Agenda
Advisory Committee on Rules of Civil Procedure

May 26, 2010
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
Rule 58A. Entry of judgment; abstract of judgment	Tab 2	Tim Shea
Simplified Civil Procedures	Tab 3	Fran Wikstrom

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

Meeting Schedule
June 23, 2010
September 22, 2010
October 27, 2010
November 17, 2010

Tab 1

MINUTES

UTAH SUPREME COURT ADVISORY COMMITTEE ON THE RULES OF CIVIL PROCEDURE

Wednesday, April 28, 2010
Administrative Office of the Courts

Francis M. Wikstrom, Presiding

PRESENT: Francis M. Wikstrom, Francis J. Carney, Honorable Anthony B. Quinn, Terrie T. McIntosh, Honorable David O. Nuffer, Leslie W. Slaugh, Lincoln L. Davies, James T. Blanch, Trystan B. Smith, Anthony W. Schofield, Janet H. Smith, Todd M. Shaughnessy, Lori Woffinden, Cullen Battle, Honorable Lyle R. Anderson, Honorable Reuben Renstrom, Jonathan O. Hafen

PHONE: Honorable Derek P. Pullan

EXCUSED: Barbara L. Townsend

STAFF: Tim Shea, Sammi Anderson

GUESTS: Associate Chief Justice Matthew Durrant

I. WELCOME TO ASSOCIATE CHIEF JUSTICE DURRANT AND PRESENTATION OF CERTIFICATES TO JUDGE QUINN AND FORMER JUDGE SCHOFIELD.

Mr. Wikstrom called the meeting to order at 4:00 p.m. Justice Durrant thanked Judge Quinn and former Judge Schofield for their work on the bench and in the committee. Mr. Wikstrom echoed Justice Durrant's comments and expressed sincere thanks for Judge Quinn's and former Judge Schofield's participation on the committee.

II. INTRODUCTIONS.

Pursuant to Utah Supreme Court Rule 11-101(4), the following committee members formally introduced themselves: Todd M. Shaughnessy and Francis J. Carney.

III. APPROVAL OF MINUTES.

Mr. Wikstrom entertained comments from the committee concerning the March 24, 2010 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.

IV. SIMPLIFIED RULES OF CIVIL PROCEDURE.

The committee continued its discussions regarding the simplified rules.

A. Rule 26.

Mr. Davies suggested and the committee agreed to remove the expert disclosure requirement from the Rule 26(a)(1) initial disclosures.

The committee discussed whether electronic information should be treated differently in light of the proportionality rules. Ms. McIntosh noted that electronic discovery is sometimes massive and may deserve separate treatment. Mr. Shea expressed concern regarding treating this differently from Rule 37. Mr. Wikstrom noted that proportionality should be referenced. Mr. Shaughnessy suggested acknowledging that electronic discovery is its own animal, requiring a showing that the cost of obtaining the discovery is proportionate to the need. The committee discussed the question of who bears the burden to demonstrate undue burden or proportionality. Judge Nuffer noted that only the party in possession of the electronic discovery can identify specific components of undue burden and expressed concern about creating two different standards. Committee determined to eliminate the language from 26(b)(3) except ll. 93-96, providing that the party claiming that electronic information is not reasonably accessible shall describe the source, the nature and extent of the burden, the nature of the information not provided, etc. In other words, the party claiming undue burden must demonstrate that the information is not reasonably accessible without undue burden or cost. The committee unanimously agreed to revise the language accordingly.

The committee discussed Rule 26(a)(3) and whether experts should be required to produce the data, compilations, etc., that underlie the expert's opinions and/or conclusions in his or her report. The concern expressed was that if one cannot take the expert's deposition, one may not be able to prepare to cross-examine the expert at trial without the underlying data or other information. Mr. Slaugh expressed concern about the stiffness of the penalty because the parties don't know everything early on and need to have flexibility to address issues as they arise at trial. The committee agreed to revise the sanction on p. 20, l. 51, to state that an expert may not testify in a party's case in chief concerning any matter "not fairly disclosed" in the expert report. The committee also agreed to incorporate the federal requirement that an expert must produce the data, exhibits, and other information that the expert "relied upon" in reaching opinions or conclusions. The committee unanimously approved these changes.

Judge Nuffer also noted that the December 2010 amendments to the Federal Rules of Civil Procedure will protect drafts of expert reports and communications. These will now fall under the work-product section of Rule 26. The Federal Rules also clarify as to which experts must provide reports: non-retained experts must only provide an opinion statement, not a report. The committee expressed interest in clarifying this point in the Utah Rules of Civil Procedure as well. Mr. Wikstrom suggested that the two items from the federal amendments be incorporated into the draft revised rules and highlighted so that the committee can fully consider how the federal amendments would fit within the revised rules.

B. Rule 35.

Mr. Wikstrom reintroduced the topic of what disclosures are required by an examining expert under Rule 35. The first issue discussed by the committee is whether the report from the physical examination must be produced or whether it need only be produced if that expert is called to testify in the party's case in chief. Judge Pullan opined that under this rule, a party is coming to the court and asking for an order allowing the physical examination of another party. The examined party is therefore entitled to a copy of the report. The committee agreed that if a physical examination is conducted, a report must be prepared and disclosed to the examined party. Further, if the examining expert is going to testify at trial, the expert must provide a report, including the expert's findings and conclusions, pursuant to Rule 26(a)(3).

Mr. Wikstrom then raised the issue of whether the examining expert should be required to disclose his or her reports and transcripts of expert testimony during the prior four years. Mr. Carney attempted to summarize the concerns that have been expressed by the plaintiff's bar as to why these disclosures should be required. Mr. Shaughnessy commented that there is no good answer as to why to treat these "professional" experts different than any other "professional" expert.

Judge Pullan asked whether the committee was saying that this type of expert is more prone to abuse than others. Mr. Slaugh responded that, because the defense has only one opportunity to examine the plaintiff, the defense is primarily motivated to retain an expert that is likely to give a report that is favorable to the defense. Mr. Davies and Mr. Smith disagreed, emphasizing that the primary motivation behind the physical examination is to see whether the defense is evaluating the case correctly. If the examination is not favorable to the defense, the report and/or examination will have value for settlement purposes and for more expediently resolving the case. Mr. Smith stated that a defense lawyer is not shopping for an expert, but is using the physical examination for purposes of case evaluation.

Mr. Carney stated that Utah is the only jurisdiction of which he is aware that requires the disclosure of prior reports and testimony. The committee observed that the federal rules also do not include this requirement. However, Mr. Carney also expressed concern that parties would simply serve subpoenas, leaving the trial judges to address the issue on a case by case basis without guidance. Mr. Davies pointed out that there should be parity. If plaintiff's counsel can get prior reports and testimony under the rule, defendant's counsel should get the equivalent.

Mr. Shaughnessy moved to strike the language on p. 37, ll. 15-16, requiring the disclosure of reports and transcripts of testimony for the four years prior. Mr. Battle seconded. A vote was taken. Six in favor. Five opposed. Mr. Wikstrom indicated the language would be removed for now but revisited at the next meeting when more of the committee is present.

C. Rule 37.

Mr. Wikstrom suggested revisions to Rule 37, specifically that p. 40, ll. 15-16 be revised to reference a document subpoena and that p. 41, ll. 55-56 be revised to confirm that the party

seeking discovery has the burden to show that discovery is needed. Mr. Wikstrom noted that this is consistent with the requirements for burdens throughout the simplified rules. The committee agreed with these changes.

Tab 2

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: May 19, 2010
Re: Rule 58A

Brent Johnson has pointed out a long-standing inconsistency that no one saw when we amended this rule a short while ago. Under paragraph (f) of the current rule, a judgment by confession is to be signed by the clerk. But paragraph (f) is not one of the exceptions listed in paragraph (b), leaving the conclusion that judgment by confession should be signed by the judge. There is no need for both to sign.

The options appear to be to delete the last sentence of paragraph (f), and require the judge to sign the judgment by confession, or add paragraph (f) to the exceptions in paragraph (b) to permit the clerk to sign the judgment. Given the routine nature of the judgment and the more specific language in paragraph (f), I have drafted the amendment around the latter option.

Encl. Rule 58A

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

(a) Judgment upon the verdict of a jury. Unless the court otherwise directs and subject to Rule 54(b), the clerk shall promptly sign and file the judgment upon the verdict of a jury. If there is a special verdict or a general verdict accompanied by answers to interrogatories returned by a jury, the court shall direct the appropriate judgment, which the clerk shall promptly sign and file.

(b) Judgment in other cases. Except as provided in ~~Subdivision~~ paragraphs (a) and (f) and Rule 55(b)(1), all judgments shall be signed by the judge and filed with the clerk.

(c) When judgment entered; recording. A judgment is complete and shall be deemed entered for all purposes, except the creation of a lien on real property, when it is signed and filed as provided in ~~Subdivisions~~ paragraphs (a) or (b). The clerk shall immediately record the judgment in the register of actions and the register of judgments.

(d) Notice of judgment. A copy of the signed judgment shall be promptly served by the party preparing it in the manner provided in Rule 5. The time for filing a notice of appeal is not affected by this requirement.

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

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

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

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

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

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

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

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

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

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

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

Tab 3

PROPOSED RULES GOVERNING CIVIL DISCOVERY

by

The Utah Supreme Court Advisory Committee on the Rules of Civil Procedure

Background

For many years the Civil Rules Committee has been concerned with the increased expansion and cost of discovery and the impact of this on our civil justice system. Rule 1 states that the rules "shall be liberally construed to secure the just, speedy, and inexpensive determination of every action." The discovery rules may have contributed to "just" results in the sense that they provide parties of sufficient means with the ability to discover all facts relevant to the litigation, but modern, expansive discovery has had a decidedly negative impact on the "speedy" and "inexpensive" resolution of civil disputes. Current civil discovery practice fosters one of the goals of Rule 1 at the expense of the other two.

Discovery has become the focus and the most expensive part of modern litigation. Discovery is viewed also as a primary contributor to delay.

The committee's observations have been borne out by recent empirical research. A 2008 survey of the most experienced trial lawyers in the country conducted by the American College of Trial Lawyers Task Force on Civil Discovery and the Institute for the Advancement of the American Legal System at Denver University found that our civil justice system takes too long and costs too much. Discovery was seen as the primary problem. *See*, AM. COLL. OF TRIAL LAWYERS TASK FORCE ON DISCOVERY & INST. FOR THE ADVANCEMENT OF THE AM. LEGAL SYS., FINAL REPORT (2009). These results were corroborated by similar surveys conducted by the Litigation Section of the ABA and the National Employment Lawyers Association. More than 80% of the respondents in the ACTL, ABA, and NELA surveys said that they or their firms turned down cases because the amount at issue did not justify the expense. The most commonly cited amount-in-controversy threshold, below which a case cannot be economically handled, was $100,000.

These surveys were directed to the federal discovery rules which are virtually the same as the Utah Rules. Indeed, during the past 30 years or more, the Utah Rules have evolved to be increasingly consistent with the federal rules and their amendments. It was perceived that consistency with the federal rules, along with the extensive case-law interpreting them, would provide a positive benefit. The federal discovery rules are now being seriously questioned as well, but the committee has come to question the very premise upon which Utah adopted those rules. The federal rules were designed for complex cases with large amounts in controversy that typify the federal system. The vast majority of cases filed in Utah courts are not those types of cases. As a result, our state civil justice system has become unavailable to many people because they cannot afford it.

The concepts underlying the federal discovery rules were sound when they were first adopted—a time before copy machines, computers, and massive electronic data storage. Electronic information is expanding at a staggering rate. Discovery has become the most expensive part of civil litigation and, unless changes are made, discovery will continue to become more problematic as the amount of electronic information expands.

Another problem of our modern world is the need for expert witnesses. As science and technology expand, so does the need for expert witnesses to explain them. Consequently, expert discovery has become an increasingly integral part of litigation and a very expensive part of discovery.

The committee has spent the last three years studying these problems and drafting a new set of discovery rules designed to achieve all three goals of Rule 1. The changes are fundamental and will require a change of mind-set by judges, lawyers, and litigants. Specifically, the change in mind-set is *away* from a system in which discovery is the predominant aspect of litigation (in which every party has a right or obligation to incur or bear the cost of almost any request for discovery) and *toward* a system in which each request for discovery must be justified by its proponent, and the focus is on moving quickly and efficiently to the disposition of the merits of the case (through settlement, summary judgment, or trial).

Proportionality Is the Key Principle Underlying the Proposed Discovery Rules

Under the existing rules, the scope of discovery is governed by "relevance" or the "likelihood to lead to discovery of admissible evidence." UT.R.CIV.P. 26(b)(1). As the information pool expands, so expands the universe of discoverable information.

Proportionality will govern the scope of discovery under the proposed rules. Simply stated, it means that the cost of discovery should be proportional to what is at stake in the litigation. The concept of proportionality is not new. It has existed since 1987 (not as "proportionality" *per se*) in Rule 26(b)(3) ("The frequency or extent of the use of the discovery methods … shall be limited by the court if it determines that: … (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.") But proportionality has been largely overlooked by all of us who have operated for decades under the principle that a party who has relevant information must produce it. Under the proposed rules, proportionality will become the controlling factor for all discovery.

Proportionality exists if the following standards are met:

1. the likely benefits of the proposed discovery outweigh the burden or expense;
2. the discovery is consistent with the overall case management and will further the just, speedy and inexpensive determination of the case;
3. the discovery is reasonable, considering the needs of the case, the amount in controversy, the complexity of the case, the parties' resources, the importance of the issues, and the importance of the discovery in resolving the issues;
4. the discovery is not unreasonably cumulative or duplicative;
5. the information cannot be obtained from another source that is more convenient, less burdensome or less expensive; and
6. the party seeking discovery has not had sufficient opportunity to obtain the information by discovery or otherwise, taking into account the parties' relative access to the information.

The second significant change in the proposed rules involves the burden of demonstrating entitlement to discovery. In the past, the operative presumption has been that a party is entitled

to discovery within the broad parameters of relevance unless the other party can persuade a court to the contrary. Under the proposed rules, this presumption would be changed to require the party seeking discovery to demonstrate, in every case, that the requested discovery is relevant ***and*** proportional with respect to the amount and issues in controversy.

Another concept that existed in theory, but was rarely used, is cost-shifting. Presently the recipient of the discovery request bears the cost of producing the information. Under the proposed rules, a court may require the requesting party to pay some or all of the costs of producing the information to achieve proportionality.

Disclosures

The proposed rules seek to reduce discovery costs by requiring each party to produce, at a very early stage and without a discovery request, all of the documents and physical evidence the party may offer in its case-in-chief and the names of all witnesses the party may call in its case-in-chief with a description of expected testimony. The duty is a continuing one, and disclosures must be supplemented as new evidence and witnesses become known. The penalty for failure to make timely disclosure is that the evidence may not be used in the party's case-in-chief. These proposed new disclosures are in addition to the disclosures presently required under Rule 26.

Disclosure is staggered. Since the plaintiff controls when it brings the action, plaintiffs are required to make to make their disclosures within 14 days after service of the first answer. A defendant is required to make its disclosures within 28 days after the plaintiff's first disclosure or after that defendant's appearance, whichever is later.

The purpose of early disclosure is to get each party to "lay on the table" the evidence it expects to use to prove its claims or defenses. The opposing party will then be better able to evaluate the case and to decide what further discovery is necessary. If parties anticipate wanting to use evidence at trial, they will be liberal in disclosing it because of the penalty for failure to do so. The goal of the proposed new disclosure rules is to prevent "sandbagging."

Standard Discovery

After initial disclosures are made, each party may engage in what the proposed rules term "standard discovery." Since each party will automatically receive disclosures of what the opponent expects to use in its case-in-chief, it is expected that standard discovery will be used to find those documents and other evidence that are harmful, rather than helpful, to the opponent's case.

Standard discovery is limited. Each party may take up to 20 hours of depositions, with the proviso that a deposition of a party may not exceed seven hours and a deposition of any other witness may not exceed four hours. The number of interrogatories is limited to 15, and requests for production, and requests for admission are also limited to 25 each.

The expectation is that, for most state cases, standard discovery and the required disclosures will be more than adequate. A presumptive time limit of 150 days is imposed. After 150 days of discovery, the case will be presumed ready for trial.

Extraordinary Discovery

The committee recognizes that there will be some cases for which standard discovery is not sufficient or appropriate. For those cases, the proposed rules provide two avenues to obtain

additional discovery. The first is by stipulation. The parties may stipulate to as much additional discovery as they desire PROVIDED that they stipulate that the additional discovery is proportional to what is at stake in the litigation and EACH party certifies that it has reviewed and approved a discovery budget for the additional discovery. If these conditions are met, then the court will not second-guess the parties and their counsel and must approve the stipulation. But it is not sufficient for the lawyers to get together and agree to millions of dollars of additional discovery. Each lawyer must also privately discuss the cost of the additional discovery with the client, and the client must certify that a discovery budget has been reviewed and approved.

The second means of obtaining additional discovery is by motion. The committee anticipates there will be cases in which there is a significant disparity between the parties' resources or access to information. To prevent a party from taking advantage in this situation, the proposed rules allow any party to move for additional discovery. Counsel must demonstrate that the additional discovery is proportional and the client must certify that the it has reviewed and approved a discovery budget.

Whether by motion or stipulation, the parties will not be "shooting in the dark" because they will have received the mandatory continuing disclosures from the other party and will have had the opportunity to conduct standard discovery. This should allow them both to better focus any requests for additional discovery and to better demonstrate proportionality.

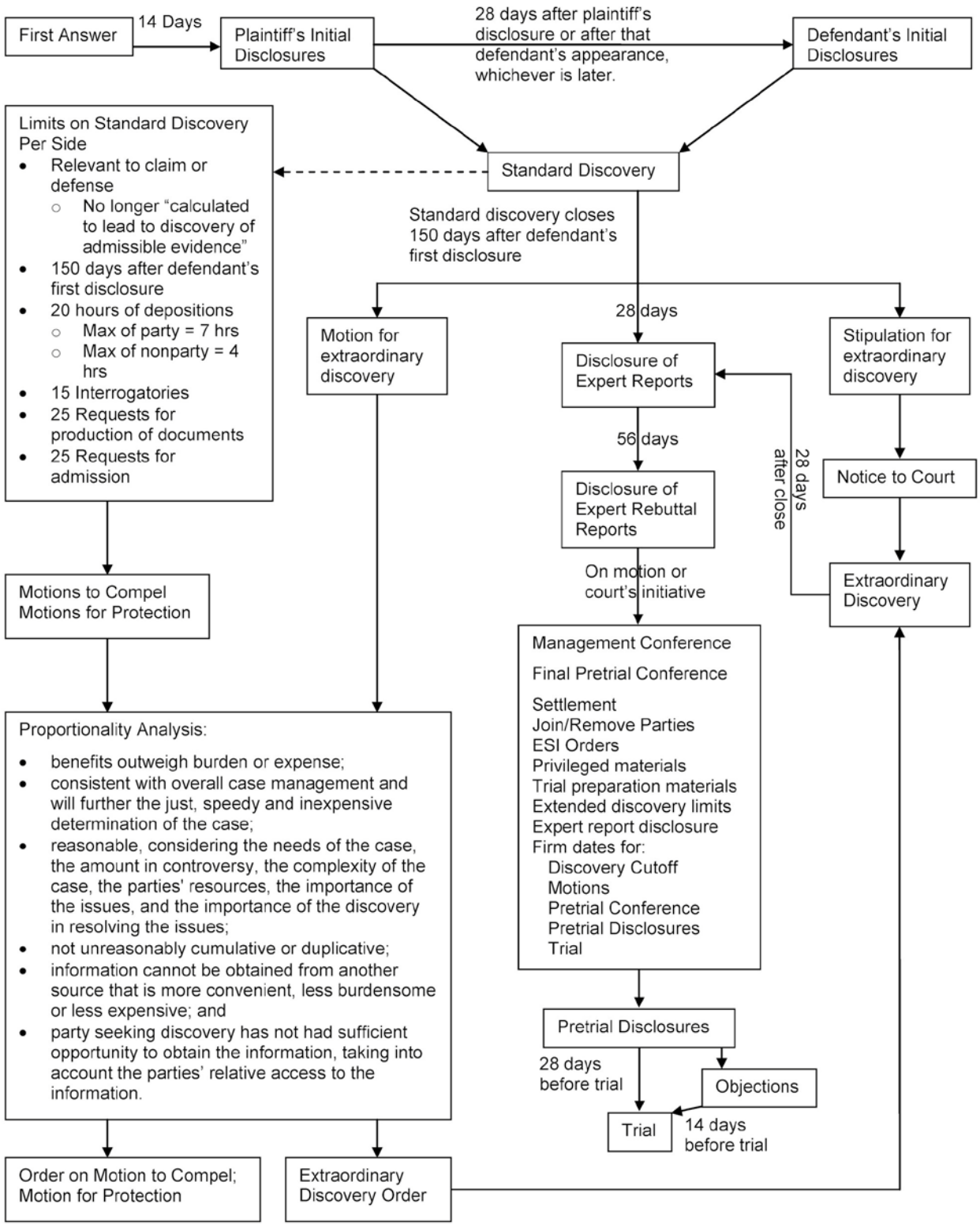
Expert Discovery

Expert discovery has become an ever-increasing component of discovery cost. If an expert's testimony is limited to what is fairly disclosed in the required expert disclosure, then there should be no need to take the expert's deposition. So the proposed rules do just that. Depositions of retained experts are not allowed in the proposed rules, but the expert cannot testify beyond what is fairly disclosed in the report. This will allow the opposing party to prepare knowing that the expert will not be able to offer surprise testimony at trial.

Disclosure and Discovery Flowsheet

The attached flowsheet demonstrates how disclosure and discovery will proceed under the proposed rules.

Disclosure and Discovery under Proposed Rules



Rule 1. General provisions.

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

Advisory Committee Notes

Rule 3. Commencement of action.

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

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

Advisory Committee Notes

Rule 4. Process.

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

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

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

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

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

(c) Contents of summons.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

(d)(4) Other service.

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

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

(e) Proof of Service.

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

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

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

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

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

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

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

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

Advisory Committee Notes

Rule 8. General rules of pleadings.

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

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

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

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

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

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

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

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

(c)(3) a demand for relief.

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

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

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

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

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

Advisory Committee Notes

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

Rule 16. Pretrial conferences.

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

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

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

(a)(3) discouraging wasteful pretrial activities;

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

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

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

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

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

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

(a)(10) extending fact discovery;

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

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

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

(a)(14) any other appropriate matters.

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

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

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

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

Advisory Committee Notes

Rule 26. General provisions governing disclosure and discovery.

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

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

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

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

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

~~(a)(1)(A)(iii) each witness who may be used at trial to present evidence under Rules 702, 703, or 705 of the Utah Rules of Evidence;~~

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

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

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

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

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

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

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

(a)(2) Exemptions.

(a)(2)(A) Unless otherwise ordered by the court or agreed to by the parties, the requirements of paragraph (a)(1) do not apply to actions:

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

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

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

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

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

(a)(3) Disclosure of expert testimony.

(a)(3)(A) A party shall, without waiting for a discovery request, provide to other parties a copy of a written report of any person who may be used at trial to present evidence under Rules 702, 703, or 705 of the Utah Rules of Evidence and 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. The report shall be signed by the expert and contain: ~~the subject matter on which the expert expects to testify; the substance of the facts and opinions to which the expert expects to testify; a summary of the grounds for each opinion;~~ a complete statement of all opinions the witness will express and the basis and reasons for them; the data or other information relied upon by the witness in forming them; any exhibits that will be used to summarize or support them; the qualifications of the expert, including a list of all publications authored within the preceding ten years; the compensation to be paid for the study and testimony; and a list of any other cases in which the expert has testified as an expert at trial or by deposition within the preceding four years. Such an expert may not testify in a party's case-in-chief concerning any matter not ~~contained~~ fairly disclosed in the report.

(a)(3)(B) If the expert witness is not required to provide a written report, the party shall disclose the subject matter on which the witness is expected to present evidence under Rule of Evidence 702, 703 or 705 and a summary of the facts and opinions to which the witness is expected to testify.

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

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

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

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

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

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

(b) Discovery scope.

(b)(1) In general. Parties may discover any matter, not privileged, which is relevant to the claim or defense of any party if the discovery satisfies the standards of proportionality set forth below. Discovery and discovery requests are proportional if:

(b)(1)(A) the likely benefits of the proposed discovery outweigh the burden or expense;

(b)(1)(B) the discovery is consistent with the overall case management and will further the just, speedy and inexpensive determination of the case;

(b)(1)(C) the discovery is reasonable, considering the needs of the case, the amount in controversy, the complexity of the case, the parties' resources, the importance of the issues, and the importance of the discovery in resolving the issues;

(b)(1)(D) the discovery is not unreasonably cumulative or duplicative;

(b)(1)(E) the information cannot be obtained from another source that is more convenient, less burdensome or less expensive; and

(b)(1)(F) the party seeking discovery has not had sufficient opportunity to obtain the information by discovery or otherwise, taking into account the parties' relative access to the information.

(b)(2) The party seeking discovery has the burden of showing proportionality. To ensure proportionality, the court may enter orders ~~described~~ under in Rule 37.

(b)(3) A party ~~need not provide discovery of~~ claiming that electronically stored information ~~from sources that the party identifies as~~ is not reasonably accessible because of undue burden or cost~~. The party shall expressly make any claim that the source is not reasonably accessible, describing~~ shall describe the source of the electronically stored information, the nature and extent of the burden, the nature of the information not provided, and any other information that will enable other parties to evaluate the claim. ~~On motion to compel discovery or for a protective order, the party from whom discovery is sought must show that the information is not reasonably accessible because of undue burden or cost. If that showing is made, the court may order discovery from such sources if the requesting party shows good cause. The court may specify conditions for the discovery.~~

(b)(4) Trial preparation materials. A party may obtain otherwise discoverable documents and tangible things prepared in anticipation of litigation or for trial by or for another party or by or for that other party's representative (including the party's attorney, consultant, surety, indemnitor, insurer, or agent) only upon a showing that the party seeking discovery has substantial need of the materials and that the party is unable without undue hardship to obtain substantially equivalent materials by other means. In ordering discovery of such materials, the court shall protect against disclosure of the mental impressions, conclusions, opinions, or legal theories of an attorney or other representative of a party.

(b)(5) Statement previously made about the action. A party may obtain without the showing required in paragraph (b)(4) a statement concerning the action or its subject matter previously made by that party. Upon request, a person not a party may obtain without the required showing a statement about the action or its subject matter previously made by that person. If the request is refused, the person may move for a court order under Rule 37. A statement previously made is (A) a written statement

signed or approved by the person making it, or (B) a stenographic, mechanical, 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)(6) Claims of Privilege or Protection of Trial Preparation Materials.

(b)(6)(A) Information withheld. If a party withholds discoverable information by claiming that it is privileged or prepared in anticipation of litigation or for trial, the party shall make the claim expressly and shall describe the nature of the documents, communications, or things not produced in a manner that, without revealing the information itself, will enable other parties to evaluate the claim.

(b)(6)(B) Information produced. If a party produces information that the party claims is privileged or prepared in anticipation of litigation or for trial, the producing party may notify any receiving party of the claim and the basis for it. After being notified, a receiving party must promptly return, sequester, or destroy the specified information and any copies it has and may not use or disclose the information until the claim is resolved. A receiving party may promptly present the information to the court under seal for a determination of the claim. If the receiving party disclosed the information before being notified, it must take reasonable steps to retrieve it. The producing party must preserve the information until the claim is resolved.

(c) Sequence and timing of discovery.

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

(c)(2) Extraordinary discovery. To obtain discovery beyond the limits established in Paragraph (c)(1), a party shall file:

(c)(2)(A) before the close of standard discovery, a stipulation of extraordinary discovery and a statement signed by the parties and attorneys that extraordinary

discovery is necessary and proportional under paragraph (b)(1) and that each party has reviewed and approved a discovery budget; or

(c)(2)(B) before the close of the standard discovery and after reaching the limits of standard discovery imposed by these rules, a motion for extraordinary discovery and a statement signed by the party and attorney that the extraordinary discovery is necessary and proportional under paragraph (b)(1) and that the party has reviewed and approved a discovery budget.

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

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

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

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

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

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

(e) Signing discovery requests, responses, and objections. Every disclosure, request for discovery, response to a request for discovery and objection to a request for discovery shall be in writing and signed by at least one attorney of record or by the party if the party is not represented. The signature of the attorney or party is a certification

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

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

Advisory Committee Notes

Rule 26A. Disclosure in domestic relations actions.

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

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

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

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

(c)(2) For the two tax years before the petition was filed, complete federal and state income tax returns, including Form W-2 and supporting tax schedules and attachments, filed by or on behalf of that party or by or on behalf of any entity in which the party has a majority or controlling interest, including, but not limited to, Form 1099 and Form K-1 with respect to that party.

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

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

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

(c)(6) All statements for the 3 months before the petition was filed for all financial accounts, including, but not limited to checking, savings, money market funds, certificates of deposit, brokerage, investment, retirement, regardless of whether the

account has been closed including those held in that party's name, jointly with another person or entity, or as a trustee or guardian, or in someone else's name on that party's behalf.

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

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

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

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

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

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

Advisory Committee Notes

(c)(3): Refer to statutory definition

Rule 29. Stipulations regarding disclosure and discovery procedure.

The parties may modify these rules for disclosure and discovery by filing, before the close of standard discovery, a stipulated notice of extraordinary discovery and a statement signed by the parties and lawyers that the extraordinary discovery is necessary and proportional under Rule 26(b)(1) and that each party has reviewed and approved a discovery budget. Stipulations extending the time for or limits of disclosure or discovery require court approval if the extension would interfere with a court order for completion of discovery or with the date of a hearing or trial.

Advisory Committee Notes

Rule 30. Depositions upon oral questions.

(a) When depositions may be taken; when leave required; no deposition of expert witnesses. A party may depose a party or witness by oral questions. A witness may not be deposed more than once in standard discovery. An expert who has prepared a report disclosed under Rule 26(a)(3) may not be deposed.

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

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

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

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

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

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

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

(c) Examination and cross-examination; objections.

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

(c)(2) All objections shall be recorded, but the questioning shall proceed, and the testimony taken subject to the objections. Any objection shall be stated concisely and in a non-argumentative and non-suggestive manner. A person may instruct a witness not to answer only to preserve a privilege, to enforce a limitation on evidence directed by the court, or to present a motion for a protective order under Rule 26(c). Upon demand of the objecting party or witness, the deposition shall be suspended for the time necessary to make a motion. The party taking the deposition may complete or adjourn the deposition before moving for an order to compel discovery under Rule 37.

(d) Limits. During standard discovery, each side (plaintiffs collectively, defendants collectively, and third-party defendants collectively) is limited to 20 hours of deposition by oral questioning. Oral questioning of a nonparty shall not exceed four hours, and oral questioning of a party shall not exceed seven hours.

(e) Submission to witness; changes; signing. Within 28 days after being notified by the officer that the transcript or recording is available, a witness may sign a statement of

changes to the form or substance of the transcript or recording and the reasons for the changes. The officer shall append any changes timely made by the witness.

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

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

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

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

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

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

required to be submitted to the court shall be submitted to the court in the county where the deposition is being taken.

Advisory Committee Notes

Rule 31. Depositions upon written questions.

(a) A party may depose a party or witness by written questions. Rules 30 and 45 apply to depositions upon written questions, except insofar as by their nature they are clearly inapplicable.

(b) A party taking a deposition using written questions shall serve on the parties a notice which includes the name or description and address of the deponent, the name or descriptive title of the officer before whom the deposition will be taken, and the questions to be asked.

(c) Within 14 days after the questions are served, a party may serve cross questions. Within 7 days after being served with cross questions, a party may serve redirect questions. Within 7 days after being served with redirect questions, a party may serve re-cross questions.

(d) A copy of the notice and copies of all questions served shall be delivered by the party taking the deposition to the designated officer who shall proceed promptly to ask the questions and prepare a record of the responses.

(e) During standard discovery, a deposition by written questioning shall not cumulatively exceed 15 questions, including discrete subparts, by the plaintiffs collectively, by the defendants collectively or by third-party defendants collectively.

Advisory Committee Notes

Rule 33. Interrogatories to parties.

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

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

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

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

Advisory Committee Notes

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

(a) Scope.

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

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

(b) Procedure and limitations.

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

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

(c) Form of documents and electronically stored information.

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

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

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

Advisory Committee Notes

Rule 35. Physical and mental examination of persons.

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

(b) ~~Examiner as witness.~~ Report. The party requesting the examination shall disclose a detailed written report of the examiner, setting out the examiner's findings, including results of all tests made, diagnoses and conclusions. If the party requesting the examination wishes to call the examiner as a witness, the party shall disclose an expert report as required by Rule 26(a)(3)~~, and shall also disclose all expert reports disclosed and transcripts of any expert testimony given during the prior four years~~.

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

Rule 36. Request for admission.

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

(b) Answer or objection.

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

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

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

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

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

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

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

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

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

Advisory Committee Notes

Rule 37. Discovery and disclosure motions; Sanctions.

(a) Motion for order compelling disclosure or discovery.

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

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

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

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

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

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

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

(a)(3) The moving party must attach a copy of the request for discovery, the disclosure, or the response at issue. The moving party must also attach a certification that the moving party has in good faith conferred or attempted to confer with the other affected parties in an effort to secure the disclosure or discovery without court action and that the discovery being sought is proportional under Rule 26(b)(1).

(b) Motion for protective order.

(b)(1) A party or the person from whom discovery is sought may move for an order of protection from discovery. The moving party shall attach to the motion a copy of the request for discovery or the response at issue. The moving party shall also attach a certification that the moving party has in good faith conferred or attempted to confer with other affected parties to resolve the dispute without court action.

(b)(2) If the motion raises issues of proportionality under Rule 26(b)(1), the party seeking the discovery has the burden of demonstrating that the information being sought is proportional.

(c) Orders. The court may make any order to require disclosure or discovery or to protect a party or person from discovery being conducted in bad faith or from annoyance, embarrassment, oppression, or undue burden or expense, or to achieve proportionality under Rule 26(b)(1), 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;

(c)(9) that a question about a statement or opinion of fact or the application of law to fact not be answered until after designated discovery has been completed or until a pretrial conference or other later time; or

(c)(10) that the costs, expenses and attorney fees of discovery be allocated among the parties as justice requires.

(c)(11) If a protective order terminates a deposition, it shall be resumed only upon the order of the court in which the action is pending.

~~(d)~~(d) Expenses and sanctions for motions. If the motion to compel or for a protective order is granted, or if a party provides disclosure or discovery or withdraws a disclosure or discovery request after a motion is filed, the court may order the party,

witness or attorney to pay the reasonable expenses and attorney fees incurred on account of the motion if the court finds that the party, witness, or attorney did not act in good faith or asserted a position that was not substantially justified.

(e) Failure to comply with order.

(e)(1) Sanctions by court in district where deposition is taken. Failure to follow an order of the court in the district in which the deposition is being taken or where the document subpoena was served is contempt of that court.

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

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

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

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

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

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

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

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

(f) Expenses on failure to admit. If a party fails to admit the genuineness of any document or the truth of any matter as requested under Rule 36, and if the party requesting the admissions proves the genuineness of the document or the truth of the matter, the party requesting the admissions may apply to the court for an order requiring the other party to pay the reasonable expenses incurred in making that proof, including reasonable attorney fees. The court shall make the order unless it finds that:

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

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

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

(f)(4) that the request is not proportional under Rule 26(b)(1); or

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

(g) Failure of party to attend at own deposition. The court on motion may take any action authorized by paragraph (e)(2) if a party or an officer, director, or managing agent of a party or a person designated under Rule 30(b)(6) or 31(a) to testify on behalf of a party fails to appear before the officer taking the deposition, after proper service of the notice. The failure to act described in this paragraph may not be excused on the ground that the discovery sought is objectionable unless the party failing to act has applied for a protective order under paragraph (b).

(h) Failure to disclose. If a party fails to disclose a witness, document or other material as required by Rule 26(a) or Rule 26(e)(1), or to amend a prior response to discovery as required by Rule 26(e)(2), that party shall not be permitted to use the witness, document or other material at any hearing unless the failure to disclose is harmless or the party shows good cause for the failure to disclose. In addition to or in lieu of this sanction, the court on motion may take any action authorized by paragraph (e)(2).

(i) Failure to preserve evidence. Nothing in this rule limits the inherent power of the court to take any action authorized by paragraph (e)(2) if a party destroys, conceals, alters, tampers with or fails to preserve a document, tangible item, electronic data or other evidence in violation of a duty. Absent exceptional circumstances, a court may not impose sanctions under these rules on a party for failing to provide electronically stored information lost as a result of the routine, good-faith operation of an electronic information system.

Advisory Committee Notes