Agenda

Advisory Committee on Rules of Civil Procedure

November 19, 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 approval of minutes.	Tab 1	Jonathan Hafen
Responses to circulation of Rule 7.	Tab 2	Tim Shea
Consideration of comments to Rules 5, 26, 30, 37 and 45.	Tab 3	Tim Shea
Rule 43. Evidence.	Tab 4	Tim Shea
Rule 63. Disability or disqualification of a judge.	Tab 5	Tim Shea
Small Claims Rule 14. Settlement offers.	Tab 6	Tim Shea

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

Meeting Schedule:

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

UTAH SUPREME COURT ADVISORY COMMITTEE ON RULES OF CIVIL PROCEDURE

Meeting Minutes – October 22, 2014

Present:	Sammi V. Anderson, Rod N. Andreason, Hon. John L. Baxter, Hon. Evelyn J. Furse, Jonathan Hafen, Steve Marsden, Terrie T. McIntosh, Amber M. Mettler, Hon. Derek Pullan, David W. Scofield, Hon. Todd M. Shaughnessy, Leslie W. Slaugh, Trystan B. Smith, Paul Stancil, Hon. Kate Toomey, Barbara L. Townsend
Telephone:	Hon. Lyle R. Anderson
Staff:	Timothy Shea, Heather M. Sneddon
Not Present:	Hon. James T. Blanch, Lori Wiffinden, Scott S. Bell, Lincoln Davies

I. Welcome and approval of minutes. [Tab 1]

Jonathan Hafen welcomed the committee. Rod Andreason moved to approve the draft minutes from last month, which motion was seconded and unanimously approved.

II. Rule 7. Pleadings allowed; motions, memoranda, hearings, orders. [Tab 2]
Rule 54. Judgments; costs.
Rule 58A. Entry of judgment; abstract of judgment.
Form 22. Judgment.

Rule 7. Tim Shea made the changes requested at the last meeting, including the nomenclature for naming motions and memoranda. As to subsection (j)(1), Mr. Shea suggested that it be left as a definition with the use of the term "complete." Because he was unable to find "register of actions" in the rules elsewhere, he proposed "docket" as is used in the appellate rules. He suggested that we repeal and reenact the rule to allow for better readability in submitting comments.

Discussion:

- Leslie Slaugh suggested that we delete the phrase "on a motion" in subjection (j)(1), line 90. If the judge makes a decision following trial, the same rules should apply. Mr. Shea indicated that this change was proposed at the last meeting, but Judge Shaughnessy believed the rule should address orders on motions only. Nevertheless, the current rule on motions is being applied well beyond its scope. The committee discussed at length whether "on a motion" should remain in the rule, taking into account the comments of Prof. Stancil, Rod Andreason, Mr. Slaugh, Judge Furse, Trystan Smith, Jonathan Hafen and Amber Mettler, as well as Judge Shaughnessy's comments from the last meeting. In particular, Prof. Stancil and Mr. Slaugh commented that "on a motion" is redundant in a rule that addresses motions. Heather Sneddon raised Judge Shaughnessy's comments at the last hearing in favor of keeping "on a motion" in the rule to cure the existing confusion over an order's "completeness" with respect to a motion versus the requirements for a "final judgment" for purposes of appeal. The

committee then discussed the proper structure of the first sentence of subsection (j)(1) to achieve clarity and better readability. Judge Furse questioned whether the phrase "however designated" is necessary. Mr. Shea recommended that the committee keep the phrase, as decisions by judges are called several things (e.g., rulings, orders, memorandum decisions, opinions, etc.). Although "on a motion" is new to Rule 7, Mr. Shea commented that he believes it will work.

- Mr. Slaugh proposed the elimination of "to" on lines 26 and 38, to account for motions "for" summary judgment, etc. He likewise proposed removing "the" from the phrase "memorandum opposing the motion" in subsection (d). Concerning lines 27, 33, 37, and 55, he questioned why the relevant portions of cited documents are excluded. As a practical matter, will practitioners be encouraged to block-quote from cases? Further, how will practitioners determine the number of pages they have utilized if these portions are excluded from the page count? He proposed that we take the exclusion out and leave the page limitation as it is, including the statement of facts. The committee discussed this issue at length, including whether subsection (c) accurately describes what should be included in the substantive text of a motion. Mr. Shea clarified that it was derived from the local federal rule. Judge Furse responded that the local federal rule addresses attachments, whereas subsection (c)(3) sounds more like the substantive text of the motion. Judge Furse commented that the material in (c)(3) should be treated separately from the motion. The relevant portions of the cited documents are to be attached. With the adjustment suggested by Judge Furse, Mr. Slaugh proposed that the page limit not include the appendix/exhibits. Mr. Hafen proposed that (c)(3) be kept, but redrafted to make clear that it refers to an appendix/exhibits, and is not counted toward the page limitations.

- Prof. Stancil stated that Rule 7(c), as written, assumes practitioners are permitted to file overlength motions and proposed that the committee consider adding "except on leave of court" or words to that effect. Mr. Slaugh agreed. Mr. Shea mentioned that overlength motions are addressed in subsection (n), lines 140-41, and will add limiting language throughout the rule where page limitations are expressed. Judge Furse also commented that the sentence on line 29 should come before the discussion of page limitations to make clear that it applies to all motions, not just overlength motions.

- Mr. Slaugh proposed to change the language in lines 209-10 to "which affects the time in which to appeal" and strike "and consequently the time in which to appeal." He also commented that line 137 prohibits motions to strike evidence. Mr. Shea stated that the intent was to change the practice with respect to motions to strike.

- With respect to subsection (j)(1), Mr. Andreason questioned whether it creates two species of an order: one that is a decision, and one that is an order "confirming" a decision. It is confusing, as it implies that two signatures are required. Judge Furse also raised the issue of oral rulings, which obviously are not signed because a party has been directed to prepare the order. Mr. Shea stated that the purpose is to distinguish between two species of order. A decision, when in writing and signed, is complete. The judge might or might not direct someone to prepare an order confirming the decision. Mr. Hafen commented that with respect to an oral ruling, it is not complete until signed. Mr. Slaugh proposed that the second sentence in (j)(1) be eliminated, as it is covered by the first. Mr. Shea stated that Mr. Slaugh is probably correct; the second sentence came into being when the rule included language

regarding the judge directing a party to prepare an order. That has been removed, so the second sentence makes little sense. Mr. Hafen proposed to remove the second sentence and "or order" in the third sentence, which the committee approved. Judge Furse also suggested the removal of "and order" in the title of the subsection, which the committee approved.

- Concerning subsection (j)(2), Ms. Mettler proposed changing line 93 to refer to the court's "decision" rather than "ruling." Messrs. Shea and Hafen agreed. The committee also discussed whether there is a need for line 97, which provides that the "court may prepare and serve an order." Mr. Shea commented that court-prepared orders are not intended to go through the process described in (j)(2). The committee discussed the sentence and concluded that, even though some practitioners file objections to proposed orders rather than engaging in a discussion/negotiation regarding the proposed order language, which may be a reason to keep the sentence, the court has the inherent power to enter orders. The committee agreed to remove the sentence.

- Ms. McIntosh suggested grammatical edits to lines 172-79. Mr. Shea agreed to rephrase them and to create a new sentence after the last bullet point.

- Judge Baxter moved to approve Rule 7 as discussed, and Mr. Slaugh seconded. The committee voted unanimously in favor of sending Rule 7, as discussed, to the Rules of Appellate Procedure Committee for review and comment.

Rule 54. Mr. Shea reported that he did not believe any changes had been made since the last meeting. The rule follows the federal rules pretty closely. In lines 2-3, however, the committee has proposed an affirmative definition of a judgment whereas the federal rule does not.

Discussion:

- Mr. Slaugh suggested changing line 2 from "a decree and any order" to "a decree or order" instead. Mr. Andreason suggested further that the phrase read "any order or decree."

- Mr. Slaugh also expressed concern that in line 12, Rule 54 says "expressly states" as opposed to the phrase "expressly determines" that is in the federal rule. Mr. Hafen commented that, as for rulemaking, we need a good reason to depart from the federal rules. Mr. Shea indicated that he would change the language to follow the federal rule.

- Judge Anderson commented that, from the case law, he believed that all claims between the parties must be adjudicated to obtain a judgment certified as final. Mr. Slaugh stated that the judgment must be a discrete unit such that the facts pertaining to the claims requested to be certified are not intertwined with the remaining claims. In other words, not all claims between the parties have to be decided. Mr. Shea added that the rule requires there to be "no just reason for delay." He also commented that there are nuances in the case law that are not codified in the rule.

- With the proposed changes, Judge Toomey moved to send Rule 54 to the Rules of Appellate Procedure Committee for review and comment. Ms. Mettler seconded and the committee voted unanimously in favor of the motion.

Rule 58A. Mr. Shea discussed the recent Butler case, which is cited in the note on Rule 7. Butler is part of a series of cases on finality and was issued after the last committee meeting. Based upon Butler, Mr. Shea recommended changes to Rule 58A to recognize that Rule 54(b) certification still requires a separate document that qualifies as a final judgment. Mr. Shea also redrafted subsection (b)(1) to identify the post-trial motions and rules that Judge Shaughnessy had raised. This follows the federal rule, but a party may request that a judgment be set out in a separate document even if not required. Mr. Shea also made changes to the advisory committee note.

Discussion:

- The committee discussed subsection (b)(2) at length and the confusion created by identifying select orders that are not required to be set out in a separate document as a judgment under (b)(1), when in fact those orders are not technically judgments at all, but then permitting a party to request that a "judgment" be set out in a separate document in (b)(2). Messrs. Slaugh and Hafen commented that we're really talking about an order in (b)(2), not a "judgment." Mr. Andreason suggested that (b)(2) refer to an order set forth in (b)(1). Mr. Smith agreed. Mr. Shea stated that under the federal rules, a party may request that a judgment be set out as a separate document as required by rule 58A, i.e., a party may request that what is required be done. Subsection (b)(1) is the exception. Mr. Slaugh commented that the federal courts are addressing a separate issue because in federal court, orders and judgments are more often prepared by judges. It may be addressing an issue where a clerk failed to do it, for example. Mr. Shea responded that perhaps (b)(2) is not relevant in state court. Mr. Slaugh said that a new practitioner may read (b)(2) and think that he/she *should* make such a request because he/she can. Mr. Hafen proposed that (b)(2) be removed from the rule.

- Concerning subsection (c), Mr. Slaugh noted that it mentions Rule 7(j) but limits it. Rule 7(j) addresses when a party is directed by the court to prepare an order. Rule 58A(c) mandates the prevailing party to prepare, but in pro se cases, the court will often direct the lawyer of the represented party to prepare the order, even if that party lost. Mr. Shea suggested that the judgment be prepared consistent with Rule 7(j), to which Mr. Slaugh agreed. Mr. Andreason expressed his concern that we are eliminating the "default" of the prevailing party preparing the judgment. Mr. Slaugh commented that before, the rule required that the prevailing party "shall" prepare it, but the other party "may." Judge Furse stated that there may be value in stating—in the rule—what parties are required to do rather than referring back to Rule 7(j). Messrs. Shea and Slaugh suggested cut-and-pasting from Rule 7(j). Mr. Hafen proposed that the rule include an introductory phrase that "unless the court prepares the judgment or otherwise directs." Mr. Slaugh agreed to that suggestion, proposing that Mr. Andreason's suggestion also be included that the prevailing party be the presumptive party to prepare the judgment. Mr. Shea expressed his hesitation regarding the prevailing party, as that language caused trouble with Rule 7. The intent was to permit the judges to direct traffic. He will prepare a modified subsection (c) with a cut-and-paste from Rule 7(j), incorporating the committee's comments.

- The committee identified minor typographical and grammar changes to Rule 58A, which were unanimously approved.

- Ms. Mettler questioned how Rule 58A was expected to operate with a request for attorneys' fees. Messrs. Hafen and Slaugh recognized this as an issue. Mr. Shea commented that our

case law is different than the federal case law. Attorneys' fees were purposefully left out of the list in Rule 58A, whereas they are included in the federal rule. However, we may not be able to address it in Rule 58A at this time. Mr. Hafen agreed.

- Mr. Slaugh moved to entrust Mr. Shea with amending Rule 58A per the committee's comments, with a cut-and-paste from Rule 7(j), and sending it to the Rules of Appellate Procedure Committee for review and comment. Mr. Smith seconded and the motion carried.

Form 22: Mr. Shea discussed Form 22 dealing with the clerk signing a judgment. Judge Toomey moved to change the form as proposed by Mr. Shea. Mr. Slaugh seconded and the motion carried.

III. Consideration of comments to Rules 5, 26, 30, 37 and 45. [Tab 3]

Mr. Shea said these rules are coming back from the comment period and are ready for final comments/edits from the committee before going to the Supreme Court. The draft rules and synopses of comments were provided. Mr. Shea also described for new committee members how the process works for comments and proposed rule changes. Mr. Hafen said that the Supreme Court wants the committee to seriously consider comments received from the legal community.

Discussion:

- Judge Furse raised a question regarding a comment about Rule 5 and the electronic filing sealing/privacy issue: Is there a way to file a sealed document that is not shared with the other party? She thought that is what Mr. Bogart was getting at. Mr. Shea informed the committee that there is a classification for records like that, which is "safeguarded." These are kept from other parties and the public. Most are identified by statute. Based upon that classification, Judge Furse asked whether the rule should indicate that either notice will not be sent regarding "safeguarded" information, or that notice will be sent that informs other parties and counsel that "safehuarded" information has been filed (without giving access to that information). Mr. Shea does not believe that the current electronic filing system would accommodate that. Notice of filings is delivered immediately. There is not a current mechanism for an electronically filed document to be safeguarded—it must be paper-filed and hand-delivered to the judge. Judge Toomey mentioned that the filings are often in paper anyway because pro se litigants are involved. And with respect to documents to be reviewed in camera (trade secrets, for example), oftentimes attorneys will request that they be permitted to hand-deliver those documents to chambers and sometimes that method is accepted. Judge Furse questioned whether the rule should acknowledge that happens. Mr. Shea mentioned that a notice that safeguarded documents have been filed needs to be served. Judge Furse stated that the notice requirement also needs to be addressed.

- Mr. Shea stated that these were legitimate observations regarding the inadequacy of the current rule, but they were not the target of the amendments that went out for comment. Judge Toomey questioned whether the issue is prevalent enough to need a rule change. Mr. Shea said that "safeguarded" is a special classification. Trade secrets are "protected," but not kept from the other side. Ms. Mettler mentioned her experience that these types of materials are submitted by hand with an entry on the docket, but no electronic notice is given. Oftentimes, parties will then file a redacted version, which the other parties receive notice of. Ms. Mettler expressed her understanding that a party must file the materials electronically,

thereby making them public, and then request that their public status be changed, which is a non-starter.

- To summarize the committee's comments, Mr. Shea expressed his understanding that the court needs a process by which a party can electronically file a record and request that it be *not* public until the request is addressed by the court. The court also needs a process by which to file a record and request that it be *safeguarded*, i.e., that notice of it being filed go to the other side, but the substance of the record does not until the request is addressed. Mr. Hafen stated that he believes this is a technology issue. Ms. Mettler agreed.

- With respect to the non-technology aspect, Judge Furse questioned whether the rule should reflect an exception with respect to what must be served on other parties. For instance, what about "a paper relating to disclosure or discovery" that is being submitted for in camera review. The paper should not have to be served on other parties, but notice of its filing should be. She suggested that such an exception be reflected in line 4, "except for safeguarded materials," which could be defined elsewhere. Mr. Shea stated that there would need to be a way for an e-filer to flag it, such as a check box, but that does not currently exist. Judge Furse responded that if the technology doesn't exist, then there should be a requirement to file a notice that may be circulated.

- Mr. Smith questioned whether the committee should be making substantive decisions on what does not have to be provided to the other party. Mr. Shea commented that a party needs to be able to request it for documents that do not fall into the automatic "private" category and, instead, are within the judge's discretion to classify. For documents that are identified by rule as private, the e-filing system is programmed to recognize that type of document (such as a victim impact statement) and immediately treat it as private. No request is necessary in that situation.

- Nevertheless, Mr. Shea pointed out that this issue is bigger than the committee can resolve in responding to Mr. Bogart's comment; it would likely require the rule to be resubmitted for comment. If that's the case, it may not need to be resolved in this meeting. Mr. Hafen suggested that it be added to the list of future topics to address.

- Judge Furse commented that because line 4 includes "or as otherwise directed by the court," we should ensure that judges know about the gap in the rules and technology and that they may need to anticipate requests to treat certain filings as sealed pending the resolution of a request or issue. Judge Toomey indicated that the judges are aware of it, as they field phone calls on the issue. Even so, it may not hurt to send out a memo.

- The committee engaged in further discussion regarding the need for the e-filing system to address this issue, how best to handle it in the interim, what has been happening in practice, and whether the "as otherwise provided by these rules" language creates confusion. Mr. Shea proposed that the issue be set aside for the time being to permit him to speak with Deborah and the IT team to create a sound policy for the rule and come up with a technology solution that will allow a party to request that a document, other than those identified as "private" by rule or statute, be classified as something other than public and a process to make that happen. Judge Toomey proposed that further discussion be tabled, as it may be a good idea to cover this issue more fully. Mr. Hafen mentioned that the committee will have

time before these rules take effect, and suggested that the committee discuss the issue further at the next meeting.

IV. Rulemaking principles. [Tab 4]

For the benefit of new members, Mr. Hafen explained that the committee spent time last year discussing general philosophical principles that should govern what we do. We've done a pretty good job on most of the proposed rule-making principles, but could do better on some. One that informs the materials from Tab 3 is input: the committee will consider all comments on rule changes. It is important that we make sure everyone gets due process. Another principle is prioritizing, which Mr. Shea does very well given his discussions with other constituent groups and the justices. Mr. Hafen commented that it is helpful to have principles to keep the committee focused on the fundamentals of why we exist and what we're supposed to accomplish.

V. Rule 43. Evidence. [Tab 5]

Mr. Shea introduced the amendment to Rule 43, based on the federal rule, to accommodate remote testimony. It came about through the ad hoc committee of the Judicial Council to provide services in more remote locations. A civil rule was the simplest because there is a national model in the federal rules. The amendment is essentially lines 5-6. If the committee wants to include language regarding participation by lawyers, we can. Judges often do that in any event.

Mr. Shea indicated that the intent is to build an audio/video system in remote locations that is much better than the existing system. Each of the three rules committees is considering their proposed amendments.

Discussion:

- Mr. Hafen commented that another principle concern is expense and providing access to the courts for people without as much money. It could certainly be abused, but it would be meeting an issue of making the courts more available.

- Mr. Smith questioned whether there are federal cases addressing the meaning of good cause and compelling circumstances. Mr. Andreason asked whether they are redundant or in conflict. Mr. Slaugh questioned why the rule should include compelling circumstances and suggested that the judge should simply decide whether good cause exists. Mr. Shea mentioned that lines 5-6 reflect the federal rule, he believed verbatim, and that the juvenile committee has decided to keep compelling circumstances without referring to good cause. Judge Toomey questioned the meaning of compelling circumstances. Mr. Shea suggested that the meaning is intentionally left to the judge's discretion. Mr. Hafen and Judge Toomey mentioned technology problems with providing remote access. Given the potential detriment, Mr. Slaugh proposed that remote access be permitted based upon a showing of good cause without the inclusion of compelling circumstances. Judge Toomey questioned whether a stipulation constitutes good cause.

- Mr. Smith also questioned how the rule will affect the parties' and the court's ability to use and hear cross-examination. Right now, whether a video witness is permitted is based upon the judge assigned. If there is no case law addressing the issue, the standard will be an abuse

of discretion. What does this mean for jury trials? The quality of cross-examinations will not be the same; the jury will miss many of the things that can only be seen through live testimony. Mr. Hafen agreed, and identified impeachment as an example. How will counsel impeach a person on the phone with documents? Judge Toomey mentioned that it is difficult to deal with an expert on the phone in a document intensive case.

- Prof. Stancil commented that he suspects federal rule makers did not intend for "good cause" and "compelling circumstances" to constitute a belt and suspenders approach, but rather, to reflect a broad range of discretion. They may give the appellate courts something to build upon in developing a common law rule. If we choose one, he proposed compelling circumstances. In his experience, good cause means too many different things. He also mentioned that the vaguery of "contemporaneous transmission" is probably helpful in ascertaining the appropriate mechanism under the circumstances. Judge Anderson stated that if compelling circumstances are required, he is concerned that judges may never get a chance to try the pilot program in the way it is intended to operate. New conferencing abilities now permit lawyers to appear by phone. Objections to whether the witness is who she says she is will still persist, but having a video witness in real time is much preferred over lawyers reading deposition testimony. He would prefer to have a less rigorous standard.

- Judge Baxter commented that, whatever language is used in the rule, it should be clear that remote access is not routine and language to that effect should be included.

- Judge Furse asked whether contemporaneous transmission should be both audio and visual. Mr. Shea responded that one of the administrative rules that came out of the ad hoc committee was that "contemporaneous transmission" means that everyone can see and hear everyone else.

- Mr. Andreason mentioned that good cause is much more broadly accepted, but the rule goes to how much we trust the technology and who is operating it. Are we comfortable enough now with the technology to adopt a rule on remote access? At some point we will be, but perhaps that time is not now. Mr. Hafen commented that in federal court and bankruptcy, lawyers and parties in southern Utah appear remotely by showing up in a courtroom in southern Utah. That may not be possible here, but at some point, we will get to the stage where everyone will have confidence. Mr. Shea stated that we need appropriate safeguards.

- Mr. Slaugh questioned whether we allow judges to make the decision of what is compelling, or we let the rules dictate. Mr. Shea commented that the intent was to leave discretion with the judge, even if the parties agree. Good cause and compelling circumstances probably cover the same base, but they raise the bar a bit. Mr. Shea agreed with Mr. Andreason that as time goes by, the legal community's comfort level will increase and technology will improve. Judge Furse mentioned that it may also change depending on whether a case requires a bench or jury trial, and what the witness is testifying about.

VI. Adjournment.

The meeting adjourned at 6:04 pm. The next meeting will be held on November 19, 2014 at 4:00pm at the Administrative Office of the Courts.

Tab 2

Timothy M. Shea
Appellate Court Administrator

Andrea R. Martinez
Clerk of Court

Supreme Court of Utah

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November 16, 2014

To: Civil Procedures Committee
From: Tim Shea
Re: Rule 7

I circulated Rules 7, 54 and 58A after the last meeting and received two comments regarding Rule 7:

- Should paragraph (a) recognize a counterclaim as a pleading?
- Will judges be overwhelmed with attachments if parties "must" attach an appendix of relevant portions of any documents cited? (See paragraphs (c)(2), (d)(2) and (e)(2).)

Regarding the first question, neither federal rule 7 nor the current state rule identify a counterclaim as a pleading. Regarding the second, the provisions are intended to parallel DUCiv 7-1(c).

The Supreme Court requested that the Advisory Committee on the Rules of Appellate Procedure review our proposal before requesting public comments. That committee recommends that we add to Rule 7(j)(1) the notion that if the judge directs a party to prepare a further order, it is the later order and not the earlier decision that starts the appellate clock ticking. They appear to be interested in the deadline for a petition to appeal an interlocutory order ("small a" appealability). Rule 58A(e) and its committee note adequately describe this result for judgments ("large A" appealability).

I recommend that if a further description is necessary or useful, that it be included at the end of the proposed committee note, rather than in the rule itself. The concept being proposed is:

> If the order is not a judgment, the time in which to petition for permission to appeal under Rule of Appellate Procedure 5 is calculated from the date on which an order confirming an earlier decision is entered, but only if the judge directs that a confirming order be prepared. If the judge does not direct that a confirming order be prepared, the time is calculated from the date on which the decision, however designated, is entered.

The Appellate Rules Committee also plans to consider whether they need to amend Appellate Rule 5 to reflect what we are doing with our changes.

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.

(c)(1) The rules governing captions and other matters of form in pleadings apply to motions and other papers. The moving party must title the motion substantially as: “Motion [short phrase describing the relief requested].” Unless permitted by the court, the motion, which shall include the supporting memorandum, may not exceed 15 pages, not counting the appendix. The motion must include under appropriate headings and in the following order:

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

(c)(1)(B) one or more sections that include a concise statement of the relevant facts claimed by the moving party and argument citing authority for the relief requested.

(c)(2) The moving party must attach to the motion an appendix of relevant portions of any documents cited, such as affidavits or discovery materials or opinions, statutes or rules.

(d) Name and content of memorandum opposing the motion.

(d)(1) A nonmoving party may file a memorandum opposing the motion within 14 days after the motion is filed. The nonmoving party must title the memorandum substantially as: "Memorandum opposing motion [short phrase describing the relief requested]." Unless permitted by the court, the memorandum may not exceed 15 pages, not counting the appendix. The memorandum must include under appropriate headings and in the following order:

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

(d)(1)(B) one or more sections that include a concise statement of the relevant facts claimed by the nonmoving party and argument citing authority for that disposition; and

(d)(1)(C) objections to evidence in the motion, citing authority for the objection.

(d)(2) The non-moving party must attach to the memorandum an appendix of relevant portions of any documents cited in the memorandum, such as affidavits or discovery materials or opinions, statutes or rules.

(e) Name and content of reply memorandum.

(e)(1) Within 7 days after the memorandum opposing the motion is filed, the moving party may file a reply memorandum, which must be limited to rebuttal of new matters raised in the memorandum opposing the motion. The moving party must title the memorandum substantially as "Reply memorandum supporting the motion [short phrase describing the relief requested]." Unless permitted by the court, the memorandum may not exceed 5 pages, not counting the appendix. The memorandum must include under appropriate headings and in the following order:

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

(e)(1)(B) one or more sections that include a concise statement of the relevant facts claimed by the moving party and argument citing authority rebutting the new matter;

(e)(1)(C) objections to evidence in the memorandum opposing the motion, citing authority for the objection; and

(e)(1)(D) response to objections made in the memorandum opposing the motion, citing authority for the response.

(e)(2) The moving party must attach to the memorandum an appendix of relevant portions of any 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 nonmoving party 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 moving party 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 opposing 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 opposition 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) Decision complete when signed; entered when recorded. However designated, the court's decision on a motion is complete when signed by the judge. The decision is entered when recorded in the docket.

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

(j)(3) Effect of approval as to form. A party's approval as to form of a proposed order certifies that the proposed order accurately reflects the court's decision. 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 follows, 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 opposing 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 [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 a 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 [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 opposing memorandum or reply memorandum prohibited. A party may not make a motion in a memorandum opposing 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. An over-length motion or memorandum must include a table of contents and a table of authorities with page references.

(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 2015 changes to Rule 7 repeal and reenact the rule. Many of the provisions from the former Rule 7 are preserved in the 2015 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 memoranda;
- regulate the process for citing supplemental authority;
- prohibit proposed orders before a decision, 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 opposing memorandum.

In Central Utah Water Conservancy District v. King, 2013 UT 13 ¶27; the Supreme Court directed the committee to address the problem of undue delay when the parties fail to comply with former Rule 7(f)(2). A major objective of the of the 2015 amendments is to continue the policy of clear expectations of the parties established in:

- Butler v. Corporation of The President of The Church of Jesus Christ of Latter-Day Saints, 2014 UT 41
- 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.

However, the 2015 amendments do so in a manner simpler than the "magic words" required under the former Rule 7(f)(2).

In these 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 what, if anything, should come next.

There were three ways to meet the test: a proposed order was submitted with the supporting or opposing memorandum; an order was prepared at the direction of the judge; the decision included an express indication that a further order was not required. The 2015 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 as 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 2015 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 the recognized ways. The 2015 rule imposes a completed decision by operation of law when the document memorializing the decision 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 ways described in Rule 7. The presumption in the 2015 amendments is the opposite: silence means that nothing further is required from the parties. Judges can expressly require an order confirming a decision if one 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 modify a phrase of long standing from Rule 54(b)—"a decision, however designated"—in this rule and in Rule 58A. In this rule, however a judge's decision may be designated, that decision is complete when the judge signs the document memorializing the decision. Whether there is a right to appeal is determined by whether the decision—or subsequent order confirming the decision—is a judgment. That analysis is governed by Rule 54. When the judgment is entered is governed by Rule 58A.

Tab 3

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November 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 http://www.utcourts.gov/resources/forms/subpoena/. 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.

COMMENTS

(1) RULE 5

Re 5(b): service is effected by efiling a document, presumably because the court system sends notice and access to a copy to all other counsel. In cases that are not private, filing a paper as private (under seal) will not necessarily generate a notice from the court so other counsel may not be aware of the filing.

Posted by J.Bogart May 12, 2014 11:17 AM

How are we defining "conformed signature"? We need the definition or a reference.

Posted by Knute Rife May 8, 2014 07:39 PM

The proposed change to URCP 005 is long overdue, especially allowing service by email for all documents where the attorney has an efiling account. This change is strongly supported.

Posted by Michael A. Jensen May 7, 2014 12:42 PM

Some of the proposed changes to RULE 5 are scary at best, and should NOT be changed.

I am against the change in Rule 5 (b)(2)(A) (now Rule 5 [b][2]) that "a paper that is filed with the court must be served before or on the same day that it is filed". This rule is too general and does not fit every type of situation that may occur. There are times when you cannot serve another party on the same day that you file the document with the Court. What then, what happens? For example, you could be e-filing the documents at 11:58 p.m., with the Court and then dropping the papers in the mail to the other party shortly thereafter at say 12:00 a.m., which would be the next day. As long as the attached certificate of service states the date of service then why do we need such a rule as to require they are filed and served the same day? As another example- it is extremely common for a party to file a motion for temp orders in a family law case at the time the complaint/Petition is filed with the Court, then obtain a hearing date from the Court for that motion. The motion and notice of hearing along with the Complaint/Petition are then all sent out for personal service upon the opposing party. This rule would prohibit such common and efficient practice, which does not make sense. It's hard to see why this rule is being amended at all. Courts are not dumb. They have checks and procedures they follow to figure out if a paper was properly served and if enough time has been given before addressing it. Moreover, if there is a problem, the other party can simply object.

I am against the change in Rule 5 (b)(1)(A)(ii) which allows service upon a person without their consent by email if they have an electronic filing account. It is one thing to have your EFSP send/serve documents to an email address that you have given the EFSP and a completely different thing for an opposing party to send/serve you out of the blue documents directly via an email address, which is believed to be correct. The service of a document by email can only be safely accomplished through receiving the same from the EFSP or when permission is asked from and granted by the receiving party. There are several reasons why. (1) Often the email address that is given by the attorney to the EFSP is different than what is listed with the Bar or known by anyone else. This is because email addresses are subject to being compromised by SPAMMERS after time if the email address is generally given out and used by the public. Often people’s email accounts are compromised and all of the email addresses they have stored in their address books are then passed around and used obtained by SPAMMERS or worse virus. So at our office we find that the only way to to combat the spamming problem is to give our EFSP an email address that we do not disclose to anyone else and then every so often we have to change the email addresses we generally give out and use with the public. If someone does not have to ask for permission to serve a document to us via email then they might have an old address they are sending the

documents to and we will miss the service (please note that “old” can mean as much as a millisecond). (2) There is no tracking method to determine if the person that was served by email was actually served by email unless the same is done through an EFSP. (3) If the person who is being served was not asked by the servicer if it is okay to be served by email, then that person who is being served would not be aware of such an attempt and would not be looking for the arrival of the email. Conversely, if the person being served was asked if it is okay to serve via email, then if the email does not come then that person has enough awareness of the situation to follow-up on it and ask for it to be resent. That is why the rule that permission be granted existed in the first place, as it provided the necessary checks to insure that service would be received. (4) Updating the email address with the Utah Bar is not an instantaneous event, and takes time (an attorney just the other day told me that he had been trying to get the Bar to update his email address for over 2 weeks now, when explaining to me why the old email address that I had sent an email to had come back to me as being undeliverable). So in the meantime service is going to an old email address, and not being reached by the person, and such could be very costly for the attorney. Even if a change with the bar was instantaneous, there could still be problems. For example, a person looks on the Bar's webpage and sees an email address for an attorney. They then go and insert it into the paperwork they are working on. Meanwhile, unbeknownst to that person, the attorney goes to the Bar's website, and changes his/her email address. The person serving then sends the email out. Service is not received, but yet the Rule would say it was "served". Moreover, there is no way for anyone to know when the email address was changed... there is no tracking log, which also causes problems for everyone.

Bottom line here is that we are setting attorney’s up for potential malpractice and at the very least doing a disservice to the people we serve. Service of a document upon another party should be taken VERY, VERY SERIOUSLY and the method employed should have the HIGHEST assurances that it will be received by the intended party. Why would we ever change this or weaken it?

On another note, this change in the rule will place attorneys at a disadvantage to pro se litigants. The pro se person will always be able to serve the attorney via email because the attorney will have an e-filing account, and the attorney will never be able to serve the pro se litigant via email if they don't agree to such. This is especially unfair in the area of discovery, where the documents can be voluminous and the cost to print can be high. The attorney will have to print the documents that are sent to him/her via email by the opposing party, at the attorney’s own cost, and the attorney will also have to print the documents that he or she will be sending out to the pro se person at the attorney’s own cost.

Rule 5 (b)(1)(B) removes the rule that 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.

WHY? In what circumstance would there ever be a good reason to ignore a return email stating the email was automatically denied by the email service for whatever reason (often for the reason that the email service automatically believed it was SPAM) or not delivered due to an error of some sort?

This is really a good rule to keep, and goes with the comments I wrote above.

Finally, I am against the removal of the ability to serve someone via fax if they agree to such (see Rule 5 [b][1][A][iii]). Why are we messing with this? Someone might not have or want service via email, but they have a fax and are willing to receive it by the same. Why are we taking away options here, especially one that, unlike email (as discussed above), at least has a verifiable confirmation that the document was sent and received by the person at that phone number, on the date and time indicated in the fax confirmation?

Posted by Superman! May 7, 2014 12:30 PM

I don't think it is a good idea to allow people to serve by email without consent. I understand that we must agree to service by email through the electronic filing system, but I prefer to receive discovery materials and other documents through mail, unless I have consented to service by email.

With electronic filing, we are already bombarded with emails and it is too easy for an email to slip through the cracks unless I am expecting, and have agreed, to receive documents through email.

I believe the better rule is to still require consent to receive documents through email.

Posted by Daniel Young May 7, 2014 09:25 AM

Lines 3-4: replace “Except as otherwise provided in these rules or as otherwise directed by the court” with “Unless these rules provide or the court orders otherwise” (avoid passive voice—Garner, 2.3)

Line 6: delete subparagraph (a)(1)(A) as unnecessary and duplicative of Rule 58A(d).

Line 7: either delete subparagraph (a)(1)(B) as unnecessary (the words “unless otherwise directed by the court” in (a)(1) should cover this provision)

Line 8: insert the word “filed” between the words “pleading” and “after”

Line 10: insert a comma after “court” and replace “other than” with “except”

Lines 12-13: delete subparagraph (a)(1)(F) as unnecessary and duplicative of (a)(1)(E).

Lines 16-27: consider replacing with the following for the sake of simplicity:

(a)(2)(A) a party in default for any reason other than for failure to appear must be served as provided in paragraph (a)(1);

(a)(2)(B) a party in default for any reason must be served under Rule 4 with a pleading that asserts a new claim for relief against that party; and

(a)(2)(C) a party in default for any reason must be served under Rule 5(b)(3) with:

(a)(2)(C)(i) notice of any hearing to determine the amount of damages to be entered against the defaulting party;

(a)(2)(C)(ii) notice of entry of judgment under Rule 58A(d);

(a)(2)(C)(iii) other papers as the court directs.

Line 16: replace “as ordered by the court” with “as the court orders” (avoid passive voice—Garner, 2.3)

Line 26: replace “pleadings asserting new or additional claims” with “a pleading that asserts a new claim” (avoid plurals—Garner, 2.1)

Line 39: insert a colon after the word “if”

Lines 44-48: Paragraph (b)(2) mixes up a method of service (method most likely to be promptly received) with the time to serve (must be served before or on the same day that it is filed). The word “otherwise” on line 7 doesn’t apply here, because the first part of the paragraph isn’t an exception—just like other papers, papers served within 7 days of a hearing “must be served before or on the same day that it is filed.” I recommend deleting the words “If a hearing is scheduled 7 days or less from the date of service, a party must serve a paper related to the hearing by the method most likely to be promptly received. Otherwise,” from this paragraph and inserting it into its own paragraph after (b)(3) as explain below.

Line 49: replace “A paper served under this rule may be served by:” with “A paper is served under this rule by:”

Line 64: insert “if the person has no office or the office is closed,” before the word “leaving.” This language is in the federal rule and would prevent a person from serving an attorney at his or her home during business hours.

Line 66: insert as separate subparagraph (b)(3)(#): “delivering it by any other means that the person consented to in writing.”

Line 67: insert as separate paragraph (b)(#): ”Service within 7 days of hearing. If a hearing is scheduled 7 days or less from the date of service, a party must serve a paper related to the hearing by the method most likely to be promptly received.”

Line 68: replace “complete” with “effective” (it matches the heading)

Line 68: as indicated in the minutes, the committee inserted at the end of this sentence “Service by other means is effective upon delivery.”

Lines 71-77: (b)(5)(A) as unnecessary—this goes without saying based on (a)(1). The word “preparing” is problematic—it only really applies to proposed orders and judgments. It also calls into question whether a party must serve both a proposed order it prepared, and then serve it again after it was signed by the court. Consider changing (b)(5) as follows:

(b)(5) Service by the court. Unless the court directs otherwise, an order, judgment, or other paper filed by the court will be served by the court.

Line 75: replace “preparing” with “filing”

Line 76: replace “prepared” with “filed”

Line 76: replace “an order or judgment” with “an order, judgment, or other paper” (notices are routinely prepared and filed by the court)

Line 89: paragraph (c)(4) should not be grouped with (c)(1)-(3). Under the current version of the state rules and the federal rules, the language of (c)(4) states that a copy of an order directing parties the method of serving numerous defendants must be served on the parties as the court directs, not that the court may order that a copy of the order must be served on the parties. I would recommend revising the structure as follows: (c)—title only; the text of (c) into (c)(1); (c)(1)-(3) into (c)(1)(A)-(C); (c)(4) into (c)(2).

Lines 102-03: replace “all papers after the complaint that are required to be served” with “a paper after the complaint that is required to be served” (avoid plurals—Garner, 2.1)

Line 103: replace “Parties” with “A party” (avoid plurals—Garner, 2.1)

Line 105: delete “of the court” as unnecessary

Lines 105-06: delete “of the court” as unnecessary, insert who agrees to accept it for filing” after the word “judge”

Line 110: replace “the original affidavit with a notary acknowledgement” with “an electronically signed and acknowledged affidavit”

Line 111: replace “46-1-16(7)” with “46-4-205”

Line 114: replace “e-filing” with electronic filing”

Line 115: replace “clerk of the court, and the clerk will” with “clerk, who will”

Lines 117-19: This is a dangling section. I would recommend revising the structure of (f) as follows: (f)—title only; the text of (f) into (f)(1); (f)(1)-(4) into (f)(1)(A)-(d); lines 117-19 into (f)(2).

Lines 118-19: replace “, including any appeal or until the time in which to appeal has expired” with “and the time for appeal has expired or any appeal has terminated”

Lines 132-139: consider deleting as outdated.

Line 144: add the following explanatory notes:

2014 Amendments

Former subparagraph (b)(1)(A) was amended to allow service by email upon e-filers without the requirement of written consent. While e-filers could be electronically served with papers filed with the court, there was no equivalent means to electronically serve papers not filed with the court, such as discovery papers or proposed orders. The committee concluded that as e-filers already received notice of e-filed documents by email, the risk of e-filers failing to notice that they had been served with documents was small enough to tip the scales in favor of allowing parties the convenience of serving parties with discovery documents and proposed orders by email.

Former subparagraph (b)(1)(A) was also amended to remove explicit reference to service by fax. A party is still allowed to be served by a method not mentioned in these rules provided the party consents to the method of service in writing. While it is not necessary to file a written consent to a method of service with the court, a party may do so if it wishes.

Former subparagraph (b)(1)(B) was amended to remove the provision that service by electronic means is not effective if the party making service leads that the attempted service did not reach the person to be served. The committee concluded that rather than dealing with the consequences of retroactively invalidating service, the better course would be to treat a paper as served when sent and allow the district courts to deal with any problems with receiving notice on a case-by-case basis, much like they have done with service by mail. Despite the change, parties and attorneys are obliged upon learning that a party did not receive the served paper to promptly resend a paper by an alternate means of service.

Subdivision (f) was added to address the question of how to electronically file an affidavit or declaration of a person other than the e-filer. A conforming notary acknowledgement must contain the information listed in Utah Code Section 46-1-16(7) in or next to the notary's signature block.

The language throughout has been amended and reorganized to make the rule more easily understood.

Posted by Nathan Whittaker May 2, 2014 11:10 AM

(2) RULE 26

My concern is that the proposed change to Rule 26 will limit the discretion of the judge to allow additional discovery. The reference to Rule 37 will require some type of misconduct or non-disclosure by the non-moving party. There are situations when additional discovery is necessary despite full disclosure by the adverse party. I see no benefit in taking the discretion away from the judge to allow additional discovery if he or she is convinced the circumstances warrant it.

Posted by Ryan Schriever June 25, 2014 09:24 AM

(3) RULE 30

We received no comments.

(4) RULE 37

With the proposed change to URCP Rule 37, does this eliminate motions for protective orders all together. This would necessitate an amendment to Rule 45(e)(5) which permits a party to file a motion for protective order after being served with notice of a subpoena. Of course, as I currently read Rule 4-502, this amendment to Rule 45(e)(5) is already necessary.

Posted by Mark Dahl May 20, 2014 04:04 PM

Multiple comments about Proposed Rule 37:

1. Is the Discovery Statement truly intended only for responding parties? The Proposed Rule 37(a)(1) states that "A party or the person FROM WHOM DISCOVERY IS SOUGHT may request …." But what if

the person “from whom discovery is sought” is the party engaging in improper conduct? What if the responding party is not providing responses, or gives incomplete or evasive responses, or gives disingenuous objections. Can the person who seeks the discovery file a discovery statement? If not, what is the requesting party’s recourse, a standard motion? If a requesting party can also use the Discovery Statement, revise the rule to so indicate.

2. Is the Discovery Statement an additional tool that can be used, or a mandatory initial mechanism to solve “any discovery dispute”? Proposed Rule 37(a)(1) states a party “may” request an order about “any discovery dispute”. But will this be enforced as the party “must” use this rule? I seem to recall that local rule version of this rule made it a mandatory pre-requisite before another discovery motion could be filed.

3. Are Discovery Statements to be used for requesting extra discovery? Adv. Comm. Note 1 states that “Statements of discovery issues replace discovery motions.” Are they intended to replace all discovery motions or only certain enumerated motions? If this is only truly intended to replace a subset of discovery motions, please clarify.

4. In Proposed Rule 37(a)(3), the use of 7 days is a bit confusing. I’ve never seen a 7 day time limit. The only time I’ve seen deadlines using multiples of 7 is when it’s been more than 10 days, i.e., 14, 28, etc. With a 7 day deadline, presumably the intervening weekends and holidays are not counted per Rule 6(a). This would capture two weekends if the statement is filed on Thursday or Friday. Is that intended?

5. I’m confused by Proposed Rule 37(a)(4). It states that “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.” But with this being a new procedure, where else in the law might other attachments be required? And if something else is required, then does that mean that filing the request or response is no longer required? I recommend: (a) make it explicit here what attachments are required; and (b) if a copy of the request or response is always required, include that in a separate sentence, not the conditional sentence that starts with an “unless.”

6. I’m confused by Proposed Rule 37(a)(7). Is this intended to be an exhaustive list of what the court can order in response to Discovery Statements, or is it just a suggestive list? If it is an exhaustive list, then what is to be understood by Proposed Rule 37(a)(1)’s statement that Discovery Statement can be used for “any discovery dispute”? Can it be used for a dispute that does not require one of the enumerated orders currently in (a)(7)(A)-(K)? If the proposed list is not exhaustive, then I recommend adding an “other appropriate matters” option as Proposed Rule 37 (a)(7)(L), i.e., something like Current Rule 16(a)(14). Failure to do so will result in confusion about the court’s authority to issue orders.

7. I’m confused by Proposed Rule 37(a)(8). I’m struggling to understand when costs or fees might be requested in an Discovery Statement unless it is for the type of sanctionable conduct specified in Proposed Rule 37(b)-(e). Can you clarify this in the advisory committee notes?

Posted by Victor Sipos May 13, 2014 09:45 AM

Line 37: Consider changing “the person from whom discovery is sought” to the more indefinite “any person from whom discovery is sought.” This language conforms to Federal Rule 26(c)(1).

Line 38: Consider replacing the word “regarding” to “resolving” as it better describes the purpose of the order.

Lines 39–44: the wording of the list needs to be altered to make the phrasing of each of the list items consistent. Also, line 41 may be misread to suggest that a court order is required to obtain a subpoena. Consider amending as follows:

(a)(1)(A) compelling disclosure under Rule 26;

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

(a)(1)(C) compelling compliance with or quashing a subpoena under Rule 45;

(a)(1)(D) protecting a party from discovery; or

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

Lines 74–99: While paragraph (a)(7) claims to be about orders, the list provided is only about protective orders (except for (K), addressed below). As the authority to make any order resolving discovery is clearly implied in (a)(1), I think all that this paragraph needs to be is an illustrative list of protective orders. Also, the language of the protective order list is outdated; I suggest adopting the updated versions of (a)(7)(A)–(H) that are in Federal Rule 26(c)(1), and updating (I) and (J) to match. Specifically, I would recommend changing these lines as follows:

(a)(7) Protective orders. The court may, for good cause, enter an order to protect a party or person from annoyance, embarrassment, oppression, undue burden or expense, or to achieve proportionality under Rule 26(b)(2), including one or more of the following:

(a)(7)(A) forbidding the disclosure or discovery;

(a)(7)(B) specifying terms, including time and place, for the disclosure or discovery;

(a)(7)(C) prescribing a discovery method other than the one selected by the party seeking discovery;

(a)(7)(D) forbidding inquiry into certain matters, or limiting the scope of disclosure or discovery to certain matters;

(a)(7)(E) designating the persons who may be present while the discovery is conducted;

(a)(7)(F) requiring that a deposition be sealed and opened only on court order;

(a)(7)(G) requiring that a trade secret or other confidential research, development, or commercial information not be revealed or be revealed only in a specified way;

(a)(7)(H) requiring that the parties simultaneously file specified documents or information in sealed envelopes, to be opened as the court directs;

(a)(7)(I) allowing a party to defer its answer to a question about a fact, the application of law to fact, or an opinion about either, until after designated discovery has been completed, a pretrial conference, or other later time; and

(a)(7)(J) allocating the costs, expenses, and attorney fees of discovery among the parties as justice requires.

Lines 105–112: Paragraph (a)(7) combines a list of protective orders with the provision for expenses and attorney fees. While these are all orders, all but one of them are a specific type of order, and the provision for expenses and attorney fees is likely to get lost or ignored as just another type of protective order. I would suggest moving it out into a paragraph (a)(#). Also, the word “costs” is confusing, as it usually refers to taxable costs under Rule 54(d). What I believe the drafters of the federal rule had in mind when they said “reasonable expenses, including attorney fees” was attorney fees and litigation expenses that are not normally taxable under 54(d). Third, the language of this provision only applies to a party paying another party’s expenses and fees—I see no good reason why non-parties should not be subject to this rule or be able to take advantage of it. Finally, the wording of this paragraph is awkward. Specifically, I would recommend changing these lines as follows:

(a)(#) Expenses and attorney fees. The court may order a party, person, or attorney to pay the reasonable expenses and attorney fees incurred by the other party or person on account of the statement of discovery issues if:

(a)(#)(A) the court rules against the party or person in deciding the statement of discovery issues, or the party or person provides the contested discovery or withdraws the contested discovery request after a statement of discovery issues is filed; and

(a)(#)(B) the court finds that the party, witness, or attorney did not act in good faith or asserted a position that was not substantially justified.

Line 114: replace “costs” with “expenses” for the reasons explained above.

Lines 127–138: this is a list of “appropriate sanctions for the failure to follow [the court’s] orders” and therefore is a list of nouns. This is supported by the fact that the main sentence that the list splinters off from already has a main verb, “may impose,” and so all other verbs must be in a non-finite form such as an infinitive, gerund, or participle. Therefore, the form of each item in the list should be in gerund (“[verb]+ing”) form, just as they are in Federal Rule 37(b)(2)(A).

Lines 139–145: This language is awkward and clunky. I would recommend adopting the wording of Federal Rule 37(c)(2), revised as follows:

If a party fails to admit what is requested under Rule 36 and [] the requesting party later proves a document to be genuine or the matter true, the requesting party may move that the party who failed to admit pay the reasonable expenses and attorney fees incurred in making that proof. The court must so order unless:

Lines 159–160: The phrase “filed a statement of discovery issues under paragraph (a)” is a little vague—consider replacing with “requested protection from discovery under subparagraph (a)(1)(D).”

Lines 183–184: The phrase “related to a nonparty” is vague—consider replacing with “brought by or against a nonparty”

Lines 185 & 189: replace “paragraph” with “subdivision” as per Garner, 3.2.

Line 187: italicize “see also”

Posted by Nathan Whittaker May 11, 2014 03:42 PM

First, the revised Rule 37(a) creates a conflict, or at least confusion, with Rule 26(d)(4). Rule 26 categorizes required disclosures -- governed by Rule 26(a) -- separately from discovery -- governed by Rule 26(b)). However, this distinction disappears in Rule 37. Under 37(a)(1)(a), if a party fails to disclose under Rule 26 (in other words fails to disclose initial disclosures, expert reports, or pretrial disclosures), the prejudiced party would need to file a statement of discovery issues under Rule 37(a) rather than a motion to exclude under Rule 26(d)(4), in order to prevent use of the undisclosed witness, document, or report at any hearing or trial. If the advisory committee intends that motions to exclude based on failure to make required Rule 26 disclosures, including pretrial disclosures, are discovery issues that must be addressed by Rule 37, this intent should be expressed more explicitly.

Second, Rule 37(a)(2) requires that the movant include a certification that the movant conferred or attempted to confer with the other affected parties in an effort to resolve the dispute without court action, as well as file a statement of proportionality under Rule 26(b)(2). In the context of enforcing Rule 26(d)(4), an effort to meet and confer may make sense solely to determine whether the failure to disclose was for good cause. A statement of proportionality does not.

Third, while 37(a)(4) defines required attachments, it fails to define a "permitted attachment" under 37(a)(2) and 37(a)(3). Rule 37(a)(4) should also probably be revised to identify the "disclosure at issue" as a required attachment.

Fourth, while Rule 37(e) allows the court to retain its the inherent authority to deal with spoliation issues, 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).

Lastly, Rule 37 fails to state that the 37(a) statement of discovery issues is the sole means for addressing discovery disputes. In contrast, Rule 4-502 makes use of the statement mandatory when it states that "The parties shall do the following before filing with the court any discovery motion ...."

Posted by Karthik Nadesan May 9, 2014 01:53 PM

A statement of discovery issues re a nonparty is filed with the court before which the case is pending even when the nonparty is not within the jurisdiction of that court. That seems odd. This provision of 37 appears to conflict with 45(e)(5) which has the nonparty filing a motion for a protective order -- is that now a statement of discovery issues? It seems burdensome to require a nonparty to come to the forum of the parties to seek protection, or to defend objections. In any event, it would be helpful to get 37 and 45 in line with one another.

Posted by J.Bogart May 7, 2014 03:32 PM

URCP 45(e)(5) should be modified to comport with the changes to URCP 37. The current language in 45(e)(5) refers to a "motion for protective order" and ought to be changed consistent with the language referencing a "Statement of Discovery Issues".

Posted by Michael A. Jensen May 7, 2014 12:53 PM

(5) RULE 45

I think that the proposed change to Rule 45(b)(3) is helpful in that it requires prior service of the actual subpoena itself before it is issued. In my experience, I am frequently served with a notice of intent to subpoena from various individuals or entities, but I am still left wanting to know the precise scope of the subpoena.

My concern with this subsection, (Rule 45(b)(3)), is that while it clearly requires "delivery" or "actual notice before serving the subpoena," the rule remains silent on how much notice is appropriate. Some attorneys give 5 days notice; others 10 days; and still others 14 days; but what about instances when less than even 5 days is given? I don't think that the rule is satisfied if notice is given on the eve of issuing the subpoenas, but the rule doesn't necessarily say that either.

I think that it's noteworthy that the local rules for the federal district court here in Utah have addressed this issue by requiring at least 5 days' notice, (8 days if the notice is served by mail), under DUCivR 45-1 when serving subpoenas.

It seems that the recent changes in Utah's rules of civil procedure have been generally aimed at more closely mirroring the federal rules. Wouldn't that goal also be accomplished by including a provision into Utah's rules that addresses how much notice is required before issuing subpoenas? I think it would certainly be helpful.

Posted by Trevor Sanders July 17, 2014 11:18 AM

Tab 4

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 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. The motion shall also be accompanied by a request to submit for decision.

(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 or a response, 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~~ responding 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

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November 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.