and discretion ~~then residing therein~~ who resides there.

~~(b)(1)(B)~~ (b)(4) When service is effective. Service by mail~~, email or fax~~ or electronic means is complete upon sending. ~~Service by electronic means is not effective if the party making service learns that the attempted service did not reach the person to be served.~~

~~(b)(2)~~ (b)(5) Who serves. Unless otherwise directed by the court:

~~(b)(2)(A) an order signed by the court and required by its terms to be served or a judgment signed by the court shall be served by the party preparing it;~~

~~(b)(2)(B)~~ (b)(5)(A) every ~~other pleading or~~ paper required ~~by this rule~~ to be served ~~shall~~ must be served by the party preparing it; and

~~(b)(2)(C)~~ (b)(5)(B) an order or judgment prepared by the court ~~shall~~ will be served by the court.

(c) ~~Service: N~~ Serving numerous defendants. ~~In any~~ If an action ~~in which there is~~ involves an unusually large number of defendants, the court, upon motion or ~~of~~ its own initiative, may order that:

(c)(1) ~~service of the~~ a defendant's pleadings ~~of the defendants~~ and replies ~~thereto need not be made as between~~ to them do not need to be served on the other defendants; ~~and that~~

(c)(2) any cross-claim, counterclaim~~, or matter constituting an~~ avoidance or affirmative defense ~~contained therein shall be~~ in a defendant's pleadings and replies to them are deemed ~~to be~~ denied or avoided by all other parties; ~~and that the~~

(c)(3) filing ~~of any such~~ a defendant's pleadings and ~~service thereof upon~~ serving them on the plaintiff constitutes notice of ~~it~~ them to ~~the~~ all other parties~~.~~; and

(c)(4) ~~A~~ a copy of ~~every such~~ the order ~~shall~~ must be served upon the parties ~~in such manner and form as the court directs~~.

~~**(d) Filing.** All papers after the complaint required to be served upon a party shall be filed with the court either before or within a reasonable time after service.~~

~~**(e) Filing with the court defined.** A party may file with the clerk of court using any means of delivery permitted by the court. The court may require parties to file electronically with an electronic filing account. Filing is complete upon the earliest of acceptance by the electronic filing system, the clerk of court or the judge. The filing date shall be noted on the paper.~~

~~(f)~~ (d) Certificate of service. ~~Every pleading, order or~~ A paper required by this rule to be served, including electronically filed papers, ~~shall~~ must include a signed certificate of service showing the name of the document served, the date and manner of service and on whom it was served.

(e) Filing. Except as provided in Rule 7(f) and Rule 26(f), all papers after the complaint that are required to be served must be filed with the court. Parties with an electronic filing account must file a paper electronically. A party without an electronic filing account may file a paper by delivering it to the clerk of the court or to a judge of the court. Filing is complete upon the earliest of acceptance by the electronic filing system, the clerk of court or the judge.

(f) Filing an affidavit or declaration. If a person files an affidavit or declaration, the filer may:

(f)(1) electronically file the original affidavit with a notary acknowledgment as provided by Utah Code Section 46-1-16(7);

(f)(2) electronically file a scanned image of the affidavit or declaration;

(f)(3) electronically file the affidavit or declaration with a conformed signature; or

(f)(4) if the filer does not have an e-filing account, present the original affidavit or declaration to the clerk of the court, and the clerk will electronically file a scanned image and return the original to the filer.

The filer must keep an original affidavit or declaration of anyone other than the filer safe and available for inspection upon request until the action is concluded, including any appeal or until the time in which to appeal has expired.

~~(g) **Service by the court.** The court may serve papers by email on a party to the email address provided by the party or on an attorney to the email address on file with the Utah State Bar.~~

Advisory Committee Notes

~~Rule 5(d) is amended to give the trial court the option, either on an ad hoc basis or by local rule, of ordering that discovery papers, depositions, written interrogatories, document requests, requests for admission, and answers and responses need not be filed unless required for specific use in the case. The committee is of the view that a local rule of the district courts on the subject should be encouraged.~~

The 1999 amendment to subdivision (b)(1)(B) does not authorize the court to conduct a hearing with less than 5 days notice, but rather specifies the manner of service of the notice when the court otherwise has that authority.

2001 amendments

Paragraph (b)(1)(A) has been changed to allow service by means other than U.S. Mail and hand delivery if consented to in writing by the person to be served, i.e. the attorney of the party. Electronic means include facsimile transmission, e-mail and other possible electronic means.

While it is not necessary to file the written consent with the court, it would be advisable to have the consent in the form of a stipulation suitable for filing and to file it with the court.

~~Paragraph (b)(1)(B) establishes when service by electronic means, if consented to in writing, is complete. The term "normal business hours" is intended to mean 8:00 a.m. to 5:00 p.m. Monday through Friday, excluding legal holidays. If a fax or e-mail is received after 5:00 p.m., the service is deemed complete on the next business day.~~

Rule 26. General provisions governing disclosure and discovery.

(a) Disclosure. This rule applies unless changed or supplemented by a rule governing disclosure and discovery in a practice area.

(a)(1) Initial disclosures. Except in cases exempt under paragraph (a)(3), a party shall, without waiting for a discovery request, serve on the other parties:

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

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

(a)(1)(A)(ii) each fact witness the party may call in its case-in-chief and, except for an adverse party, a summary of the expected testimony;

(a)(1)(B) a copy of all documents, data compilations, electronically stored information, and tangible things in the possession or control of the party that the party may offer in its case-in-chief, except charts, summaries and demonstrative exhibits that have not yet been prepared and must be disclosed in accordance with paragraph (a)(5);

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

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

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

(a)(2) Timing of initial disclosures. The disclosures required by paragraph (a)(1) shall be served on the other parties:

(a)(2)(A) by the plaintiff within 14 days after filing of the first answer to the complaint; and

(a)(2)(B) by the defendant within 42 days after filing of the first answer to the complaint or within 28 days after that defendant's appearance, whichever is later.

(a)(3) Exemptions.

(a)(3)(A) Unless otherwise ordered by the court or agreed to by the parties, the requirements of paragraph (a)(1) do not apply to actions:

(a)(3)(A)(i) for judicial review of adjudicative proceedings or rule making proceedings of an administrative agency;

(a)(3)(A)(ii) governed by Rule 65B or Rule 65C;

(a)(3)(A)(iii) to enforce an arbitration award;

(a)(3)(A)(iv) for water rights general adjudication under Title 73, Chapter 4, Determination of Water Rights.

(a)(3)(B) In an exempt action, the matters subject to disclosure under paragraph (a)(1) are subject to discovery under paragraph (b).

(a)(4) Expert testimony.

(a)(4)(A) Disclosure of expert testimony. A party shall, without waiting for a discovery request, serve on the other parties the following information regarding any person who may be used at trial to present evidence under Rule 702 of the Utah Rules of Evidence and who is retained or specially employed to provide expert testimony in the case or whose duties as an employee of the party regularly involve giving expert testimony: (i) the expert's name and qualifications, including a list of all publications authored within the preceding 10 years, and a list of any other cases in which the expert has testified as an expert at trial or by deposition within the preceding four years, (ii) a brief summary of the opinions to which the witness is expected to testify, (iii) all data and other information that will be relied upon by the witness in forming those opinions, and (iv) the compensation to be paid for the witness's study and testimony.

(a)(4)(B) Limits on expert discovery. Further discovery may be obtained from an expert witness either by deposition or by written report. A deposition shall not exceed four hours and the party taking the deposition shall pay the expert's reasonable hourly fees for attendance at the deposition. A report shall be signed by the expert and shall contain a complete statement of all opinions the expert will offer at trial and the basis and reasons for them. Such an expert may not testify in a party's case-in-chief concerning any matter not fairly disclosed in the report. The party offering the expert shall pay the costs for the report.

(a)(4)(C) Timing for expert discovery.

(a)(4)(C)(i) The party who bears the burden of proof on the issue for which expert testimony is offered shall serve on the other parties the information required by paragraph (a)(4)(A) within seven days after the close of fact discovery. Within seven days thereafter, the party opposing the expert may serve notice electing either a deposition of the expert pursuant to paragraph (a)(4)(B) and Rule 30, or a written report pursuant to paragraph (a)(4)(B). The deposition shall occur, or the report shall be served on the other parties, within 28 days after the election is served on the other parties. If no election is served on the other parties, then no further discovery of the expert shall be permitted.

(a)(4)(C)(ii) The party who does not bear the burden of proof on the issue for which expert testimony is offered shall serve on the other parties the information required by paragraph (a)(4)(A) within seven days after the later of (A) the date on which the election under paragraph (a)(4)(C)(i) is due, or (B) receipt of the written report or the taking of the expert's deposition pursuant to paragraph (a)(4)(C)(i). Within seven days thereafter, the party opposing the expert may serve notice electing either a deposition of the expert pursuant to paragraph (a)(4)(B) and Rule 30, or a written report pursuant to paragraph (a)(4)(B). The deposition shall occur, or the report shall be served on the other parties, within 28 days after the election is served on the other parties. If no election is served on the other parties, then no further discovery of the expert shall be permitted.

(a)(4)(C)(iii) If the party who bears the burden of proof on an issue wants to designate rebuttal expert witnesses it shall serve on the other parties the information required by paragraph (a)(4)(A) within seven days after the later of (A) the date on which the election under paragraph (a)(4)(C)(ii) is due, or (B) receipt of the written report or the taking of the expert's deposition pursuant to paragraph (a)(4)(C)(ii). Within seven days thereafter, the party opposing the expert may serve notice electing either a deposition of the expert pursuant to paragraph (a)(4)(B) and Rule 30, or a written report pursuant to paragraph (a)(4)(B). The deposition shall occur, or the report shall be served on the other parties, within 28 days after the election is served on the other parties. If no election is served on the other parties, then no further discovery of the expert shall be permitted.

(a)(4)(D) Multiparty actions. In multiparty actions, all parties opposing the expert must agree on either a report or a deposition. If all parties opposing the expert do not agree, then further discovery of the expert may be obtained only by deposition pursuant to paragraph (a)(4)(B) and Rule 30.

(a)(4)(E) Summary of non-retained expert testimony. If a party intends to present evidence at trial under Rule 702 of the Utah Rules of Evidence from any person other than an expert witness who is retained or specially employed to provide testimony in the case or a person whose duties as an employee of the party regularly involve giving expert testimony, that party must serve on the other parties a written summary of the facts and opinions to which the witness is expected to testify in accordance with the deadlines set forth in paragraph (a)(4)(C). A deposition of such a witness may not exceed four hours.

(a)(5) Pretrial disclosures.

(a)(5)(A) A party shall, without waiting for a discovery request, serve on the other parties:

(a)(5)(A)(i) the name and, if not previously provided, the address and telephone number of each witness, unless solely for impeachment, separately identifying witnesses the party will call and witnesses the party may call;

(a)(5)(A)(ii) the name of witnesses whose testimony is expected to be presented by transcript of a deposition and a copy of the transcript with the proposed testimony designated; and

(a)(5)(A)(iii) a copy of each exhibit, including charts, summaries and demonstrative exhibits, unless solely for impeachment, separately identifying those which the party will offer and those which the party may offer.

(a)(5)(B) Disclosure required by paragraph (a)(5) shall be served on the other parties at least 28 days before trial. At least 14 days before trial, a party shall serve and file counter designations of deposition testimony, objections and grounds for the objections to the use of a deposition and to the admissibility of exhibits. Other than objections under Rules 402 and 403 of the Utah Rules of Evidence, objections not listed are waived unless excused by the court for good cause.

(b) Discovery scope.

(b)(1) In general. Parties may discover any matter, not privileged, which is relevant to the claim or defense of any party if the discovery satisfies the standards of proportionality set forth below. Privileged matters that are not discoverable or admissible in any proceeding of any kind or character include all information in any form provided during and created specifically as part of a request for an investigation, the investigation, findings, or conclusions of peer review, care review, or quality assurance processes of any organization of health care providers as defined in the Utah Health Care Malpractice Act for the purpose of evaluating care provided to reduce morbidity and mortality or to improve the quality of medical care, or for the purpose of peer review of the ethics, competence, or professional conduct of any health care provider.

(b)(2) Proportionality. Discovery and discovery requests are proportional if:

(b)(2)(A) the discovery is reasonable, considering the needs of the case, the amount in controversy, the complexity of the case, the parties' resources, the importance of the issues, and the importance of the discovery in resolving the issues;

(b)(2)(B) the likely benefits of the proposed discovery outweigh the burden or expense;

(b)(2)(C) the discovery is consistent with the overall case management and will further the just, speedy and inexpensive determination of the case;

(b)(2)(D) the discovery is not unreasonably cumulative or duplicative;

(b)(2)(E) the information cannot be obtained from another source that is more convenient, less burdensome or less expensive; and

(b)(2)(F) the party seeking discovery has not had sufficient opportunity to obtain the information by discovery or otherwise, taking into account the parties' relative access to the information.

(b)(3) Burden. The party seeking discovery always has the burden of showing proportionality and relevance. To ensure proportionality, the court may enter orders under Rule 37.

(b)(4) Electronically stored information. A party claiming that electronically stored information is not reasonably accessible because of undue burden or cost shall describe the source of the electronically stored information, the nature and extent of the burden, the nature of the information not provided, and any other information that will enable other parties to evaluate the claim.

(b)(5) Trial preparation materials. A party may obtain otherwise discoverable documents and tangible things prepared in anticipation of litigation or for trial by or for another party or by or for that other party's representative (including the party's attorney, consultant, surety, indemnitor, insurer, or agent) only upon a showing that the party seeking discovery has substantial need of the materials and that the party is unable without undue hardship to obtain substantially equivalent materials by other means. In ordering discovery of such materials, the court shall protect against disclosure of the mental impressions, conclusions, opinions, or legal theories of an attorney or other representative of a party.

(b)(6) Statement previously made about the action. A party may obtain without the showing required in paragraph (b)(5) a statement concerning the action or its subject matter previously made by that party. Upon request, a person not a party may obtain without the required showing a statement about the action or its subject matter previously made by that person. If the request is refused, the person may move for a court order under Rule 37. A statement previously made is (A) a written statement signed or approved by the person making it, or (B) a stenographic, mechanical, electronic, or other recording, or a transcription thereof, which is a substantially verbatim recital of an oral statement by the person making it and contemporaneously recorded.

(b)(7) Trial preparation; experts.

(b)(7)(A) Trial-preparation protection for draft reports or disclosures. Paragraph (b)(5) protects drafts of any report or disclosure required under paragraph (a)(4), regardless of the form in which the draft is recorded.

(b)(7)(B) Trial-preparation protection for communications between a party's attorney and expert witnesses. Paragraph (b)(5) protects communications between the party's attorney and any witness required to provide disclosures under paragraph (a)(4), regardless of the form of the communications, except to the extent that the communications:

(b)(7)(B)(i) relate to compensation for the expert's study or testimony;

(b)(7)(B)(ii) identify facts or data that the party's attorney provided and that the expert considered in forming the opinions to be expressed; or

(b)(7)(B)(iii) identify assumptions that the party's attorney provided and that the expert relied on in forming the opinions to be expressed.

(b)(7)(C) Expert employed only for trial preparation. Ordinarily, a party may not, by interrogatories or otherwise, discover facts known or opinions held by an expert who has been retained or specially employed by another party in anticipation of litigation or to prepare for trial and who is not expected to be called as a witness at trial. A party may do so only:

(b)(7)(C)(i) as provided in Rule 35(b); or

(b)(7)(C)(ii) on showing exceptional circumstances under which it is impracticable for the party to obtain facts or opinions on the same subject by other means.

(b)(8) Claims of privilege or protection of trial preparation materials.

(b)(8)(A) Information withheld. If a party withholds discoverable information by claiming that it is privileged or prepared in anticipation of litigation or for trial, the party shall make the claim expressly and shall describe the nature of the documents, communications, or things not produced in a manner that, without revealing the information itself, will enable other parties to evaluate the claim.

(b)(8)(B) Information produced. If a party produces information that the party claims is privileged or prepared in anticipation of litigation or for trial, the producing party may notify any receiving party of the claim and the basis for it. After being notified, a receiving party must

promptly return, sequester, or destroy the specified information and any copies it has and may not use or disclose the information until the claim is resolved. A receiving party may promptly present the information to the court under seal for a determination of the claim. If the receiving party disclosed the information before being notified, it must take reasonable steps to retrieve it. The producing party must preserve the information until the claim is resolved.

(c) Methods, sequence and timing of discovery; tiers; limits on standard discovery; extraordinary discovery.

(c)(1) Methods of discovery. Parties may obtain discovery by one or more of the following methods: depositions upon oral examination or written questions; written interrogatories; production of documents or things or permission to enter upon land or other property, for inspection and other purposes; physical and mental examinations; requests for admission; and subpoenas other than for a court hearing or trial.

(c)(2) Sequence and timing of discovery. Methods of discovery may be used in any sequence, and the fact that a party is conducting discovery shall not delay any other party's discovery. Except for cases exempt under paragraph (a)(3), a party may not seek discovery from any source before that party's initial disclosure obligations are satisfied.

(c)(3) Definition of tiers for standard discovery. Actions claiming $50,000 or less in damages are permitted standard discovery as described for Tier 1. Actions claiming more than $50,000 and less than $300,000 in damages are permitted standard discovery as described for Tier 2. Actions claiming $300,000 or more in damages are permitted standard discovery as described for Tier 3. Absent an accompanying damage claim for more than $300,000, actions claiming non-monetary relief are permitted standard discovery as described for Tier 2.

(c)(4) Definition of damages. For purposes of determining standard discovery, the amount of damages includes the total of all monetary damages sought (without duplication for alternative theories) by all parties in all claims for relief in the original pleadings.

(c)(5) Limits on standard fact discovery. Standard fact discovery per side (plaintiffs collectively, defendants collectively, and third-party defendants collectively) in each tier is as follows. The days to complete standard fact discovery are calculated from the date the first defendant's first disclosure is due and do not include expert discovery under paragraphs(a)(4)(C) and (D).

Tier	Amount of Damages	Total Fact Deposition Hours	Rule 33 Interrogatories including all discrete subparts	Rule 34 Requests for Production	Rule 36 Requests for Admission	Days to Complete Standard Fact Discovery
1	$50,000 or less	3	0	5	5	120

2	More than $50,000 and less than $300,000 or non-monetary relief	15	10	10	10	180
3	$300,000 or more	30	20	20	20	210

(c)(6) Extraordinary discovery. To obtain discovery beyond the limits established in paragraph (c)(5), a party shall file:

(c)(6)(A) before the close of standard discovery and after reaching the limits of standard discovery imposed by these rules, a stipulated statement that extraordinary discovery is necessary and proportional under paragraph (b)(2) and that each party has reviewed and approved a discovery budget; or

(c)(6)(B) before the close of standard discovery and after reaching the limits of standard discovery imposed by these rules, a ~~motion~~ request for extraordinary discovery ~~setting forth the reasons why the extraordinary discovery is necessary and proportional under paragraph (b)(2) and certifying that the party has reviewed and approved a discovery budget and certifying that the party has in good faith conferred or attempted to confer with the other party in an effort to achieve a stipulation~~ under Rule 37(a).

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

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

(d)(2) If the party providing disclosure or responding to discovery is a corporation, partnership, association, or governmental agency, the party shall act through one or more officers, directors, managing agents, or other persons, who shall make disclosures and responses to discovery based on the information then known or reasonably available to the party.

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

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

(d)(5) If a party learns that a disclosure or response is incomplete or incorrect in some important way, the party must timely serve on the other parties the additional or correct information if it has not

been made known to the other parties. The supplemental disclosure or response must state why the additional or correct information was not previously provided.

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

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

Advisory Committee Notes

Disclosure requirements and timing. Rule 26(a)(1). The 2011 amendments seek to reduce discovery costs by requiring each party to produce, at an early stage in the case, and without a discovery request, all of the documents and physical evidence the party may offer in its case-in-chief and the names of witnesses the party may call in its case-in-chief, with a description of their expected testimony. In this respect, the amendments build on the initial disclosure requirements of the prior rules. In addition to the disclosures required by the prior version of Rule 26(a)(1), a party must disclose each fact witness the party may call in its case-in-chief and a summary of the witness's expected testimony, a copy of all documents the party may offer in its case-in-chief, and all documents to which a party refers in its pleadings.

Not all information will be known at the outset of a case. If discovery is serving its proper purpose, additional witnesses, documents, and other information will be identified. The scope and the level of detail required in the initial Rule 26(a)(1) disclosures should be viewed in light of this reality. A party is not required to interview every witness it ultimately may call at trial in order to provide a summary of the witness's expected testimony. As the information becomes known, it should be disclosed. No summaries are required for adverse parties, including management level employees of business entities, because opposing lawyers are unable to interview them and their testimony is available to their own counsel. For uncooperative or hostile witnesses any summary of expected testimony would necessarily be limited to the subject areas the witness is reasonably expected to testify about. For example, defense counsel may be unable to interview a treating physician, so the initial summary may only disclose that the witness will be questioned concerning the plaintiff's diagnosis, treatment and prognosis. After medical records have been obtained, the summary may be expanded or refined.

Subject to the foregoing qualifications, the summary of the witness's expected testimony should be just that – a summary. The rule does not require prefiled testimony or detailed descriptions of everything

a witness might say at trial. On the other hand, it requires more than the broad, conclusory statements that often were made under the prior version of Rule 26(a)(1)(e.g., "The witness will testify about the events in question" or "The witness will testify on causation."). The intent of this requirement is to give the other side basic information concerning the subjects about which the witness is expected to testify at trial, so that the other side may determine the witness's relative importance in the case, whether the witness should be interviewed or deposed, and whether additional documents or information concerning the witness should be sought. This information is important because of the other discovery limits contained in the 2011 amendments, particularly the limits on depositions.

Likewise, the documents that should be provided as part of the Rule 26(a)(1) disclosures are those that a party reasonably believes it may use at trial, understanding that not all documents will be available at the outset of a case. In this regard, it is important to remember that the duty to provide documents and witness information is a continuing one, and disclosures must be promptly supplemented as new evidence and witnesses become known as the case progresses.

The amendments also require parties to provide more information about damages early in the case. Too often, the subject of damages is deferred until late in the case. Early disclosure of damages information is important. Among other things, it is a critical factor in determining proportionality. The committee recognizes that damages often require additional discovery, and typically are the subject of expert testimony. The Rule is not intended to require expert disclosures at the outset of a case. At the same time, the subject of damages should not simply be deferred until expert discovery. Parties should make a good faith attempt to compute damages to the extent it is possible to do so and must in any event provide all discoverable information on the subject, including materials related to the nature and extent of the damages.

The penalty for failing to make timely disclosures is that the evidence may not be used in the party's case-in-chief. To make the disclosure requirement meaningful, and to discourage sandbagging, parties must know that if they fail to disclose important information that is helpful to their case, they will not be able to use that information at trial. The courts will be expected to enforce them unless the failure is harmless or the party shows good cause for the failure.

The 2011 amendments also change the time for making these required disclosures. Because the plaintiff controls when it brings the action, plaintiffs must make their disclosures within 14 days after service of the first answer. A defendant is required to make its disclosures within 28 days after the plaintiff's first disclosure or after that defendant's appearance, whichever is later. The purpose of early disclosure is to have all parties present the evidence they expect to use to prove their claims or defenses, thereby giving the opposing party the ability to better evaluate the case and determine what additional discovery is necessary and proportional.

The time periods for making Rule 26(a)(1) disclosures, and the presumptive deadlines for completing fact discovery, are keyed to the filing of an answer. If a defendant files a motion to dismiss or other Rule

12(b) motion in lieu of an answer, these time periods normally would be not begin to run until that motion is resolved.

Finally, the 2011 amendments eliminate two categories of actions that previously were exempt from the mandatory disclosure requirements. Specifically, the amendments eliminate the prior exemption for contract actions in which the amount claimed is $20,000 or less, and actions in which any party is proceeding pro se. In the committee's view, these types of actions will benefit from the early disclosure requirements and the overall reduced cost of discovery.

Expert disclosures and timing. Rule 26(a)(3). Expert discovery has become an ever-increasing component of discovery cost. The prior rules sought to eliminate some of these costs by requiring the written disclosure of the expert's opinions and other background information. However, because the expert was not required to sign these disclosures, and because experts often were allowed to deviate from the opinions disclosed, attorneys typically would take the expert's deposition to ensure the expert would not offer "surprise" testimony at trial, thereby increasing rather than decreasing the overall cost. The amendments seek to remedy this and other costs associated with expert discovery by, among other things, allowing the opponent to choose either a deposition of the expert or a written report, but not both; in the case of written reports, requiring more comprehensive disclosures, signed by the expert, and making clear that experts will not be allowed to testify beyond what is fairly disclosed in a report, all with the goal of making reports a reliable substitute for depositions; and incorporating a rule that protects from discovery most communications between an attorney and retained expert. Discovery of expert opinions and testimony is automatic under Rule 26(a)(3) and parties are not required to serve interrogatories or use other discovery devices to obtain this information.

Disclosures of expert testimony are made in sequence, with the party who bears the burden of proof on the issue for which expert testimony will be offered going first. Within seven days after the close of fact discovery, that party must disclose: (i) the expert's curriculum vitae identifying the expert's qualifications, publications, and prior testimony; (ii) compensation information; (iii) a brief summary of the opinions the expert will offer; and (iv) a complete copy of the expert's file for the case. The file should include all of the facts and data that the expert has relied upon in forming the expert's opinions. If the expert has prepared summaries of data, spreadsheets, charts, tables, or similar materials, they should be included. If the expert has used software programs to make calculations or otherwise summarize or organize data, that information and underlying formulas should be provided in native form so it can be analyzed and understood. To the extent the expert is relying on depositions or materials produced in discovery, then a list of the specific materials relied upon is sufficient. The committee recognizes that experts frequently will prepare demonstrative exhibits or other aids to illustrate the expert's testimony at trial, and the costs for preparing these materials can be substantial. For that reason, these types of demonstrative aids may be prepared and disclosed later, as part of the Rule 26(a)(4) pretrial disclosures when trial is imminent.

Within seven days after this disclosure, the party opposing the retained expert may elect either a deposition or a written report from the expert. A deposition is limited to four hours, which is not included in

the deposition hours under Rule 26(c)(5), and the party taking it must pay the expert's hourly fee for attending the deposition. If a party elects a written report, the expert must provide a signed report containing a complete statement of all opinions the expert will express and the basis and reasons for them. The intent is not to require a verbatim transcript of exactly what the expert will say at trial; instead the expert must fairly disclose the substance of and basis for each opinion the expert will offer. The expert may not testify in a party's case in chief concerning any matter that is not fairly disclosed in the report. To achieve the goal of making reports a reliable substitute for depositions, courts are expected to enforce this requirement. If a party elects a deposition, rather than a report, it is up to the party to ask the necessary questions to "lock in" the expert's testimony. But the expert is expected to be fully prepared on all aspects of his/her trial testimony at the time of the deposition and may not leave the door open for additional testimony by qualifying answers to deposition questions.

The report or deposition must be completed within 28 days after the election is made. After this, the party who does not bear the burden of proof on the issue for which expert testimony is offered must make its corresponding disclosures and the opposing party may then elect either a deposition or a written report. Under the deadlines contained in the rules, expert discovery should take less than three months to complete. However, as with the other discovery rules, these deadlines can be altered by stipulation of the parties or order of the court.

The amendments also address the issue of testimony from non-retained experts, such as treating physicians, police officers, or employees with special expertise, who are not retained or specially employed to provide expert testimony, or whose duties as an employee do not regularly involve giving expert testimony. This issue was addressed by the Supreme Court in Drew v. Lee, 2011 UT 15, wherein the court held that reports under the prior version of Rule 26(a)(3) are not required for treating physicians.

There are a number of difficulties inherent in disclosing expert testimony that may be offered from fact witnesses. First, there is often not a clear line between fact and expert testimony. Many fact witnesses have scientific, technical or other specialized knowledge, and their testimony about the events in question often will cross into the area of expert testimony. The rules are not intended to erect artificial barriers to the admissibility of such testimony. Second, many of these fact witnesses will not be within the control of the party who plans to call them at trial. These witnesses may not be cooperative, and may not be willing to discuss opinions they have with counsel. Where this is the case, disclosures will necessarily be more limited. On the other hand, consistent with the overall purpose of the 2011 amendments, a party should receive advance notice if their opponent will solicit expert opinions from a particular witness so they can plan their case accordingly. In an effort to strike an appropriate balance, the rules require that such witnesses be identified and the information about their anticipated testimony should include that which is required under Rule 26(a)(1)(A)(ii), which should include any opinion testimony that a party expects to elicit from them at trial. If a party has disclosed possible opinion testimony in its Rule 26(a)(1)(A)(ii) disclosures, that party is not required to prepare a separate Rule 26(a)(3)(D) disclosure for the witness. And if that disclosure is made in advance of the witness's deposition, those opinions should be explored

in the deposition and not in a separate expert deposition. Otherwise, the timing for disclosure of non-retained expert opinions is the same as that for retained experts under Rule 26(a)(4)(C) and depends on whether the party has the burden of proof or is responding to another expert. Rule 26(a)(3)(D) and 26(a)(1)(A)(ii) are not intended to elevate form over substance – all they require is that a party fairly inform its opponent that opinion testimony may be offered from a particular witness. And because a party who expects to offer this testimony normally cannot compel such a witness to prepare a written report, further discovery must be done by interview or by deposition.

Finally, the amendments include a new Rule 26(b)(7) that protects from discovery draft expert reports and, with limited exception, communications between an attorney and an expert. These changes are modeled after the recent changes to the Federal Rules of Civil Procedure and are intended to address the unnecessary and costly procedures that often were employed in order to protect such information from discovery, and to reduce "satellite litigation" over such issues.

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

In the past, the scope of discovery was governed by "relevance" or the "likelihood to lead to discovery of admissible evidence." These broad standards may have secured just results by allowing a party to discover all facts relevant to the litigation. However, they did little to advance two equally important objectives of the rules of civil procedure—the speedy and inexpensive resolution of every action. Accordingly, the former standards governing the scope of discovery have been replaced with the proportionality standards in subpart (b)(1).

The concept of proportionality is not new. The prior rule permitted the Court to limit discovery methods if it determined that "the discovery was unduly burdensome or expensive, taking into account the needs of the case, the amount in controversy, limitations on the parties' resources, and the importance of the issues at stake in the litigation." The Federal Rules of Civil Procedure contains a similar provision. See Fed. R. Civ. P. 26(b)(2)(C). This method of limiting discovery, however, was rarely invoked either under the Utah rules or federal rules.

Under the prior rule, the party objecting to the discovery request had the burden of proving that a discovery request was not proportional. The new rule changes the burden of proof. Today, the party seeking discovery beyond the scope of "standard" discovery has the burden of showing that the request is "relevant to the claim or defense of any party" and that the request satisfies the standards of proportionality. As before, ultimate admissibility is not an appropriate objection to a discovery request so long as the proportionality standard and other requirements are met.

The 2011 amendments establish three tiers of standard discovery in Rule 26(c). Ideally, rules of procedure should be crafted to promote predictability for litigants. Rules should limit the need to resort to judicial oversight. Tiered standard discovery seeks to achieve these ends. The "one-size-fits-all" system is

rejected. Tiered discovery signals to judges, attorneys, and parties the amount of discovery which by rule is deemed proportional for cases with different amounts in controversy.

Any system of rules which permits the facts and circumstances of each case to inform procedure cannot eliminate uncertainty. Ultimately, the trial court has broad discretion in deciding whether a discovery request is proportional. The proportionality standards in subpart (b)(2) and the discovery tiers in subpart (c) mitigate uncertainty by guiding that discretion. The proper application of the proportionality standards will be defined over time by trial and appellate courts.

Standard and extraordinary discovery. Rule 26(c). As a counterpart to requiring more detailed disclosures under Rule 26(a), the 2011 amendments place new limitations on additional discovery the parties may conduct. Because the committee expects the enhanced disclosure requirements will automatically permit each party to learn the witnesses and evidence the opposing side will offer in its case-in-chief, additional discovery should serve the more limited function of permitting parties to find witnesses, documents, and other evidentiary materials that are harmful, rather than helpful, to the opponent's case.

Rule 26(c) provides for three separate "tiers" of limited, "standard" discovery that are presumed to be proportional to the amount and issues in controversy in the action, and that the parties may conduct as a matter of right. An aggregation of all damages sought by all parties in an action dictates the applicable tier of standard discovery, whether such damages are sought by way of a complaint, counterclaim, or otherwise. The tiers of standard discovery are set forth in a chart that is embedded in the body of the rule itself. "Tier 1" describes a minimal amount of standard discovery that is presumed proportional for cases involving damages of $50,000 or less. "Tier 2" sets forth larger limits on standard discovery that are applicable in cases involving damages above $50,000 but less than $300,000. Finally, "Tier 3" prescribes still greater standard discovery for actions involving damages in excess of $300,000. Deposition hours are charged to a side for the time spent asking questions of the witness. In a particular deposition, one side may use two hours while the other side uses only 30 minutes. The tiers also provide presumptive limitations on the time within which standard discovery should be completed, which limitations similarly increase with the amount of damages at issue. ~~Discovery motions~~ A statement of discovery issues will not toll the period. Parties are expected to be reasonable and accomplish as much as they can during standard discovery. ~~The motions~~ A statement of discovery issues may result in additional discovery and sanctions at the expense of a party who unreasonably fails to respond or otherwise frustrates discovery. After the expiration of the applicable time limitation, a case is presumed to be ready for trial. Actions for non-monetary relief, such as injunctive relief, are subject to the standard discovery limitations of Tier 2, absent an accompanying monetary claim of $300,000 or more, in which case Tier 3 applies. The committee determined these standard discovery limitations based on the expectation that for the majority of cases filed in the Utah State Courts, the magnitude of available discovery and applicable time parameters available under the three-tiered system should be sufficient for cases involving the respective amounts of damages.

Despite the expectation that standard discovery according to the applicable tier should be adequate in the typical case, the 2011 amendments contemplate there will be some cases for which standard discovery is not sufficient or appropriate. In such cases, parties may conduct additional discovery that is shown to be consistent with the principle of proportionality. There are two ways to obtain such additional discovery. The first is by stipulation. If the parties can agree additional discovery is necessary, they may stipulate to as much additional discovery as they desire, provided they stipulate the additional discovery is proportional to what is at stake in the litigation and counsel for each party certifies that the party has reviewed and approved a budget for additional discovery. Such a stipulation should be filed before the close of the standard discovery time limit, but only after reaching the limits for that type of standard discovery available under the rule. If these conditions are met, the Court will not second-guess the parties and their counsel and must approve the stipulation.

The second method to obtain additional discovery is by ~~motion~~ a statement of discovery issues. The committee recognizes there will be some cases in which additional discovery is appropriate, but the parties cannot agree to the scope of such additional discovery. These may include, among other categories, large and factually complex cases and cases in which there is a significant disparity in the parties' access to information, such that one party legitimately has a greater need than the other party for additional discovery in order to prepare properly for trial. To prevent a party from taking advantage of this situation, the 2011 amendments allow any party to ~~move the Court for~~ request additional discovery. As with stipulations for extraordinary discovery, a party ~~filing a motion for~~ requesting extraordinary discovery should do so before the close of the standard discovery time limit, but only after the ~~moving~~ party has reached the limits for that type of standard discovery available to it under the rule. By taking advantage of this discovery, counsel should be better equipped to articulate for the court what additional discovery is needed and why. The requesting party ~~making such a motion~~ must demonstrate that the additional discovery is proportional and certify that the party has reviewed and approved a discovery budget. The burden to show the need for additional discovery, and to demonstrate relevance and proportionality, always falls on the party seeking additional discovery. However, cases in which such additional discovery is appropriate do exist, and it is important for courts to recognize they can and should permit additional discovery in appropriate cases, commensurate with the complexity and magnitude of the dispute.

Protective order language moved to Rule 37. The 2011 amendments delete in its entirety the prior language of Rule 26(c) governing motions for protective orders. The substance of that language is now found in Rule 37. The committee determined it was preferable to cover ~~motions~~ requests for an order to compel, ~~motions~~ for a protective order~~s~~, and ~~motions for discovery~~ sanctions in a single rule, rather than two separate rules. ~~Accordingly, Rule 37 now governs these motions and orders.~~

Consequences of failure to disclose. Rule 26(d). If a party fails to disclose or to supplement timely its discovery responses, that party cannot use the undisclosed witness, document, or material at any hearing or trial, absent proof that non-disclosure was harmless or justified by good cause. More complete disclosures increase the likelihood that the case will be resolved justly, speedily, and inexpensively. Not

being able to use evidence that a party fails properly to disclose provides a powerful incentive to make complete disclosures. This is true only if trial courts hold parties to this standard. Accordingly, although a trial court retains discretion to determine how properly to address this issue in a given case, the usual and expected result should be exclusion of the evidence.

Legislative Note

Rule 30. Depositions upon oral questions.

(a) **When depositions may be taken; when leave required.** A party may depose a party or witness by oral questions. A witness may not be deposed more than once in standard discovery. An expert who has prepared a report disclosed under Rule 26(a)(4)(B) may not be deposed.

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

(b)(1) The party deposing a witness shall give reasonable notice in writing to every other party. The notice shall state the date, time and place for the deposition and the name and address of each witness. If the name of a witness is not known, the notice shall describe the witness sufficiently to identify the person or state the class or group to which the person belongs. The notice shall designate any documents and tangible things to be produced by a witness. The notice shall designate the officer who will conduct the deposition.

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

(b)(3) A deposition shall be conducted before an officer appointed or designated under Rule 28 and shall begin with a statement on the record by the officer that includes (A) the officer's name and business address; (B) the date, time and place of the deposition; (C) the name of the witness; (D) the administration of the oath or affirmation to the witness; and (E) an identification of all persons present. If the deposition is recorded other than stenographically, the officer shall repeat items (A) through (C) at the beginning of each unit of the recording medium. At the end of the

deposition, the officer shall state on the record that the deposition is complete and shall state any stipulations.

(b)(4) The notice to a party witness may be accompanied by a request under Rule 34 for the production of documents and tangible things at the deposition. The procedure of Rule 34 shall apply to the request. The attendance of a nonparty witness may be compelled by subpoena under Rule 45. Documents and tangible things to be produced shall be stated in the subpoena.

(b)(5) A deposition may be taken by remote electronic means. A deposition taken by remote electronic means is considered to be taken at the place where the witness is located.

(b)(6) A party may name as the witness a corporation, a partnership, an association, or a governmental agency, describe with reasonable particularity the matters on which questioning is requested, and direct the organization to designate one or more officers, directors, managing agents, or other persons to testify on its behalf. The organization shall state, for each person designated, the matters on which the person will testify. A subpoena shall advise a nonparty organization of its duty to make such a designation. The person so designated shall testify as to matters known or reasonably available to the organization.

(c) **Examination and cross-examination; objections.**

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

(c)(2) All objections shall be recorded, but the questioning shall proceed, and the testimony taken subject to the objections. Any objection shall be stated concisely and in a non-argumentative and non-suggestive manner. A person may instruct a witness not to answer only to preserve a privilege, to enforce a limitation on evidence directed by the court, or to present a motion for a protective order under Rule 37. Upon demand of the objecting party or witness, the deposition shall be suspended for the time necessary to make a motion. The party taking the deposition may complete or adjourn the deposition before moving for an order to compel discovery under Rule 37.

(d) **Limits.** During standard discovery, oral questioning of a nonparty shall not exceed four hours, and oral questioning of a party shall not exceed seven hours.

(e) **Submission to witness; changes; signing.** Within 28 days after being notified by the officer that the transcript or recording is available, a witness may sign a statement of changes to the form or substance of the transcript or recording and the reasons for the changes. The officer shall append any changes timely made by the witness.

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

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

(f)(2) Every party may inspect and copy documents and things produced for inspection and must have a fair opportunity to compare copies and originals. Upon the request of a party, documents and things produced for inspection shall be marked for identification and added to the record. If the witness wants to retain the originals, that person shall offer the originals to be copied, marked for identification and added to the record.

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

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

the party giving the notice to pay to the other party the reasonable costs, expenses and attorney fees incurred.

(h) **Deposition in action pending in another state.** Any party to an action in another state may take the deposition of any person within this state in the same manner and subject to the same conditions and limitations as if such action were pending in this state. Notice of the deposition shall be filed with the clerk of the court of the county in which the person whose deposition is to be taken resides or is to be served. Matters required to be submitted to the court shall be submitted to the court in the county where the deposition is being taken.

(i) **Stipulations regarding deposition procedures.** The parties may by written stipulation provide that depositions may be taken before any person, at any time or place, upon any notice, and in any manner and when so taken may be used like other depositions.

Rule 37. ~~Discovery and disclosure motions~~ ~~Expedited s~~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 s**~~**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)(K) that a party pay the other party's 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~~ upon motion, may impose appropriate sanctions for the failure to follow its orders, 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 Amendments.

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). See also *The Townhomes At Pointe Meadows Owners Association v. Pointe Meadows Townhomes, LLC*, 2014 UT App 52 ¶14. The process for resolving disclosure issues is included in paragraph (a).

Rule 45. Subpoena.

(a) Form; issuance.

(a)(1) Every subpoena shall:

(a)(1)(A) issue from the court in which the action is pending;

(a)(1)(B) state the title and case number of the action, the name of the court from which it is issued, and the name and address of the party or attorney responsible for issuing the subpoena;

(a)(1)(C) command each person to whom it is directed

(a)(1)(C)(i) to appear and give testimony at a trial, hearing or deposition, or

(a)(1)(C)(ii) to appear and produce for inspection, copying, testing or sampling documents, electronically stored information or tangible things in the possession, custody or control of that person, or

(a)(1)(C)(iii) to copy documents or electronically stored information in the possession, custody or control of that person and mail or deliver the copies to the party or attorney responsible for issuing the subpoena before a date certain, or

(a)(1)(C)(iv) to appear and to permit inspection of premises;

(a)(1)(D) if an appearance is required, specify the date, time and place for the appearance; and

(a)(1)(E) include a notice to persons served with a subpoena in a form substantially similar to the subpoena form appended to these rules. A subpoena may specify the form or forms in which electronically stored information is to be produced.

(a)(2) The clerk shall issue a subpoena, signed but otherwise in blank, to a party requesting it, who shall complete it before service. An attorney admitted to practice in Utah may issue and sign a subpoena as an officer of the court.

(b) Service; fees; prior notice.

(b)(1) A subpoena may be served by any person who is at least 18 years of age and not a party to the case. Service of a subpoena upon the person to whom it is directed shall be made as provided in Rule 4(d).

(b)(2) If the subpoena commands a person's appearance, the party or attorney responsible for issuing the subpoena shall tender with the subpoena the fees for one day's attendance and the mileage allowed by law. When the subpoena is issued on behalf of the United States, or this state, or any officer or agency of either, fees and mileage need not be tendered.

(b)(3) If the subpoena commands a person to copy and mail or deliver documents or electronically stored information, to produce documents, electronically stored information or tangible things for inspection, copying, testing or sampling or to permit inspection of premises, the party or attorney responsible for issuing the subpoena shall serve each party with ~~notice of~~ the subpoena by delivery or other method of actual notice before serving the subpoena.

(c) Appearance; resident; non-resident.

(c)(1) A person who resides in this state may be required to appear:

(c)(1)(A) at a trial or hearing in the county in which the case is pending; and

(c)(1)(B) at a deposition, or to produce documents, electronically stored information or tangible things, or to permit inspection of premises only in the county in which the person resides, is employed, or transacts business in person, or at such other place as the court may order.

(c)(2) A person who does not reside in this state but who is served within this state may be required to appear:

(c)(2)(A) at a trial or hearing in the county in which the case is pending; and

(c)(2)(B) at a deposition, or to produce documents, electronically stored information or tangible things, or to permit inspection of premises only in the county in which the person is served or at such other place as the court may order.

(d) Payment of production or copying costs. The party or attorney responsible for issuing the subpoena shall pay the reasonable cost of producing or copying documents, electronically stored information or tangible things. Upon the request of any other party and the payment of reasonable costs, the party or attorney responsible for issuing the subpoena shall provide to the requesting party copies of all documents, electronically stored information or tangible things obtained in response to the subpoena or shall make the tangible things available for inspection.

(e) Protection of persons subject to subpoenas; objection.

(e)(1) The party or attorney responsible for issuing a subpoena shall take reasonable steps to avoid imposing an undue burden or expense on the person subject to the subpoena. The court shall enforce this duty and impose upon the party or attorney in breach of this duty an appropriate sanction, which may include, but is not limited to, lost earnings and a reasonable attorney fee.

(e)(2) A subpoena to copy and mail or deliver documents or electronically stored information, to produce documents, electronically stored information or tangible things, or to permit inspection of premises shall comply with Rule 34(a) and (b)(1), except that the person subject to the subpoena must be allowed at least 14 days after service to comply.

(e)(3) The person subject to the subpoena or a non-party affected by the subpoena may object under Rule 37 if the subpoena:

(e)(3)(A) fails to allow reasonable time for compliance;

(e)(3)(B) requires a resident of this state to appear at other than a trial or hearing in a county in which the person does not reside, is not employed, or does not transact business in person;

(e)(3)(C) requires a non-resident of this state to appear at other than a trial or hearing in a county other than the county in which the person was served;

(e)(3)(D) requires the person to disclose privileged or other protected matter and no exception or waiver applies;

(e)(3)(E) requires the person to disclose a trade secret or other confidential research, development, or commercial information;

(e)(3)(F) subjects the person to an undue burden or cost;

(e)(3)(G) requires the person to produce electronically stored information in a form or forms to which the person objects;

(e)(3)(H) requires the person to provide electronically stored information from sources that the person identifies as not reasonably accessible because of undue burden or cost; or

(e)(3)(I) requires the person to disclose an unretained expert's opinion or information not describing specific events or occurrences in dispute and resulting from the expert's study that was not made at the request of a party.

(e)(4)(A) If the person subject to the subpoena or a non-party affected by the subpoena objects, the objection must be made before the date for compliance.

(e)(4)(B) The objection shall be stated in a concise, non-conclusory manner.

(e)(4)(C) If the objection is that the information commanded by the subpoena is privileged or protected and no exception or waiver applies, or requires the person to disclose a trade secret or other confidential research, development, or commercial information, the objection shall sufficiently describe the nature of the documents, communications, or things not produced to enable the party or attorney responsible for issuing the subpoena to contest the objection.

(e)(4)(D) If the objection is that the electronically stored information is from sources that are not reasonably accessible because of undue burden or cost, the person from whom discovery is sought must show that the information sought is not reasonably accessible because of undue burden or cost.

(e)(4)(E) The objection shall be served on the party or attorney responsible for issuing the subpoena. The party or attorney responsible for issuing the subpoena shall serve a copy of the objection on the other parties.

(e)(5) If objection is made, or if a party ~~files a motion for~~ requests a protective order, the party or attorney responsible for issuing the subpoena is not entitled to compliance but may ~~move for~~ request an order to compel compliance under Rule 37(a). The ~~motion~~ objection or request shall be served on the other parties and on the person subject to the subpoena. An order compelling compliance shall protect the person subject to or affected by the subpoena from significant expense or harm. The court may quash or modify the subpoena. If the party or attorney responsible for issuing the subpoena shows a substantial need for the information that cannot be met without undue hardship, the court may order compliance upon specified conditions.

(f) Duties in responding to subpoena.

(f)(1) A person commanded to copy and mail or deliver documents or electronically stored information or to produce documents, electronically stored information or tangible things shall serve on the party or attorney responsible for issuing the subpoena a declaration under penalty of law stating in substance:

(f)(1)(A) that the declarant has knowledge of the facts contained in the declaration;

(f)(1)(B) that the documents, electronically stored information or tangible things copied or produced are a full and complete response to the subpoena;

(f)(1)(C) that the documents, electronically stored information or tangible things are the originals or that a copy is a true copy of the original; and

(f)(1)(D) the reasonable cost of copying or producing the documents, electronically stored information or tangible things.

(f)(2) A person commanded to copy and mail or deliver documents or electronically stored information or to produce documents, electronically stored information or tangible things shall copy or produce them as they are kept in the usual course of business or shall organize and label them to correspond with the categories in the subpoena.

(f)(3) If a subpoena does not specify the form or forms for producing electronically stored information, a person responding to a subpoena must produce the information in the form or forms in which the person ordinarily maintains it or in a form or forms that are reasonably usable.

(f)(4) If the information produced in response to a subpoena is subject to a claim of privilege or of protection as trial-preparation material, the person making the claim may notify any party who received the information of the claim and the basis for it. After being notified, the party must promptly return, sequester, or destroy the specified information and any copies of it and may not use or disclose the information until the claim is resolved. A receiving party may promptly present the information to the court under seal for a determination of the claim. If the receiving party disclosed the information before being notified, it must take reasonable steps to retrieve the information. The person who produced the information must preserve the information until the claim is resolved.

(g) Contempt. Failure by any person without adequate excuse to obey a subpoena served upon that person is punishable as contempt of court.

(h) Procedure when witness evades service or fails to attend. If a witness evades service of a subpoena or fails to attend after service of a subpoena, the court may issue a warrant to the sheriff of the county to arrest the witness and bring the witness before the court.

(i) Procedure when witness is confined in jail. If the witness is a prisoner, a party may move for an order to examine the witness in the jail or prison or to produce the witness before the court or officer for the purpose of being orally examined.

(j) Subpoena unnecessary. A person present in court or before a judicial officer may be required to testify in the same manner as if the person were in attendance upon a subpoena.

Advisory Committee Notes

To quash a subpoena, a party or a non-party affected by the subpoena should file a ~~motion~~ request for a protective order under the statement of discovery procedures in Rule ~~26 and a non-party affected by the subpoena should file an objection under this rule~~ 37. The non-party might be the person subpoenaed or might be someone who has an interest in the testimony of the subpoenaed person or in the documents or other materials ordered to be produced.

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Tab 5

Rule 63. Disability or disqualification of a judge.

(a) **Substitute judge; Prior testimony.** If the judge to whom an action has been assigned is unable to perform the duties required of the court under these rules, then any other judge of that district or any judge assigned pursuant to Judicial Council rule is authorized to perform those duties. The judge to whom the case is assigned may in the exercise of discretion rehear the evidence or some part of it.

(b) **Disqualification.**

(b)(1)(A) A party to any action or the party's attorney may file a motion to disqualify a judge. The motion shall be accompanied by a certificate that the motion is filed in good faith and shall be supported by an affidavit stating facts sufficient to show bias, prejudice or conflict of interest.

(b)(1)(B) The motion shall be filed after commencement of the action, but not later than 21 days after the last of the following:

(b)(1)(B)(i) assignment of the action or hearing to the judge;

(b)(1)(B)(ii) appearance of the party or the party's attorney; or

(b)(1)(B)(iii) the date on which the moving party learns or with the exercise of reasonable diligence should have learned of the grounds upon which the motion is based.

If the last event occurs fewer than 21 days prior to a hearing, the motion shall be filed as soon as practicable.

(b)(1)(C) Signing the motion or affidavit constitutes a certificate under Rule 11 and subjects the party or attorney to the procedures and sanctions of Rule 11. No party may file more than one motion to disqualify in an action, unless the second or subsequent motion is based on circumstances that did not exist at the time of the earlier motion.

(b)(2) The judge against whom the motion and affidavit are directed shall, without further hearing and without a response or a request to submit for decision, enter an order granting the motion or certifying the motion and affidavit to a reviewing judge. The judge shall take no further action in the case until the motion is decided. If the judge grants the motion, the order shall direct the presiding judge of the court or, if the court has no presiding judge, the presiding officer of the Judicial Council to assign another judge to the action or hearing. The presiding judge of the court, any judge of the district, any judge of a court of like jurisdiction, or the presiding officer of the Judicial Council may serve as the reviewing judge.

(b)(3)(A) If the reviewing judge finds that the motion and affidavit are timely filed, filed in good faith and legally sufficient, the reviewing judge shall assign another judge to the action or hearing or request the presiding judge or the presiding officer of the Judicial Council to do so.

(b)(3)(B) In determining issues of fact or of law, the reviewing judge may consider any part of the record of the action and may request of the judge who is the subject of the motion and affidavit an affidavit responsive to questions posed by the reviewing judge.

(b)(3)(C) The reviewing judge may deny a motion not filed in a timely manner.

Tab 6

Rule 43. Evidence.

(a) Form. In all trials, the testimony of witnesses shall be taken ~~orally~~ in open court, unless otherwise provided by these rules, the Utah Rules of Evidence, or a statute of this state. ~~All evidence shall be admitted which is admissible under the Utah Rules of Evidence or other rules adopted by the Supreme Court.~~ For good cause in compelling circumstances and with appropriate safeguards, the court may permit testimony in open court by contemporaneous transmission from a different location.

(b) Evidence on motions. When a motion is based on facts not ~~appearing of~~ in the record the court may hear the matter on affidavits, ~~presented by the respective parties, but the court may direct that the matter be heard wholly or partly on~~ declarations, oral testimony or depositions.

Tab 7

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September 16, 2014

To: Civil Procedures Committee
From: Tim Shea
Re: Small Claims Rule 14. Offer of judgment.

I have been encouraged to pursue this proposed rule one more time.

Addressing two of the points made at the May meeting. The rule's proponent would not have qualified to receive payment of costs under existing rules because the proponent did not prevail. The proponent's objective is to qualify for payment of costs incurred after an offer if the judgment (adjusted award) is not more favorable than the offer.

In the proponent's particular circumstance, the offeree was a municipality. In URCP 54(d), costs can be imposed on the "state of Utah, its officers and agencies … only to the extent permitted by law." I do not know whether a municipality would be considered an "agency" of the state. Municipalities are "political subdivisions" of the state. Section 10-1-201. The phrase "agency of the state" appears to be critical; governmental units that are not state agencies can be held liable for costs. Lyon v. Burton, 5 P 3rd 616 (UT 2000) (Order Modifying Opinion on Denial of Rehearing June 30, 2000).

Because of my uncertainty about whether a municipality is an agency of the state, I do not know whether, under this rule, an offeror's costs incurred after an offer could be imposed on a municipality. As drafted, Rule 14 does not distinguish between government and non-government parties, nor should it. This rule alone may be sufficient to establish the policy being sought. If not, the proponent would have to seek legislation to authorize costs against municipalities and counties.

This draft of the rule has been amended from the previous draft to remove the requirement that the offer be made after the original judgment. That provision was included at the request of the Board of Justice Court Judges, but an offer after the judgment makes no sense. Once the court has entered a judgment, whether the creditor accepts an offer to pay less than all of it to satisfy the judgment is not the court's concern.

And I have added a note to the effect that the filing fee for the trial de novo is a cost occurring after the offer, but, to avoid liability for costs, the creditor-offeree's judgment after trial de novo only has to be more favorable than the offer. The creditor does not have to improve upon the original judgment in order to avoid liability for costs. I believe this is the result of the rule itself, but I've included it out of an abundance of caution.

copy: Rick Schwermer

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 more than 10 days before trial;

(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 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.

Advisory Committee Notes

The filing fee for the trial de novo is a cost occurring after the offer, but, to avoid liability for costs, the judgment creditor-offeree’s judgment after trial de novo only has to be more favorable than the offer. The judgment creditor does not have to improve upon the original judgment in order to avoid liability for costs.