Agenda
Advisory Committee on Rules of Civil Procedure

October 22, 2008
4:00 to 6:00 p.m.

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

Approval of minutes	Tab 1	Fran Wikstrom
Simplified Civil Procedures	Tab 2	Fran Wikstrom
Final recommendations on amendments to Rules 6, 45, and 103	Tab 3	Tim Shea
Rule 30(b)(6) designation of trial witnesses	Tab 4	Rich Humphreys
Canfield Request	Tab 5	Tim Shea
Rule 26	Tab 6	Leslie Slaugh

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

Meeting Schedule

November 19, 2008
January 28, 2009
February 25, 2009
March 25, 2009
April 22, 2009
May 27, 2009
September 23, 2009
October 28, 2009
November 18, 2009
January 27, 2010

Tab 1

MINUTES

UTAH SUPREME COURT ADVISORY COMMITTEE ON THE RULES OF CIVIL PROCEDURE

Wednesday, May 28, 2008
Administrative Office of the Courts

Francis M. Wikstrom, Presiding

PRESENT: Francis M. Wikstrom, Terrie T. McIntosh, Honorable Lyle R. Anderson, Honorable David O. Nuffer, Lincoln Davies, Jonathan Hafen, Thomas R. Lee, Judge R. Scott Waterfall, David W. Scofield, Cullen Battle, Barbara Townsend, Honorable Anthony B. Quinn, Leslie W. Slaugh, Lori Woffinden

EXCUSED: James T. Blanch, Francis J. Carney, Todd M. Shaughnessy, Janet H. Smith, Anthony W. Schofield, Steven Marsden, Honorable Derek Pullan

STAFF: Tim Shea, Matty Branch, Trystan B. Smith

GUESTS: Representative Jack Drexler, Jeff Keller, Ester Chelsea-McCarty

I. APPROVAL OF MINUTES.

Mr. Wikstrom called the meeting to order at 4:00 p.m., and entertained comments from the committee concerning the April 23, 2008 minutes. No comments were made and Mr. Wikstrom asked for a motion that the minutes be approved. The motion was duly made and seconded, and unanimously approved.

II. GARNISHMENT PROCEDURES.

Mr. Wikstrom welcomed our guests, and Mr. Shea summarized for the committee the current garnishment process.

Rep. Drexler addressed the committee, and introduced his constituent, Jeff Keller. Mr. Keller owns Sunset Cycle. He expressed his concerns about what he felt was sloppy and abusive behavior by a lawyer trying to garnish wages. He further expressed his concerns as a small business owner about the inadequacy of the garnishment fee employers receive as compensation for the garnishment — ten ($10) dollars for a single garnishment and twenty-five ($25) dollars for a continuing garnishment.

Mr. Wikstrom noted that federal law required some of the information requested in the forms. Mr. Shea indicated the current rules did not mandate use of the garnishment forms. The committee discussed revising the garnishment rules to mandate using the garnishment forms. Mr. Shea also indicated that there is no clear rule that would allow the employer-garnishee to seek court intervention.

Mr. Wikstrom suggested the committee re-examine the garnishment rules and the forms at a later meeting, and thanked the guests for their attendance.

III. RULE 45. OBJECTION TO SUBPOENA BY A PARTY.

Mr. Shea revised Rule 45(e)(3) to allow a non-party affected by a subpoena to object in the same manner as a person subject to a subpoena and to make it clear that a party must file a motion in order to object to a subpoena. After discussion, the committee unanimously approved the revision.

IV. DISCOVERY TIMING.

Mr. Slaugh noted his concern about a loophole in Rule 26 that allowed practitioners to serve document subpoenas immediately after filing the complaint, but before an attorneys' planning meeting.

The committee debated language amending Rule 26. Mr. Battle suggested an amendment that precluded any discovery from any source until thirty days after service of the initial pleading, unless otherwise ordered or agreed to by the parties.

Mr. Wikstrom asked Mr. Shea to submit a proposed amendment to Rule 26 incorporating the above language, and bring the proposed revisions to the committee at the next meeting.

V. REFERENCES TO TITLE 78.

Mr. Shea revised the rules of civil procedure to adopt what the Supreme Court considers technical amendments to correct references to Title 78. Mr. Shea indicated the Supreme Court did not feel it was necessary to publish these changes for comment.

The committee agreed to adopt the changes.

VI. OVERALL EVALUATION OF URCP.

Mr. Wikstrom continued the committee's discussions concerning expedited discovery.

Mr. Scofield addressed his observations of Toronto's expedited or simplified discovery procedures. Toronto's expedited discovery rules, like Colorado, contained opt-in and opt-out provisions. However, Toronto does not allow discovery at all, only disclosures.

Mr. Davies examined a sampling of Canadian provinces' expedited discovery rules. He noted that some of these provinces not only limited discovery, but limited the trial process, by limiting the circumstances for live testimony and cross-examination.

The committee discussed the current phenomenon of lawyers discovering every fact before going to trial, and the need to change the culture. The committee further discussed the possible alternatives for expedited discovery, and the types of cases suitable for expedited discovery.

Mr. Wikstrom asked that the committee continue its discussions at the next meeting.

VII. ADJOURNMENT.

The meeting adjourned at 5:50 p.m. The next meeting of the committee will be held at 4:00 p.m. on Wednesday, September 17, 2008, at the Administrative Office of the Courts.

MINUTES

UTAH SUPREME COURT ADVISORY COMMITTEE ON THE RULES OF CIVIL PROCEDURE

Wednesday, September 17, 2008
Administrative Office of the Courts

Francis M. Wikstrom, Presiding

PRESENT: Francis M. Wikstrom, Terrie T. McIntosh, Honorable Lyle R. Anderson, Honorable David O. Nuffer, Jonathan Hafen, David W. Scofield, Cullen Battle, Barbara Townsend, Honorable Anthony B. Quinn, Leslie W. Slaugh, James T. Blanch, Francis J. Carney, Todd M. Shaughnessy, Anthony W. Schofield, Steven Marsden, Honorable Derek Pullan, Matty Branch, Lori Woffinden

EXCUSED: Janet H. Smith, Judge R. Scott Waterfall, Lincoln Davies, Thomas R. Lee

STAFF: Tim Shea, Trystan B. Smith

GUEST: Rebecca Love Kourlis, Executive Director, Institute for the Advancement of the American Legal System

I. SIMPLIFIED CIVIL PROCEDURES.

Mr. Wikstrom called the meeting to order at 4:00 p.m., and introduced Rebecca Love Kourlis, former Justice of the Colorado Supreme Court. She is the founder and Executive Director of the Institute for the Advancement of the American Legal System. Mr. Wikstrom provided Ms. Kourlis with some background on the committee's previous discussions concerning simplified discovery.

Ms. Kourlis summarized the Institute's work and research for the committee. She indicated the Institute maintains a database of different jurisdictions' rules of civil procedure from across the world. She discussed the work of a joint task force on discovery between the American College of Trial Lawyers and the Institute, and the task force's observations that in seventy-five (75%) percent of civil cases discovery was a problem. She indicated the joint task force planned to look at a set of concepts or principles for overhauling the current rules. In that context, Ms. Kourlis asked the committee to describe its goals and desires for simplified discovery rules.

Mr. Wikstrom and Mr. Carney indicated concerns about proportionality and in what cases simplified rules should be applied. Judge Nuffer noted his observations that discovering the adverse party's case has benefitted the process by allowing parties to know the deficits in their own case and settle cases without the need for a trial. Judge Pullan expressed his concerns about the current discovery rules and the lack of access to justice.

Mr. Shaughnessy questioned whether fee-shifting or a "loser pays" system had any affect on simplifying or decreasing the amount of discovery. Ms. Kourlis indicated the empirical data did not support fee-shifting as an alternative.

Ms. Kourlis indicated that the Oregon Bar was satisfied with their state discovery rules, but the Arizona Bar was dissatisfied with its rules. She further indicated that Utah would be on the forefront of re-examining its rules, and would have to be cautious and periodically re-evaluate the effectiveness of any changes.

Ms. Kourlis was asked what model she would recommend. She suggested requiring the plaintiff and defendant to put their respective cases on the table at the outset (for example disclosing witnesses, the subject matter of testimony, and material documents) in the complaint and in a responsive pleading. She would advocate early judicial intervention for case management. She would also suggest the judicial control of experts. In terms of document disclosure and particularly e-discovery, the requesting party would have to show the need for additional document requests beyond some presumed, limited discovery. If warranted, the requesting party could then be responsible to pay for it.

Mr. Wikstrom suggested specifically referencing proportionality. For example, limiting discovery in proportion to the amount in controversy and/or revising the rules to only allow discovery of admissible evidence.

The committee discussed pleading with particularity and disclosing all facts, documents, and witnesses as a part of the complaint and responsive pleading, and the limitations on a party's ability to introduce evidence that was not initially disclosed.

The committee also discussed e-discovery—the process and the cost.

Ms. Kourlis suggested the committee begin by gathering feedback from the Bar to allow lawyers to be invested in the concepts and principles for a simplified process. She discussed developing a position paper outlining the proposals and discussing the issues with members of the Bar. She also suggested gathering the input of consumers of legal services to address their concerns in the process.

Finally, the committee discussed a pilot program where cases would be randomly picked for expedited discovery.

Mr. Wikstrom thanked Ms. Kourlis for joining us, and asked the committee to continue its discussions at the next meeting.

II. ADJOURNMENT.

The meeting adjourned at 6:00 p.m. The next meeting of the committee will be held at 4:00 p.m. on Wednesday, October 22, 2008, at the Administrative Office of the Courts.

Tab 2

The following colloquy is an exaggeration—but only slightly:

> Client: "How much justice can I get?"
> Lawyer: "How much can you afford?"

We have a marvelous system of civil justice—for those who can afford it. It is designed to discover every single fact that may bear some relevance to every issue in the case. Discovery has become the "tail" that "wags the litigation dog." Civil trials are a rarity. Cases are discovered to death and then resolved by motion or mediation. But what of the cases that are never brought because the amount in controversy will not justify the cost of litigation? Are the legal needs of the middle class being met when few can even afford to hire a lawyer?

Do we meet the lofty goals stated in Rule 1, i.e., do the Rules "secure the just, speedy, and inexpensive determination of every action"? Most would agree that they do a pretty good job of providing a "just" result, but few would admit that they achieve "speedy and inexpensive" justice.

According to a recent national survey of trial attorneys from both plaintiff and defense oriented practices, our system of discovery in civil cases is broken. 85% of those respondents said the system is too expensive; 87% said that electronic discovery increases the costs of litigation; and 94% said that litigation costs are an important factor in driving cases to settle.

What does all of this mean? It reflects a growing national consensus that our civil justice system is in need of substantial repair – repair designed to make the system more efficient, less costly, less complex, and ultimately more accessible.

The United States is the only major common law jurisdiction in the world that has not undertaken broad and deep systemic civil justice reforms. In fact, we are still operating with basic Federal Rules that were adopted in 1938, when computers and copy machines had not been conceived. The intention of the drafters of those Rules was to prevent trial by ambush and the Rules were based on two assumptions: notice pleading and liberal discovery. For decades, those principles worked to create generally fair outcomes, with proportionate costs because there just wasn't that much information to discover. In Utah, we have generally followed the Federal Rules.

Now, in the heart of the Information Age when emails, text messages, voice mails, and multiple drafts of documents are multiplying at a rate that we can only begin to understand, those principles need to be reexamined. Is it still appropriate to operate with a premise that discovery is open season – all information is good information, and the more the better? Are we not creating a system that is going to implode from sheer weight of available information and the cost and delay involved in seeking it?

The rest of the world has come up with some good ideas to address these issues. In the United Kingdom, documents are exchanged even in advance of litigation in accordance

with a set of expectations or "protocols" developed by practice area. In some countries, , there is an affirmative duty on each party to the litigation to produce relevant documents as attachments to the complaint and answer. In Canada, in some simplified cases, discovery is prohibited completely, and in all other cases, it is strictly limited. Depositions of experts are not allowed in many other common law countries, and interrogatories are limited or disallowed without court approval. There is also a specific focus on case management by the judges – so that the judge, not the attorneys, is in control of the pre-trial process.

Recently, in British Columbia, a task force charged with civil justice reform proposals observed that the time for "tinkering" has passed. If we were to build a system now, without any of the existing structure, what would it look like? Instead of a system driven by the principles of notice pleading and liberal discovery, how about a system in which each party has to disclose what it knows in the pleadings, and discovery is limited?

The Supreme Court Advisory Committee on the Rules of Civil Procedure is wrestling with these issues. We are looking for solutions to the very real problems plaguing civil litigation. Rather than just tinkering with the Rules, we are taking a step back and trying to conceptualize a set of rules that will better serve our state in this information age.

Here are some of the issues we will be considering:

Should the scope of discovery be limited? In this age of exponential information growth, is the standard of "reasonably calculated to lead to the discovery of admissible evidence" too broad? Do we need to strengthen the concept of "proportionality" currently stated in Rule 26(b)(3)(C) so that discovery costs may not exceed a certain percentage of the amount in controversy absent special circumstances?

Should fact pleading be required instead of notice pleading? Should the plaintiff be required to produce all documents that support her claim as soon as counsel for the defendant appears? Should the defendant be required to produce all documents supporting his defenses at or near the time of the answer? What should be the penalties for failure to disclose? What is the duty of supplementation? Should there be special disclosure rules developed by the specialty bars for particular types of cases such as divorce, collection cases, personal injury, or medical malpractice?

Should the discovery rules be designed for the garden variety smaller case rather than the "bet the company" case? Should we drastically reduce the default limits on discovery to force lawyers to be more reasonable at the outset when they discuss a discovery plan? It would not be expected that these limits would be sufficient in most cases, or in any case. The point would be to put pressure on counsel to be reasonable and to reach an agreement if possible. Even if the lawyers agree, should the clients be required to certify that they have discussed the proposed discovery and the proposed budget and agree? What about cases where one party has most of the information? If counsel cannot agree, how should the judge get involved and what standards should apply.

Should contention interrogatories and requests for admission be limited or prohibited without agreement of the parties or court permission?

Should there be a concept of "cost-shifting" or a "co-pay" requirement to force parties to be more focused and efficient in their discovery requests? How should we deal with the concept of a "litigation hold" as it applies to electronic data?

What should be done about experts? Should the proponent be required to "pre-file" the opinion as a report or transcribed testimony with the proviso that he cannot testify beyond the report on direct at trial? Would such a requirement eliminate the need for a deposition? If a *Rimmasch* challenge is filed, could it be resolved on the basis of the report?

Change is never comfortable, and wholesale changes to the discovery rules will be particularly unsettling. This process will challenge each of us to lay aside our economic interests, and our plaintiff or defense orientation, and truly focus on what is best for the citizens of Utah – who deserve access to a fair, affordable and trustworthy civil justice system. As we consider these issues, we welcome your input.

Tab 3

Administrative Office of the Courts

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

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

MEMORANDUM

To: Civil Procedures Committee
From: Tim Shea
Date: October 16, 2008
Re: Comments to published rules

The comment period for the following rules has closed, and they are ready for your final recommendations.

URCP 006. Time. Repeal and reenact. Conforms the computation of time to the days-are-days approach of the Federal Rules of Civil Procedure. Deadlines of less than 30 days in several rules will be extended to a uniform 7/14/21 days. The list of deadlines proposed to be amended is attached. If Rule 6 is approved, those rules will be amended to change the deadlines as indicated, but the rules will not be published for comment. Deadlines not listed are not proposed to be amended.

URCP 045. Subpoena. Amend. Permits a person affected by a subpoena to object.

URCP 103. Child support worksheets. Repeal. Eliminates the requirement that parties send a copy of their child support worksheet to the AOC.

Encl. Draft rules
Comments

450 South State Street / POB 140241 / Salt Lake City, Utah 84114-0241 / 801-578-3808 / Fax: 801-578-3843 / email: tims@email.utcourts.gov

Rule 6. Time.

~~(a) Computation. In computing any period of time prescribed or allowed by these rules, by the local rules of any district court, by order of court, or by any applicable statute, the day of the act, event, or default from which the designated period of time begins to run shall not be included. The last day of the period so computed shall be included, unless it is a Saturday, a Sunday, or a legal holiday, in which event the period runs until the end of the next day that is not a Saturday, a Sunday, or a legal holiday. When the period of time prescribed or allowed, without reference to any additional time provided under subsection (e), is less than 11 days, intermediate Saturdays, Sundays and legal holidays shall be excluded in the computation.~~

~~(b) Enlargement. When by these rules or by a notice given thereunder or by order of the court an act is required or allowed to be done at or within a specified time, the court for cause shown may at any time in its discretion (1) with or without motion or notice order the period enlarged if request therefor is made before the expiration of the period originally prescribed or as extended by a previous order or (2) upon motion made after the expiration of the specified period permit the act to be done where the failure to act was the result of excusable neglect; but it may not extend the time for taking any action under Rules 50(b), 52(b), 59(b), (d) and (e), and 60(b), except to the extent and under the conditions stated in them.~~

~~(c) Unaffected by expiration of term. The period of time provided for the doing of any act or the taking of any proceeding is not affected or limited by the continued existence or expiration of a term of court. The continued existence or expiration of a term of court in no way affects the power of a court to do any act or take any proceeding in any civil action that has been pending before it.~~

~~(d) Notice of hearings. Notice of a hearing shall be served not later than 5 days before the time specified for the hearing, unless a different period is fixed by these rules or by order of the court. Such an order may for cause shown be made on ex parte application.~~

~~(e) Additional time after service by mail. Whenever a party has the right or is required to do some act or take some proceedings within a prescribed period after the service of a notice or other paper upon him and the notice or paper is served upon him~~

~~by mail, 3 days shall be added to the end of the prescribed period as calculated under subsection (a). Saturdays, Sundays and legal holidays shall be included in the computation of any 3-day period under this subsection, except that if the last day of the 3-day period is a Saturday, a Sunday, or a legal holiday, the period shall run until the end of the next day that is not a Saturday, Sunday, or a legal holiday.~~

(a) Computing time. The following rules apply in computing any time period specified in these rules, any local rule or court order, or in any statute that does not specify a method of computing time.

(a)(1) Period stated in days or a longer unit. When the period is stated in days or a longer unit of time:

(a)(1)(A) exclude the day of the event that triggers the period;

(a)(1)(B) count every day, including intermediate Saturdays, Sundays, and legal holidays; and

(a)(1)(C) include the last day of the period, but if the last day is a Saturday, Sunday, or legal holiday, the period continues to run until the end of the next day that is not a Saturday, Sunday or legal holiday.

(a)(2) Period stated in hours. When the period is stated in hours:

(a)(2)(A) begin counting immediately on the occurrence of the event that triggers the period;

(a)(2)(B) count every hour, including hours during intermediate Saturdays, Sundays, and legal holidays; and

(a)(2)(C) if the period would end on a Saturday, Sunday, or legal holiday, the period continues to run until the same time on the next day that is not a Saturday, Sunday, or legal holiday.

(a)(3) Inaccessibility of the clerk's office. Unless the court orders otherwise, if the clerk's office is inaccessible:

(a)(3)(A) on the last day for filing under Rule 6(a)(1), then the time for filing is extended to the first accessible day that is not a Saturday, Sunday or legal holiday; or

(a)(3)(B) during the last hour for filing under Rule 6(a)(2), then the time for filing is extended to the same time on the first accessible day that is not a Saturday, Sunday, or legal holiday.

(a)(4) “Last day” defined. Unless a different time is set by a statute, local rule, or court order, filing on the last day means:

(a)(4)(A) for electronic filing, the filing must be made before midnight; and

(a)(4)(B) for filing by other means, the filing must be made before the clerk’s office is scheduled to close.

(a)(5) “Next day” defined. The “next day” is determined by continuing to count forward when the period is measured after an event and backward when measured before an event.

(a)(6) “Legal holiday” defined. “Legal holiday” means the day for observing:

(a)(6)(A) New Year's Day;

(a)(6)(B) Martin Luther King, Jr. Day;

(a)(6)(C) Washington and Lincoln Day;

(a)(6)(D) Memorial Day;

(a)(6)(E) Independence Day;

(a)(6)(F) Pioneer Day;

(a)(6)(G) Labor Day;

(a)(6)(H) Columbus Day;

(a)(6)(I) Veterans' Day;

(a)(6)(J) Thanksgiving Day;

(a)(6)(K) Christmas Day; and

(a)(6)(L) any day designated by the President or Congress as a national holiday or the Governor or Legislature as a state holiday.

(b) The court may extend any time period other than those stated in Rules 50(b), 52(b), 59(b), 59(d), 59(e) and 60(b). If the request to extend a time period is made before expiration of the period, as originally prescribed or as extended by a previous order, the order may be entered upon an ex parte application and a showing of good cause. If the request to extend the time period is made after expiration of the period, the request shall be made by motion and may be granted upon a showing of excusable neglect.

(c) Notice of a hearing shall be served not less than 7 days before the day of the hearing, unless a different period is stated by these rules or by order of the court. An

order to shorten the time period may be entered upon an ex parte application and a showing of good cause.

List of Deadline Changes in Conjunction with New Rule 6.

Rule	Change	To
3(a)	10	14
4(c)(2)	13	14
4(f)(1)	20	21
5(b)(1)(B)	5	7
7(c)(1)	5	7
7(c)(1)	10	14
7(f)	15	21
7(f)	5	7
12(a)	20	21
12(a)(1)	10	14
12(a)(2)	10	14
12(e)	10	14
12(f)	20	21
14(a)	10	14
15(a)	20	21
15(a)	10	14
17(c)(2)	20	21
17(c)(3)	20	21
27(a)(2)	20	21
31(a)(4)	7	14
38(b)	10	14
38(c)	10	14
50(b)	10	14
50(c)(2)	10	14
52(b)	10	14
53(d)(1)	20	21
53(e)(2)	10	14
54(d)(2)	5	14
54(d)(2)	7	14
56(a)	20	21

Rule	Change	To
59(b)	10	14
59(c)	10	14
59(c)	20	21
59(d)	10	14
59(e)	10	14
60(b)	3 months	90
62(a)	10	14
63(b)(1)(B)	20	21
63(b)(1)(B)(iii)	20	21
64(d)(3)(C)	10	14
64(d)(3)(D)(ii)	10	14
64(e)(2)	10	14
64(f)(1)	5	7
64A(i)(5)	10	14
64D(g)	7	14
64D(h)	10	14
64D(i)	20	21
64(D)(l)(3)	7	14
64E(d)(1)	10	14
65A(b)(2)	10	14
65C(g)(3)	20	21
65C(i)	Delete “plus time...”	
65C(m)(1)	5	7
66(f)	10	14
68(c)(3)	10	14
68(c)(4)	10	14
69C(f)	20	21
69C(f)	7	14
69C(i)(2)	5	7
69C(i)(2)	15	21

Rule	Change	To
74(c)	20	21
101(b)	Delete “calendar”	
101(c)	5	7

Rule 45. Subpoena.

(a) Form; issuance.

(a)(1) Every subpoena shall:

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

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

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

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

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

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

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

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

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

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

(b) Service; fees; prior notice.

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

(b)(2) If the subpoena commands a person's appearance, the party or attorney responsible for issuing the subpoena shall tender with the subpoena the fees for one day's attendance and the mileage allowed by law. When the subpoena is issued on

behalf of the United States, or this state, or any officer or agency of either, fees and mileage need not be tendered.

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

(c) Appearance; resident; non-resident.

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

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

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

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

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

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

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

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

(e)(1) The party or attorney responsible for issuing a subpoena shall take reasonable steps to avoid imposing an undue burden or expense on the person subject to the

subpoena. The court shall enforce this duty and impose upon the party or attorney in breach of this duty an appropriate sanction, which may include, but is not limited to, lost earnings and a reasonable attorney fee.

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

(e)(3) The person subject to the subpoena or a non-party affected by the subpoena may object 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 person subject to the subpoena shall state the~~ 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 ~~person shall serve 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 a protective order, the party or attorney responsible for issuing the subpoena is not entitled to compliance but may move for an order to compel compliance. The motion 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.

~~**Rule 103. Child support worksheets.**~~

~~(a) When filing a child support worksheet required by Utah Code Section 78-45-7.3, a party shall:~~

~~(a)(1) file the worksheet in duplicate and the clerk of court shall send one copy to the Administrative Office of the Courts; or~~

~~(a)(2) file one worksheet with the court, send the information on the worksheet electronically to the Administrative Office and so indicate on the worksheet.~~

~~(b) The court shall not enter the final decree of divorce, final order of modification, or final decree of paternity until the completed worksheet is filed.~~

Comments to Rules of Civil Procedure

Rule 6.

I have read the proposal to amend Rule 6 URCP to change some 63 time limitations stated in various rules to 7, 14, or 21 days. I oppose this proposal. The rationale given is that the changed times will match the federal standards. There are currently so many differences between the Utah Rules and the Federal Rules that any competent litigator will always check for differences. The benefit to be gained by this proposed conformity is de minimus. On the other hand, the reasons for requiring the current fluctuating standards remain. It is extremely common for counsel to submit motions to extend time based on the already short times allowed for many motions. Making the proposed changes will increase the necessity for these motions. The result will be that the typical attorney will not save any time by being able to rely on the uniformity of the rules but will spend more time writing motions to extend time. This change will not subserve Rule 1's admonition for a speeding and inexpensive determination of every action.

Robert H. Wilde

I will add my name to the list of attorneys that oppose the proposed changes to Rule 6. As has been previously stated, in many cases the lack of an allowance for mailing would substantially reduce time periods and create an undue rush to respond.

It is a good idea to change the rules to account for the speed of electronic filing and under those circumstances it is appropriate to eliminate the non-existent mailing period. However, the rules should continue to recognize the reality that a delay does exist for regular mail and an appropriate time allowance should be given.

Posted by Jeremy McCullough June 23, 2008 03:39 PM

I agree with much of what has been posted in opposition to the adoption of the proposed changes. The most significant reasons to oppose the proposal:

1. The changes would allow for gamesmanship - i.e. filing/mailing an opposition memorandum on a Thursday afternoon to give opposing counsel only one, perhaps two, days to respond.

2. The coming adoption of electronic filing (it will happen at some point) will require further changes to the rules. Why adopt these changes when we know further amendments will be needed in just a few years.

3. Until electronic filing is fully implemented (and perhaps even then), the three-day mailing rule is necessary to prevent parties from being prejudiced by the whims and vagaries of the USPS.

4. What's the impetus for the proposal? Is there a need for these changes? Are parties being prejudiced by the current system?

Posted by Blake Hill June 23, 2008 01:16 PM

Does Section (b) contemplate that all extensions of time must be granted by the Court? Part of what makes Utah a much more pleasant place to practice is that we can give each other flexibility in responding to accomodate both personal needs (vacations, illnesses) and case needs (permitting time to respond to explore settlement). I would hate to think that the new rule would require us to bother the Court each time we wanted to give or receive an additional couple of days to respond to a motion. I cannot imagine that our judiciary would want to be burdened with reviewing every request for additional time either.

Posted by John Pearce June 6, 2008 03:11 PM

My position is similar to those previously stated because of the following hypothetical: party A submits a motion and calendars 14 days on which party B must respond. On day 14, party B places a memorandum of opposition in the mail box. At the same time, because party A is yet to receive any response, party A, therefore, mails a Request to Submit for Decision, on that same day, to the Court.

My question is how do the rules of procedure treat this situation? My understanding is that with the current three additional days for mailing rule would require party B to mail the memorandum of opposition three day prior to the end of the 14 days. This point is made frequently below, i.e. that there is a substantial difference between mailing and electronic transmission. I argue there needs to be a corresponding revision of rule 5(b)(1)(B).

Posted by Jason Grant June 5, 2008 10:35 AM

The 3-day extension for mailing should be continued because without it, the 5-day deadlines would run too quickly. The current rule should be modified in a different way. Delivery by fax is the same as hand delivery in terms of how fast it arrives. This gives a no-cost option for reducing the time to respond that has the same practical effect as paying a runner to deliver the document, while still allowing sufficeint time to respond. The rule should state that three days will be added if it is mailed, but delivery by fax is the equivalent of hand delivery and is considered to have been delivered on the day it is faxed if faxed before 5:00 p.m. I also think the rule on filing a document with the court by mail should be clarified. Is a pleading considered timely if it is mailed prior to the due date? Or must it be in the clerk's office as of the due date?

Posted by Ryan Nord June 4, 2008 12:18 PM

The proposed changes in rule 6 to eliminate additional time for service by mailing and requiring filing by due date are completely unworkable given the slow delivery of mail in St. George. Just last week I received from a lawyer in St. George an opposition to a motion for summary judgment late on a Friday afternoon. From the date of mailing to the date of arrival in our office was a five full days. My reply brief was due I believe the following Thursday. I did have a weekend to work on it however. Under the

proposed rule change I would have received the document on a Friday afternoon and my reply brief would have been due the following Monday.

In tracking the Federal rules changes you have neglected a very important difference in the two systems. We can file and serve documents electronically in Federal Court and we do that in several cases with great success and efficiency. We do not have electronic filing in St. George. In St. George the clerks are in such short supply (legislature's lack of funding I understand) they cannot even give us conformed copies for at least four or five days after we file documents. We obviously don't have electronic filing here nor is it foreseen as far as I know. Heaven forbid that anyone should mail a filing to Washington County District Court. They will not know whether the mail arrived in time and the document got filed for another week while the clerks get around to the backlog. I suggest you wait to make the rules changes until electronic filing has become a reality for the entire state.

Posted by Bryce Dixon June 3, 2008 11:47 AM

The days-are-days approach only makes sense if electronic filing is also made mandatory (and I believe it should be, the sooner the better). Without mandatory electronic filing, I am troubled by removal of the 3-day mailing extension. Also, I agree with Mr. Ellsworth's May 30 comment explaining that it makes more sense to use 13 weeks instead of 90 days. Further, I strongly recommend that this rule only be changed once in the next several years (i.e., don't change now, and then change again next year after electronic filing). For this reason, I concur with Mr. Newhall that it might be wise to wait to make any change.

Posted by Victor Sipos June 3, 2008 10:56 AM

We should not get rid of the mailing days until there is electronic filing.

Posted by Richard Barnes June 3, 2008 10:37 AM

As we can see from many of the comments, eliminating the 3-day extension for mailing and counting weekends and holidays, effectively reduces the response period under various circumstances. If that is the intent of the changes, then I will expect to see an increase in the number of requests for extensions, which will defeat the purpose and lend nothing to clarity.

Posted by Daniel Day June 3, 2008 09:16 AM

I'm also concerned about the removal of the additional three days for mailing. The local federal court has allowed us (thus far) to continue adding three days even for eletronic filing. If we must get rid of the additional three days, I don't think we should do so until we fully implement electronic filing.

Posted by Bart Kunz June 2, 2008 05:27 PM

The 3-day time period for mailing needs to be retained because it is used in connection with counting other time periods in statutes and contracts. See, e.g., Utah Code Ann. § 31A-21-303(2)(e)(iii) ("(iii) If the notice required by this Subsection (2)(e) is sent by first-class mail, postage prepaid, to the insured at the insured's last-known address, delivery is considered accomplished after the passing, since the mailing date, of the mailing time specified in the Utah Rules of Civil Procedure.").

Dropping the time period for mailing is tantamount to rewriting at least one statute and eliminating substantive rights protected under the statute. That's neither a good idea nor constitutional.

Posted by Trent J. Waddoups June 2, 2008 02:23 PM

Currently, Rule 3(a) requires that a Complaint be filed within 10 days from the date of service. And according to Rule 4(c)(2), a defendant may call the court AFTER 13 days to determine whether a Complaint has been filed. The reason for those extra three days is so that adverse courthouse paperwork processing will be less likely to affect the rights of the defendant, and so that the defendant will not be given incorrect information in case the Complaint has been filed with the court, but not yet entered into the computer system.

If Rule 3(a) is changed to allow filing of a Complaint within 14 days after service, Rule 4(c)(2) needs to give a correspondingly greater period of time after which it would be reasonable to assume the Complaint (if it is going to be filed) WILL be filed with the court. 14 days is not enough, if that is also the last day for the Plaintiff to file the Complaint. I can appreciate that 21 days may feel like too long . . . but this would seem to me to be a valid issue. Maybe not every time period can be (or should be) conformed to multiples of 7.

Although, if this rule is adopted as-is, I agree with the comment from Scott M Ellsworth that the three-month count should be converted to 91 days (13 weeks), not 90 days.

Posted by Carol Holmes June 2, 2008 02:20 PM

The "days are days" comment fails to recognize that certain days (Saturdays, Sundays, Holidays) are different - attorneys may not be working, mail is not delivered on Sundays and Holidays (as previously noted, a document could be mailed {for example, from Salt Lake City to St. George} on a Thursday and not be delivered until Tuesday after a three-day Holiday weekend and a response would be due just 2 days later!

I don't see the problem with the current rule - has someone in the Rules Committee recently had a problem with the 3-day mailing rule or with ignoring Saturdays, Sundays, and Holidays?

Obviously, the 3-day mailing rule was put in for a reason! Has that reason changed? It seemed like a sound rule to me - time should be allowed for the time it takes a motion, etc. to be delivered!

What about not counting Saturdays, Sundays, and Holidays - those days are not counted because they are not considered "working days" (the Courts are closed on those days); are we, now, requiring everyone to work through the weekends and on Holidays?

If it ain't broke, don't "fix" it!

The current rule has been working fine!

Posted by Richard Hutchins June 2, 2008 12:11 PM

The rule change as to the 5 day time period for responding actually reduces the time significantly by eliminating weekends and the 3 day period for mailing. I strongly oppose this change. My recommendation would be to have all of the 5 day response times change to 10 days instead of 7.

Posted by Catherine Larson June 1, 2008 07:00 PM

The rule change as to the 5 day time period for responding actually reduces the time significantly by eliminating weekends and the 3 day period for mailing. I strongly oppose this change. My recommendation would be to have all of the 5 day response times change to 10 days instead of 7.

Posted by Brad Bowen, Bar #5042 May 31, 2008 04:54 PM

I am revising my earlier comment opposing the rule change, based on further understanding. I understand that the new rule is intended to track coming changes in the Federal rules. That being the case, I think it would be wise to wait for a while to see how the Federal rules work out. While the goal of harmony with the Federal rules is admirable, there are instances where the Federal rules cause more problems than they solve (Daubert, for instance) and a period of reflection on the actual effect of the rule change is salutary. After all, there is no harmony now between the Federal and state rules on time calculation, so a longer period of disharmony will not be as much of a burden as making a change in two rules and finding the change was ill-advised.

Posted by Clark Newhall May 31, 2008 08:09 AM

I am opposed to the new rule. It seems antiquated to develop a rule that does not take into account the growing use of electronic transmission of all kinds. Moreover, it seems that if we are going to change the rule, we should change it to make it simpler and reduce the number of periods of time that apply to various actions. For instance, why not make a rule that has two time periods: 15 days and 30 days. That is more similar to the Federal rules time periods.

In any case, I am opposed to this rule that does not account for the difference between electronic and snailmail gtransmission.

Posted by Clark Newhall May 31, 2008 07:59 AM

Is the provision for "Additional time after service by mail" repealed altogether or does it appear elsewhere in the rules?

Posted by John Martinez May 30, 2008 07:30 PM

I notice that the drafter has taken pains to convert the count in every case to a multiple of seven days (which makes things much simpler to count on a calendar, as one need only count week to week down the matrix: e.g., Thursday to Thursday to Thursday = 14 days). I was surprised, therefore, to see the three-month count converted to 90 days. If we want uniformity, it should be 91 days, which is 13 weeks.

With the 90-day rule, one must go down the calendar 13 weeks and then subtract a day. If we are trying for the efficiency of calendar counting, why not make it uniform? It will reduce the number of errors and spare clerks, secretaries, assistants, and paralegals the need to count and recount ninety days instead of 13 weeks; and it will reflect better the original notion, since 7 of the 12 possible three-month periods in a year are actually 92 days long (only 2 are always 91 days long; 2 more are 90 or 91 days long depending on February; and one is either 90 or 89 days long ... (that averages about 91.4 days).

Posted by Scott M. Ellsworth May 30, 2008 06:07 PM

I don't see how this proposed Rule "conforms" to Federal Rule of Civil Procedure 6. The two Rules look materially different.

Why would any proposed change to Rule 6 drop the three additional days after service by mail and the allowance that any period of time under ten days allows for not counting Saturdays, Sundays, and legal holidays? Federal Rule 6 has these provisions.

Under this proposed Rule, an attorney could file an opposition brief on a Thursday before a three day weekend, and the attorney replying could wind up with one or two days to reply.

Posted by Meb Anderson May 30, 2008 05:50 PM

My only comment on the proposed URCP Rule 6 change is that I have to wonder why it took so long to be proposed in the first place (and why did the rules committee force us to suffer under the old Rule 6 for so long? Heads should roll). Kudos to the committee for adopting the far more clear and understandable and manageable days-are-days approach. There is simply no reason to keep Rule 6 as it is and no reason not to adopt and welcome the proposed revision.

Posted by Eric K. Johnson May 30, 2008 05:47 PM

Rule 45

The way I read this the affected non-party can be someone not served with a subpoena. For instance: In a termination of alimony proceeding, a man is served with a subpoena by the ex-husband to establish that the ex-wife is co-habitating. The wife of the man served has standing to object to the subpoena on the grounds that she is affected by the disclosure of her husband's alleged adulatory. Is this a correct interpretation?

Judge L.A. Dever

This is a good amendment. It clarifies and authorizes the practice that has developed when a third person wishes to object to a subpoena.

"Matthew C. Barneck" Matthew-Barneck@rbmn.com

It might be a good idea to define "affected" or use a different term. Does "affected" mean Wal-Mart can file an objection becuase its greeter is subpoenaed to a deposition for the morning and they will have to pay $10 overtime to another greeter? Of course, the objection would be overruled but the parties and the court still have to take the time to deal with it. Never underestimate who will take advantage of the broad term "affected" and attempt to argue minor inconveniences qualify. It seems like a stronger phrase such as "any person who will incur a severe hardship" would be better than "affected." I'm sure there is a more appropriate term out there we could use.

Posted by Sam McVey June 5, 2008 09:51 AM

Perhaps the proposed amendment would be better stated if it said "a person affected by a subpoena" rather than a "non-party affected by a subpoena." What if a party is not the person subject to a subpoena but is a person affected by it? Can he or she object, or is his or her only remedy to file a motion for a protective order? It seems that a needless motion for protective order could be avoided in some cases by allowing the party to serve an objection and let the parties try to work out their differences informally before having to file a motion.

Posted by Paul Simmons June 3, 2008 09:43 AM

Amendment to Rule 45 to allow a non-party to object. This is an important positive change to Rule 45. I recently spent several months contesting a subpoena served on my non-party client in the third district. This change clarifies the rule. The court should adopt this change.

Posted by Bob Wilde June 2, 2008 06:02 PM

Much litigation is affected by the question of standing. Here, it does not appear that "a person affected by" a subpoena is defined. Does anyone and everyone have standing to object? Wow!

Posted by Andrew McCullough June 2, 2008 05:59 PM

Rule 103

Good idea to repeal this rule. It seemed to serve no useful end. My only question is how can the same committee that recommends the repeal of URCP 103 propose a rule such CJA 4-509?

Posted by Eric K. Johnson April 9, 2008 08:57 PM

Tab 4

Designation of Witnesses

Maybe I've missed something in the rules, but the rules committee ought to address a rule regarding requiring the opposing party to designate a Rule 30 b 6 witness to appear and testify at trial if so requested by the other party. Rule 30 applies to depositions, and in fact Rule 30 b 6 states, "A subpoena shall advise a nonparty organization of its duty to make such a designation." Rule 45 doesn't add a 30 b 6 designation.

An opposing party should have the right to file a notice requiring the other party to designate a witness, similar to 30 b 6, for trial. Why should the rules only allow such a right for deposition only? From a practical standpoint, many attorneys will comply with such a request, but one can also object to the designation as being disallowed under the rules. An example of why this should be allowed is when the opposing party represents or leads the other to believe that there will be no objection to certain documents, and then objects to the documents just before trial. The other party can simply require the corporate party to designate a person most knowledgeable on the documents to appear and get the docs authenticated. This would eliminate some game playing that some attorneys engage in just before trial. (e.g., I had ******* to two different cases object to documents he produced as not being authenticated.) It could also eliminate in smaller cases the need to take some depositions or do other discovery before trial.

Rich Humphreys

Rule 30. Depositions upon oral examination.

(a) When depositions may be taken; When leave required.

(a)(1) A party may take the testimony of any person, including a party, by deposition upon oral examination without leave of court except as provided in paragraph (2). The attendance of witnesses may be compelled by 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)(3), 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 31 by the plaintiffs, or by the defendants, or by third-party defendants;

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

(a)(2)(C) a party seeks to take a deposition before the time specified in Rule 26(d) unless the notice contains a certification, with supporting facts, that the person to be examined is expected to leave the state and will be unavailable for examination unless deposed before that time. The party or party's attorney shall sign the notice, and the signature constitutes a certification subject to the sanctions provided by Rule 11.

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

(b)(1) A party desiring to take the deposition of any person upon oral examination shall give reasonable notice in writing to every other party to the action. The notice shall state the time and place for taking the deposition and the name and address of each person to be examined, if known, and, if the name is not known, a general description sufficient to identify the person or the particular class or group to which the person belongs. If a subpoena duces tecum is to be served on the person to be examined, the designation of the materials to be produced as set forth in the subpoena shall be attached to or included in the notice.

(b)(2) The party taking the deposition shall state in the notice the method by which the testimony shall be recorded. Unless the court orders otherwise, it may be recorded by sound, sound-and-visual, or stenographic means, and the party taking the deposition shall bear the cost of the recording.

(b)(3) With prior notice to the deponent and other parties, any party may designate another method to record the deponent's testimony in addition to the method specified by the person taking the deposition. The additional record or transcript shall be made at that party's expense unless the court otherwise orders.

(b)(4) Unless otherwise agreed by the parties, 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 deponent; (D) the administration of the oath or affirmation to the deponent; 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 tape or other recording medium. The appearance or demeanor of deponents or attorneys shall not be distorted through camera or sound-recording techniques. At the end of the deposition, the officer shall state on the record that the deposition is complete and shall set forth any stipulations made by counsel concerning the custody of the transcript or recording and the exhibits, or concerning other pertinent matters.

(b)(5) The notice to a party deponent may be accompanied by a request made in compliance with Rule 34 for the production of documents and tangible things at the taking of the deposition. The procedure of Rule 34 shall apply to the request.

(b)(6) A party may in the notice and in a subpoena name as the deponent a public or private corporation, a partnership, an association, or a governmental agency and describe with reasonable particularity the matters on which examination is requested. In that event, the organization so named shall designate one or more officers, directors, managing agents, or other persons who consent to testify on its behalf and may set forth, 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 persons so designated shall testify as to matters known or reasonably available to the organization. This Subdivision (b)(6) does not preclude taking a deposition by any other procedure authorized in these rules.

(b)(7) The parties may stipulate in writing or the court may upon motion order that a deposition be taken by remote electronic means. For the purposes of this rule and Rules 28(a), 37(b)(1), and 45(d), a deposition taken by remote electronic means is taken at the place where the deponent is to answer questions.

(c) Examination and cross-examination; record of examination; oath; objections. Examination and cross-examination of witnesses may proceed as permitted at the trial under the provisions of the Utah Rules of Evidence, except Rules 103 and 615. The officer before whom the deposition is to be taken shall put the witnesses on oath or affirmation and shall personally, or by someone acting under the officer’s direction and in the officer’s presence, record the testimony of the witness. All objections made at the time of the examination to the qualifications of the officer taking the deposition, to the manner of taking it, to the evidence presented, or to the conduct of any party and any other objection to the proceedings shall be noted by the officer upon the record of the deposition, but the examination shall proceed with the testimony being taken subject to the objections. In lieu of participating in the oral examination, parties may serve written questions in a sealed envelope on the party taking the deposition, and the party taking the deposition shall transmit them to the officer, who shall propound them to the witness and record the answers verbatim.

(d) Schedule and duration; motion to terminate or limit examination.

(d)(1) Any objection to evidence during a deposition shall be stated concisely and in a non-argumentative and non-suggestive manner. A person may instruct a deponent not to answer only when necessary to preserve a privilege, to enforce a limitation on evidence directed by the court, or to present a motion under paragraph (4).

(d)(2) Unless otherwise authorized by the court or stipulated by the parties, a deposition is limited to one day of seven hours. The court must allow additional time consistent with Rule 26(b)(2) if needed for a fair examination of the deponent or if the deponent or another person, or other circumstance, impedes or delays the examination.

(d)(3) If the court finds that any impediment, delay, or other conduct has frustrated the fair examination of the deponent, it may impose upon the persons responsible an appropriate sanction, including the reasonable costs and attorney fees incurred by any parties as a result thereof.

(d)(4) At any time during the taking of the deposition, on motion of a party or of the deponent and upon a showing that the examination is being conducted in bad faith or in such manner as unreasonably to annoy, embarrass, or oppress the deponent or party, the court in which the action is pending or the court in the district where the deposition is being taken may order the officer conducting the examination to cease forthwith from taking the deposition, or may limit the scope and manner of the taking of the deposition as provided in Rule 26(c). If the order made terminates the examination, it shall be resumed thereafter only upon the order of the court in which the action is pending. Upon demand of the objecting party or deponent, the taking of the deposition shall be suspended for the time necessary to make a motion for an order. The provisions of Rule 37(a)(4) apply to the award of expenses incurred in relation to the motion.

(e) Submission to witness; changes; signing. If requested by the deponent or a party before completion of the deposition, the deponent shall have 30 days after being notified by the officer that the transcript or recording is available in which to review the transcript or recording and, if there are changes in form or substance, to sign a statement reciting such changes and the reasons given by the deponent for making them. The officer shall indicate in the certificate prescribed by subdivision (f)(1) whether any review was requested and, if so, shall append any changes made by the deponent during the period allowed.

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

(f)(1) The transcript or other recording of the deposition made in accordance with this rule shall be the record of the deposition. The officer shall sign a certificate, to accompany the record of the deposition, that the witness was duly sworn and that the transcript or other recording is a true record of the testimony given by the witness. Unless otherwise ordered by the court, the officer shall securely seal the record of the deposition in an envelope endorsed with the title of the action and marked "Deposition of" and shall promptly send the sealed record of the deposition to the attorney who

arranged for the transcript or other record to be made. If the party taking the deposition is not represented by an attorney, the record of the deposition shall be sent to the clerk of the court for filing unless otherwise ordered by the court. An attorney receiving the record of the deposition shall store it under conditions that will protect it against loss, destruction, tampering, or deterioration.

(f)(2) Documents and things produced for inspection during the examination of the witness shall, upon the request of a party, be marked for identification and annexed to the record of the deposition and may be inspected and copied by any party, except that, if the person producing the materials desires to retain them, that person may (A) offer copies to be marked for identification and annexed to the record of the deposition and to serve thereafter as originals, if the person affords to all parties fair opportunity to verify the copies by comparison with the originals, or (B) offer the originals to be marked for identification, after giving to each party an opportunity to inspect and copy them, in which event the originals may be used in the same manner as if annexed to the record of the deposition. Any party may move for an order that the originals be annexed to and returned with the record of the deposition to the court, pending final disposition of the case.

(f)(3) Unless otherwise ordered by the court or agreed by the parties, the officer shall retain stenographic notes of any depositions taken stenographically or a copy of the recording of any deposition taken by another method. Upon payment of reasonable charges therefor, the officer shall furnish a copy of the record of the deposition to any party or to the deponent. Any party or the deponent may arrange for a transcription to be made from the recording of a deposition taken by non-stenographic means.

(g) Failure to attend or to serve subpoena; expenses.

(g)(1) If the party giving the notice of the taking of a deposition fails to attend and proceed therewith and another party attends in person or by attorney pursuant to the notice, the court may order the party giving the notice to pay to such other party the reasonable expenses incurred by him and his attorney in attending, including reasonable attorney's fees.

(g)(2) If the party giving the notice of the taking of a deposition of a witness fails to serve a subpoena upon him and the witness because of such failure does not attend, and if another party attends in person or by attorney because he expects the deposition of that witness to be taken, the court may order the party giving the notice to pay to such other party the reasonable expenses incurred by him and his attorney in attending, including reasonable attorney's fees.

Tab 5

GAILE CANFIELD
4174 Moss Oak Place
Sarasota, FL 34231

April 26, 2008

Timothy M. Shea, Senior Staff Attorney
Administrative Office of the courts
450 South State Street
Salt Lake City, Utah 84114-0241

RE: Utah Rule Civil Procedure 74

Dear Mr. Shea:

I am again writing to appeal to the Civil Procedures Committee regarding amending Utah Rule of Civil Procedure 74 regarding withdrawal of representation by an attorney.

The Ethics and Discipline Committee of the Utah Supreme Court handed down a decision in the matter of the Complaint of Gaile Canfield, Complainant, Against Thomas R. Grisley, Respondent, as follows:

"The Chair is most concerned regarding the termination of representation issue. Rule 1.16(d) of the Utah Rules of Professional Responsibility provides that "upon termination of representation, a lawyer shall take steps to the extent reasonably practicable to protect a client's interests, such as giving reasonable notice to the client, and allowing time for employment of other counsel." Utah R. Prof. Responsibility 1.16(d). The Utah Rules of Civil Procedure in fact allow an attorney to unilaterally withdraw as counsel without first seeking permission of the Court where there is no pending Motion. However, an attorney does so subject to Rule 1.16(d). The Chair is concerned that counsel's decision to withdraw only two days before the dispositive motion cut-off and a matter of only several days before a long-scheduled mediation, could certainly have resulted in prejudice to a client. This is so even if Respondent, for whatever reason, determined that he should terminate his representation based on allegedly inappropriate conduct of Complainant, and even if the rules of procedure allowed some period for a party to obtain new counsel. While the Chair expresses no view as to the merits of Complainant's allegations or as to the merits of Respondent's defenses, the allegations raise probable cause of a violation of the Utah Rules of Professional Responsibility and should be reviewed by a screening panel."

Inasmuch as the Ethics and Discipline Committee of the Utah Supreme Court found reason to question the actions of an attorney who withdrew representation "only two days before the dispositive motion cut-off and a matter of only several days before a long-

scheduled mediation" I hereby request that Rule 74 be amended to include allowing an attorney's withdrawal not only when there are no motions before the Court but also when the Judge assigned to a case has ordered mediation and there has been a long scheduled mediation.

I will appreciate being advised when the Civil Committee next meets and will consider the proposed amendment based upon the foregoing decision by the Ethics and Discipline Committee of the Utah Supreme Court.

Sincerely,

Gaile Canfield

Gaile Canfield

GC/me

GAILE CANFIELD
4174 Moss Oak Place
Sarasota, FL 34231

April 29, 2007

Timothy M. Shea, Senior Staff Attorney
Administrative Office of the Courts
450 South State Street
Salt Lake City, UT 84114-0241

RE: Utah Rule of Civil Procedure 74

Dear Mr. Shea:

Thank you for your letter of April 19, 2007.

I called the Office of Public Guardian Department of Human Services and was advised that they were not a correct service to give us any assistance. Perhaps you have another suggestion. I have already filed with the Fee Arbitration Board for our particular issue which, if Mr. Grisley desires, our case will be heard. I do not believe this is fair system either because the client is at the mercy of the choice of the attorney to go forward. If the attorney knows he is in the wrong, it would be a disadvantage to have the case heard. I probably could file in Small Claims Court for damages and am considering such a venue.

I am requesting a change to amend Rule 74 but not for our particular issue since that is a moot point now. I am asking as I did in my letter of April 6, when may I petition the Administrative Office of the Courts again regarding an amendment to this Rule 74 so another unsuspecting client will not be taken advantage of. Would it be best if our legal counsel prepares a petition and we appear when the committee meets?

Thanking you in advance once again for your reply to my questions, I am

Sincerely,

Gaile Canfield

Gaile Canfield

GC/me

Administrative Office of the Courts

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

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

May 14, 2007

Ms. Gaile Canfield
4174 Moss Oak Place
Sarasota, FL 34231

Re: Utah Rule of Civil Procedure 74

Dear Ms. Canfield:

You are of course free to ask that Rule 74 be amended, but I believe it would not be successful. When I presented your initial request, it was to amend Rule 74 to require the judge's approval for any withdrawal. That is the request the committee denied.

You or your attorney may be able to put together a more convincing argument than I did. There is no particular form to such a request. A letter is fine. Simply explain the objective and the nature of the amendment, putting forward the best supporting arguments.

Sincerely,

Timothy M. Shea
Senior Staff Attorney

GAILE CANFIELD
4174 Moss Oak Place
Sarasota, FL 34231

April 6, 2007

Timothy M. Shea, Senior Staff Attorney
Administrative Office of the Courts
450 South State Street
Salt Lake City, UT 84114-0241

RE: Utah Rule of Civil Procedure 74

Dear Mr. Shea:

Thank you for your letter of April 2, 2007, which is very disappointing needless to say. Can you give me an explanation as to why amending Rule 74 to some degree was not considered?

I would like to know when I may petition the Administrative Office of the Courts again regarding the above? Do I need to have legal representation and/or make a formal petition? At the bottom of your letterhead it states "The mission of the Utah judiciary is to provide the people an open, fair, efficient, and independent system for the advancement of justice under the law." I guess the catch is "under the law." When the law is not just to people then it needs to be changed.

My husband of nearly 88 years is a native of Utah and I lived in the State 20 years. He has not received fair and just representation and I don't know where to turn as an advocate for him to find this justice. Do you have any suggestions? Seniors in this land above all else have certain rights and I'd like to know where in the State of Utah I might find those rights for him.

I will most gratefully appreciate your response and appreciate your attempts thus far.

Sincerely,

Gaile Canfield

Gaile Canfield

gc/me

Administrative Office of the Courts

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

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

April 19, 2007

Ms. Gaile Canfield
4174 Moss Oak Place
Sarasota, FL 34231

Re: Utah Rule of Civil Procedure 74

Dear Ms. Canfield:

I suspect that I will never be able to give you a satisfactory explanation for the committee's decision not to further amend Rule 74. Their perspective is to consider the system as a whole, rather than individual circumstances. With that in mind, they concluded that there is no problem with the rule, although the rule worked to your and your husband's disadvantage.

The Office of Professional Conduct has sole responsibility for disciplinary action against lawyers. So if they have decided not to pursue your former attorney, there is no review that I am aware of. You may have a civil remedy against him, but you should consult with counsel on that issue.

I don't know the particular issues that you and your husband are facing. You may find assistance in the executive branch of government. The website for the Office of Public Guardian is http://opg.utah.gov/. You can reach them at:

Office of Public Guardian
Department of Human Services
120 North 200 West, #329
Salt Lake City, Utah 84103
Phone: (801) 538-8255
E-mail: lbays@utah.gov

Sincerely,

Timothy M. Shea
Senior Staff Attorney

GAILE CANFIELD
4174 Moss Oak Place
Sarasota, FL 34231

March 1, 2007

Administrative Office of the Courts
Matheson Courthouse
450 State Street
Salt Lake City, UT 84114

Attention: Tim M. Shea, Staff Attorney

RE: Rule 74, Utah Rules of Civil Procedure

Dear Mr. Shea:

Mediator and attorney Robert Wilde directed me to this office about proposing a change to the above referenced Rule 74

My husband, Harry Canfield for whom I am Guardian, and I were involved in litigation for nearly two years with my husband's nephew Leonard Canfield. This action took place in Box Elder County and Thomas Grisley represented us for a year and a half. Mr. Grisley had set a mediation date October 18, 2006. Mr. Grisley appeared on a renewed Motion to Compel on our behalf nine days prior to the scheduled mediation. We had no written agreement with Mr. Grisley for a fee schedule in the litigation case but he verbally quoted to me $10,000 to litigate. We have paid him over $20,000 and when I was in Salt Lake City for a deposition I told him that we could no longer send him thousands of dollars each month but would pay him on account. After the hearing on the Motion was held he called and asked me how much we owed him and questioned me about what happened to funds we had received for a property sale. This was not an appropriate question but I indicated we would continue paying his fees. Mr. Grisley the same day faxed us a Notice to Withdraw together with a letter and no explanation as to why he was withdrawing. The only reference Mr. Grisley made was that he was permitted to withdraw under Rule 74, Utah Rules of Civil Procedure, when there are no other motions before the court. I was stunned and left with no recourse except to postpone the mediation and locate another attorney to represent us. It was unethical for Mr. Grisley to take this action with his mediation scheduled. He caused subsequent mediation to be very difficult for me impacting the outcome. I had scheduled plane reservations and a hotel for a 3,000-mile trip to Utah. It was unconscionable for Mr. Grisley to take such action.

I Know all the above information is not going to change our situation but my position at this time is to inquire how a proposal may be made to change this Rule so that no other unsuspecting clients are so adversely affected. I spoke with Derek Brown, legal counsel for Senator Orin Hatch. He in turn spoke to several attorneys in Salt Lake City and Mr. Brown advised me that they were all in agreement that they were unaware such a law was in effect. Mr. Brown quoted a case wherein an attorney had represented a client for a period of time and the client discontinued paying fees altogether. There was a hearing to withdraw held before the assigned Judge and he ordered the attorney to continue representation since it had been for a considerable length of time and whether or not the attorney received compensation. It is professionally responsible for an attorney to notify the client giving a reason for withdrawal, continue representation for a period of time until new counsel can be located and a hearing held in the matter.

What must be done to amend Rule 74 in the Utah Rules of Civil Procedure? I will appreciate your response.

Sincerely,

Gaile Canfield

Gaile Canfield

GC/me
Certified Mail
Return Receipt Requested

Rule 74. Withdrawal of counsel.

(a) An attorney may withdraw from the case by filing with the court and serving on all parties a notice of withdrawal. The notice of withdrawal shall include the address of the attorney's client and a statement that no motion is pending and no hearing or trial has been set. If a motion is pending or a hearing, ~~or~~ trial or mediation has been set, an attorney may not withdraw except upon motion and order of the court. The motion to withdraw shall describe the nature of any pending motion and the date and purpose of any scheduled hearing, ~~or~~ trial or mediation.

(b) An attorney who has entered a limited appearance under Rule 75 shall withdraw from the case by filing and serving a notice of withdrawal upon the conclusion of the purpose or proceeding identified in the Notice of Limited Appearance. An attorney who seeks to withdraw before the conclusion of the purpose or proceeding shall proceed under subdivision (a).

(c) If an attorney withdraws other than under subdivision (b), dies, is suspended from the practice of law, is disbarred, or is removed from the case by the court, the opposing party shall serve a Notice to Appear or Appoint Counsel on the unrepresented party, informing the party of the responsibility to appear personally or appoint counsel. A copy of the Notice to Appear or Appoint Counsel must be filed with the court. No further proceedings shall be held in the case until 20 days after filing the Notice to Appear or Appoint Counsel unless the unrepresented party waives the time requirement or unless otherwise ordered by the court.

(d) Substitution of counsel. An attorney may replace the counsel of record by filing and serving a notice of substitution of counsel signed by former counsel, new counsel and the client. Court approval is not required if new counsel certifies in the notice of substitution that counsel will comply with the existing hearing schedule and deadlines.

III. RULE 11. SANCTIONS FOR UNCIVIL MATERIALS.

Mr. Shea brought Rule 11 to the committee. The Supreme Court requested the committee consider amending the Rules of Civil Procedure to include the language contained in Rule 24(k) of the Rules of Appellate Procedure regarding civility.

Mr. Shea suggested including language in Rule 11, which in summary would prohibit burdensome, irrelevant, immaterial, scandalous and uncivil matters from written submissions, and also allow a trial court to assess fees against the offending lawyer. Mr. Lee and Mr. Hafen suggested the proposed language may be too ambiguous, and undermine the remaining language of Rule 11. Mr. Lee suggested perhaps expanding the language of Rule 12(f).

The committee noted the trial court may have inherent authority to strike uncivil materials and sanction counsel, but there was no explicit language allowing it. The committee debated whether the language in Rule 24(k) should be included under a separate rule instead of as a part of an existing rule, perhaps Rule 11A.

Judge Nuffer suggested the proposed rule contemplates a more severe context than those matters currently addressed in Rule 11.

The committee noted the explicit language of Rule 24(k), and further noted that Rule 11 does not address oral representations.

The committee indicated its desire to draft a proposed Rule 11A incorporating the civility language.

The committee debated whether the language should speak not only to a "pleading written motions, and other papers," but also oral arguments. The committee discussed whether the proposed rule should include a safe harbor provision similar to that in Rule 11. The committee also discussed granting trial courts the authority to *sua sponte* invoke the sanctions of the proposed rule.

The committee indicated their desire for Mr. Shea to draft a proposed Rule 11A.

IV. RULE 74. COURT APPROVAL TO WITHDRAW BEFORE MEDIATION.

Mr. Shea brought Rule 74 to the committee. Mr. Shea noted a suggested change from a member of the public requiring lawyers to comply with the provisions of Rule 74 if a hearing, trial, or [mediation] is pending.

The committee considered the change, but felt the change was unnecessary.

V. RULE 108. MOTION FOR TEMPORARY ORDER.

Mr. Shea drafted a proposed new rule, Rule 108, to the committee. Mr. Shea indicated

Tab 6

Rule 26.

I am writing to request that we modify rule 26 for divorce cases. I spoke with you about this when you presented at the Central Utah Bar Association Lunch a few months ago. You asked me to write you an email. Rule 26 provides:

> Except for cases exempt under subdivision (a)(2), except as authorized under these rules, or unless otherwise stipulated by the parties or ordered by the court, a party may not seek discovery from any source before the parties have met and conferred as required by subdivision (f). Unless otherwise stipulated by the parties or ordered by the court, fact discovery shall be completed within 240 days after the first answer is filed. Unless the court upon motion, for the convenience of parties and witnesses and in the interests of justice, orders otherwise, methods of discovery may be used in any sequence and the fact that a party is conducting discovery, whether by deposition or otherwise, shall not operate to delay any other party's discovery.

Divorce cases generally begin in with a motion for temporary orders before a court commissioner. Rule 101 requires that the moving party serve the responding party with a motion and affidavit 14 days before that hearing. The motion is to contain attachments that include income verification and a financial declaration. Frequently, you are setting this hearing without knowing who will be representing the other party.

Often in divorce cases, one party has sole access to the family financial information. Sometimes a wife does not know what her husband earns. Sometimes the wife pays all the bills and the husband is ignorant of those expenses. Every family is different, but It is quite common for a spouse to have blind spots regarding portions of the family finances.

Often, the only way the uninformed spouse can get at unknown financial information is to subpoena it. As I read rule 26, I cannot subpoena financial information prior to an attorney planning meeting or without the agreement of counsel. This gives the knowledgeable spouse a tremendous advantage in the hearing on the motion for temporary orders.

The motion for temporary orders hearing is critical to the case. This hearing is the first thing to occur and often sets the tone for the rest of the case. Commissioners are naturally reticent to modify the initial temporary order; they don't want to see the same issues over and over again. Some divorce cases take a long time to litigate. This initial order can substantially affect the party’s rights for sometimes a year of longer. It is imperative, therefore, to get the best information possible to the commissioner at this hearing. That can best be accomplished by allowing subpoena's to be used prior to the Rule 101 hearing.

There are exemptions' to the need for Attorney planning meeting they are found in 26(a)(2) (see also Rule 26(f) requiring a discovery and scheduling conference for all cases except those exempt under (a)(2)). I propose that we add an additional exemption to (a)(2) for divorce cases. The exemption could read something like: "for motion practice before the commissioner under rule 101"

Of course, there are other ways to do this that would be equally acceptable. I am most concerned about changing the requirement for a scheduling conference before issuing subpoenas in a divorce case. There are probably several acceptable ways to accomplish this. Please consider this request for change and let me know if I can be of assistance.

Ken Parkinson
Howard, Lewis & Petersen

Several recent cases in our office have highlighted a loophole in the discovery timing rules. Some attorneys are serving document subpoenas immediately after the complaint and before an answer is filed. I could find no rule that prohibits this.

Prior to the 1999 amendments, the rules prohibited some discovery immediately after the complaint except by leave of court. The time limits were 30 days for depositions (Rule 30(a)), 45 days for interrogatories (Rule 33(a)), 45 days for requests for production (Rule 34(b)). Because a records subpoena had to be tied to a deposition, it could not be served until 30 days after the complaint.

In 1999, Rule 26(d) prohibited any discovery "before the parties have met and conferred as required by Subdivision (f)." This provision does not apply, however, to cases exempt under Subdivision (a)(2). Among the exemptions are any case "in which any party not admitted to practice law in Utah is not represented by counsel." Rule 26(a)(2)(A)(vi). By definition, therefore, all cases are exempt from the discovery timing rules during the period between filing the complaint and the filing of an answer.

I recommend the following initial sentence could be added to Rule 26(d): "In all cases, a party may not seek discovery from any source until 30 days after service of the pleading to which the discovery relates."

Alternatively, Rule 26(a)(2)(A)(vi) could be amended to read: "in which any party not admitted to practice law in Utah has answered or otherwise appeared in the case and is not represented by counsel."

Leslie W. Slaugh
Howard, Lewis & Petersen

Rule 26. General provisions governing discovery.

(a) Required disclosures; Discovery methods.

(a)(1) Initial disclosures. Except in cases exempt under subdivision (a)(2) and except as otherwise stipulated or directed by order, a party shall, without awaiting a discovery request, provide to other parties:

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

(a)(1)(B) a copy of, or a description by category and location of, all discoverable documents, data compilations, electronically stored information, and tangible things in the possession, custody, or control of the party supporting its claims or defenses, unless solely for impeachment;

(a)(1)(C) a computation of any category of damages claimed by the disclosing party, making available for inspection and copying as under Rule 34 all discoverable documents or other evidentiary material on which such computation is based, including materials bearing on the nature and extent of injuries suffered; and

(a)(1)(D) for inspection and copying as under Rule 34 any insurance agreement under which any person carrying on an insurance business may be liable to satisfy part or all of a judgment which may be entered in the case or to indemnify or reimburse for payments made to satisfy the judgment.

Unless otherwise stipulated by the parties or ordered by the court, the disclosures required by subdivision (a)(1) shall be made within 14 days after the meeting of the parties under subdivision (f). Unless otherwise stipulated by the parties or ordered by the court, a party joined after the meeting of the parties shall make these disclosures within 30 days after being served. A party shall make initial disclosures based on the information then reasonably available and is not excused from making disclosures because the party has not fully completed the investigation of the case or because the party challenges the sufficiency of another party's disclosures or because another party has not made disclosures.

(a)(2) Exemptions.

(a)(2)(A) The requirements of subdivision (a)(1) and subdivision (f) do not apply to actions:

(a)(2)(A)(i) based on contract in which the amount demanded in the pleadings is $20,000 or less;

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

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

(a)(2)(A)(iv) to enforcbbbe an arbitration award;

(a)(2)(A)(v) for water rights general adjudication under Title 73, Chapter 4; and

(a)(2)(A)(vi) in which any party not admitted to practice law in Utah is not represented by counsel.

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

(a)(3) Disclosure of expert testimony.

(a)(3)(A) A party shall disclose 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.

(a)(3)(B) Unless otherwise stipulated by the parties or ordered by the court, this disclosure shall, with respect to a witness 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, be accompanied by a written report prepared and signed by the witness or party. 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 listing 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)(C) Unless otherwise stipulated by the parties or ordered by the court, the disclosures required by subdivision (a)(3) shall be made within 30 days after the expiration of fact discovery as provided by subdivision (d) or, if the evidence is intended

solely to contradict or rebut evidence on the same subject matter identified by another party under paragraph (3)(B), within 60 days after the disclosure made by the other party.

(a)(4) Pretrial disclosures. A party shall provide to other parties the following information regarding the evidence that it may present at trial other than solely for impeachment:

(a)(4)(A) the name and, if not previously provided, the address and telephone number of each witness, separately identifying witnesses the party expects to present and witnesses the party may call if the need arises;

(a)(4)(B) the designation of witnesses whose testimony is expected to be presented by means of a deposition and, if not taken stenographically, a transcript of the pertinent portions of the deposition testimony; and

(a)(4)(C) an appropriate identification of each document or other exhibit, including summaries of other evidence, separately identifying those which the party expects to offer and those which the party may offer if the need arises.

Unless otherwise stipulated by the parties or ordered by the court, the disclosures required by subdivision (a)(4) shall be made at least 30 days before trial. Within 14 days thereafter, unless a different time is specified by the court, a party may serve and file a list disclosing (i) any objections to the use under Rule 32(a) of a deposition designated by another party under subparagraph (B) and (ii) any objection, together with the grounds therefor, that may be made to the admissibility of materials identified under subparagraph (C). Objections not so disclosed, other than objections under Rules 402 and 403 of the Utah Rules of Evidence, shall be deemed waived unless excused by the court for good cause shown.

(a)(5) Form of disclosures. Unless otherwise stipulated by the parties or ordered by the court, all disclosures under paragraphs (1), (3) and (4) shall be made in writing, signed and served.

(a)(6) Methods to discover additional matter. 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; and requests for admission.

(b) Discovery scope and limits. Unless otherwise limited by order of the court in accordance with these rules, the scope of discovery is as follows:

(b)(1) In general. Parties may obtain discovery regarding any matter, not privileged, which is relevant to the subject matter involved in the pending action, whether it relates to the claim or defense of the party seeking discovery or to the claim or defense of any other 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. It is not ground for objection that the information sought will be inadmissible at the trial if the information sought appears reasonably calculated to lead to the discovery of admissible evidence.

(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 assess 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, considering the limitations of subsection (b)(3). The court may specify conditions for the discovery.

(b)(3) Limitations. The frequency or extent of use of the discovery methods set forth in Subdivision (a)(6) shall be limited by the court if it determines that:

(b)(3)(A) the discovery sought is unreasonably cumulative or duplicative, or is obtainable from some other source that is more convenient, less burdensome, or less expensive;

(b)(3)(B) the party seeking discovery has had ample opportunity by discovery in the action to obtain the information sought; or

(b)(3)(C) the discovery is unduly burdensome or expensive, taking into account the needs of the case, the amount in controversy, limitations on the parties' resources, and the importance of the issues at stake in the litigation. The court may act upon its own initiative after reasonable notice or pursuant to a motion under Subdivision (c).

(b)(4) Trial preparation: Materials. Subject to the provisions of Subdivision (b)(5) of this rule, a party may obtain discovery of documents and tangible things otherwise discoverable under Subdivision (b)(1) of this rule and 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 in the preparation of the case and that the party is unable without undue hardship to obtain the substantial equivalent of the materials by other means. In ordering discovery of such materials when the required showing has been made, the court shall protect against disclosure of the mental impressions, conclusions, opinions, or legal theories of an attorney or other representative of a party concerning the litigation.

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 concerning the action or its subject matter previously made by that person. If the request is refused, the person may move for a court order. The provisions of Rule 37(a)(4) apply to the award of expenses incurred in relation to the motion. For purposes of this paragraph, a statement previously made is (A) a written statement signed or otherwise adopted or approved by the person making it, or (B) a stenographic, mechanical, electrical, or other recording, or a transcription thereof, which is a substantially verbatim recital of an oral statement by the person making it and contemporaneously recorded.

(b)(5) Trial preparation: Experts.

(b)(5)(A) A party may depose any person who has been identified as an expert whose opinions may be presented at trial. If a report is required under subdivision (a)(3)(B), any deposition shall be conducted within 60 days after the report is provided.

(b)(5)(B) A party may discover facts known or opinions held by an expert who has been retained or specially employed by another party in anticipation of litigation or

preparation for trial and who is not expected to be called as a witness at trial, only as provided in Rule 35(b) or upon a showing of exceptional circumstances under which it is impracticable for the party seeking discovery to obtain facts or opinions on the same subject by other means.

(b)(5)(C) Unless manifest injustice would result,

(b)(5)(C)(i) The court shall require that the party seeking discovery pay the expert a reasonable fee for time spent in responding to discovery under Subdivision (b)(5) of this rule; and

(b)(5)(C)(ii) With respect to discovery obtained under Subdivision (b)(5)(A) of this rule the court may require, and with respect to discovery obtained under Subdivision (b)(5)(B) of this rule the court shall require, the party seeking discovery to pay the other party a fair portion of the fees and expenses reasonably incurred by the latter party in obtaining facts and opinions from the expert.

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

(b)(6)(A) Information withheld. When a party withholds information otherwise discoverable under these rules by claiming that it is privileged or subject to protection as trial preparation material, the party shall make the claim expressly and shall describe the nature of the documents, communications, or things not produced or disclosed in a manner that, without revealing information itself privileged or protected, will enable other parties to assess the applicability of the privilege or protection.

(b)(6)(B) Information produced. If information is produced in discovery that is subject to a claim of privilege or of protection as trial-preparation material, the party making the claim may notify any party that received the information of the claim and the basis for it. After being notified, a 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) Protective orders. Upon motion by a party or by the person from whom discovery is sought, accompanied by a certification that the movant has in good faith conferred or

attempted to confer with other affected parties in an effort to resolve the dispute without court action, and for good cause shown, the court in which the action is pending or alternatively, on matters relating to a deposition, the court in the district where the deposition is to be taken may make any order which justice requires to protect a party or person from annoyance, embarrassment, oppression, or undue burden or expense, including one or more of the following:

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

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

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

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

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

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

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

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

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. The provisions of Rule 37(a)(4) apply to the award of expenses incurred in relation to the motion.

(d) Sequence and timing of discovery. Except for cases exempt under subdivision (a)(2), except as authorized under these rules, or unless otherwise stipulated by the parties or ordered by the court, a party may not seek discovery from any source before the parties have met and conferred as required by subdivision (f). Unless otherwise ordered by the court, no party may request discovery from any source until 30 days after service of the complaint. Unless otherwise stipulated by the parties or ordered by the court, fact discovery shall be completed within 240 days after the first answer is

filed. Unless the court upon motion, for the convenience of parties and witnesses and in the interests of justice, orders otherwise, methods of discovery may be used in any sequence and the fact that a party is conducting discovery, whether by deposition or otherwise, shall not operate to delay any other party's discovery.

(e) Supplementation of responses. A party who has made a disclosure under subdivision (a) or responded to a request for discovery with a response is under a duty to supplement the disclosure or response to include information thereafter acquired if ordered by the court or in the following circumstances:

(e)(1) A party is under a duty to supplement at appropriate intervals disclosures under subdivision (a) if the party learns that in some material respect the information disclosed is incomplete or incorrect and if the additional or corrective information has not otherwise been made known to the other parties during the discovery process or in writing. With respect to testimony of an expert from whom a report is required under subdivision (a)(3)(B) the duty extends both to information contained in the report and to information provided through a deposition of the expert.

(e)(2) A party is under a duty seasonably to amend a prior response to an interrogatory, request for production, or request for admission if the party learns that the response is in some material respect incomplete or incorrect and if the additional or corrective information has not otherwise been made known to the other parties during the discovery process or in writing.

(f) Discovery and scheduling conference.

The following applies to all cases not exempt under subdivision (a)(2), except as otherwise stipulated or directed by order.

(f)(1) The parties shall, as soon as practicable after commencement of the action, meet in person or by telephone to discuss the nature and basis of their claims and defenses, to discuss the possibilities for settlement of the action, to make or arrange for the disclosures required by subdivision (a)(1), to discuss any issues relating to preserving discoverable information and to develop a stipulated discovery plan. Plaintiff’s counsel shall schedule the meeting. The attorneys of record shall be present at the meeting and shall attempt in good faith to agree upon the discovery plan.

(f)(2) The plan shall include:

(f)(2)(A) what changes should be made in the timing, form, or requirement for disclosures under subdivision (a), including a statement as to when disclosures under subdivision (a)(1) were made or will be made;

(f)(2)(B) the subjects on which discovery may be needed, when discovery should be completed, whether discovery should be conducted in phases and whether discovery should be limited to particular issues;

(f)(2)(C) any issues relating to preservation, disclosure or discovery of electronically stored information, including the form or forms in which it should be produced;

(f)(2)(D) any issues relating to claims of privilege or of protection as trial-preparation material, including - if the parties agree on a procedure to assert such claims after production - whether to ask the court to include their agreement in an order;

(f)(2)(E) what changes should be made in the limitations on discovery imposed under these rules, and what other limitations should be imposed;

(f)(2)(F) the deadline for filing the description of the factual and legal basis for allocating fault to a non-party and the identity of the non-party; and

(f)(2)(G) any other orders that should be entered by the court.

(f)(3) Plaintiff's counsel shall submit to the court within 14 days after the meeting and in any event no more than 60 days after the first answer is filed a proposed form of order in conformity with the parties' stipulated discovery plan. The proposed form of order shall also include each of the subjects listed in Rule 16(b)(1)-(8), except that the date or dates for pretrial conferences, final pretrial conference and trial shall be scheduled with the court or may be deferred until the close of discovery. If the parties are unable to agree to the terms of a discovery plan or any part thereof, the plaintiff shall and any party may move the court for entry of a discovery order on any topic on which the parties are unable to agree. Unless otherwise ordered by the court, the presumptions established by these rules shall govern any subject not included within the parties' stipulated discovery plan.

(f)(4) Any party may request a scheduling and management conference or order under Rule 16(b).

(f)(5) A party joined after the meeting of the parties is bound by the stipulated discovery plan and discovery order, unless the court orders on stipulation or motion a

modification of the discovery plan and order. The stipulation or motion shall be filed within a reasonable time after joinder.

(g) Signing of discovery requests, responses, and objections. Every request for discovery or response or objection thereto made by a party shall be signed by at least one attorney of record or by the party if the party is not represented, whose address shall be stated. The signature of the attorney or party constitutes a certification that the person has read the request, response, or objection and that to the best of the person's knowledge, information, and belief formed after reasonable inquiry it is: (1) consistent with these rules and warranted by existing law or a good faith argument for the extension, modification, or reversal of existing law; (2) not interposed for any improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation; and (3) not unreasonable or unduly burdensome or expensive, given the needs of the case, the discovery already had in the case, the amount in controversy, and the importance of the issues at stake in the litigation. If a request, response, or objection is not signed, it shall be stricken unless it is signed promptly after the omission is called to the attention of the party making the request, response, or objection, and a party shall not be obligated to take any action with respect to it until it is signed.

If a certification is made in violation of the rule, the court, upon motion or upon its own initiative, shall impose upon the person who made the certification, the party on whose behalf the request, response, or objection is made, or both, an appropriate sanction, which may include an order to pay the amount of the reasonable expenses incurred because of the violation, including a reasonable attorney fee.

(h) Deposition where action pending in another state. Any party to an action or proceeding 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 or proceeding were pending in this state, provided that in order to obtain a subpoena the notice of the taking of such 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, and provided further that all matters arising during the taking of such deposition which by the rules are required to be submitted to the court shall be submitted to the court in the county where the deposition is being taken.

(i) Filing.

(i)(1) Unless otherwise ordered by the court, a party shall not file disclosures or requests for discovery with the court, but shall file only the original certificate of service stating that the disclosures or requests for discovery have been served on the other parties and the date of service. Unless otherwise ordered by the court, a party shall not file a response to a request for discovery with the court, but shall file only the original certificate of service stating that the response has been served on the other parties and the date of service. Except as provided in Rule 30(f)(1), Rule 32 or unless otherwise ordered by the court, depositions shall not be filed with the court.

(i)(2) A party filing a motion under subdivision (c) or a motion under Rule 37(a) shall attach to the motion a copy of the request for discovery or the response which is at issue.