Rule 1. General provisions.

(a) Scope of rules. These rules govern the procedure in the courts of the state of Utah in all actions of a civil nature, whether cognizable at law or in equity, and in all statutory proceedings, except as governed by other rules promulgated by this court or enacted by the Legislature and except as stated in Rule 81. They shall be liberally construed and applied to achieve the just, speedy, and inexpensive determination of every action. These rules govern all actions brought after they take effect and all further proceedings in actions then pending. If, in the opinion of the court, applying a rule in an action pending when the rule takes effect would not be feasible or would work injustice, the former procedure applies.

Advisory Committee Notes

Rule 3. Commencement of action.

(a) How commenced. A civil action is commenced by filing a complaint with the court.

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

Advisory Committee Notes

Rule 4. Process.

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

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

(b)(ii) In an action against two or more defendants, if service has been timely made upon one of them,

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

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

(c) Contents of summons.

(c)(1) The summons shall contain the name of the court, the address of the court, the names of the parties to the action, and the county in which it is brought. It shall be directed to the defendant, state the name, address and telephone number of the plaintiff's attorney, if any, and otherwise the plaintiff's address and telephone number. It shall state the time within which the defendant must answer the complaint in writing, and shall notify the defendant that judgment by default will be entered against the defendant for failure to answer the complaint in writing.

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

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

(d)(1) Personal service. The summons and complaint may be served in any state or judicial district of the United States by the sheriff or constable or by the deputy of either, by a United States Marshal or by the marshal's deputy, or by a person 18 years of age or older at the time of service and not a party to the action or a party's attorney. Personal service shall be made as follows:

(d)(1)(A) Upon any individual other than one covered by paragraphs (B), (C) or (D), by delivering a copy of the summons and complaint to the individual personally, or by

delivering them to a person of suitable age and discretion residing at the individual's dwelling or by delivering them to an agent authorized by appointment or by law to receive service of process;

(d)(1)(B) Upon a minor, by delivering a copy of the summons and complaint to the minor and to the minor’s parent or guardian or, if none can be found within the state, then to any person having the care and control of the minor, or with whom the minor resides;

(d)(1)(C) Upon a protected person judicially declared incapacitated, by delivering a copy of the summons and complaint to the protected person and to the person's guardian or conservator;

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

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

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

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

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

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

(d)(1)(J) Upon the state of Utah, by delivering a copy of the summons and complaint to the attorney general and any other person or agency required by statute to be served; and

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

(d)(1)(L) If the person to be served refuses to accept a copy of the process, service is effective if the person serving the same states the name of the process and offers to deliver it.

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

(d)(2)(A) The summons and complaint may be served upon an individual other than one covered by paragraphs (d)(1)(B) or (d)(1)(C) by mail or commercial courier service if the defendant signs a document indicating receipt.

(d)(2)(B) The summons and complaint may be served upon an entity covered by paragraphs (d)(1)(E) through (d)(1)(I) by mail or commercial courier service if the defendant's agent signs a document indicating receipt.

(d)(2)(C) Service by mail or commercial courier service is complete on the date the receipt is signed.

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

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

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

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

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

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

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

(d)(4) Other service.

(d)(4)(A) If the person to be served cannot be served through reasonable diligence, or if service upon all of the parties is impracticable under the circumstances, the party seeking service may file a motion supported by affidavit requesting an order allowing service by other means. The supporting affidavit shall set forth the efforts made to identify, locate or serve the party or the circumstances which make it impracticable to serve all of the parties.

(d)(4)(B) If the motion is granted, the court shall order service by other means reasonably calculated under all the circumstances to notify the party of the action. The order shall specify the content of the process to be served and the event that constitutes completion of service.

(e) Proof of Service.

(e)(1) The person effecting service shall file proof with the court. The proof of service must state the date, place, and manner of service. Proof of service made pursuant to paragraph (d)(2) shall include a receipt signed by the defendant or defendant's agent. If service is made by a person other than by an attorney, the sheriff or constable, or by the deputy of either, by a United States Marshal or by the marshal's deputy, the proof of service shall be made by affidavit.

(e)(2) Proof of service in a foreign country shall be made as provided in these rules, or by the law of the foreign country, or by order of the court. Proof of service under paragraph (d)(3)(B)(iii) shall include a receipt signed by the addressee or other evidence of delivery to the addressee satisfactory to the court.

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

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

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

(f)(2) A defendant who timely returns a waiver must respond to the complaint within 42 days after the date on which the request for waiver of service was mailed, e-mailed or delivered, or 56 days after that date if addressed to a person outside of the United States.

(f)(3) A defendant who waives service of the summons and complaint does not thereby make any other waiver.

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

Advisory Committee Notes

Rule 8. General rules of pleadings.

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

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

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

(a)(3) demand for judgment for specified relief. Relief in the alternative or of several different types may be demanded.

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

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

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

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

(c)(3) a demand for relief.

A party shall set forth affirmatively in a responsive pleading accord and satisfaction, arbitration and award, assumption of risk, contributory negligence, discharge in bankruptcy, duress, estoppel, failure of consideration, fraud, illegality, injury by fellow servant, laches, license, payment, release, res judicata, statute of frauds, statute of limitations, waiver, and any other matter constituting an avoidance or affirmative defense. If a party mistakenly designates a defense as a counterclaim or a counterclaim as a defense, the court, on terms, may treat the pleadings as if the defense or counterclaim had been properly designated.

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

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

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

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

Advisory Committee Notes

By requiring a party to plead the "facts" (rather than the former "claims") showing that the party is entitled to relief, the committee does not intend to put in place the old technical pleading requirements of fact pleading. Rather, the committee intends that the pleadings, both claims and defenses, should provide more and earlier notice of the facts alleged by a party with less reliance on discovery. We don't mean Twombly.

Rule 16. Pretrial conferences.

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

(a)(1) expediting the disposition of the action;

(a)(2) establishing early and continuing control so that the case will not be protracted for lack of management;

(a)(3) discouraging wasteful pretrial activities;

(a)(4) improving the quality of the trial through more thorough preparation;

(a)(5) facilitating the settlement of the case;

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

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

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

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

(a)(10) extending fact discovery;

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

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

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

(a)(14) any other appropriate matters.

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

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

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

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

Advisory Committee Notes

Rule 26. General provisions governing disclosure and discovery.

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

(a)(1) Initial disclosures. Except in cases exempt under paragraph (a)(2), a party shall, without waiting for a discovery request, provide to other parties:

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

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

(a)(1)(A)(ii) each fact witness the party may call in its case in chief and a summary of the expected testimony;

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

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

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

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

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

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

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

(a)(2) Exemptions.

(a)(2)(A) The requirements of paragraph (a)(1) do not apply to actions:

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

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

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

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

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

(a)(3) Disclosure of expert testimony.

(a)(3)(A) A party shall, without waiting for a discovery request, provide to other parties the identity of any person who may be used at trial to present evidence under Rules 702, 703, or 705 of the Utah Rules of Evidence and a copy of a written report prepared and signed by the witness or party. An expert witness may not testify in a party's case-in-chief concerning any matter not contained in the report. The report shall contain the subject matter on which the expert is expected to testify; the substance of the facts and opinions to which the expert is expected to testify; a summary of the grounds for each opinion; the qualifications of the witness, including a list of all publications authored by the witness within the preceding ten years; the compensation to be paid for the study and testimony; and a list of any other cases in which the witness has testified as an expert at trial or by deposition within the preceding four years.

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

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

(a)(4)(A) the name and, if not previously provided, the address and telephone number of each witness, unless solely for impeachment, separately identifying witnesses the party will call and witnesses the party may call;

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

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

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

(b) Discovery scope.

(b)(1) In general. Parties may discover any matter, not privileged, which is relevant to the claim or defense of any party, including the existence, description, nature, custody, condition, and location of any books, documents, or other tangible things and the identity and location of persons having knowledge of any discoverable matter. For good cause, the court may order broader discovery.

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

(b)(3) 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 to prepare the case 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)(4) Statement previously made about the action. A party may obtain without the required showing 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 contemporaneously recorded oral statement by the person making it or a transcript thereof.

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

(b)(5)(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)(5)(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) Proportionality; protective orders.

(c)(1) Discovery must be proportional to the case. The court may consider the following factors:

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

(c)(2) A party or the person from whom discovery is sought may move for an order of protection from discovery. The movant shall attach to the motion a copy of the request for discovery or the response which is at issue and a certification that the movant has in good faith conferred or attempted to confer with other affected parties to resolve the dispute without court action. The court may make any order to protect a party or person from discovery being conducted in bad faith or from annoyance, embarrassment, oppression, or undue burden or expense, or to achieve proportionality, including one or more of the following:

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

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

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

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

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

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

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

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

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

(c)(3) The court may allocate the costs, expenses and attorney fees of discovery to achieve proportionality.

(c)(4) If the order terminates a deposition, it shall be resumed only upon the order of the court in which the action is pending.

(c)(5) If the motion for a protective order is denied in whole or in part, the court may, on such terms and conditions as are just, order that any party or person provide or permit discovery. Rule 37(a)(4) applies to the award of expenses incurred in relation to the motion.

(d) Sequence and timing of discovery.

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

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

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

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

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

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

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

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

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

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

(f) 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, a party does not need to take any action with respect to it. If a certification is made in violation of the rule, the court, upon motion or upon its own initiative, may take any action authorized by Rule 11 or Rule 37(b)(2).

(g) 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.

(h) 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

Suggested by the Institute. Statement of concept only.

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

In actions claiming damages for personal injuries, the claimant shall disclose the names and addresses of health care providers who have provided care for the condition for which damages are sought within five years prior to the date of injury, and shall produce all records from those providers or shall provide a waiver allowing the opposing party to obtain those records, subject to automatic protective provisions that restrict the use of the materials to the instant litigation. The defending party shall provide copies of all applicable insurance policies, and any insurance claims documents that address the facts of the case.

Rule 26C. Disclosure and discovery in employment actions.

In actions seeking damages for loss of employment, the claimant shall disclose the names and addresses of employers for five years prior to the date of disclosure, all documents reflective of claimant’s efforts to find employment following departure from the defending party’s employ; and written waivers allowing the defending party to obtain the claimant’s personnel files from each such employer, subject to automatic protective provisions that restrict the use of the materials to the instant litigation. The defending party shall produce the claimant’s personnel files and all applicable personnel policies and employee handbooks;

Rule 26D. Disclosure and discovery in nnnnn.

Advisory committee note: (b)(1) relevant means evidentiary relevance 401 and 402.

Advisory Committee Note—URCP 26(b)

(b) Scope of Discovery. The 2010 amendment narrows the scope of discovery. A party is no longer entitled to discover information merely because it appears calculated to lead to the discovery of admissible evidence. Rather, parties may discover any matter, not privileged, which is relevant to the claim or defense of any party.

The term “relevant” under this rule has the same meaning as in Rule 401 of the Utah Rules of Evidence. Thus, information is discoverable if it has any tendency to make a fact of consequence to a claim or defense, more probable or less probable than it would be without the information.

Upon request, the Court may order discovery of any matter relevant to the “subject matter of the action.” This provision broadens the “relevant to a claim or defense” standard. For example, it would permit a party to discover information relevant to impeachment of a witness.

The Court has authority to limit discovery requests which are not proportional to the case, even though the request seeks information relevant to a claim or defense, or to the subject matter of the action. This limitation on discovery is patterned after the Rules of Evidence. Rule 403 permits the Court to exclude relevant evidence to prevent, among other things, undue delay, waste of time, or needless presentation of cumulative evidence. In the same way, the proportionality requirement in Subsection (c) may limit the scope of otherwise discoverable information.

Fran & Derek:

In reviewing the advisory committee note that Derek sent and re-reading our draft rule, I am concerned that despite our best efforts to date we may not have managed to limit discovery as well as we might. I would like to outline here some concerns about the current revision to the proposed Rule 26 and advisory note and to make a few suggestions on some changes.

First, I am not sure that the adoption of a Rule 401 standard of relevance gets us very far. Moore's Federal Practice indicates that "information sought for the purpose of impeachment is almost always relevant to the claims or defenses the parties have asserted," given that "the credibility of the testimony of live witnesses" is often "at the heart of the proof of a party's claim or defense." (Moore's s 26.41[9][a]) The Rule 401 standard is a very low bar; impeachment evidence seems to clearly meet that standard. (Id. (citing Weinstein's Federal Evidence))

In fact, there may be some instances in which the articulation of a Rule 401 standard is confusing and unhelpful. Our rule, for example, follows the federal rule in making "the identity and location" of witnesses and documents fair game in discovery. The mere existence or location of witnesses or documents would not be relevant under Rule 401, however, so the articulation of a Rule 401 standard may cause confusion. The longstanding provision allowing discovery of matter that is "reasonably calculated to lead to the discovery of admissible evidence" seems aimed at this kind of discovery. I understand and agree with the goal of limiting discovery, but deleting this provision

while keeping the notion of the discoverability of the identity and location of witnesses and documents may not help, since without this provision the court may think it lacks the capacity to curtail such discovery as unreasonable. I suggest that we put this provision back into the rule and rephrase it to allow discovery that is "reasonably calculated to lead to the discovery of admissible evidence and consistent with the standards of proportionality set forth herein."

As Derek and I discussed on the phone yesterday, I think it is really the "proportionality" provision of our draft rule that does most of the work, but I'm not sure that our draft does a good job of articulating that standard in a useful way. Maybe I'm missing something, but it seems to me that the proportionality standard belongs in sub-section (b) where we define the scope of discovery, not (or at least not just) in sub-section (c). I suggest that we provide a relevance standard incorporating the proportionality principles that applies both to discovery regarding claims and defenses and regarding the subject matter of the action. After all, I don't think the distinction between relevance to claims and defenses and relevance to subject matter has provided a very useful tool for limiting discovery in the federal courts, since most everything relevant to the subject matter can be deemed relevant to claims and defenses. Specifically, I suggest that we provide in (b) that "Parties may discover any matter, not privileged, which is relevant to the claim or defense of any party and consistent with the standards of proportionality set forth in sub-section (c)." (We could also add a similar standard for discovery relevant to subject matter on order of the court.)

As for the proportionality standard itself, it seems to me that we should give some thought to defining what we mean by "proportionality." The federal rule says that a court should limit the frequency or extent of discovery if it determines that (i) the discovery is unreasonably cumulative or duplicative or can be obtained from another source that is more convenient; (ii) the party seeking discovery has had ample opportunity to obtain the information by discovery in the action; or (iii) the burden or expense of the proposed discovery outweighs its likely benefit, considering the needs of the case, the amount in controversy, the parties' resources, the importance of the issues at stake in the action, and the importance of the discovery in resolving the issues." Our approach simply suggests that "proportionality" is the goal and lists a bunch of factors. There are some aspects of the federal standard that I prefer, including the fact that it is more specific in how the factors relate to each other.

I suggest that we take that aspect of the federal rule but retain some of the aspects of our rule that make it harder to abuse the discovery process. For example, I like the idea of using proportionality to define the scope of discovery instead of as a standard the judge can use to limit discovery. This would allow the recipient of a discovery request to object on proportionality grounds and force the issue that way. (The downside to that is the satellite litigation problem, but I tend to think that the benefits would outweigh the costs.) At the same time, I think we could soften some of the federal language to make it more useful for our purposes. Here is some proposed language:

"A discovery request may be objectionable under principles of proportionality if (i) the subject of the request is unreasonably cumulative or duplicative or can be obtained from another source that is more convenient; (ii) the party seeking discovery has had

sufficient opportunity to obtain the information by discovery in the action or otherwise; or (iii) the burden or expense of the proposed discovery outweighs its likely benefit, 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."

I have put the additional language I am proposing to add to the federal rule in bold. It seems to me that the other factors we had listed in the prior proposed version of the rule are encompassed by other factors and are unnecessary.

I hope that is of some help. Thanks for reading this far. Best,

Tom

Rule 26A. Disclosure in domestic relations actions.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Advisory Committee Notes

(c)(3): Refer to statutory definition

Rule 29. Stipulations regarding disclosure and discovery procedure.

The parties may modify these rules for disclosure and discovery by filing, before the close of the initial fact discovery, a stipulated notice of extended discovery and a statement signed by the parties and lawyers that the additional discovery is necessary and proportionate and that each party has reviewed and approved a discovery budget. Stipulations extending the time for or limits of disclosure or discovery require court approval if the extension would interfere with a court order for completion of discovery or with the date of a hearing or trial.

Advisory Committee Notes

Rule 30. Depositions.

(a) When depositions may be taken; when leave required; no deposition of expert witnesses. A party may depose a party or witness by oral or written questioning. A witness may not be deposed more than once. A person who may present evidence under Rules 702, 703, or 705 of the Utah Rules of Evidence 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; written questions.

(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 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.

(b)(6) A deposition may be taken by remote electronic means. A deposition taken by remote electronic means is considered to be taken at the place where the witness answers questions.

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

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

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

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

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

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

(c) Examination and cross-examination; objections.

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

(c)(2) All objections shall be recorded, but the questioning shall proceed, and the testimony taken subject to the objections. Any objection shall be stated concisely and in a non-argumentative and non-suggestive manner. A person may instruct a witness not to answer only to preserve a privilege, to enforce a limitation on evidence directed by

the court, or to present a motion for a protective order under Rule 26(c). Upon demand of the objecting party or witness, the deposition shall be suspended for the time necessary to make a motion. The party taking the deposition may complete or adjourn the deposition before moving for an order to compel discovery under Rule 37.

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

(e) Submission to witness; changes; signing. 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.

Advisory Committee Notes

~~Rule 31. Depositions upon written questions.~~

~~(a) Serving questions; notice.~~

~~(a)(1) A party may take the testimony of any person, including a party, by deposition upon written questions without leave of court except as provided in paragraph (2).~~ an opposing y~~The attendance of witnesses may be compelled by the use of subpoena as provided in Rule 45.~~

~~(a)(2) A party must obtain leave of court, which shall be granted to the extent consistent with the principles stated in Rule 26(b)(2), if the person to be examined is confined in prison or if, without the written stipulation of the parties,~~

~~(a)(2)(A) a proposed deposition would result in more than ten depositions being taken under this rule or Rule 30 by the plaintiffs, or by the defendants, or by third-party defendants;~~

~~(a)(2)(B) the person to be examined has already been deposed in the case; or~~

~~(a)(2)(C) a party seeks to take a deposition before the time specified in Rule 26(d).~~

~~(a)(3) A party desiring to take a deposition upon written questions shall serve them upon every other party with a notice stating (1) the name and address of the person who is to answer them, if known, and if the name is not known, a general description sufficient to identify him or the particular class or group to which he belongs, and (2) the name or descriptive title and address of the officer before whom the deposition is to be taken. A deposition upon written questions may be taken of a public or private corporation or a partnership or association or governmental agency in accordance with the provisions of Rule 30(b)(6).~~

~~(a)(4) Within 14 days after the notice and written questions are served, a party may serve cross questions upon all other parties. Within 7 days after being served with cross questions, a party may serve redirect questions upon all other parties. Within 7 days after being served with redirect questions, a party may serve recross questions upon all other parties. The court may for cause shown enlarge or shorten the time.~~

~~(b) Officer to take responses and prepare record. A copy of the notice and copies of all questions served shall be delivered by the party taking the deposition to the officer designated in the notice, who shall proceed promptly, in the manner provided by Rule~~

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

~~Advisory Committee Notes~~

Rule 33. Written questions to parties.

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

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

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

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

Advisory Committee Notes

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

(a) Scope.

(a)(1) Any party may serve on any other party a request to produce and permit the requesting party to inspect, copy, test or sample any designated discoverable documents, electronically stored information or tangible things (including writings, drawings, graphs, charts, photographs, sound recordings, images, and other data or data compilations stored in any medium from which information can be obtained, translated, if necessary, by the respondent into reasonably usable form) in the possession or control of the responding party .

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

(b) Procedure and limitations.

(b)(1) The request shall identify the items to be inspected by individual item or by category, and describe each item and category with reasonable particularity. During initial fact discovery, the request shall not cumulatively include more than 25 distinct items or categories of items. The request shall specify a reasonable date, time, place, and manner of making the inspection and performing the related acts. The request may specify the form or forms in which electronically stored information is to be produced.

(b)(2) The responding party shall serve a written response within 28 days after service of the request. The response shall state, with respect to each item or category, that inspection and related acts will be permitted as requested, or that the request is objected to. If the party objects to a request, the party must state the reasons for the objection. Any reason not stated is waived unless excused by the court for good cause. The party shall identify and permit inspection of any part of a request that is not objectionable. If the party objects to the requested form or forms for producing electronically stored information -- or if no form was specified in the request -- the responding party must state the form or forms it intends to use.

(c) Form of documents and electronically stored information.

(c)(1) A party who produces documents for inspection shall produce them as they are kept in the usual course of business or shall organize and label them to correspond with the categories in the request.

(c)(2) If a request does not specify the form or forms for producing electronically stored information, a responding party must produce the information in a form or forms in which it is ordinarily maintained or in a form or forms that are reasonably usable.

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

Advisory Committee Notes

Rule 35. Physical and mental examination of persons.

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

(b) Waiver of privilege. By requesting and obtaining the examiner's report, the party examined waives any privilege the party may have in that action or any other involving the same controversy, regarding the testimony of every other person who has examined or may thereafter examine the party about the same condition. Question: Does this paragraph fit with the model that expert reports must be disclosed? Seems like the person examined necessarily waives the privilege.

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

Rule 36. Request for admission.

(a) Request for admission. A party may serve upon any other party a written request to admit the truth of any discoverable matter set forth in the request, including the genuineness of any document. The matter must relate to statements or opinions of fact or of the application of law to fact. Each matter shall be separately stated. During initial fact discovery, a party may not request admission of more than 25 matters. A copy of the document shall be served with the request unless it has already been furnished or made available for inspection and copying. The request shall notify the responding party that the matters will be deemed admitted unless the party responds within 28 days after service of the request.

(b) Answer or objection.

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

(b)(2) Unless the answering party objects to a matter, the party must admit or deny the matter or state in detail the reasons why the party cannot truthfully admit or deny. A party may identify the part of a matter which is true and deny the rest. A denial shall fairly meet the substance of the request. Lack of information is not a reason for failure to admit or deny unless the information known or reasonably available is insufficient to form an admission or denial. If the truth of a matter is a genuine issue for trial, the answering party may deny the matter or state the reasons for the failure to admit or deny.

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

(c) Sanctions for failure to admit. If a party fails to admit the truth of any discoverable matter set forth in the request, and if the requesting party proves the truth of the matter, the requesting party may move for an order requiring the other party to pay the reasonable expenses of proving the matter, including reasonable attorney fees. The court shall enter the order unless it finds that:

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

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

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

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

(d) Effect of admission. Any matter admitted under this rule is conclusively established unless the court on motion permits withdrawal or amendment of the admission. The court may permit withdrawal or amendment if the presentation of the merits of the action will be promoted and withdrawal or amendment will not prejudice the requesting party. Any admission under this rule is for the purpose of the pending action only. It is not an admission for any other purpose, nor may it be used in any other action.

Advisory Committee Notes

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

(a) Motion for order compelling disclosure or discovery.

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

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

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

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

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

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

(a)(2) Appropriate court. A motion may be made to the court in which the action is pending, or, on matters relating to a deposition, to the court in the district where the deposition is being taken. A motion for an order to a nonparty witness shall be made to the court in the district where the deposition is being taken.

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

(a)(4) Expenses and sanctions.

(a)(4)(A) If the motion is granted, or if the disclosure or discovery is provided after the motion was filed, the court shall, after opportunity for response, require the party or witness whose conduct necessitated the motion or the party or attorney advising such conduct or both of them to pay to the moving party the reasonable expenses incurred in obtaining the order, including attorney fees, unless the court finds that the movant did not make a good faith effort to obtain the disclosure or discovery without court action, or that the nondisclosure, response, or objection was substantially justified, or that other circumstances make an award of expenses unjust.

(a)(4)(B) If the motion is denied, the court may enter any protective order authorized under Rule 26(c) and shall, after opportunity for response, require the moving party or the attorney or both of them to pay to the party or witness who opposed the motion the reasonable expenses incurred in opposing the motion, including attorney fees, unless the court finds that the motion was substantially justified or that other circumstances make an award of expenses unjust.

(a)(4)(C) If the motion is granted in part and denied in part, the court may enter any protective order authorized under Rule 26(c) and may, after opportunity for response, apportion the reasonable expenses incurred in relation to the motion among the parties and persons in a just manner.

(b) Failure to comply with order.

(b)(1) Sanctions by court in district where deposition is taken. Failure to follow an order of the court in the district in which the deposition is being taken is contempt of that court.

(b)(2) Sanctions by court in which action is pending. Unless the court finds that the failure was substantially justified, the court in which the action is pending may take such action in regard to the failure to follow its orders as are just, including the following:

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

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

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

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

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

(b)(2)(F) treat the failure to obey an order, other than an order to submit to a physical or mental examination, as contempt of court; and

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

(c) Failure to preserve evidence. Nothing in this rule limits the inherent power of the court to take any action authorized by paragraph (b)(2) if a party destroys, conceals,

alters, tampers with or fails to preserve a document, tangible item, electronic data or other evidence in violation of a duty. Absent exceptional circumstances, a court may not impose sanctions under these rules on a party for failing to provide electronically stored information lost as a result of the routine, good-faith operation of an electronic information system.

Advisory Committee Notes