Agenda
Advisory Committee on Rules of Civil Procedure

November 28, 2012
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
Consideration of comments: Rule 5, Rule 10, Rule 11, Rule 26, Rule 37, Rule 105	Tab 2	Tim Shea
Rule 37. Sanctions for failure to disclose	Tab 3	Judge Todd Shaughnessy
Post-trial motions: Rules 50, 52, 59, 60.	Tab 4	Frank Carney
Appeals		Tim Shea
FAQs	Tab 5	Fran Wikstrom

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

Meeting Schedule: Matheson Courthouse, Judicial Council Room, 4:00 to 6:00 unless otherwise stated.

January 23, 2013
February 27, 2013
March 27, 2013
April 24, 2013
May 22, 2013
September 25, 2013
October 23, 2013
November 20, 2013

Tab 1

MINUTES

UTAH SUPREME COURT ADVISORY COMMITTEE OF THE RULES OF CIVIL PROCEDURE

OCTOBER 24, 2012

PRESENT**:** Francis M. Wikstrom, Chair, Honorable Todd W. Shaughnessy, Honorable Derek P. Pullan, Honorable Kate Toomey, Francis J. Carney, W. Cullen Battle, Terrie T. McIntosh, Honorable John L. Baxter, Jonathan O. Hafen, David W. Scofield, Honorable James T. Blanch, Lincoln L. Davies

STAFF: Diane Abegglen, Sammi Anderson

EXCUSED: Trystan B. Smith, Leslie W. Slaugh, Robert J. Shelby, Barbara L. Townsend, Lori Woffinden, Professor David H. Moore, Tim Shea, Steven Marsden

GUESTS: Clark Sabey

I. MINUTES.

Mr. Wikstrom entertained comments from the Committee concerning the September 26, 2012 minutes. Mr. Carney noted a typographical error in Section VIII of the minutes. With that amendment, the minutes were unanimously approved by the Committee.

II. RULE 58A.

Mr. Sabey attended on behalf of the Rules of Appellate Procedure Committee and indicated that the Appellate Rules Committee would like to consider amending the appellate rules to resolve issues surrounding notice of entry of judgment and resulting issues resulting from a party's failure to receive notice. Mr. Wikstrom shared with the Committee that the Chair of the Appellate Rules Committee expressed the same sentiment to him. Mr. Davies provided research to the Committee indicating how other states have treated the issue. Mr. Davies' research shows that this issue is always (or virtually always) resolved in the Rules of Appellate Procedure. Mr. Battle indicated he would like to revisit the issue with the Appellate Rules subcommittee before going forward. Mr. Sabey suggested that subparagraph (d) probably requires amendment regardless of which Committee handles it; however, a decision will have to be reached as to which Committee takes on the revisions in subparagraph (h). Mr. Wikstrom asked the Appellate Rules Committee to propose something concrete in fairly short order so that the issue can be addressed as requested by the Supreme Court.

III. COURT GENERATED DEADLINE NOTICES TO PARTIES.

Judge Blanch led a discussion regarding his proposed revisions to the court-generated notices being sent to parties and counsel under the new rules of discovery. Judge Blanch described the revisions as changing the approach from a gentle advisory, inviting some attention, to the approach that these dates will govern unless the parties notify the court that the dates are wrong or stipulate to different dates under Rule 29. Judge Blanch feels that we should tell parties and counsel that the dates govern absent some corrective action. Judge Blanch proposed that his revised version serve as the notice. The committee discussed the timing and mechanism for making this recommendation. Judge Blanch moved the Committee for approval of the notice as revised and noted that the notice can be modified down the road if necessary. Mr. Hafen seconded the motion and the Committee unanimously approved.

In a discussion led by Judges Pullan and Shaughnessy, the Committee next discussed timing in general under the new rules. Mr. Hafen raised the issue of a summary judgment cut-off – a deadline not currently found within the new rules. The committee discussed the issue, including whether the place for a summary judgment cut-off is in connection with the certificate of readiness for trial (or an objection thereto). Judge Pullan advocated for an automated type approach, requiring both a certificate of readiness for trial and a summary judgment deadline to be 30 days after close of expert discovery. Mr. Wikstrom invited Mr. Hafen to propose a change to address this issue and Mr. Hafen agreed.

IV. FREQUENTLY ASKED QUESTIONS.

Question 1 – Monitoring Discovery Deadlines. The Committee approved the response as drafted.

Question 2 – Definition of "Damages" for Designation of a Discovery Tier. The Committee approved the response as drafted.

Question 3 – Discovery Tiers – Effect of Discovery Tier on Limiting the Judgment. The Committee approved the response as drafted, including all 3 subparts.

Question 4 – Depositions – Length of Depositions. The Committee approved the response as drafted.

Question 5 – Expert Discovery – Effect of Premature Disclosure of Expert Witnesses. The Committee determined that the question should be re-worked to make it consistent with the format of other FAQ's. The Committee approved the question and response subject to these non-substantive revisions.

Question 6 - Expert Discovery – Designation of Experts on Affirmative Defenses. The Committee approved this response as drafted.

Question 7 – Expert Discovery – Timing on election of report or depositions. The Committee will hold off on finalizing this FAQ and response until the related proposed amendment is effective.

Question 8 – Extraordinary Discovery – Reaching the Limits of Standard Discovery. The Committee determined that the question should be re-worked to make it consistent with the format of other FAQ's. The Committee approved the question and response subject to these non-substantive revisions.

V. ADJOURNMENT.

The meeting adjourned at 5:28 pm. The next meeting will be held on November 28, 2012 at 4:00 pm at the Administrative Office of the Courts.

Tab 2

Administrative Office of the Courts

Chief Justice Matthew B. Durrant
Utah Supreme Court
Chair, Utah Judicial Council

Daniel J. Becker
State Court Administrator
Raymond H. Wahl
Deputy Court Administrator

MEMORANDUM

To: Civil Procedures Committee
From: Tim Shea
Date: November 20, 2012
Re: Rules for final action

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

Rule summary

URCP 005. Service and filing of pleadings and other papers. Requires a certificate of service appended to each document that has to be served. Permits the court to serve documents by email.

URCP 010. Form of pleadings and other papers. Requires designation of the discovery tier in the caption of a claim. Requires a court-approved coversheet for counterclaims and cross claims as well as complaints. Requires that a lawyer's contact information on a paper be the same as on file with the Utah State Bar.

URCP 011. Signing of pleadings, motions, affidavits, and other papers; representations to court; sanctions. Deletes a provision that conflicts with Rule 26(e). The consequence will be that the signature on disclosures, discovery requests and discovery responses is a certification under Rule 11.

URCP 026. General provisions governing disclosure and discovery. Changes the time for initial disclosures. Provides for timing of disclosure and discovery of rebuttal experts. Clarifies that disclosure and discovery documents must be served.

URCP 026.02. Disclosures in personal injury actions. Narrows the limitation on the further use of disclosures to Plaintiff’s Social Security number and Medicare health insurance claim numbers. In a committee note, describes the committee's intent regarding the scope of the rule.

URCP 037. Discovery and disclosure motions; Sanctions. Allows the court to enter sanctions if a motion for a protective order or motion to compel is denied.

URCP 105. Shortening 90 day waiting period in domestic matters. Changes the standard of "good cause" to "extraordinary circumstances" in keeping with Section 30-3-18.

Comments

There were no comments about proposed amendments to Rules 5, 11, 37 or 105.

Rule 10

What is the motivation for requiring a party to identify what discovery tier a case occupies? Is this a rule that is needed?

Posted by Eric Johnson August 23, 2012 11:56 AM

I agree with the comments already posted regarding Rule 10. It is unnecessary to require one mailing address. And requiring one email address should be sufficient instead of a physical mailing address to accomplish whatever goal this rule change was intended for.

Posted by Ashley Bown July 9, 2012 11:40 AM

The proposed amendment to Rule 10, that all pleadings and papers have the same one contact information as is listed with the Utah Bar Association, is unnecessary and burdens attorneys who have more than one office.

Many attorneys and law firms have more than one office. Moreover, as the practice of law becomes more mobile, many attorneys have post office boxes, and work from home. The rules should accommodate the reality of the practice of law, and reflect the changes in the practice of law, rather than attempt to prevent change.

Requiring attorneys with more than one office to use only one address will increase costs for clients because of the increased administrative burden created by processing and transmitting papers at two offices, rather than at one office. There will be increased cost incurred when an attorney has to transmit copies from one office to the office where a case is actually being handled.

A better solution is to require that each attorney have an email address, and that all papers be served on an attorney at that email address, which the attorney can access anywhere in the world. It works in federal court. There is no reason it can't work in Utah.

Posted by R. King July 6, 2012 03:51 PM

Regarding URCP 010 - It is a good change to require the tier to appear in the caption. However I have already had the experience that one tier is claimed in the complaint together with an inconsistent amount of damages with that plead tier. (i.e. a tier 1 pled case specifically asking for tier 3 damages). This rule should clarify what tier is being plead and that the caption governs over any inconsistent pleading....or something to this effect. Better to fix this now. Al Gray

Posted by Al Gray July 6, 2012 11:13 AM

Rule 10 requires that attorney contact information on the caption of a pleading be the same as is listed with the Utah State Bar. The rule should NOT require this. The proposed amendment ignores the reality that many attorneys and law firms that have more than one office and more than one address.

The proposed amendment to Rule 10 increases the administrative burden and cost to clients when an attorney has more than one office address because Clients must pay to have documents transferred between offices.

There is nothing wrong with requiring opposing counsel to send papers to the address on a caption instead of the address on file with the Bar. A better solution would be to amend to rules to require the Court and Counsel to serve an attorney at one email address, which can be accessed anywhere in the world by the recipient attorney.

Posted by Rule 10 July 6, 2012 11:11 AM

Commenting on the requirement in Rule 10 to provide contact info that is on file with the bar. This rule ignores the reality of the legal field right now. Many attorneys (including many recent grads) work for multiple law firms, whether on a contract basis or a part-time w-2 basis. Some firms will take an attorney part-time while that attorney tries to grow his/her own practice in another area of law. However, for liability and confidentiality purposes, the attorney needs to be able to file under different contact information. A firm won't be willing to hire an attorney part-time if all of the court filings from another practice are being sent to the one office. Each office needs to be able to keep its appropriate records. Even requiring one e-mail address isn't sufficient because one of these attorneys could have an e-mail with each firm, and using the appropriate e-mail helps the firm keep appropriate records in the digital age.

This rule will really hurt the opportunity for young lawyers to gain experience by working on a contract or part-time basis for multiple firms, and the ability to work in this manner is critical with this poor economy where full-time jobs for a new attorney are very hard to obtain.

In my opinion, if this rule stays and is put into effect, then the Bar needs to have a way to record all of the phone numbers, addresses, and e-mail addresses used by that attorney. Otherwise, our ability to practice, keep the appropriate records, and keep our work separate for liability and confidentiality reasons will be seriously restricted.

Austin Hepworth

Rule 26

I have a comment to go along with the change to Rule 26(a)(2)(B). Rule 26(c)(5) states that the time for discovery runs from when the defendant's first disclosure is due. With the limits on fact discovery in Rule 26(c), plaintiffs don't want to start discovery until they receive the defendant's disclosures. If a defendant serves his disclosures late, the time available to the plaintiff is reduced because a plaintiff can't waste discovery requests on

information he may get in the tardy disclosure. Thus, the plaintiff waits for a week or a month for disclosures, burning valuable discovery time. It would be better to have the fact discovery period begin when the defendant's first disclosure is served rather than when it is due. That way, plaintiffs get the full time allotted, and the parties won't have to ask the Court for extra time because a defendant served his initial disclosures late.

Posted by M. Barnhill July 26, 2012 11:03 AM

I do not like the change to Rule 26(a)(2)(B), which requires a defendant to automatically serve his/her answers without compliance by the plaintiff. If a plaintiff fails to comply with filing his/her initial disclosures, then a defendant should be able to bring a motion to compel or dismiss before being required to go to the expense of preparing initial disclosures. I think the current version of the rule is better.

Posted by Ashley Bown July 9, 2012 11:40 AM

I think the changes to Rules 26 and 26.2 are good. One issue has recently come up with the new rules that I think the Committee needs to address. An attorney for the plaintiff in a personal injury case our Firm is handling filed his client's Retained Expert Disclosures with his client's Initial Disclosures. He is taking the position that his filing triggers the requirement for the defendant to elect a report or a deposition and that we need to get started on expert discovery now. We have taken the position that his client can certainly choose to designate early, but the defense does not need to make our election of a report or deposition until the close of fact discovery. I do not think the new rule is intended to force the defense into undertaking expert discovery before discovering the basic facts of the case. Hypothetically, if the plaintiff's attorney in our case is correct, a plaintiff could file their expert disclosures with their Complaint and the defense would have to determine which experts they intend to use before even having an opportunity to review a plaintiff's initial disclosures.

Posted by Ryan Atkinson July 6, 2012 12:04 PM

Encl. Draft rules

Rule 5. Service and filing of pleadings and other papers.

(a) **Service: When required.**

(a)(1) Except as otherwise provided in these rules or as otherwise directed by the court, every judgment, every order required by its terms to be served, every pleading subsequent to the original complaint, every paper relating to discovery, every written motion other than one heard ex parte, and every written notice, appearance, demand, offer of judgment, and similar paper shall be served upon each of the parties.

(a)(2) No service need be made on parties in default except that:

(a)(2)(A) a party in default shall be served as ordered by the court;

(a)(2)(B) a party in default for any reason other than for failure to appear shall be served with all pleadings and papers;

(a)(2)(C) a party in default for any reason shall be served with notice of any hearing necessary to determine the amount of damages to be entered against the defaulting party;

(a)(2)(D) a party in default for any reason shall be served with notice of entry of judgment under Rule 58A(d); and

(a)(2)(E) pleadings asserting new or additional claims for relief against a party in default for any reason shall be served in the manner provided for service of summons in Rule 4.

(a)(3) In an action begun by seizure of property, in which no person is named as defendant, any service required to be made prior to the filing of an answer, claim or appearance shall be made upon the person having custody or possession of the property at the time of its seizure.

(b) **Service: How made.**

(b)(1) If a party is represented by an attorney, service shall be made upon the attorney unless service upon the party is ordered by the court. If an attorney has filed a Notice of Limited Appearance under Rule 75 and the papers being served relate to a matter within the scope of the Notice, service shall be made upon the attorney and the party.

(b)(1)(A) If a hearing is scheduled 5 days or less from the date of service, the party shall use the method most likely to give prompt actual notice of the hearing. Otherwise, a party shall serve a paper under this rule:

(b)(1)(A)(i) upon any person with an electronic filing account who is a party or attorney in the case by submitting the paper for electronic filing;

(b)(1)(A)(ii) by sending it by email to the person's last known email address if that person has agreed to accept service by email;

(b)(1)(A)(iii) by faxing it to the person's last known fax number if that person has agreed to accept service by fax;

(b)(1)(A)(iv) by mailing it to the person's last known address;

(b)(1)(A)(v) by handing it to the person;

(b)(1)(A)(vi) by leaving it at the person's office with a person in charge or leaving it in a receptacle intended for receiving deliveries or in a conspicuous place; or

(b)(1)(A)(vii) by leaving it at the person's dwelling house or usual place of abode with a person of suitable age and discretion then residing therein.

(b)(1)(B) Service by mail, email or fax is complete upon sending. Service by electronic means is not effective if the party making service learns that the attempted service did not reach the person to be served.

(b)(2) Unless otherwise directed by the court:

(b)(2)(A) an order signed by the court and required by its terms to be served or a judgment signed by the court shall be served by the party preparing it;

(b)(2)(B) every other pleading or paper required by this rule to be served shall be served by the party preparing it; and

(b)(2)(C) an order or judgment prepared by the court shall be served by the court.

(c) **Service: Numerous defendants.** In any action in which there is an unusually large number of defendants, the court, upon motion or of its own initiative, may order that service of the pleadings of the defendants and replies thereto need not be made as between the defendants and that any cross-claim, counterclaim, or matter constituting

an avoidance or affirmative defense contained therein shall be deemed to be denied or avoided by all other parties and that the filing of any such pleading and service thereof upon the plaintiff constitutes notice of it to the parties. A copy of every such order shall be served upon the parties in such manner and form as the court directs.

(d) **Filing.** All papers after the complaint required to be served upon a party shall be filed with the court either before or within a reasonable time after service. The papers shall be accompanied by a certificate of service showing the date and manner of service completed by the person effecting service. Rule 26(f) governs the filing of papers related to discovery.

(e) **Filing with the court defined.** A party may file with the clerk of court using any means of delivery permitted by the court. The court may require parties to file electronically with an electronic filing account. Filing is complete upon the earliest of acceptance by the electronic filing system, the clerk of court or the judge. The filing date shall be noted on the paper.

(f) **Certificate of service.** Every pleading, order or paper required by this rule to be served shall include a signed certificate of service showing the name of the document served, the date and manner of service and on whom it was served.

(g) **Service by the court.** The court may serve papers on a party or attorney by email.

Advisory Committee Notes

Rule 10. Form of pleadings and other papers.

(a)~~(1)~~ **Caption; names of parties; other necessary information.**

(a)(1) All pleadings and other papers filed with the court shall contain a caption setting forth the name of the court, the title of the action, the file number, the name of the pleading or other paper, and the name, if known, of the judge (and commissioner if applicable) to whom the case is assigned. A party filing a claim for relief, whether by original claim, counterclaim, cross-claim or third-party claim, shall include in the caption the discovery tier for the case as determined under Rule 26.

(a)(2) In the complaint, the title of the action shall include the names of all the parties, but other pleadings and papers need only state the name of the first party on each side with an indication that there are other parties. A party whose name is not known shall be designated by any name and the words "whose true name is unknown." In an action in rem, unknown parties shall be designated as "all unknown persons who claim any interest in the subject matter of the action."

(a)(3) Every pleading and other paper filed with the court shall state in the top left hand corner of the first page the name, address, email address, telephone number and bar number of the attorney or party filing the paper, and, if filed by an attorney, the party for whom it is filed. An attorney's address, email address and telephone number shall match the information on file with the Utah State Bar.

(a)(4) ~~The plaintiff shall file together with the complaint a~~ A party filing a claim for relief, whether by original claim, counterclaim, cross-claim or third-party claim, shall also file a completed cover sheet substantially similar in form and content to the cover sheet approved by the Judicial Council. The clerk may destroy the coversheet after recording the information it contains.

(b) **Paragraphs; separate statements.** All statements of claim or defense shall be made in numbered paragraphs. Each paragraph shall be limited as far as practicable to a single set of circumstances; and a paragraph may be adopted by reference in all succeeding pleadings. Each claim founded upon a separate transaction or occurrence and each defense other than denials shall be stated in a separate count or defense whenever a separation facilitates the clear presentation of the matters set forth.

(c) **Adoption by reference; exhibits.** Statements in a paper may be adopted by reference in a different part of the same or another paper. An exhibit to a paper is a part thereof for all purposes.

(d) **Paper format.** All pleadings and other papers, other than exhibits and court-approved forms, shall be 8½ inches wide x 11 inches long, on white background, with a top margin of not less than 2 inches, a right and left margin of not less than 1 inch and a bottom margin of not less than one-half inch, with text or images only on one side. All text or images shall be clearly legible, shall be double spaced, except for matters customarily single spaced, and shall not be smaller than 12-point size.

(e) **Signature line.** The name of the person signing shall be typed or printed under that person's signature. If a paper is electronically signed, the paper shall contain the typed or printed name of the signer with or without a graphic signature.

(f) **Non-conforming papers.** The clerk of the court shall examine all pleadings and other papers filed with the court. If they are not prepared in conformity with ~~subdivisions~~ paragraphs (a) – (e), the clerk shall accept the filing but may require counsel to substitute properly prepared papers for nonconforming papers. The clerk or the court may waive the requirements of this rule for parties appearing pro se. For good cause shown, the court may relieve any party of any requirement of this rule.

(g) **Replacing lost pleadings or papers.** If an original pleading or paper filed in any action or proceeding is lost, the court may, upon motion, with or without notice, authorize a copy thereof to be filed and used in lieu of the original.

(h) **No improper content.** The court may strike and disregard all or any part of a pleading or other paper that contains redundant, immaterial, impertinent or scandalous matter.

(i) **Electronic papers.**

(i)(1) Any reference in these rules to a writing, recording or image includes the electronic version thereof.

(i)(2) A paper electronically signed and filed is the original.

(i)(3) An electronic copy of a paper, recording or image may be filed as though it were the original. Proof of the original, if necessary, is governed by the Utah Rules of Evidence.

(i)(4) An electronic copy of a paper shall conform to the format of the original.

(i)(5) An electronically filed paper may contain links to other papers filed simultaneously or already on file with the court and to electronically published authority.

Advisory Committee Notes

Rule 11. Signing of pleadings, motions, affidavits, and other papers; representations to court; sanctions.

(a) **Signature.**

(a)(1) Every pleading, written motion, and other paper shall be signed by at least one attorney of record, or, if the party is not represented, by the party.

(a)(2) A person may sign a paper using any form of signature recognized by law as binding. Unless required by statute, a paper need not be accompanied by affidavit or have a notarized, verified or acknowledged signature. If a rule requires an affidavit or a notarized, verified or acknowledged signature, the person may submit a declaration pursuant to Utah Code Section 78B-5-705. If a statute requires an affidavit or a notarized, verified or acknowledged signature and the party electronically files the paper, the signature shall be notarized pursuant to Utah Code Section 46-1-16.

(a)(3) An unsigned paper shall be stricken unless omission of the signature is corrected promptly after being called to the attention of the attorney or party.

(b) **Representations to court.** By presenting a pleading, written motion, or other paper to the court (whether by signing, filing, submitting, or advocating), an attorney or unrepresented party is certifying that to the best of the person's knowledge, information, and belief, formed after an inquiry reasonable under the circumstances,

(b)(1) it is not being presented for any improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation;

(b)(2) the claims, defenses, and other legal contentions are warranted by existing law or by a nonfrivolous argument for the extension, modification, or reversal of existing law or the establishment of new law;

(b)(3) the allegations and other factual contentions have evidentiary support or, if specifically so identified, are likely to have evidentiary support after a reasonable opportunity for further investigation or discovery; and

(b)(4) the denials of factual contentions are warranted on the evidence or, if specifically so identified, are reasonably based on a lack of information or belief.

(c) **Sanctions.** If, after notice and a reasonable opportunity to respond, the court determines that subdivision (b) has been violated, the court may, subject to the conditions stated below, impose an appropriate sanction upon the attorneys, law firms, or parties that have violated subdivision (b) or are responsible for the violation.

(c)(1) **How initiated.**

(c)(1)(A) **By motion.** A motion for sanctions under this rule shall be made separately from other motions or requests and shall describe the specific conduct alleged to violate subdivision (b). It shall be served as provided in Rule 5, but shall not be filed with or presented to the court unless, within 21 days after service of the motion (or such other period as the court may prescribe), the challenged paper, claim, defense, contention, allegation, or denial is not withdrawn or appropriately corrected. If warranted, the court may award to the party prevailing on the motion the reasonable expenses and attorney fees incurred in presenting or opposing the motion. In appropriate circumstances, a law firm may be held jointly responsible for violations committed by its partners, members, and employees.

(c)(1)(B) **On court's initiative.** On its own initiative, the court may enter an order describing the specific conduct that appears to violate subdivision (b) and directing an attorney, law firm, or party to show cause why it has not violated subdivision (b) with respect thereto.

(c)(2) **Nature of sanction; limitations.** A sanction imposed for violation of this rule shall be limited to what is sufficient to deter repetition of such conduct or comparable conduct by others similarly situated. Subject to the limitations in subparagraphs (A) and (B), the sanction may consist of, or include, directives of a nonmonetary nature, an order to pay a penalty into court, or, if imposed on motion and warranted for effective deterrence, an order directing payment to the movant of some or all of the reasonable attorney fees and other expenses incurred as a direct result of the violation.

(c)(2)(A) Monetary sanctions may not be awarded against a represented party for a violation of subdivision (b)(2).

(c)(2)(B) Monetary sanctions may not be awarded on the court's initiative unless the court issues its order to show cause before a voluntary dismissal or settlement of the claims made by or against the party which is, or whose attorneys are, to be sanctioned.

(c)(3) **Order.** When imposing sanctions, the court shall describe the conduct determined to constitute a violation of this rule and explain the basis for the sanction imposed.

~~(d) **Inapplicability to discovery.** Subdivisions (a) through (c) of this rule do not apply to disclosures and discovery requests, responses, objections, and motions that are subject to the provisions of Rules 26 through 37.~~

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)(3), a party shall, without waiting for a discovery request, ~~provide to~~ serve on the other parties:

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

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

(a)(1)(A)(ii) each fact witness the party may call in its case-in-chief and, except for an adverse party, a summary of the expected testimony;

(a)(1)(B) a copy of all documents, data compilations, electronically stored information, and tangible things in the possession or control of the party that the party may offer in its case-in-chief, except charts, summaries and demonstrative exhibits that have not yet been prepared and must be disclosed in accordance with paragraph (a)(5);

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

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

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

(a)(2) **Timing of initial disclosures.** The disclosures required by paragraph (a)(1) shall be ~~made~~ served on the other parties:

(a)(2)(A) by the plaintiff within 14 days after ~~service~~ filing of the first answer to the complaint; and

(a)(2)(B) by the defendant within ~~28~~ 42 days after ~~the plaintiff's first disclosure~~ filing of the first answer to the complaint or within 28 days after that defendant's appearance, whichever is later.

(a)(3) **Exemptions.**

(a)(3)(A) Unless otherwise ordered by the court or agreed to by the parties, the requirements of paragraph (a)(1) do not apply to actions:

(a)(3)(A)(i) for judicial review of adjudicative proceedings or rule making proceedings of an administrative agency;

(a)(3)(A)(ii) governed by Rule 65B or Rule 65C;

(a)(3)(A)(iii) to enforce an arbitration award;

(a)(3)(A)(iv) for water rights general adjudication under Title 73, Chapter 4, Determination of Water Rights.

(a)(3)(B) In an exempt action, the matters subject to disclosure under paragraph (a)(1) are subject to discovery under paragraph (b).

(a)(4) **Expert testimony.**

(a)(4)(A) **Disclosure of expert testimony.** A party shall, without waiting for a discovery request, ~~provide to~~ serve on the other parties the following information regarding any person who may be used at trial to present evidence under Rule 702 of the Utah Rules of Evidence and who is retained or specially employed to provide expert testimony in the case or whose duties as an employee of the party regularly involve giving expert testimony: (i) the expert's name and qualifications, including a list of all publications authored within the preceding 10 years, and a list of any other cases in which the expert has testified as an expert at trial or by deposition within the preceding four years, (ii) a brief summary of the opinions to which the witness is expected to testify, (iii) all data and other information that will be relied upon by the witness in forming those opinions, and (iv) the compensation to be paid for the witness's study and testimony.

(a)(4)(B) **Limits on expert discovery.** Further discovery may be obtained from an expert witness either by deposition or by written report. A deposition shall not exceed four hours and the party taking the deposition shall pay the expert's

reasonable hourly fees for attendance at the deposition. A report shall be signed by the expert and shall contain a complete statement of all opinions the expert will offer at trial and the basis and reasons for them. Such an expert may not testify in a party's case-in-chief concerning any matter not fairly disclosed in the report. The party offering the expert shall pay the costs for the report.

(a)(4)(C) **Timing for expert discovery.**

(a)(4)(C)(i) The party who bears the burden of proof on the issue for which expert testimony is offered shall ~~provide~~ serve on the other parties the information required by paragraph (a)(4)(A) within seven days after the close of fact discovery. Within seven days thereafter, the party opposing the expert may serve notice electing either a deposition of the expert pursuant to paragraph (a)(4)(B) and Rule 30, or a written report pursuant to paragraph (a)(4)(B). The deposition shall occur, or the report shall be ~~provided~~ served on the other parties, within 28 days after the election is ~~made~~ served on the other parties. If no election is ~~made~~ served on the other parties, then no further discovery of the expert shall be permitted.

(a)(4)(C)(ii) The party who does not bear the burden of proof on the issue for which expert testimony is offered shall ~~provide~~ serve on the other parties the information required by paragraph (a)(4)(A) within seven days after the later of ~~(i)~~ (A) the date on which the election under paragraph (a)(4)(C)(i) is due, or ~~(ii)~~ (B) receipt of the written report or the taking of the expert's deposition pursuant to paragraph (a)(4)(C)(i). Within seven days thereafter, the party opposing the expert may serve notice electing either a deposition of the expert pursuant to paragraph (a)(4)(B) and Rule 30, or a written report pursuant to paragraph (a)(4)(B). The deposition shall occur, or the report shall be ~~provided~~ served on the other parties, within 28 days after the election is ~~made~~ served on the other parties. If no election is ~~made~~ served on the other parties, then no further discovery of the expert shall be permitted.

(a)(4)(C)(iii) If the party who bears the burden of proof on an issue wants to designate rebuttal expert witnesses it shall serve on the other parties the

information required by paragraph (a)(4)(A) within seven days after the later of (A) the date on which the election under paragraph (a)(4)(C)(ii) is due, or (B) receipt of the written report or the taking of the expert's deposition pursuant to paragraph (a)(4)(C)(ii). Within seven days thereafter, the party opposing the expert may serve notice electing either a deposition of the expert pursuant to paragraph (a)(4)(B) and Rule 30, or a written report pursuant to paragraph (a)(4)(B). The deposition shall occur, or the report shall be served on the other parties, within 28 days after the election is served on the other parties. If no election is served on the other parties, then no further discovery of the expert shall be permitted.

(a)(4)(D) **Multiparty actions.** In multiparty actions, all parties opposing the expert must agree on either a report or a deposition. If all parties opposing the expert do not agree, then further discovery of the expert may be obtained only by deposition pursuant to paragraph (a)(4)(B) and Rule 30.

(a)(4)(E) **Summary of non-retained expert testimony.** If a party intends to present evidence at trial under Rule 702 of the Utah Rules of Evidence from any person other than an expert witness who is retained or specially employed to provide testimony in the case or a person whose duties as an employee of the party regularly involve giving expert testimony, that party must ~~provide~~ serve on the other parties a written summary of the facts and opinions to which the witness is expected to testify in accordance with the deadlines set forth in paragraph (a)(4)(C). A deposition of such a witness may not exceed four hours.

(a)(5) **Pretrial disclosures.**

(a)(5)(A) A party shall, without waiting for a discovery request, ~~provide to~~ serve on the other parties:

(a)(5)(A)(i) the name and, if not previously provided, the address and telephone number of each witness, unless solely for impeachment, separately identifying witnesses the party will call and witnesses the party may call;

(a)(5)(A)(ii) the name of witnesses whose testimony is expected to be presented by transcript of a deposition and a copy of the transcript with the proposed testimony designated; and

(a)(5)(A)(iii) a copy of each exhibit, including charts, summaries and demonstrative exhibits, unless solely for impeachment, separately identifying those which the party will offer and those which the party may offer.

(a)(5)(B) Disclosure required by paragraph (a)(5) shall be ~~made~~ served on the other parties at least 28 days before trial. At least 14 days before trial, a party shall serve and file counter designations of deposition testimony, objections and grounds for the objections to the use of a deposition and to the admissibility of exhibits. Other than objections under Rules 402 and 403 of the Utah Rules of Evidence, objections not listed are waived unless excused by the court for good cause.

(b) **Discovery scope.**

(b)(1) **In general.** Parties may discover any matter, not privileged, which is relevant to the claim or defense of any party if the discovery satisfies the standards of proportionality set forth below. Privileged matters that are not discoverable or admissible in any proceeding of any kind or character include all information in any form provided during and created specifically as part of a request for an investigation, the investigation, findings, or conclusions of peer review, care review, or quality assurance processes of any organization of health care providers as defined in the Utah Health Care Malpractice Act for the purpose of evaluating care provided to reduce morbidity and mortality or to improve the quality of medical care, or for the purpose of peer review of the ethics, competence, or professional conduct of any health care provider.

(b)(2) **Proportionality.** Discovery and discovery requests are proportional if:

(b)(2)(A) the discovery is reasonable, considering the needs of the case, the amount in controversy, the complexity of the case, the parties' resources, the importance of the issues, and the importance of the discovery in resolving the issues;

(b)(2)(B) the likely benefits of the proposed discovery outweigh the burden or expense;

(b)(2)(C) the discovery is consistent with the overall case management and will further the just, speedy and inexpensive determination of the case;

(b)(2)(D) the discovery is not unreasonably cumulative or duplicative;

(b)(2)(E) the information cannot be obtained from another source that is more convenient, less burdensome or less expensive; and

(b)(2)(F) the party seeking discovery has not had sufficient opportunity to obtain the information by discovery or otherwise, taking into account the parties' relative access to the information.

(b)(3) **Burden.** The party seeking discovery always has the burden of showing proportionality and relevance. To ensure proportionality, the court may enter orders under Rule 37.

(b)(4) **Electronically stored information.** A party claiming that electronically stored information is not reasonably accessible because of undue burden or cost shall describe the source of the electronically stored information, the nature and extent of the burden, the nature of the information not provided, and any other information that will enable other parties to evaluate the claim.

(b)(5) **Trial preparation materials.** A party may obtain otherwise discoverable documents and tangible things prepared in anticipation of litigation or for trial by or for another party or by or for that other party's representative (including the party's attorney, consultant, surety, indemnitor, insurer, or agent) only upon a showing that the party seeking discovery has substantial need of the materials and that the party is unable without undue hardship to obtain substantially equivalent materials by other means. In ordering discovery of such materials, the court shall protect against disclosure of the mental impressions, conclusions, opinions, or legal theories of an attorney or other representative of a party.

(b)(6) **Statement previously made about the action.** A party may obtain without the showing required in paragraph (b)(5) a statement concerning the action or its subject matter previously made by that party. Upon request, a person not a party

may obtain without the required showing a statement about the action or its subject matter previously made by that person. If the request is refused, the person may move for a court order under Rule 37. A statement previously made is (A) a written statement signed or approved by the person making it, or (B) a stenographic, mechanical, electronic, or other recording, or a transcription thereof, which is a substantially verbatim recital of an oral statement by the person making it and contemporaneously recorded.

(b)(7) **Trial preparation; experts.**

(b)(7)(A) **Trial-preparation protection for draft reports or disclosures.** Paragraph (b)(5) protects drafts of any report or disclosure required under paragraph (a)(4), regardless of the form in which the draft is recorded.

(b)(7)(B) **Trial-preparation protection for communications between a party's attorney and expert witnesses.** Paragraph (b)(5) protects communications between the party's attorney and any witness required to provide disclosures under paragraph (a)(4), regardless of the form of the communications, except to the extent that the communications:

(b)(7)(B)(i) relate to compensation for the expert's study or testimony;

(b)(7)(B)(ii) identify facts or data that the party's attorney provided and that the expert considered in forming the opinions to be expressed; or

(b)(7)(B)(iii) identify assumptions that the party's attorney provided and that the expert relied on in forming the opinions to be expressed.

(b)(7)(C) **Expert employed only for trial preparation.** Ordinarily, a party may not, by interrogatories or otherwise, discover facts known or opinions held by an expert who has been retained or specially employed by another party in anticipation of litigation or to prepare for trial and who is not expected to be called as a witness at trial. A party may do so only:

(b)(7)(C)(i) as provided in Rule 35(b); or

(b)(7)(C)(ii) on showing exceptional circumstances under which it is impracticable for the party to obtain facts or opinions on the same subject by other means.

(b)(8) **Claims of privilege or protection of trial preparation materials.**

(b)(8)(A) **Information withheld.** If a party withholds discoverable information by claiming that it is privileged or prepared in anticipation of litigation or for trial, the party shall make the claim expressly and shall describe the nature of the documents, communications, or things not produced in a manner that, without revealing the information itself, will enable other parties to evaluate the claim.

(b)(8)(B) **Information produced.** If a party produces information that the party claims is privileged or prepared in anticipation of litigation or for trial, the producing party may notify any receiving party of the claim and the basis for it. After being notified, a receiving party must promptly return, sequester, or destroy the specified information and any copies it has and may not use or disclose the information until the claim is resolved. A receiving party may promptly present the information to the court under seal for a determination of the claim. If the receiving party disclosed the information before being notified, it must take reasonable steps to retrieve it. The producing party must preserve the information until the claim is resolved.

(c) **Methods, sequence and timing of discovery; tiers; limits on standard discovery; extraordinary discovery.**

(c)(1) **Methods of discovery.** Parties may obtain discovery by one or more of the following methods: depositions upon oral examination or written questions; written interrogatories; production of documents or things or permission to enter upon land or other property, for inspection and other purposes; physical and mental examinations; requests for admission; and subpoenas other than for a court hearing or trial.

(c)(2) **Sequence and timing of discovery.** Methods of discovery may be used in any sequence, and the fact that a party is conducting discovery shall not delay any other party's discovery. Except for cases exempt under paragraph (a)(3), a party may not seek discovery from any source before that party’s initial disclosure obligations are satisfied.

(c)(3) **Definition of tiers for standard discovery.** Actions claiming $50,000 or less in damages are permitted standard discovery as described for Tier 1. Actions

claiming more than $50,000 and less than $300,000 in damages are permitted standard discovery as described for Tier 2. Actions claiming $300,000 or more in damages are permitted standard discovery as described for Tier 3. Absent an accompanying damage claim for more than $300,000, actions claiming non-monetary relief are permitted standard discovery as described for Tier 2.

(c)(4) **Definition of damages.** For purposes of determining standard discovery, the amount of damages includes the total of all monetary damages sought (without duplication for alternative theories) by all parties in all claims for relief in the original pleadings.

(c)(5) **Limits on standard fact discovery.** Standard fact discovery per side (plaintiffs collectively, defendants collectively, and third-party defendants collectively) in each tier is as follows. The days to complete standard fact discovery are calculated from the date the first defendant's first ~~disclosure is due~~ answer is filed and do not include expert discovery under paragraphs(a)(4)(C) and (D).

Tier	Amount of Damages	Total Fact Deposition Hours	Rule 33 Interrogatories including all discrete subparts	Rule 34 Requests for Production	Rule 36 Requests for Admission	Days to Complete Standard Fact Discovery
1	$50,000 or less	3	0	5	5	~~120~~162
2	More than $50,000 and less than $300,000 or non-monetary relief	15	10	10	10	~~180~~222
3	$300,000 or more	30	20	20	20	~~210~~252

(c)(6) **Extraordinary discovery.** To obtain discovery beyond the limits established in paragraph (c)(5), a party shall file:

(c)(6)(A) before the close of standard discovery and after reaching the limits of standard discovery imposed by these rules, a stipulated statement that extraordinary discovery is necessary and proportional under paragraph (b)(2) and that each party has reviewed and approved a discovery budget; or

(c)(6)(B) before the close of standard discovery and after reaching the limits of standard discovery imposed by these rules, a motion for extraordinary discovery setting forth the reasons why the extraordinary discovery is necessary and proportional under paragraph (b)(2) and certifying that the party has reviewed and approved a discovery budget and certifying that the party has in good faith conferred or attempted to confer with the other party in an effort to achieve a stipulation.

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

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

(d)(2) If the party providing disclosure or responding to discovery is a corporation, partnership, association, or governmental agency, the party shall act through one or more officers, directors, managing agents, or other persons, who shall make disclosures and responses to discovery based on the information then known or reasonably available to the party.

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

(d)(4) If a party fails to disclose or to supplement timely a disclosure or response to discovery, that party may not use the undisclosed witness, document or material

at any hearing or trial unless the failure is harmless or the party shows good cause for the failure.

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

(e) **Signing discovery requests, responses, and objections.** Every disclosure, request for discovery, response to a request for discovery and objection to a request for discovery shall be in writing and signed by at least one attorney of record or by the party if the party is not represented. The signature of the attorney or party is a certification under Rule 11. If a request or response is not signed, the receiving party does not need to take any action with respect to it. If a certification is made in violation of the rule, the court, upon motion or upon its own initiative, may take any action authorized by Rule 11 or Rule 37(e).

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

Advisory Committee Notes

Legislative Note

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

(a)(3) The moving party must attach a copy of the request for discovery, the disclosure, or the response at issue. The moving party must also attach a certification that the moving party has in good faith conferred or attempted to confer with the other affected parties in an effort to secure the disclosure or discovery without court action and that the discovery being sought is proportional under Rule 26(b)(2).

(b) **Motion for protective order.**

(b)(1) A party or the person from whom disclosure is required or discovery is sought may move for an order of protection ~~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)(2), the party seeking the discovery has the burden of demonstrating that the information being sought is proportional.

(c) **Orders.** The court may make ~~any~~ orders ~~to require~~ regarding disclosure or discovery or to protect a party or person from discovery being conducted in bad faith or from annoyance, embarrassment, oppression, or undue burden or expense, or to achieve proportionality under Rule 26(b)(2), including one or more of the following:

(c)(1) 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 denied, or if a party provides disclosure or discovery or withdraws a disclosure or discovery request after a motion is filed, the court may order the party, witness or attorney to pay 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. A motion to compel or for a protective order does not suspend or toll the time to complete standard discovery.

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

(i) **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

Rule 105. Shortening 90 day waiting period in domestic matters.

A motion for a hearing less than 90 days from the date the petition was filed shall be accompanied by an affidavit setting forth the date on which the petition for divorce was filed and the facts constituting ~~good cause~~ extraordinary circumstances.

Tab 3

Administrative Office of the Courts

Chief Justice Matthew B. Durrant
Utah Supreme Court
Chair, Utah Judicial Council

Daniel J. Becker
State Court Administrator
Raymond H. Wahl
Deputy Court Administrator

MEMORANDUM

To: Civil Procedures Committee
From: Tim Shea
Date: November 20, 2012
Re: Reference in Rule 37(h) to Rule 37(e)(2)

It has been suggested that the committee try to limit the harsher sanctions in Rule 37(e)(2) either by an amendment to Rule 37(h) or by adding to the committee note. I have drafted some options for the committee to consider.

Rule 37(h)

(h) Failure to disclose; persistent dilatory or bad faith conduct.

(h)(1) If a party fails to disclose a witness, document or other material, or to amend a prior response to discovery as required by Rule 26(d), that party shall not be permitted to use the witness, document or other material at any hearing unless the failure to disclose is harmless or the party shows good cause for the failure to disclose. ~~In addition to or in lieu of this sanction.~~

(h)(2) If a party persists in dilatory or bad faith conduct, the court on motion may take any action authorized by paragraph (e)(2).

Committee Note

Paragraph (h) and its predecessors have long authorized the court to take the drastic steps authorized by paragraph (e)(2) for failure to disclose as required by the rules or for failure to amend a response to discovery. The federal counterpart to this provision is the same. Yet the courts historically have limited those more drastic sanctions to circumstances in which a party fails to comply with a court order or persists in dilatory or bad faith conduct.

The 2011 amendments have brought new attention to this provision. Those amendments, which emphasized greater and earlier disclosure also emphasized the enforcement of that requirement by prohibiting the party from using the undisclosed information as evidence at a hearing. The committee intends that courts should impose sanctions under (e)(2) for failure to disclose in only the most egregious circumstances. In most

> circumstances exclusion of the evidence seems an adequate sanction for failure to disclose or failure to amend discovery.

If the committee believes that none of the sanctions under (e)(2) should ever be imposed for failure to disclose or failure to amend a discovery response, then the better solution may be to remove the reference to paragraph (e)(2).

The committee may want to consider whether a similar problem exists in paragraph (g):

> (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).

Tab 4

Trial and Post-Trial Motions

Francis J. Carney

I wish the Advisory Committee to consider several aspects of our rules on trial and post-trial motions. Short papers on each of these issues follow.

1. Names- do we want to update the names of the motion "for directed verdict" and motion "JNOV" as the federal rules did some years ago?

2. Timing- all the federal rules are to be **filed** on a certain date; our state rules have a confusing mix of events: served or "made" or "move."

3. All of our post-trial motions (except Rule 60) motions are to be made within 10 days of entry of judgment. The federal rules were amended in 2009 to allow a more realistic 28 days. (Note that these deadlines are jurisdictional and *cannot* be extended by stipulation or order.) Do we want to do likewise?

4. We have a procedural trap in our state rule 50(b); namely, that a motion for directed verdict challenging the legal sufficiency of the evidence must be made at close of the opponent's case and also *renewed* at the close of all the evidence. The federal rules have eliminated this trap, and we should consider doing so as well.

5. In general terms, the rewrite of the federal trial and post-trial motions rules make them clearer than our state rules. We may want to consider adopting the federal versions.

Names of Trial Motions

Rule 50 describes the motions for a "directed verdict" and for "judgment notwithstanding the verdict."

Do we want to revise the antiquated and anachronistic names of these motions-- as the federal courts did more than twenty years ago-- to motions "for judgment as a matter of law" and "renewal of motion for judgment as a matter of law."

The note to the 1991 federal rule amendment is useful:

> *The revision abandons the familiar terminology of "direction of verdict" for several reasons. The term is misleading as a description of the relationship between judge and jury. It is also freighted with anachronisms some of which are the subject of the text of former subdivision (a) of this rule that is deleted in this revision. Thus, it should not be necessary to state in the text of this rule that a motion made pursuant to it is not a waiver of the right to jury trial, and only the antiquities of directed verdict practice suggest that it might have been. The term "judgment as a matter of law" is an almost equally familiar term and appears in the text of Rule 56; its use in Rule 50 calls attention to the relationship between the two rules. Finally, the change enables the rule to refer to preverdict and post-verdict motions with a terminology that does not conceal the common identity of two motions made at different times in the proceeding*.

I wonder if we want to revamp Rule 50 to modernize and simplify the language.

Timing for Post-Trial Motions: Filed/Served/Move/Made

State	Federal
Rule 50: Rule 50. Motion for a directed verdict and for judgment notwithstanding the verdict. Rule 50(b)- . . . Not later than ten days after the entry of judgment, a party who has moved for a directed verdict may **move** to have the verdict and any judgment entered thereon set aside and to have judgment entered in accordance with his motion for a directed verdict; or if a verdict was not returned such party, within ten days after the jury has been discharged, may move for judgment in accordance with his motion for directed verdict.	Rule 50- Judgment as a Matter of Law (b) Renewing the Motion After Trial; Alternative Motion for a New Trial. If the court does not grant a motion for judgment as a matter of law made under Rule 50(a), the court is considered to have submitted the action to the jury subject to the court's later deciding the legal questions raised by the motion. No later than 10 days after the entry of judgment — or if the motion addresses a jury issue not decided by a verdict, no later than 10 days after the jury was discharged — the movant may **file** a renewed motion for judgment as a matter of law and may include an alternative or joint request for a new trial under Rule 59.
Rule 59 New trials; amendments of judgment. (b) Time for motion. A motion for a new trial shall be **served** not later than 10 days after the entry of the judgment. (e) Motion to alter or amend a judgment. A motion to alter or amend the judgment shall be **served** not later than 10 days after entry of the judgment.	Rule 50(d)- Time for Rule 59 New Trial Motion (d) Time for a Losing Party's New-Trial Motion. Any motion for a new trial under Rule 59 by a party against whom judgment as a matter of law is rendered must be **filed** no later than 10 days after the entry of the judgment.
	Rule 59. New Trial; Altering or Amending a Judgment (b) Time to File a Motion for a New Trial. A motion for a new trial must be **filed** no later than 10 days after the entry of judgment.
	Rule 59 (e) Motion to Alter or Amend a Judgment. A motion to alter or amend a judgment must be **filed** no later than 10 days after the entry of the judgment.

Rule 60. Relief from judgment or order. The motion shall be **made** within a reasonable time and for reasons (1), (2), or (3), not more than 3 months after the judgment, order, or proceeding was entered or taken.	Rule 60. Relief from Judgment or Order (c)(1) Timing. A motion under Rule 60(b) must be **made** within a reasonable time — and for reasons (1), (2), and (3) no more than a year after the entry of the judgment or order or the date of the proceeding.
Rule 52. Findings by the court. (b) Amendment. Upon motion of a party **made** not later than 10 days after entry of judgment the court may amend its findings or make additional findings and may amend the judgment accordingly.	Rule 52. Findings and Conclusions by the Court; Judgment on Partial Findings (b) Amended or Additional Findings. On a party's motion **filed** no later than 10 days after the entry of judgment, the court may amend its findings — or make additional findings — and may amend the judgment accordingly.

Note:

U.R.Civ.P 6(b) Enlargement: *When by these rules or by a notice given thereunder or by order of the court an act is required or allowed to be done at or within a specified time, the court for cause shown may at any time in its discretion (1) with or without motion or notice order the period enlarged if request therefor is made before the expiration of the period originally prescribed or as extended by a previous order or (2) upon motion made after the expiration of the specified period permit the act to be done where the failure to act was the result of excusable neglect;* ***but it may not extend the time for taking any action under Rules 50(b), 52(b), 59(b), (d) and (e), and 60(b), except to the extent and under the conditions stated in them.***

Timing for Post-Trial Motions: 10 or 28 days?

All post-trial motions (with the exception of Rule 60 motions to alter or amend judgment) must be "made/moved/served" within **10 days** of entry of the judgment.

The federal rules were changed in 2009 to allow **28 days** on all such motions. This is the federal Advisory Committee Note:

> *Former Rules 50, 52, and 59 adopted 10-day periods for their respective post-judgment motions. Rule 6(b) prohibits any expansion of those periods. Experience has proved that in many cases it is not possible to prepare a satisfactory post-judgment motion in 10 days, even under the former rule that excluded intermediate Saturdays, Sundays, and legal holidays. These time periods are particularly sensitive because Appellate Rule 4 integrates the time to appeal with a timely motion under these rules. Rather than introduce the prospect of uncertainty in appeal time by amending Rule 6(b) to permit additional time, the former 10-day periods are expanded to 28 days. Rule 6(b) continues to prohibit expansion of the 28-day period.*

Do we want to similarly extend the deadline for these motions in state practice? The considerations are the same for state practice as they are for federal.

The Trap in Rule 50 on JNOV

It is the rule that a motion for directed verdict challenging the legal sufficiency of the evidence must be made at close of the opponent's case and also *renewed* at the close of all the evidence.

The theory behind the requirement was to permit the party subject to the motion a chance to produce what is needed to fix the "gap" in the sufficiency of the evidence. Failure to renew it at the close of all the evidence barred the party from making a motion for JNOV on "lack of legal sufficiency" grounds. Wright & Miller has a good discussion of this point:

> *Prior to the 2006 amendment of the Federal Rule, it was long established that a post-verdict motion under Rule 50(b) for judgment as a matter of law could not be made unless a previous Rule 50(a) motion for judgment as a matter of law was made by the moving party at the close of all the evidence. The purpose of requiring a renewed motion for judgment as a matter of law at that time was to give the opposing party an opportunity to cure the defects in proof that otherwise might preclude the party from taking the case to the jury. A large sample of illustrative and relatively recent cases is set out in the note below.*
>
> *Because this requirement was a potential trap for the unwary, the federal courts fortunately took a liberal view of what constituted a motion for judgment as a matter of law at the close of all the evidence in deciding whether there was a sufficient foundation for the later motion under Rule 50(b). The note below contains numerous examples of the mechanisms used by the courts to employ the liberal view of what constitutes an end of trial motion for judgment as a matter of law. Other courts, however, were less willing to excuse noncompliance with the requirement of the rule and applied it in a more demanding fashion.*
>
> . . .
>
> *Before the rule was amended in 2006, when the movant failed inexcusably to raise an objection to the sufficiency of evidence in a motion for judgment as a matter of law at the close of all the evidence, some courts denied all review, although others reviewed, but only for clear error. . . This review was exceedingly narrow, and only unusual circumstances justified allowing a motion at the close of the plaintiff's case to stand in place of a motion at the close of all the evidence.*
>
> *The 2006 amendments were designed to render all of this confusion and technicality*

moot. The amendments revised Rule 50(b) to permit renewal after verdict of any Rule 50(a) motion for judgment as a matter of law. This abolished the earlier requirement that a motion for judgment as matter of law had to be made at the close of all the evidence. However, the district court only can grant the Rule 50(b) motion on the grounds advanced in the preverdict motion, because the former is conceived of as only a renewal of the latter . . . .

9B Fed. Prac. & Proc. Civ.3d § 2537.

The federal Advisory Committee Note to the 2006 amendments makes clear that removing this procedural trap was the intent of the amendments:

> ***Rule 50(b) is amended to permit renewal of any Rule 50(a) motion for judgment as a matter of law, deleting the requirement that a motion be made at the close of all the evidence.*** *Because the Rule 50(b) motion is only a renewal of the preverdict motion, it can be granted only on grounds advanced in the preverdict motion. The earlier motion informs the opposing party of the challenge to the sufficiency of the evidence and affords a clear opportunity to provide additional evidence that may be available. The earlier motion also alerts the court to the opportunity to simplify the trial by resolving some issues, or even all issues, without submission to the jury. . . .*
>
> *This change responds to many decisions that have begun to move away from requiring a motion for judgment as a matter of law at the literal close of all the evidence. Although the requirement has been clearly established for several decades, lawyers continue to overlook it. The courts are slowly working away from the formal requirement. The amendment establishes the functional approach that courts have been unable to reach under the present rule and makes practice more consistent and predictable.*
>
> *Many judges expressly invite motions at the close of all the evidence. The amendment is not intended to discourage this useful practice.*
>
> . . .

(Emphasis added.)

So federal Rule 50(b) now reads:

> *If the court does not grant a motion for judgment as a matter of law made under Rule 50(a), the court is considered to have submitted the action to the jury subject to the court's later deciding the legal questions raised by the motion. No later than 10 days after the entry of judgment — or if the motion addresses a jury issue not decided by a verdict, no later than 10 days after the jury was discharged — the movant may file a renewed motion for judgment as a matter of law and may include an alternative or joint request for a new trial under Rule 59.*

But our Utah Rule 50(b) still requires the motion to be renewed at the close of all the evidence:

> *Motion for judgment notwithstanding the verdict. Whenever a motion for a directed verdict* ***made at the close of all the evidence*** *is denied or for any reason is not granted, the court is deemed to have submitted the action to the jury subject to a later determination of the legal questions raised by the motion. Not later than ten days after entry of judgment, a party who has moved for a directed verdict may move to have the verdict . . . .*

(Emphasis added.)

I know of no Utah case on point, but there are plenty of federal cases (pre-amendment) that dinged an appellant on this[1], and the rule seems clear that the motion must be renewed at the close of all the evidence.

Do we want to change this?

[1] *See, e.g., Davoll v. Webb,* 194 F.3d 1116, 1136 (10th Cir. 1999).

major life activity, and with respect to the issue of their qualifications, that the plaintiffs have not established as a matter of law that any of the plaintiffs have met all of the qualifications and requirements of the employer." *Id.* at 3665. Denver then put on its defense, which included calling numerous witnesses. At the close of all the evidence, plaintiffs moved for judgment as a matter of law but Denver did not.

***1136** [28] A failure to move for a directed verdict on a particular issue will bar appellate review of that issue. *See FDIC v. United Pac. Ins. Co.*, 20 F.3d 1070, 1076 (10th Cir.1994) ("Defendant's failure to raise the bond coverage issue in its directed verdict motion precludes us from reviewing the sufficiency of the evidence to support the jury's bond coverage finding"); *Cleveland v. Piper Aircraft Corp.*, 890 F.2d 1540, 1551 (10th Cir.1989) ("Failure to move for a directed verdict on this ground ... precludes Defendant from challenging the sufficiency of the evidence of crashworthiness negligence on appeal."); *Firestone Tire & Rubber Co. v. Pearson*, 769 F.2d 1471, 1478 (10th Cir.1985). Similarly, "[a]s a general rule, a defendant's motion for directed verdict made at the close of the plaintiff's evidence is deemed waived if not renewed at the close of all the evidence; failure to renew that motion bars consideration of a later motion for judgment n.o.v."*Karns v. Emerson Elec. Co.*, 817 F.2d 1452, 1455 (10th Cir.1987) (citing cases). "Failure to renew the motion thus prevents a defendant from challenging the sufficiency of the evidence on appeal." *Id.; see also* 9A CHARLES A. WRIGHT & ARTHUR R. MILLER, FEDERAL PRACTICE AND PROCEDURE § 2536 (2d ed. 1994) ("It is thoroughly established that the sufficiency of the evidence is not reviewable on appeal unless a motion for judgment as a matter of law was made in the trial court. Indeed a motion at the close of plaintiff's case will not do unless it is renewed at the close of all the evidence.").

Denver did not move for judgment as a matter of law on whether plaintiffs were qualified for vacant positions at the close of the evidence, and never moved for judgment as a matter of law on the undue hardship issue. Denver does not contend otherwise, nor does it claim that it should be excepted from the general rule precluding appellate review. We therefore decline to consider its sufficiency of evidence claims.

C. Evidentiary Issues

[29][30] Denver asserts the district court erred in four of its evidentiary and discovery rulings. Specifically, Denver contests (1) the district court's prohibition of the term "affirmative action" and like phrases at trial; (2) the introduction of one of Denver's responses to a request for an admission; (3) the admission of Dr. Kleen's testimony; and (4) the denial of Denver's motion to extend expert witness discovery and for examination of plaintiffs pursuant to Fed.R.Civ.P. 35. We review a district court's evidentiary rulings and rulings on motions in limine for an abuse of discretion. *See McCue v. Kansas Dept. of Human Resources*, 165 F.3d 784, 788 (10th Cir.1999); *Den Hartog v. Wasatch Academy*, 129 F.3d 1076, 1092 (10th Cir.1997). We review de novo a district court's interpretation of the Federal Rules of Evidence. *See Reeder v. American Econ. Ins. Co.*, 88 F.3d 892, 894 (10th Cir.1996).

1. *Prohibition on "Affirmative Action" and Like Terms*

[31] We first address whether the district court erred in granting plaintiffs' motion in limine prohibiting Denver from using terms like "affirmative action," "special rights," and "preferences." In granting that motion, the district court stated, "[w]ith regard to the issues of defendants using language at trial that plaintiffs were seeking preferences or affirmative action or special rights, defendants are precluded from using such language because it would simply muddy the waters and obfuscate the issues, and its prejudicial effect might outweigh its probative value." Aplt.App. at 2767. On appeal,

50(a), "[a] motion for a directed verdict shall state the specific grounds therefor." A motion for judgment n.o.v. cannot assert new matters not presented in the motion for directed verdict. *Dow Chemical Corp. v. Weevil-Cide Co.*, 897 F.2d 481, 486 (10th Cir.1990); *United States v. Fenix & Scisson, Inc.*, 360 F.2d 260, 265 (10th Cir.1966), *cert. denied*,386 U.S. 1036, 87 S.Ct. 1474, 18 L.Ed.2d 599 (1967).

[4] This court has recognized that in satisfying the requirements of Rule 50, technical precision is unnecessary. *Fenix & Scisson*, 360 F.2d at 266. Because the requirement of Rule 50 that a directed verdict motion must precede a motion for judgment n.o.v. is " 'harsh in any circumstance [ ],' " a directed verdict motion should not be reviewed narrowly but rather in light of the purpose of the rules to secure a just, speedy, and inexpensive determination of a case. 9 C. Wright & A. Miller, Federal Practice and Procedure § 2537, at 597 n. 32 (1971) (quoting *Mosley v. Cia. Mar. Adra S.A.*, 362 F.2d 118, 121-22 (2d Cir.1966), *cert. denied*,385 U.S. 933, 87 S.Ct. 292, 17 L.Ed.2d 213, 385 U.S. 933, 87 S.Ct. 296, 17 L.Ed.2d 213 (1966)); *see also National Indus., Inc. v. Sharon Steel Corp.*, 781 F.2d 1545, 1549 (11th Cir.1986) (taking liberal view because "rule is a harsh one"). As the Fourth Circuit has noted, "rigid application of this rule is inappropriate ... where such application serves neither of the rule's rationales-protecting the Seventh Amendment right to trial by jury, and ensuring that the opposing party has enough notice of the alleged error to permit an attempt to cure it before resting." *FSLIC v. Reeves*, 816 F.2d 130, 138 (4th Cir.1987); *see also McCarty v. Pheasant Run, Inc.* 826 F.2d 1554, 1556 (7th Cir.1987) (modern rationale of rule is opposing party should have opportunity to rectify deficiencies in evidence presented to jury before it is too late); *Miller v. Rowan Cos.*, 815 F.2d 1021, 1024 n. 4, 1025 (5th Cir.1987) (aims of rule include avoiding trapping plaintiff after submittal to jury because he cannot then cure defects in proof and securing fair trial); *Lifshitz v. Walter Drake & Sons, Inc.*, 806 F.2d 1426, 1429 (9th Cir.1986) (purpose of directed verdict motion is to provide notice of claimed evidentiary insufficiencies and preserve issue of sufficiency of evidence as question of law); *Sharon Steel Corp.*, 781 F.2d at 1549 (purpose of directed verdict requirement is to avoid ambushing court and opposing party after the verdict so that only remedy is completely new trial) (citing *Quinn v. Southwest Wood Prods., Inc.*, 597 F.2d 1018, 1025 (5th Cir.1979)); *Acosta v. Honda Motor Co.*, 717 F.2d 828, 831-32 (3d Cir.1983) (same) (citing *Wall v. United States*, 592 F.2d 154 (3d Cir.1979)).

Here, UTC moved for a directed verdict on the blacklisting claim after Anderson had presented his case at trial. At the close of all the evidence, UTC again moved for a directed verdict on the blacklisting claim. In this directed verdict motion, UTC specifically argued there was insufficient ***1504** evidence to support a claim for civil blacklisting under section 44-119. Following the jury verdict, UTC filed a motion for judgment n.o.v. and a motion for new trial on the grounds the evidence was insufficient to support the civil blacklisting claim. Because UTC raised insufficiency of the evidence on the blacklisting claim as specific grounds for both the motion for directed verdict and the motion for judgment n.o.v., we hold UTC has complied with the requirements of Rule 50.

Anderson argues Rule 50 demands that UTC must have stated in the directed verdict motion the evidence is insufficient to prove the element of a criminal blacklisting conviction. Although Rule 50(a) requires a motion for directed verdict to state the "specific grounds," the rule does not define how specific the grounds must be. We are convinced that UTC's directed verdict motion satisfies the rule's requirement. To be sure, a more specific motion may be upheld. *See, e.g., Acosta*, 717 F.2d at 832; *Thezan v. Maritime Overseas Corp.*, 708 F.2d 175, 179 n. 2 (5th Cir.1983), *cert. denied*,464 U.S. 1050, 104 S.Ct. 729, 79 L.Ed.2d 189 (1984). However, a significant number of the cases interpreting Rule 50's specificity requirement have accepted less specificity in directed verdict motions. *See, e.g., Sharon Steel*, 781 F.2d at 1548-49

From Anderson v United Tel.

Rules on Trial and Post-Trial Motions

UTAH RULES OF CIVIL PROCEDURE[1]

Rule 6. Time

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

Rule 41. Dismissal of actions.

(b) Involuntary dismissal; effect thereof. For failure of the plaintiff to prosecute or to comply with these rules or any order of court, a defendant may move for dismissal of an action or of any claim against him. After the plaintiff, in an action tried by the court without a jury, has completed the presentation of his evidence the defendant, without waiving his right to offer evidence in the event the motion is not granted, may move for a dismissal on the ground that upon the facts and the law the plaintiff has shown no right to relief. The court as trier of the facts may then determine them and render judgment against the plaintiff or may decline to render any judgment until the close of all the evidence. If the court renders judgment on the merits against the plaintiff, the court shall make findings as provided in Rule 52(a). Unless the court in its order for dismissal otherwise specifies, a dismissal under this subdivision and any dismissal not provided for in this rule, other than a dismissal for lack of jurisdiction or for improper venue or for lack of an indispensable party, operates as an adjudication upon the merits.

Rule 50. Motion for a directed verdict and for judgment notwithstanding the verdict.

(a) Motion for directed verdict; when made; effect. A party who moves for a directed verdict at the close of the evidence offered by an opponent may offer evidence in the event that the motion is not granted, without having reserved the right so to do and to the same extent as if the motion had not been made. A motion for a directed verdict which is not granted is not a waiver of trial by jury even though all parties to the action have moved for directed verdicts. A motion for a directed verdict shall state the specific ground(s) therefor. The order of the court granting a motion for a directed verdict is effective without any assent of the jury.

(b) Motion for judgment notwithstanding the verdict. Whenever a motion for a directed verdict **made at the close of all the evidence** is denied or for any reason is not granted, the court is deemed to have submitted the action to the jury subject to a later determination of the legal questions raised by the motion. Not later than **ten days** after entry of judgment, a party who has moved for a directed verdict may move to have the verdict and any judgment entered thereon set aside and to have judgment entered in accordance with his motion for a directed verdict; or if a verdict was not returned such party, within **ten days** after the jury has been discharged, may move for judgment in accordance with his motion for a directed verdict. A motion for a new trial may be joined with this motion, or a new trial may be prayed for in the alternative. If a verdict was returned the court may allow the judgment to stand or may reopen the judgment and either order a new trial or direct the entry of judgment as if the requested verdict had been directed. If no verdict was returned the court may direct the entry of judgment as if the requested verdict had been directed or may order a new trial.

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[1]All added emphasis is mine.

(c) Same: conditional rulings on grant of motion.

(1) If the motion for judgment notwithstanding the verdict, provided for in Subdivision (b) of this rule, is granted, the court shall also rule on the motion for a new trial, if any, by determining whether it should be granted if the judgment is thereafter vacated or reversed, and shall specify the grounds for granting or denying the motion for a new trial. If the motion for a new trial is thus conditionally granted, the order thereon does not affect the finality of the judgment. In case the motion for a new trial has been conditionally granted and the judgment is reversed on appeal, the new trial shall proceed unless the appellate court has otherwise ordered. In case the motion for a new trial has been conditionally denied, the respondent on appeal may assert error in that denial; and if the judgment is reversed on appeal, subsequent proceedings shall be in accordance with the order of the appellate court.

(2) The party whose verdict has been set aside on motion for judgment notwithstanding the verdict may serve a motion for a new trial pursuant to Rule 59 not later than **ten days** after entry of the judgment notwithstanding the verdict.

(d) Same: denial of motion. If the motion for judgment notwithstanding the verdict is denied, the party who prevailed on that motion may, as respondent, assert grounds entitling him to a new trial in the event the appellate court concludes that the trial court erred in denying the motion for judgment notwithstanding the verdict. If the appellate court reverses the judgment, nothing in this rule precludes it from determining that the respondent is entitled to a new trial, or from directing the trial court to determine whether a new trial shall be granted.

Rule 52. Findings by the court; correction of the record.

(a) Effect. In all actions tried upon the facts without a jury or with an advisory jury, the court shall find the facts specially and state separately its conclusions of law thereon, and judgment shall be entered pursuant to Rule 58A; in granting or refusing interlocutory injunctions the court shall similarly set forth the findings of fact and conclusions of law which constitute the grounds of its action. Requests for findings are not necessary for purposes of review. Findings of fact, whether based on oral or documentary evidence, shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge the credibility of the witnesses. The findings of a master, to the extent that the court adopts them, shall be considered as the findings of the court. It will be sufficient if the findings of fact and conclusions of law are stated orally and recorded in open court following the close of the evidence or appear in an opinion or memorandum of decision filed by the court. The trial court need not enter findings of fact and conclusions of law in rulings on motions, except as provided in Rule 41(b). The court shall, however, issue a brief written statement of the ground for its decision on all motions granted under Rules 12(b), 50(a) and (b), 56, and 59 when the motion is based on more than one ground.

(b) Amendment. Upon motion of a party made not later than **10 days** after entry of judgment the court may amend its findings or make additional findings and may amend the judgment accordingly. The motion may be made with a motion for a new trial pursuant to Rule 59. When findings of fact are made in actions tried by the court without a jury, the question of the sufficiency of the evidence to support the findings may thereafter be raised whether or not the party raising the question has made in the district court an objection to such findings or has made either a motion to amend them, a motion for judgment, or a motion for a new trial.

(c) Waiver of findings of fact and conclusions of law. Except in actions for divorce, findings of fact and conclusions of law may be waived by the parties to an issue of fact:

(c)(1) by default or by failing to appear at the trial;

(c)(2) by consent in writing, filed in the cause;

(c)(3) by oral consent in open court, entered in the minutes.

(d) . . .

Rule 59. New trials; amendments of judgment.

(a) Grounds. Subject to the provisions of Rule 61, a new trial may be granted to all or any of the parties and on all or part of the issues, for any of the following causes; provided, however, that on a motion for a new trial in an action tried without a jury, the court may open the judgment if one has been entered, take additional testimony, amend findings of fact and conclusions of law or make new findings and conclusions, and direct the entry of a new judgment:

(a)(1) Irregularity in the proceedings of the court, jury or adverse party, or any order of the court, or abuse of discretion by which either party was prevented from having a fair trial.

(a)(2) Misconduct of the jury; and whenever any one or more of the jurors have been induced to assent to any general or special verdict, or to a finding on any question submitted to them by the court, by resort to a determination by chance or as a result of bribery, such misconduct may be proved by the affidavit of any one of the jurors.

(a)(3) Accident or surprise, which ordinary prudence could not have guarded against.

(a)(4) Newly discovered evidence, material for the party making the application, which he could not, with reasonable diligence, have discovered and produced at the trial.

(a)(5) Excessive or inadequate damages, appearing to have been given under the influence of passion or prejudice.

(a)(6) **Insufficiency of the evidence to justify the verdict** or other decision, or that it is against law.

(a)(7) Error in law.

(b) Time for motion. A motion for a new trial shall be served not later than **10 days** after the entry of the judgment.

(c) Affidavits; time for filing. When the application for a new trial is made under Subdivision (a)(1), (2), (3), or (4), it shall be supported by affidavit. Whenever a motion for a new trial is based upon affidavits they shall be served with the motion. The opposing party has 10 days after such service within which to serve opposing affidavits. The time within which the affidavits or opposing affidavits shall be served may be extended for an additional period not exceeding 20 days either by the court for good cause shown or by the parties by written stipulation. The court may permit reply affidavits.

(d) On initiative of court. Not later than 10 days after entry of judgment the court of its own initiative may order a new trial for any reason for which it might have granted a new trial on motion of a party, and in the order shall specify the grounds therefor.

(e) Motion to alter or amend a judgment. A motion to alter or amend the judgment shall be served not later than **10 days** after entry of the judgment.

Rule 60. Relief from judgment or order.

(a) Clerical mistakes. Clerical mistakes in judgments, orders or other parts of the record and errors therein arising from oversight or omission may be corrected by the court at any time of its own initiative or on the motion of any party and after such notice, if any, as the court orders. During the pendency of an appeal, such mistakes may be so corrected before the appeal is docketed in the appellate court, and thereafter while the appeal is pending may be so corrected with leave of the appellate court.

(b) Mistakes; inadvertence; excusable neglect; newly discovered evidence; fraud, etc. On motion and upon such terms as are just, the court may in the furtherance of justice relieve a party or his legal representative from a final judgment, order, or proceeding for the following reasons: (1) mistake, inadvertence, surprise, or excusable neglect; (2) newly discovered evidence which by due diligence could not have been discovered in time to move for a new trial under Rule 59(b); (3) fraud (whether heretofore denominated intrinsic or extrinsic), misrepresentation or other misconduct of an adverse party; (4) the judgment is void; (5) the judgment has been satisfied, released, or discharged, or a prior judgment upon which it is based has been reversed or otherwise vacated, or it is no longer equitable that the judgment should have prospective application; or (6) any other reason justifying relief from the operation of the judgment. The motion shall be made within **a reasonable time** and for reasons (1), (2), or (3), not more than **3 months** after the judgment, order, or proceeding was entered or taken. A motion under this Subdivision (b) does not affect the finality of a judgment or suspend its operation. This rule does not limit the power of a court to entertain an independent action to relieve a party from a judgment, order or proceeding or to set aside a judgment for fraud upon the court. The procedure for obtaining any relief from a judgment shall be by motion as prescribed in these rules or by an independent action.

FEDERAL RULES OF CIVIL PROCEDURE

RULE 6(B) EXTENDING TIME.

(1) In General. When an act may or must be done within a specified time, the court may, for good cause, extend the time:

(A) with or without motion or notice if the court acts, or if a request is made, before the original time or its extension expires; or

(B) on motion made after the time has expired if the party failed to act because of excusable neglect.

(2) Exceptions. **A court must not extend the time to act under Rules 50(b) and (d), 52(b), 59(b), (d), and (e), and 60(b)**.

RULE 50. JUDGMENT AS A MATTER OF LAW IN A JURY TRIAL; RELATED MOTION FOR A NEW TRIAL; CONDITIONAL RULING

(a) Judgment as a Matter of Law.

(1) In General. If a party has been fully heard on an issue during a jury trial and the court finds that a reasonable jury would not have a legally sufficient evidentiary basis to find for the party on that issue, the court may:

(A) resolve the issue against the party; and

(B) grant a motion for judgment as a matter of law against the party on a claim or defense that, under the controlling law, can be maintained or defeated only with a favorable finding on that issue.

(2) Motion. A motion for judgment as a matter of law may be made at any time before the case is submitted to the jury. The motion must specify the judgment sought and the law and facts that entitle the movant to the judgment.

(b) Renewing the Motion After Trial; Alternative Motion for a New Trial. If the court does not grant a motion for judgment as a matter of law made under Rule 50(a), the court is considered to have submitted the action to the jury subject to the court's later deciding the legal questions raised by the motion. No later than **28 days** after the entry of judgment—or if the motion addresses a jury issue not decided by a verdict, no later than **28 days** after the jury was discharged—the movant may file a renewed motion for judgment as a matter of law and may include an alternative or joint request for a new trial under Rule 59. In ruling on the renewed motion, the court may:

(1) allow judgment on the verdict, if the jury returned a verdict;

(2) order a new trial; or

(3) direct the entry of judgment as a matter of law.

(c) Granting the Renewed Motion; Conditional Ruling on a Motion for a New Trial.

(1) In General. If the court grants a renewed motion for judgment as a matter of law, it must also conditionally rule on any motion for a new trial by determining whether a new trial should be granted if the judgment is later vacated or reversed. The court must state the grounds for conditionally granting or denying the motion for a new trial.

(2) Effect of a Conditional Ruling. Conditionally granting the motion for a new trial does not affect the judgment's finality; if the judgment is reversed, the new trial must proceed unless the appellate court orders otherwise. If the motion for a new trial is conditionally denied, the appellee may assert error in that denial; if the judgment is reversed, the case must proceed as the appellate court orders.

(d) Time for a Losing Party's New-Trial Motion. Any motion for a new trial under Rule 59 by a party against whom judgment as a matter of law is rendered must be filed no later than **28 days** after the entry of the judgment.

(e) Denying the Motion for Judgment as a Matter of Law; Reversal on Appeal. If the court denies the motion for judgment as a matter of law, the prevailing party may, as appellee, assert grounds entitling it to a new trial should the appellate court conclude that the trial court erred in denying the motion. If the appellate court reverses the judgment, it may order a new trial, direct the trial court to determine whether a new trial should be granted, or direct the entry of judgment.

RULE 52. FINDINGS AND CONCLUSIONS BY THE COURT; JUDGMENT ON PARTIAL FINDINGS

(a) Findings and Conclusions.

(1) In General. In an action tried on the facts without a jury or with an advisory jury, the court must find the facts specially and state its conclusions of law separately. The findings and conclusions may be stated on the record after the close of the evidence or may appear in an opinion or a memorandum of decision filed by the court. Judgment must be entered under Rule 58.

(2) For an Interlocutory Injunction. In granting or refusing an interlocutory injunction, the court must similarly state the findings and conclusions that support its action.

(3) For a Motion. The court is not required to state findings or conclusions when ruling on a motion under Rule 12 or 56 or, unless these rules provide otherwise, on any other motion.

(4) Effect of a Master's Findings. A master's findings, to the extent adopted by the court, must be considered the court's findings.

(5) Questioning the Evidentiary Support. A party may later question the sufficiency of the evidence supporting the findings, whether or not the party requested findings, objected to them, moved to amend them, or moved for partial findings.

(6) Findings of fact, whether based on oral or other evidence, must not be set aside unless Setting Aside the Findings. clearly erroneous, and the reviewing court must give due regard to the trial court's opportunity to judge the witnesses' credibility.

(b) Amended or Additional Findings. On a party's motion filed no later than **28 days** after the entry of judgment, the court may amend its findings—or make additional findings—and may amend the judgment accordingly. The motion may accompany a motion for a new trial under Rule 59.

(c) Judgment on Partial Findings. If a party has been fully heard on an issue during a nonjury trial and the court finds against the party on that issue, the court may enter judgment against the party on a claim or defense that, under the controlling law, can be maintained or defeated only with a favorable finding on that issue. The court may, however, decline to render any judgment until the close of the evidence. A judgment on partial findings must be supported by findings of fact and conclusions of law as required by Rule 52(a).[2]

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[2]This is the equivalent to Utah Rule of Civil Procedure 41(b) ("The court as trier of the facts may then determine them and render judgment against the plaintiff or may decline to

RULE 59. NEW TRIAL; ALTERING OR AMENDING A JUDGMENT

(a) In General.

(1) Grounds for New Trial. The court may, on motion, grant a new trial on all or some of the issues—and to any party—as follows:

(A) after a jury trial, for any reason for which a new trial has heretofore been granted in an action at law in federal court; or

(B) after a nonjury trial, for any reason for which a rehearing has heretofore been granted in a suit in equity in federal court.

(2) Further Action After a Nonjury Trial. After a nonjury trial, the court may, on motion for a new trial, open the judgment if one has been entered, take additional testimony, amend findings of fact and conclusions of law or make new ones, and direct the entry of a new judgment.

(b) Time to File a Motion for a New Trial. A motion for a new trial must be filed no later than **28 days** after the entry of judgment.

(c) Time to Serve Affidavits. When a motion for a new trial is based on affidavits, they must be filed with the motion. The opposing party has 14 days after being served to file opposing affidavits. The court may permit reply affidavits.

(d) New Trial on the Court's Initiative or for Reasons Not in the Motion. No later than **28 days** after the entry of judgment, the court, on its own, may order a new trial for any reason that would justify granting one on a party's motion. After giving the parties notice and an opportunity to be heard, the court may grant a timely motion for a new trial for a reason not stated in the motion. In either event, the court must specify the reasons in its order.

(e) Motion to Alter or Amend a Judgment. A motion to alter or amend a judgment must be filed no later than **28 days** after the entry of the judgment.

RULE 60. RELIEF FROM A JUDGMENT OR ORDER

(a) Corrections Based on Clerical Mistakes; Oversights and Omissions. The court may correct a clerical mistake or a mistake arising from oversight or omission whenever one is found in a judgment, order, or other part of the record. The court may do so on motion or on its own, with or without notice. But after an appeal has been docketed in the appellate court and while it is pending, such a mistake may be corrected only with the appellate court's leave.

(b) Grounds for Relief from a Final Judgment, Order, or Proceeding. On motion and just terms, the court may relieve a party or its legal representative from a final judgment, order, or proceeding for the following reasons:

(1) mistake, inadvertence, surprise, or excusable neglect;

(2) newly discovered evidence that, with reasonable diligence, could not have been discovered in time to move for a new trial under Rule 59(b);

(3) fraud (whether previously called intrinsic or extrinsic), misrepresentation, or misconduct by an opposing party;

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render any judgment until the close of all the evidence").

(4) the judgment is void;

(5) the judgment has been satisfied, released, or discharged; it is based on an earlier judgment that has been reversed or vacated; or applying it prospectively is no longer equitable; or

(6) any other reason that justifies relief.

(c) Timing and Effect of the Motion.

(1) Timing. A motion under Rule 60(b) must be made within **a reasonable time**—and for reasons (1), (2), and (3) no more than **a year** after the entry of the judgment or order or the date of the proceeding.

(2) Effect on Finality. The motion does not affect the judgment's finality or suspend its operation.

(d) . . .

Tab 5

FAQs

(1) Expert discovery — Timing on election of report or deposition.

Question: Under Rule 26(a)(4)(C)(i), the election of a report or deposition must be made within seven days after the opponent's expert designation. Does this mean after service of the expert designation? Is the time for the election calculated under Rule 6?

Answer: Yes. The committee intended that the election of a report or deposition must be made within seven days after an opposing party serves its designation of experts. Proposed amendments — published for comment but not yet approved — will expressly state that. The time for electing a report or deposition is calculated using Rule 6. That is, the party who does not bear the burden of proof, must serve its election on the other party within seven days after the other party serves its designation of experts. Under Rule 6 intermediate weekends and holidays are excluded from the seven-day period, and, if the other party's designation of experts was served by mail, three extra days are added for serving the election.

(2) Extraordinary discovery — Order.

Question: Is an order needed for stipulations to extend discovery, or can the parties rely on a stipulation filed with the court?

Answer: If the proposed extraordinary discovery does not interfere with a previously established trial, hearing or discovery cutoff date, then no order is necessary, and the parties need file only a stipulation that complies with Rule 29. However, the judge retains the authority under Rule 16 to manage discovery, so it is possible that a judge who believes that a stipulation goes beyond what is proportional may deny the stipulation and schedule a conference for deciding discovery limits.

(3) Expert discovery — Rebuttal experts.

Question: How does the designation of rebuttal experts work.

Answer: Unfortunately, the committee omitted from the 2011 amendments the designation of rebuttal experts and the election of reports by them or depositions of them. That oversight is being fixed in further amendments — published for comment but not yet approved — that establish the same procedures and time frames for rebuttal experts as for experts generally.

(4) Expert discovery — Payment for expert's report.

Question: Does the requesting party have to pay for the report from the opposing expert witness?

Answer: No. Rule 26(a)(4)(B) requires that the requesting party pay for the cost of a deposition, not for preparing reports. The cost for preparing a report is borne by the party offering the expert.

(5) Expert discovery — Stipulations.

Question: How can you stipulate to extend the 28 days on expert disclosures if under Rule 29 such stipulations must be filed before the close of fact discovery?

Answer: Option One: They can't. Stipulations must be filed, even as to expert discovery, before the close of standard discovery.

Option Two: Rule 29, as worded, technically applies only to standard discovery. Nevertheless, the intent of the Committee is that parties may modify the limits and procedures for expert discovery under Rule 26(a)(4) after the close of standard discovery, and during expert discovery, by filing the same "stipulated statement" as required under Rule 29.

(6) Expert discovery — Data relied upon by an expert.

Question: In disclosing an expert, Rule 26(a)(4)(A) says to provide "A brief summary of the anticipated opinions, along with all data and other information that was relied upon." Does this latter phrase mean the party must produce actual records? Or does it mean just a summary list, such as "my training, my education, my 30 years of experience, the medical records of the plaintiff"?

Answer: The committee intends that "a brief summary of the anticipated opinions, along with all data and other information that was relied upon" would mean a short, but concise, summary of the opinions, in the same way that a summary of the expected testimony of fact witnesses is to be disclosed in initial disclosures. It is sufficient if the expert witness disclosure identifies in general terms the basis for the opinion, including materials reviewed, texts consulted, and so forth, keeping in mind that full exploration of such foundational topics would normally be made in the report or deposition.

Question: Must an expert produce his complete file? Why does the committee note (line 362) say that an expert must produce his "complete file" when Rule 26(a)(4) says nothing about this?

Answer:

(7) Expert discovery — Length of expert depositions.

Question: Expert depositions are limited to 4 hours under Rule 26(a)(4)(B) ("A deposition shall not exceed four hours . . .") Does this mean per side or in total? Rule 26(c)(5) refers to the hour and other limits on discovery as pertaining to plaintiffs collectively, defendants collectively, and third-party defendants collectively, but this applies to standard discovery, and not expert discovery.

Answer: It is the intent of the Committee that the limitation on deposition hours set forth for standard discovery under Rule 26(c)(5) also apply as to expert discovery.

(8) Expert discovery — Discovery between aligned parties.

Question: The rule says that you must file an election or you get neither a report nor a deposition. What happens when multiple defendants do not file an election? Does it default to a deposition?

Answer: No. Rule 26(a)(4)(D) only defaults to a deposition where "competing" elections are served; i.e. one defendant asks for a report and the other asks for a deposition. In that case, it defaults to a deposition. However, where no defendant files an election, the default is no further discovery (no report, no deposition) under Rule 26(a)(4)(C)(ii).

(9) Partial motions to dismiss and deadlines.

Question: If there is a Rule 12 motion to dismiss on some claims, but answers are filed on other claims, are the deadlines stayed?

Answer: No. As under the rules applicable to cases filed before November 1, 2011, there is no automatic stay unless a motion to dismiss is filed as to all claims for relief. As the Committee Note states, "the time periods for making Rule 26(a)(1) disclosures, and the presumptive deadlines for completing fact discovery, are keyed to the filing of an answer. If a defendant files a motion to dismiss or other Rule 12(b) motion in lieu of an answer, these time periods normally would be not begin to run until that motion is resolved."

The trigger for the deadlines under Rule 26(c)(5) is the date the first defendant's first disclosure is due and that, in turn, is determined under Rule 26 (a)(2) by the service of the first answer to the complaint. Careful practice requires filing an answer as to claims on which no motion to dismiss has been filed, although a stipulation commonly obviates the need for this. If an answer is filed, and absent any order or stipulation otherwise, the deadlines would begin to run.

(10) Subpoena for medical examiner reports.

Question: The old rule 35(c) on getting prior reports from medical examiners has been eliminated. Can we still get those reports through subpoenas?

Answer: Yes, subject to requirements of proportionality and relevance under Rule 26. The amendment to Rule 35 simply eliminated the need for automatic production of such prior reports, without request.

(11) Special practice rules.

Question: One of the committee notes suggests that specialty practice groups may propose their own rules. Are there any limitations on this?

Answer: As long as the proposed rules for the specialty do not significantly conflict with the intent of the November 2011 amendments (see Committee Note to Rule 1), specialty practice groups are free to devise additional rules applicable to their areas.

(12) Special practice rules — Wrongful death claims.

Question: Does Rule 26.2 (applicable to "personal injury" actions) apply to actions claiming wrongful death?

Answer: Yes. The Committee intended that "actions seeking damages arising out of personal physical injuries or physical sickness" be broadly interpreted, and used IRS Code Section 104(a)(2) as its model. That would include wrongful death claims.

(13) Special practice rules — Effective date.

Question: Does Rule 26.2 apply only to cases filed on or after its effective date, December 22, 2011, to cases filed on or after the effective date of the other disclosure and discovery amendments November 1, 2011, or to all pending cases?

Answer:

(14) Special practice rules — Divorce modification.

(Bob Wilde) **Question:** In a divorce modification seeking to increase child support where assets and net worth are irrelevant, is it necessary to disclose the non-income items in 26.1(c)?

Answer:

(15) Supplementing disclosures

From Todd

Question: How frequently must a party supplement disclosures?

From Frank:

I have a med mal case where specials are under $5,000 however the general damages are substantial, permanent and lifelong. Cases like this have been tried to verdict across the nation as high as 1.2 million but most are in the $300,000 to $600,000 range. I have filed complaint alleging tier 3. Defendant files (after answer) with "Motion for Protective Order & Issuance of an Order that the Claim falls Under Tier 1." I have reread the committee notes of the new rules but really nothing on point regarding tier limits. Do the new rules provide that the Plaintiff can claim what damages they think they are? To hold otherwise would allow the Court to determine damages.

From John Bogart

If I serve an interrogatory on Mr. A and Mr. A's LLC is that one interrogatory or two?

As they are aligned and for practical purposes the same, it could be one. But there are two parties. Does any of that matter? Is it interrogatories directed to a side now, rather to a party? Rule 33 is still by party, but the allocation isn't.