Agenda
Advisory Committee on Rules of Civil Procedure

June 23, 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
Recognition of Justice Thomas Lee		Fran Wikstrom
Simplified Civil Procedures	Tab 2	Fran Wikstrom
10-Day Summons	Tab 3	Tim Shea

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

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

Tab 1

MINUTES

UTAH SUPREME COURT ADVISORY COMMITTEE OF THE RULES OF CIVIL PROCEDURE

Wednesday, May 26, 2010
Administrative Office of the Courts

Francis M. Wikstrom, Presiding

PRESENT: Francis M. Wikstrom, Francis J. Carney, Honorable Derek P. Pullan, Barbara L. Townsend, Janet H. Smith, James T. Blanch, W. Cullen Battle, Terrie T. McIntosh, David W. Scofield, Trystan B. Smith, Leslie W. Slaugh, Todd M. Shaughnessy, Honorable Kate A. Toomey, Lincoln L. Davies, Jonathan O. Hafen

EXCUSED: Tim Shea

STAFF: Sammi Anderson

GUESTS: Clark Sabey

I. APPROVAL OF MINUTES.

Mr. Wikstrom called the meeting to order at 4:00 p.m. Mr. Wikstrom entertained comments from the committee concerning the April 28, 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.

II. RULE 58A. ENTRY OF JUDGMENT.

Mr. Wikstrom asked for discussion regarding the technical amendments to Rule 58A. A motion was made to approve the amendments circulated by Tim Shea in advance of the meeting. The motion was seconded, and unanimously approved.

III. WELCOME TO JUDGE TOOMEY.

Mr. Wikstrom welcomed Judge Toomey to the committee. Judge Toomey replaces Judge Quinn.

IV. INTRODUCTIONS.

Pursuant to Utah Supreme Court Rule 11-101(4), Judge Toomey formally introduced herself.

V. REPORT ON 10 DAY SUMMONS.

Mr. Wikstrom reported to the committee regarding a conversation with a collections lawyer on the 10 day summons issue. Mr. Wikstrom reported that members of the collections bar believe that e-filing will solve some of the prior issues. The committee discussed the 10 day summons generally and whether such a summons should be allowed. The committee remained committed to the decision to eliminate the 10 day summons from the current version of the simplified rules.

VI. REPORT ON MR. WIKSTROM'S PRESENTATION AT INNS OF COURT.

Mr. Wikstrom reported on his presentation on the simplified rules to one of the Inns of Court. Mr. Wikstrom walked the group through the details, standard discovery, extraordinary discovery, etc. Mr. Wikstrom indicated that the reception was not negative.

VII. SIMPLIFIED RULES OF CIVIL PROCEDURE.

Rule 26. Ms. McIntosh noted one small change on Rule 26, line 11. The word "and" should be moved up to line 9, following the semi-colon.

Rule 30. Mr. Davies noted there has been some discussion regarding reducing further the deposition hours allotted to each side. Mr. Slaugh previously suggested reducing the allotted hours from 20 to 16. The committee discussed various limits. Judge Pullan suggested reducing the limit to 16. Messrs. Wikstrom and Hafen advocated the higher limit of 20. Mr. Smith noted that multiple party cases will go more smoothly under the 20 hour limit because then multiple parties on the same side have more room to get what they need. A motion was made to drop to 16 the limit on deposition hours per side. The motion was seconded and the committee voted 7 to 5 to reduce the hours limit from 20 to 16.

Rule 35. Mr. Wikstrom noted that the current Rule 35 is in the same iteration as it was at the last meeting. The committee voted on it at the last meeting, but the vote was close. The close vote arose primarily from the debate about whether the examining doctor should have to disclose reports and testimony for four years prior. Mr. Carney noted that he was in opposition, but that there has been full discussion and the vote is fair and well taken. Mr. Carney also noted that a good Advisory Committee Note would be useful here and volunteered to do that. There was no motion to revisit the vote. Rule 35 stands as drafted in the last meeting, with the exception of one technical change: Mr. Davies noted that on Rule 35(c), line 21, it should be (e)(2), not (d)(2).

Rule 37. The committee discussed motions to compel disclosures under rule 37. The general idea is we are moving away from Rule 26(a)(1) disclosures as currently used in practice. Parties will now have to disclose at the outset everything upon which they intend to rely. Mr. Wikstrom noted that it is self-policing - if parties don't disclose the information, they cannot use it. There will therefore be little need for a motion to compel the first sets of disclosures.

The committee agreed to leave the language regarding "disclosures" in 37(a) through (a)(1)(B). The committee also agreed to leave the word "may" in place in lines 60-63. "May" allows courts more discretion to award fees if certain findings are made. Judge Pullan emphasized that we are introducing some uncertainty into the system about what "proportionality" means and courts therefore should have more discretion in determining sanctions.

Following this discussion, Mr. Wikstrom announced that there is now a complete set of revised rules. The committee turned to the task of drafting Advisory Committee Notes. Mr. Carney agreed to prepare the first draft of a Note for Rule 30 pertaining to expert depositions and for Rule 35. Messrs. Shaughnessy and Blanch and Judge Pullan will prepare the first draft of a Note for Rule 26. Mr. Davies agreed to prepare the Note for Rule 8 and Messrs. Hafen and Lee will draft a Note for Rule 37.

The committee discussed ideas for rolling out the new rules, including consideration of a pilot program. Judge Toomey noted it is difficult for the courts if the change is not uniform. Mr. Hafen noted the concerns with forum shopping. Mr. Carney noted that the other problem with a pilot program is it is not practical. It is difficult to do it fairly and effectively. The committee agreed that a state-wide rollout is the most effective idea, and that a pilot program is essentially unworkable and imprudent. Mr. Wikstrom recommended that the committee recommend to the Utah Supreme Court that the simplified rules be adopted as proposed rules across the board. Mr. Wikstrom noted that, once the rules are in effect, there will time to study their effect on the system.

The committee discussed further ideas for rolling out the new rules and working to educate the judiciary and bar regarding the changes and their effect. Various committee members agreed to approach their constituencies, *ie*, bar conventions, county bars, board of district court judges, the bar journal, litigation section quarterly luncheons, annual district judges conference, and to seek out opportunities to present to those bodies regarding the rules changes.

The meeting adjourned at 5:50 pm. The next meeting will be June 23, 2010.

Tab 2

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.

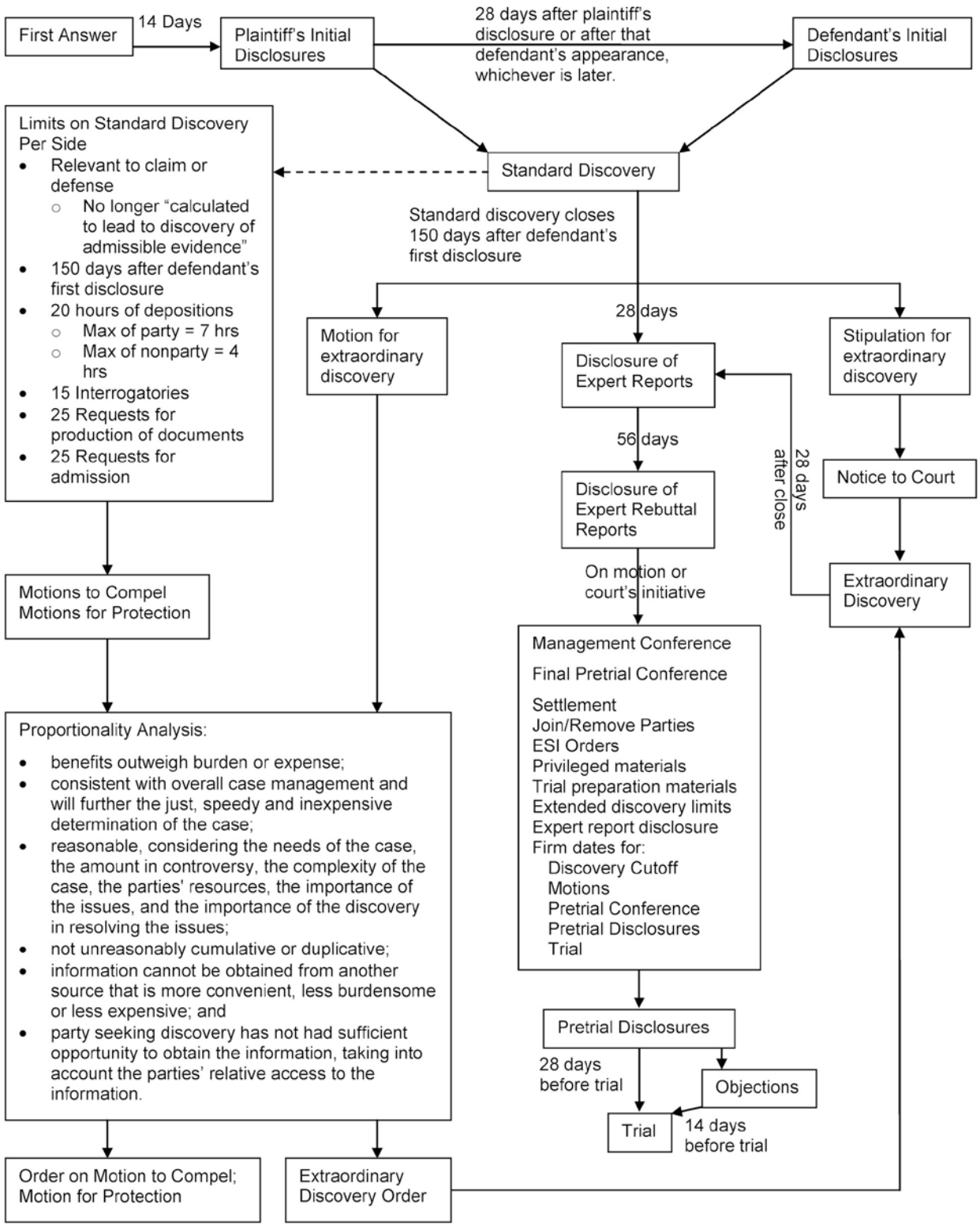
Expert Discovery

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.

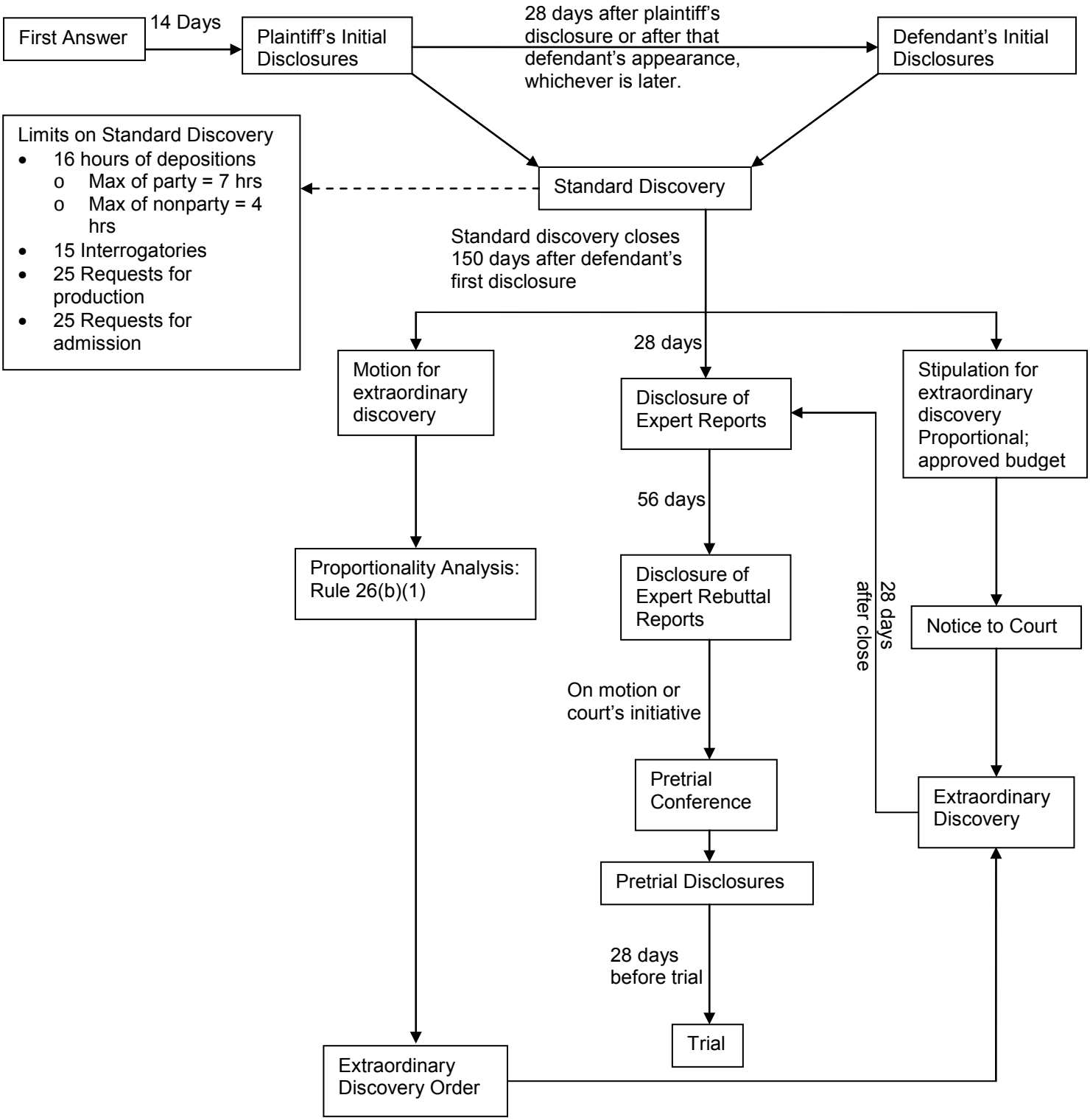
Disclosure and Discovery Flowsheet

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

Disclosure and Discovery under Proposed Rules



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

The 2010 amendments remove from Rule 8 prior language requiring a statement of the party's "claim." Instead, the rule now requires a short and plain statement of both (1) "facts showing that the party is entitled to relief" and (2) "the legal theory on which the claim rests." The purpose of this amendment is twofold. First, the amendment clarifies that parties must give notice of both the facts and the law that support their claim. The amendment thus reconfirms longstanding case law that courts, on a Rule 12 motion, will "accept the plaintiff's description of facts alleged in the complaint to be true, but . . . need not accept extrinsic facts not pleaded nor . . . legal conclusions in contradiction of the pleaded facts." Allred v. Cook, 590 P.2d 318, 319 (Utah 1979). "[M]ere conclusory allegations in a pleading . . . are insufficient . . . ." Chapman v. Primary Children's Hosp., 784 P.2d 1181, 1186 (Utah 1989). Second, by clarifying that parties should plead facts, this amendment to Rule 8 incentivizes further and earlier disclosure of facts, consistent with the general approach of Utah's new "simplified rules" and other changes made by the 2010 amendments, including those to Rule 26's disclosure requirements. To facilitate access to justice, the committee intends that all pleadings—both complaints and defenses—provide more and earlier notice of the facts alleged with less reliance on discovery. However, by requiring parties to plead "facts," this amendment expressly does not resurrect any prior requirement of technical or "code" pleading. Nor does the amendment seek to import any heightened pleading requirement, including interpretations of the United States Supreme Court's decisions in Bell Atlantic Corp. v. Twombly, 550 U.S. 544 (2007), and Ashcroft v. Iqbal, 129 S. Ct. 1937 (2009), as

mandating a heightened standard of "plausibility" pleading under the Federal Rules of Civil Procedure. Rather, the longstanding "liberal" standard of notice pleading remains in effect in Utah. E.g., Canfield v. Layton City, 2005 UT 60, ¶ 14, 122 P.3d 622. Accord Adam N. Steinman, The Pleading Problem, 62 Stanford L. Rev. 1293 (2010).

Rule 16. Pretrial conferences.

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

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

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

(a)(3) discouraging wasteful pretrial activities;

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

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

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

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

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

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

(a)(10) extending fact discovery;

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

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

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

(a)(14) any other appropriate matters.

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

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

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

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

Advisory Committee Notes

Rule 26. General provisions governing disclosure and discovery.

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

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

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

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

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

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

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

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

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

(a)(1)(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: 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 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)(C) Disclosure required by paragraph (a)(3) shall be made within 28 days after the expiration of fact discovery as provided by paragraph (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 under in Rule 37.

(b)(3) A party claiming that electronically stored information is not reasonably accessible because of undue burden or cost shall describe the source of the electronically stored information, the nature and extent of the burden, the nature of the information not provided, and any other information that will enable other parties to evaluate the claim.

(b)(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. 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, 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

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 16 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 non party 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) 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).

(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(c)(2), except that the failure cannot be treated as contempt of court.

Advisory Committee Notes

Rule 35 has been substantially revised. Few rules have generated such an extensive motions practice and disputes as the previous version of Rule 35. The battles typically raged over the production of reports of prior examinations by the examining physician, and whether the examination could be recorded or witnessed by a third party.

It is also doubtful that any rule under consideration for change has been as thoroughly studied as Rule 35. A subcommittee of the advisory committee has spent several years collecting information from both sides of the personal-injury bar and from the trial courts. While no rule amendment will please everyone, the committee is of the opinion that making videotaping the default for medical examinations, and removing the

requirement for automatic production of prior reports, will best resolve the issues that have bedeviled the trial courts and counsel.

The Committee re-emphasizes that a medical examination is not a matter of right, but should only be permitted by the trial court upon a showing of good cause. Rule 35 has always provided, and still provides, that the proponent of an examination must demonstrate good cause for the examination. And, as before, the motion and order should detail the specifics of the proposed examination.

The committee is concerned about the rise of the so-called "professional witness" in the area of medical examinations. This phenomenon is not limited to Utah. See, A World of Hurt: Exams of Injured Workers Fuel Mutual Mistrust, By N. R. Kleinfield, New York Times, April 4, 2009. The committee considered, but rejected, a proposal to require a medical examiner to demonstrate a level of "independence" in order to qualify for consideration as an examiner under Rule 35. This proposal was deemed impractical, and the committee leaves such matters to the courts' discretion under the standards of Rule 702, Utah Rules of Evidence.

Nevertheless, the committee recognizes that there is often nothing "independent" about a Rule 35 examiner. Therefore, the trial court should refrain from the use of the phrase "independent medical examiner," using instead the neutral appellation "medical examiner," "Rule 35 examiner," or the like.

As noted, a major source of controversy has been requests by plaintiffs' counsel to audio- or video-record examinations. We have heard reports of examiners claiming to have performed certain procedures when they actually did not; examiners claiming to have been told things by plaintiffs that the plaintiffs deny telling them; and claiming responses to maneuvers that are later questioned by other examiners. Defense counsel have typically objected to recording on the grounds that it stymies the free exchange of information that the examination is designed to elicit.

The Committee has determined that the benefits of video recording generally outweigh the downsides in a typical case. The new rule therefore provides that non-obtrusive videotaping shall be permitted as a matter of course unless the person moving for the examination demonstrates a clear potential for harm. See, Boswell v. Schultz,

173 P.3d 390, 394 (OK 2007) ("A video recording would be a superior method of providing an impartial record of the physical examination.")

Nothing in the rule requires that the recording be conducted by a professional, and it is not the intent of the committee that this extra cost should be necessary. The committee also recognizes that videotaping will require the presence of a third party to manage the camera, and notes that this may be an employee of counsel or a friend of the person being examined, but must be done without interference and as unobtrusively as possible.

In rare cases, the court may order that videotaping not be used. In these circumstances, an audio recording may suffice to produce an independent record.

The former requirement of Rule 35(c) providing for the production of prior reports on other examinees by the examiner was a source of great confusion and controversy. This provision does not exist in the federal version of the rule, nor is the Committee aware of any other similar state court rule. After much deliberation and discussion, it is the Committee's view that this provision is better eliminated, and in the new rule there is no longer an automatic requirement for the production of prior reports of other examinations. Medical examiners will be treated as other expert witnesses are treated, with the requirement of a report under Rule 26. The Committee notes that the use of subpoenas to obtain prior reports remains an option for the practitioner in appropriate circumstances.

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) 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

The 2010 amendments to Rule 37 make two principal changes. First, the amended Rule 37 consolidates provisions for motions for protective order (formerly set forth in Rule 26(c)) with provisions for motions to compel. By consolidating the standards for these two motions in a single rule, the Advisory Committee sought to highlight some of

the parallels and distinctions between the two types of motions and to present them in a single rule.

Second, the amended Rule 37 incorporates the new Rule 26 standard of "proportionality" as a principal criterion on which motions to compel or for protective order should be evaluated. As to motions to compel, Rule 37(a)(3) requires that a party moving to compel discovery certify to the court "that the discovery being sought is proportional under Rule 26(b)(1)." Rule 37(b) makes clear that a lack of proportionality may be raised as ground for seeking a protective order, indicating that "the party seeking the discovery has the burden of demonstrating that the information being sought is proportional."

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: June 15, 2010
Re: 10-Day Summons

The collections bar has started the campaign to retain the 10-day summons rule. I have attached a letter sent to Trystan. Someone has proposed a procedure that would permit a case to be initiated by first serving the complaint and summons, but the complaint would have to be filed by the close of the next business day.

I have attached amendments to Rules 3, 4, and 12 that would accomplish that result. The relevant amendment to Rule 3 is on lines 4 and 5. The relevant amendment to Rule 4 is on line 23.

Most of the rest of the amendments have already been agreed to as part of the simplification effort, although I had to reinstate some existing text, since the concept, under this proposal, is not completely eliminated.

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June 11, 2010

Trystan B. Smith
SNOW, CHRISTENSEN, & MARTINEAU
10 Exchange Pl 11th FL
Salt Lake City, UT 84145

Subject: 10 Day Summons

Dear Mr. Smith:

Since we have had some contact with you through some subrogation cases we are taking the opportunity to write regarding an issue that is very important to us.

We are writing this letter regarding the possible change in the Rules of Civil Procedure regarding the 10 day summons. While we are sure you have been alerted as to the potential concerns that a collection practice like ours has regarding any change in the 10 day summons rule, we wanted to provide this commentary so that the issues and concerns are clear and can be expressed to your committee. Our collection practice and its clients have already been significantly impacted by the recent increases in court costs. Because the volume of filings in collection matters is so high, the associated costs with those filings have increased dramatically. An elimination of the option of a 10 day summons would only add to this impact. Presently, only those cases where service occurs are filed. There are many cases when service cannot be effectuated. We can avoid the filing fee on these matters when a Defendant cannot be located.

The result of the removal of the 10 day summons option would be that court costs would increase for our clients again. The burden of those court costs would eventually be passed to consumers. There would also be a huge increase in the number of other motions such as Motions to Extend Time for Service; hence, the courts could be flooded with an increase in complaints and motions.

In the present atmosphere there is a strong settlement possibility before the filing of suit. Defendants will often contact the collection firm to make settlement and the cost of filing and paperwork to the court is avoided. If we become a filing first state then the costs of service and filing will always be a factor in any settlement.

It appears that the discussion on removing the 10 day summons is being considered for administrative reasons. With the decrease in staffs the processing of the 10 day summons and answers coming in may be bogging down in some of the courts. It seems to us that removing an important tool for the collection firms for administrative reasons is not appropriate. It also appears to us that this administrative problem could be dealt with in ways other than elimanating the 10 day summons. Perhaps the time for an answer to a 10 day summons could be extended while retaining the requirement of filing a complaint within 10 days after service. We are sure there are other remedies to the administrative concerns that could be pursued rather than the removal of the 10 day summons altogether.

There is an interesting and important possibility that a change in this law could bring. Credit grantors provide credit most readily in states where the lending atmosphere is most favorable. It certainly may affect the standing of Utah as a favorable credit granting state if the costs of doing business (including the cost of collecting delinquent debt) increases. Hence, the removal of the 10 day summons may have an effect on lending in Utah.

We hope that you will seriously consider the points of this letter with your committee and we stand ready to respond to any questions that you may have. Feel free to contact us.

Very truly yours,

BRYAN W. CANNON

RANDY L. ROBINSON

BWC/RLR/cg

Rule 3. Commencement of action.

(a) How commenced. A civil action is commenced (1) by filing a complaint with the court, or (2) by ~~service of~~ serving a summons together with a copy of the complaint in accordance with Rule 4 and filing the complaint and summons by the close of the next business day. ~~If the action is commenced by the service of a summons and a copy of the complaint, then the complaint, the summons and proof of service, must be filed within ten days of such service.~~ If, in a case commenced under paragraph (a)(2) ~~of this rule~~, the complaint~~,~~ and summons ~~and proof of service~~ are not timely filed ~~within ten days of service~~, the action ~~commenced~~ shall be deemed dismissed and the court shall have no further jurisdiction thereof.

(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.

(c) Time of jurisdiction. The court shall have jurisdiction from the time of filing of the complaint or service of the summons and a copy of the complaint.

Advisory Committee Notes

~~Rule 3 constitutes a significant change from the prior rule. The rule retains service of the ten-day summons as one of two means to commence an action, but the rule requires that the summons together with a copy of the complaint be served on the defendant pursuant to Rule 4. In so doing, the rule eliminates the requirement that a copy of the complaint be deposited with the clerk for the defendant whose address is unknown. The changes in Rule 3 must be read and should be interpreted in conjunction with coordinate changes in Rule 4 and with a change in Rule 12(a) that begins the running of the defendant's 20-day response time from the service of the summons and complaint.~~

~~Paragraph (a). This paragraph eliminates the requirement that a copy of the complaint be deposited with the clerk for the defendant whose address is unknown. Paragraph (b) of the former rule, which permitted the plaintiff to deposit copies of the~~

~~complaint with the clerk for defendants not otherwise served with a copy at the time of the service of the summons, has also been eliminated. The rule requires, in effect, that both the summons and the complaint be served pursuant to Rule 4. Under a coordinate change in Rule 12(a), the defendant's time for answering or otherwise responding to the complaint does not begin to run until service of the summons and complaint pursuant to Rule 4.~~

~~Paragraph (b). This paragraph is substantially identical to paragraph (c) of the former rule.~~

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) Time of service. In an action commenced under Rule 3(a)(1), the summons ~~together with~~ and a copy of the complaint shall be served no later than 120 days after ~~the filing of~~ the complaint is filed unless the court allows a longer period of time for good cause ~~shown~~. 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~~y~~ action ~~brought~~ against two or more defendants, ~~on which~~ if service has been timely ~~obtained~~ 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 ~~prior to~~ 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 ~~is required to~~ must answer the complaint in writing, and shall notify the defendant that ~~in case of failure to do so,~~ judgment by default will be ~~rendered~~ entered against the defendant for failure to answer the complaint in writing. It shall state either that the complaint is on file with the court or that the complaint will be filed with the court within one day~~s~~ of service.

~~(c)(2) If the action is commenced under Rule 3(a)(2), the summons shall state that the defendant need not answer if the complaint is not filed within 10 days after service and shall state the telephone number of the clerk of the court where the defendant may call at least 13 days after service to determine if the complaint has been filed.~~

~~(c)(3)~~ (c)(2) If service is made by publication of the summons without the complaint, the summons shall also briefly state the subject matter ~~and~~ of the action, the ~~sum of money or other~~ relief demanded, and that the complaint is on file with the court.

(d) Method of Service. Unless waived ~~in writing~~ 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~~ny other~~ person 18 years of age or older at the time of service and not a party to the action or a party's attorney. ~~If the person to be served refuses to accept a copy of the process, service shall be sufficient if the person serving the same shall state the name of the process and offer to deliver a copy thereof.~~ Personal service shall be made as follows:

(d)(1)(A) Upon any individual other than one covered by ~~sub~~paragraphs (B), (C) or (D) ~~below~~, by delivering a copy of the summons and ~~the~~ complaint to the individual personally, or by ~~leaving a copy~~ delivering them to a person of suitable age and discretion residing at the individual's dwelling ~~house or usual place of abode with some person of suitable age and discretion there residing,~~ or by delivering ~~a copy of the summons and the complaint~~ them to an agent authorized by appointment or by law to receive service of process;

(d)(1)(B) Upon ~~an infant (being a person under 14 years)~~ a minor, by delivering a copy of the summons and ~~the~~ complaint to the ~~infant~~ minor and ~~also~~ to the ~~infant's father, mother~~ 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 ~~infant~~ minor, or with whom the ~~infant~~ minor resides~~, or in whose service the infant is employed~~;

(d)(1)(C) Upon ~~an individual~~ a protected person judicially declared ~~to be of unsound mind or incapable of conducting the person's own affairs~~ incapacitated, by delivering a copy of the summons and ~~the~~ complaint to the protected person and to the person's ~~legal representative if one has been appointed and in the absence of such representative, to the individual, if any, who has care, custody or control of the person~~ 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 ~~the~~ 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 ~~or to the guardian or conservator of the individual to be served if one has been appointed, who shall, in any case, promptly deliver the process to the individual served~~;

(d)(1)(E) Upon a~~ny~~ corporation not ~~herein~~ 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 ~~the~~ complaint to an officer, a managing ~~or~~ agent, general agent, or other agent authorized by appointment or by law to receive service of process and, if ~~the agent is one authorized by statute to receive service and the statute so requires,~~ required by law by also mailing a copy of the summons and the complaint to the ~~defendant~~ 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~~, or advertises or holds itself out as having,~~ an office or place of business ~~within the state or elsewhere, or does business within this state or elsewhere,~~ 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 ~~the~~ complaint to the recorder;

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

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

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

(d)(1)(J) Upon the state of Utah, ~~in such cases as by law are authorized to be brought against the state,~~ by delivering a copy of the summons and ~~the~~ 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, ~~subject to suit,~~ by delivering a copy of the summons and ~~the~~ 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 ~~in any state or judicial district of the United States provided~~ 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 ~~in any state or judicial district of the United States provided~~ if the defendant's agent ~~authorized by appointment or by law to receive service of process~~ signs a document indicating receipt.

(d)(2)(C) Service by mail or commercial courier service ~~shall be~~ is complete on the date the receipt is signed ~~as provided by this rule~~.

(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 ~~of a copy of the summons and the complaint~~ 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) ~~Where the identity or whereabouts of~~ If the person to be served ~~are unknown and cannot be ascertained~~ cannot be served through reasonable diligence, ~~where~~ or if service upon all of the ~~individual~~ parties is impracticable under the circumstances~~, or where there exists good cause to believe that the person to be served is avoiding service of process~~, the party seeking service ~~of process~~ may file a motion supported by affidavit requesting an order allowing service by ~~publication or by some~~ other means. The supporting affidavit shall set forth the efforts made to identify, locate or serve the party ~~to be served,~~ or the circumstances which make it impracticable to serve all of the ~~individual~~ parties.

(d)(4)(B) If the motion is granted, the court shall order service ~~of process by publication or~~ by other means~~, provided that the means of notice employed shall be~~ reasonably calculated~~,~~ under all the circumstances~~,~~ to ~~apprise~~ notify the ~~interested parties of the pendency~~ party of the action ~~to the extent reasonably possible or practicable~~. The ~~court's~~ order shall ~~also~~ specify the content of the process to be served and the event ~~or events as of which~~ that constitutes completion of service ~~shall be deemed complete~~. ~~Unless service is by publication, a copy of the court's order shall be served upon the defendant with the process specified by the court.~~

~~(d)(4)(C) In any proceeding where summons is required to be published, the court shall, upon the request of the party applying for publication, designate the newspaper in which publication shall be made. The newspaper selected shall be a newspaper of general circulation in the county where such publication is required to be made and shall be published in the English language.~~

(e) Proof of Service.

(e)(1) ~~If service is not waived, the~~ 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 ~~authorized by appointment or by law to receive service of process~~. 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 ~~prescribed~~ provided in these rules ~~for service within this state~~, or by the law of the foreign country, or by order of the court. ~~When service is made pursuant to paragraph (d)(3)(C), proof~~ 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 ~~defendant subject to service under paragraph (d)~~ person other than a minor or a protected person to waive service of ~~a~~ 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). ~~It shall include a copy of the complaint,~~ The request shall allow the defendant at least ~~20~~ 21 days from the date on which the request is sent to return the waiver, or ~~30~~ 28 days if addressed to a ~~defendant~~ 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 ~~is not required to~~ must respond to the complaint ~~until 45~~ within 42 days after the date on which the request for waiver of service was mailed, e-mailed or delivered ~~to the defendant~~, or ~~60~~ 56 days after that date if addressed to a ~~defendant~~ person outside of the United States.

(f)(3) A defendant who waives service of ~~a~~ the summons and complaint does not thereby make any other waiver ~~any objection to venue or to the jurisdiction of the court over the defendant~~.

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

Advisory Committee Notes

Rule 12. Defenses and objections.

(a) When presented. Unless otherwise provided by statute or order of the court, a defendant shall serve an answer within twenty days after the service of the summons and complaint is complete within the state and within thirty days after service of the summons and complaint is complete outside the state. In an action commenced under Rule 3(a)(2), a defendant shall serve an answer within 21 days after the service of the summons and complaint is complete within the state and within 31 days after service of the summons and complaint is complete outside the state. A party served with a pleading stating a cross-claim shall serve an answer thereto within twenty days after the service. The plaintiff shall serve a reply to a counterclaim in the answer within twenty days after service of the answer or, if a reply is ordered by the court, within twenty days after service of the order, unless the order otherwise directs. The service of a motion under this rule alters these periods of time as follows, unless a different time is fixed by order of the court, but a motion directed to fewer than all of the claims in a pleading does not affect the time for responding to the remaining claims:

(a)(1) If the court denies the motion or postpones its disposition until the trial on the merits, the responsive pleading shall be served within ten days after notice of the court's action;

(a)(2) If the court grants a motion for a more definite statement, the responsive pleading shall be served within ten days after the service of the more definite statement.

(b) How presented. Every defense, in law or fact, to claim for relief in any pleading, whether a claim, counterclaim, cross-claim, or third-party claim, shall be asserted in the responsive pleading thereto if one is required, except that the following defenses may at the option of the pleader be made by motion: (1) lack of jurisdiction over the subject matter, (2) lack of jurisdiction over the person, (3) improper venue, (4) insufficiency of process, (5) insufficiency of service of process, (6) failure to state a claim upon which relief can be granted, (7) failure to join an indispensable party. A motion making any of these defenses shall be made before pleading if a further pleading is permitted. No defense or objection is waived by being joined with one or more other defenses or objections in a responsive pleading or motion or by further pleading after the denial of such motion or objection. If a pleading sets forth a claim for relief to which the adverse

party is not required to serve a responsive pleading, the adverse party may assert at the trial any defense in law or fact to that claim for relief. If, on a motion asserting the defense numbered (6) to dismiss for failure of the pleading to state a claim upon which relief can be granted, matters outside the pleading are presented to and not excluded by the court, the motion shall be treated as one for summary judgment and disposed of as provided in Rule 56, and all parties shall be given reasonable opportunity to present all material made pertinent to such a motion by Rule 56.

(c) Motion for judgment on the pleadings. After the pleadings are closed but within such time as not to delay the trial, any party may move for judgment on the pleadings. If, on a motion for judgment on the pleadings, matters outside the pleadings are presented to and not excluded by the court, the motion shall be treated as one for summary judgment and disposed of as provided in Rule 56, and all parties shall be given reasonable opportunity to present all material made pertinent to such a motion by Rule 56.

(d) Preliminary hearings. The defenses specifically enumerated (1)-(7) in subdivision (b) of this rule, whether made in a pleading or by motion, and the motion for judgment mentioned in subdivision (c) of this rule shall be heard and determined before trial on application of any party, unless the court orders that the hearings and determination thereof be deferred until the trial.

(e) Motion for more definite statement. If a pleading to which a responsive pleading is permitted is so vague or ambiguous that a party cannot reasonably be required to frame a responsive pleading, the party may move for a more definite statement before interposing a responsive pleading. The motion shall point out the defects complained of and the details desired. If the motion is granted and the order of the court is not obeyed within ten days after notice of the order or within such other time as the court may fix, the court may strike the pleading to which the motion was directed or make such order as it deems just.

(f) Motion to strike. Upon motion made by a party before responding to a pleading or, if no responsive pleading is permitted by these rules, upon motion made by a party within twenty days after the service of the pleading, the court may order stricken from

any pleading any insufficient defense or any redundant, immaterial, impertinent, or scandalous matter.

(g) Consolidation of defenses. A party who makes a motion under this rule may join with it the other motions herein provided for and then available. If a party makes a motion under this rule and does not include therein all defenses and objections then available which this rule permits to be raised by motion, the party shall not thereafter make a motion based on any of the defenses or objections so omitted, except as provided in subdivision (h) of this rule.

(h) Waiver of defenses. A party waives all defenses and objections not presented either by motion or by answer or reply, except (1) that the defense of failure to state a claim upon which relief can be granted, the defense of failure to join an indispensable party, and the objection of failure to state a legal defense to a claim may also be made by a later pleading, if one is permitted, or by motion for judgment on the pleadings or at the trial on the merits, and except (2) that, whenever it appears by suggestion of the parties or otherwise that the court lacks jurisdiction of the subject matter, the court shall dismiss the action. The objection or defense, if made at the trial, shall be disposed of as provided in Rule 15(b) in the light of any evidence that may have been received.

(i) Pleading after denial of a motion. The filing of a responsive pleading after the denial of any motion made pursuant to these rules shall not be deemed a waiver of such motion.

(j) Security for costs of a nonresident plaintiff. When the plaintiff in an action resides out of this state, or is a foreign corporation, the defendant may file a motion to require the plaintiff to furnish security for costs and charges which may be awarded against such plaintiff. Upon hearing and determination by the court of the reasonable necessity therefor, the court shall order the plaintiff to file a $ 300.00 undertaking with sufficient sureties as security for payment of such costs and charges as may be awarded against such plaintiff. No security shall be required of any officer, instrumentality, or agency of the United States.

(k) Effect of failure to file undertaking. If the plaintiff fails to file the undertaking as ordered within 30 days of the service of the order, the court shall, upon motion of the defendant, enter an order dismissing the action.

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