Agenda
Advisory Committee on Rules of Civil Procedure

April 30, 2014
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	Jonathan Hafen
Report from case management subcommittee	Tab 2	Jonathan Hafen Judge Derek Pullan
Rule 7. Pleadings allowed; motions, memoranda, hearings, orders. Rule 54. Judgment; costs. Rule 58A. Entry of judgment; abstract of judgment.	Tab 3	Cullen Battle
Rule 26. General provisions governing disclosure and discovery. Rule 45. Subpoena.	Tab 4	Tim Shea
Rule 56. Summary judgment.	Tab 5	Tim Shea
Rule 7A. Motion for order to show cause.	Tab 6	Tim Shea
Small Claims Rule 14. Settlement offers.	Tab 7	Tim Shea
Rule 68. Settlement offers.	Tab 8	Tim Shea

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

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

May 28, 2014
September 24, 2014
October 22, 2014
November 19, 2014

Tab 1

MINUTES

UTAH SUPREME COURT ADVISORY COMMITTEE ON THE RULES OF CIVIL PROCEDURE

MARCH 26, 2014

PRESENT: Jonathan Hafen, Chair, W. Cullen Battle, Hon. James T. Blanch, Frank Carney, Prof. Lincoln Davies, Steven Marsden, Terrie T. McIntosh, Hon. Derek Pullan, Hon. Todd M. Shaughnessy, Leslie W. Slaugh, Trystan B. Smith

TELEPHONE: Hon. Lyle R. Anderson, David H. Moore, Lori Woffinden

STAFF: Timothy M. Shea, Nathan Whittaker

EXCUSED: Sammi V. Anderson, Hon. John L. Baxter, Scott S. Bell, Hon. Evelyn J. Furse, David W. Scofield, Hon. Kate Toomey, Barbara L. Townsend

I. APPROVAL OF MINUTES

Mr. Hafen opened the meeting and entertained comments from the committee concerning the November 20, 2013 minutes. It was moved and seconded to approve the minutes as drafted in the meeting materials. The motion carried unanimously on voice vote.

II. COMMITTEE MEMBERSHIP

Mr. Hafen next informed the committee on a letter he had recently received from Chief Justice Durrant of the Utah Supreme Court. The letter reminded Mr. Hafen of the change to the rules governing the appointment of committee members last July. Because of to the high level of interest shown in serving on the committee, the supreme court discontinued the former policy of reappointing members at the end of their terms until they no longer wished to serve. Hereafter, as provided in UCJA 11-101(4), "No lawyer may serve more than two consecutive terms on the committee unless appointed by the Supreme Court as the committee chair or as an institutional or court representative (e.g. an academician, judge, recording secretary, etc.) or when justified by exceptional circumstances."

III. REPORT ON MEETING WITH SUPREME COURT

Mr. Hafen next reported to the committee on the meeting that occurred that morning between representatives of the committee and the Utah Supreme Court.

A. Presentation of Proposed Revisions to Rules

At the meeting, the committee's proposed revisions to Rules 6, 10, 58B, 74, and 75 were presented to the Utah Supreme Court as per UCJA 11-105(1). The supreme court approved and adopted the proposed revisions as presented. The changes are effective as of May 1, 2014.

B. Discovery Survey Results

Mr. Hafen next noted that at the meeting, they had discussed the interim results of the discovery survey being undertaken by the National Center for State Courts. He then invited Judge Pullan to summarize those results and to present to the committee the ideas and proposals discussed at the meeting.

Judge Pullan introduced the survey results, which were previously distributed to the committee in the meeting materials. He noted that the results reflected six quarters of survey data, and that two further quarters of survey data are expected to be gathered before the survey is completed. He drew the committee's attention to the observations that were summarized on pages 15–16 of the meeting materials. He was especially encouraged by the increasing perception that the initial disclosures and standard discovery limits are sufficient to evaluate the case and prepare for trial. However, he was concerned by the perception that the new rules do not have a significant impact on the cost and length of litigation.

Members discussed the results and the methodology of the survey. Some members raised the concern that the high percentage of debt collection (21.9% of responses) and domestic cases (29.6% of responses) may have skewed the results, as they both tend to be outliers from the "standard case" in terms of discovery needs. Also, the declining response rate suggested that respondents were suffering from "survey fatigue."

C. Pilot Program on Judicial Case Management

Discussion. Judge Pullan observed that if the new discovery rules are not having a significant impact on the cost and length of litigation, it is likely that

attorneys are regularly stipulating around the rules. This is problematic, as it negates the purpose of changing the rules. He noted that this stipulation problem appeared especially acute in Tier 2 and 3 cases, where respectively, 24% and 9% of respondents reported completion of fact discovery within the standard time for completion. Judge Pullan suggested that the reason that more improvement in the area of length and cost of litigation has not been made is the lack of active judicial case management. He quoted federal district Judge David G. Campbell's statement that "study after study has confirmed that judicial case management is the answer [to backlog and inefficiency in U.S. courts]. Cases resolve in less time, at lower cost, and often with better results when judges manage them actively." Institute for the Advancement of the American Legal System, *Working Smarter not Harder: How Excellent Judges Manage Cases* (2014), *available at* http://iaals.du.edu/images/wygwam/documents/publications/Working_Smarter_Not_Harder.pdf.

While the committee previously rejected the idea of judicial case management as requiring far more resources than are available to the courts, Judge Pullan suggested that it did not need to be an all-or-nothing proposition. If there was a way of identifying the cases that are most likely to be complex and most in need of active judicial management, judges could focus their efforts at case management accordingly. Judge Pullan suggested some ways of identifying complex cases and determining the cases for management, such as Tier 3 cases, cases where there are multiple counsel on a side, personal injury cases, etc.

At the case management conference, the trial court, with input from counsel, could set out firm deadlines on fact discovery, expert discovery, and dispositive motions. It would be much more difficult for a party who had input into the formation of the discovery deadlines to complain that it was not given enough time. The judge can also set up expectations with regard to civility and professionalism, get a sense about how involved he or she will need to be, and show attorneys that he or she is available and accessible to lawyers when certain aspects of the case begin falling off the tracks.

With that in mind, Judge Pullan explained that he proposed a pilot program for judicial case management to the supreme court. Certain judges in the Second, Third, and Fourth Districts would be asked to engage in case management of some of their cases selected based on predetermined criteria for complexity, and the results would be evaluated after a certain amount of time. The supreme court approved the idea and instructed the committee to flesh out a

pilot program at the next meeting, and then present it to the justices for their approval.

Committee Action. A subcommittee consisting of Mr. Hafen, Mr. Shea, Judge Pullan, Judge Blanch, Judge Shaughnessy, and Debra Moore, the District Court Administrator for the Administrative Office of Courts, was formed to put together a draft proposal for the committee's input and approval. Mr. Hafen invited members to share any ideas they had with respect to the issue.

IV. SUBCOMMITTEE REPORT ON FINAL JUDGMENT RULE

Mr. Hafen next invited Mr. Battle to report on the progress of the subcommittee appointed at the meeting of January 22, 2014 to work on a proposal for revising the Final Judgment Rule.

Discussion. Mr. Battle informed the committee that they had made progress with their proposal, but needed the committee's direction on the issue of when an order is complete—that is, when an order is understood to be the court's final expression on the subject. Mr. Battle noted that this was a separate question from when a judgment was final for purposes of appeal, and would only affect a party's appellate rights in the case of interlocutory appeals.

The subcommittee had considered two different options with respect to the completeness issue. The first option is that an order signed by the judge is not complete unless there is an express direction that nothing further is required. This option is consistent with the current case law on the subject. The second option is that an order signed by the judge is complete unless there is an express direction for some further action. This would be a departure from current case law, but would have the benefit of avoiding the requirement of invoking "magic words" to signify completeness and of resolving questions regarding the enforceability of orders.

Judge Blanch argued in behalf of the second approach, noting that when judges draft memorandum decisions, they tend not to leave the order for the parties to draft separately. At the same time, he stated that there should be a separate document requirement for a final judgment. Judge Shaughnessy suggested that the origin of this problem was that there was not sufficient discipline with respect to the title of documents—if a final order were always titled as a judgment and a decision that the judge did not intend to be complete were always titled as a memorandum decision, this problem would not exist.

Mr. Battle gave three reasons in support of the first approach. First, as it is consistent with the current case law, it would likely be easier for it to get approval from the supreme court. Second, the consequences of an error in determining whether an order is complete are less severe for this option than under option two. Third, the first option was consistent with current practice—most orders are prepared by counsel and so would not be affected by the adoption of option one.

With respect to Mr. Battle's first reason, Judge Shaughnessy observed that the supreme court's holding in *Code* and its progeny was meant to protect the right to appeal a final judgment when finality was unclear. If the committee were to propose option two along with a strong separate document requirement that achieved the same goal, the supreme court would likely have less of an issue about making the change. Judge Blanch added that the supreme court was working with the language of the rules as they were at the time, and there's no reason to think that the court believes that *Code* represents an ideal solution to the issue of surprise finality and would not be open to a different solution to the problem.

With respect to Mr. Battle's second reason, Judge Shaugnessy pointed out that if a party erroneously interprets a complete order as incomplete under the second option, the most that would happen is that it would lose its rights to file an interlocutory appeal. That is not very significant, as a party always has the ability to file an appeal from the order when it has merged into a final judgment.

With respect to Mr. Battle's third reason, Mr. Shea responded that, as written, the requirement of including language that no further order was required would apply to both judge-drafted and attorney-drafted orders. Mr. Whittaker noted that either way, this would be undesirable: if attorney-drafted orders were presumptively complete while judge-drafted orders were presumptively incomplete, it casts doubt on the validity of an order drafted by an attorney and subsequently edited by a judge—how much editing does it take to change an order from being drafted by a party to being drafted by the judge? However, if we were to require attorneys to include the magic language, we would be multiplying the incomplete order problem that currently exists and would have to educate not only the bench about the magic words, but also the bar. Finally, Judge Blanch observed that the reason that most orders were drafted by attorneys was that most decisions are announced orally from the bench.

Committee Action. After some discussion, it was the general sense of the committee that so long as there was a requirement for a judgment to be entered as a separate document as per the federal rule, an order signed by the judge should be presumed to be complete unless there is an express direction for some further action. Mr. Battle thanked the committee for its direction and expressed the subcommittee's attention to deliver a final proposal for the committee's consideration soon.

V. RULE 30

Mr. Hafen next invited Mr. Shea to lead a discussion on the proposed revision to Rule 30 that was introduced by the Utah Court Reporters Association ("UCRA") at the meeting of January 22, 2014.

Discussion. Mr. Shea suggested three changes to the rules for the committee to consider. The first change would be to specify in Rule 30(b)(2) that a deposition recorded by stenographic means must be recorded by a certified court reporter as defined by Utah Code § 58-74-102. He noted that this appears to be the universal practice, and that the amendment would simply be restating the status quo. Second, Mr. Shea recommended deleting the second sentence of Rule 30(f)(3), as it refers to a transcription process that is only available for transcribing recordings made on the audio recording systems of the district and juvenile courts. As such, it does not make sense and should be deleted.

Finally, regarding the UCRA's proposal to require a transcript of a deposition recorded by non-stenographic means to be prepared by a certified court reporter, Mr. Shea noted that his research on the issue indicated that Utah courts have not required that deposition transcripts be from certified court reporters for many years, and this would be a significant change in Utah law. However, if the committee wanted to consider this proposal, Mr. Shea recommended amending Rule 32(e) to require a transcript provided to the court to be transcribed by a certified court reporter as defined by Utah Code § 58-74-102. He cautioned that before the committee adopted this amendment, it would be wise to hear from the representatives of videography firms and similar businesses.

Mr. Carney argued that one of the purposes of the committee was to promote the inexpensive determination of civil actions. So long as there are assurances that a transcript is accurate, the committee should not add requirements that are likely to make the process more expensive. Mr. Carney also pointed out

that making a transcription from a recording does not require the degree of qualification that making a stenographic recording of a deposition in real time does, and therefore a party should not be required to pay the price premium associated with a court reporter's skills and training. Determining the qualifications of a transcriptionist in terms of training, accuracy, and professional responsibility is the purview of the legislature, and the committee should defer to its judgment on the matter. On the other hand, the court or a party should not have to listen to the recording in order to verify the accuracy of a transcript—there needed to be some sort of certification of the transcript's accuracy.

Mr. Whittaker noted that under Rule 28, a deposition must be taken before an officer authorized to administer oaths and take testimony. In the context of a deposition recorded by non-stenographic means, that officer's responsibility would include keeping custody of the recording and verifying the accuracy of any transcription made against the recording in his or her possession. After he or she has done this, the officer should certify the accuracy of the transcript. Mr. Shea added that the parties and the court are relying upon the accuracy of the transcript regardless of whether it is prepared from a recording or from stenographic notes. At least when a party has a recording, there is a way to independently verify the accuracy of the transcript.

Mr. Smith argued that so long as the deposition notice included information about the means of recording and the officer taking the deposition as required by Rule 30(b), the parties should be able to sort out the details among themselves. Mr. Slaugh added that he had heard reports where a party would not share the recording with the opposing party. Other members pointed out that under Rule 30(f), the officer taking the deposition has to keep a copy of the record and furnish it to a witness or party upon payment of reasonable charges.

With respect to the proposal to amend to Rule 30(b)(2) to state that a deposition recorded by stenographic means must be recorded by a certified court reporter as defined by Utah Code § 58-74-102, Mr. Whittaker noted that this requirement was already covered by the Certified Court Reporters Licensing Act (Utah Code Ann. § 58-72-101 *et seq.*). Section 301 of the Act requires a license to engage in "the practice of court reporting," which is defined in the Act as "the making of a verbatim record of any . . . deposition, . . . or other sworn testimony given under oath." While DOPL ruled that preparing a transcript from a recording was not the practice of court reporting, recording a deposition by stenographic means most certainly is the practice of court reporting.

Committee Action. It was moved and seconded that the committee take no further action on the proposals to amend 30(b)(2) and 32(f) and on the proposal to require a transcript of a deposition recorded by non-stenographic means to be prepared by a certified court reporter. The motion carried unanimously by voice vote.

It was further moved and seconded that Rule 30 be revised as follows:

- Paragraph (f)(3): delete "An official transcript of a recording made by non-stenographic means shall be prepared under Utah Rule of Appellate Procedure 11(e)."

The motion carried unanimously by voice vote. The proposed revision to Rule 30 was thereby approved for submission to the Administrative Office of Courts for publication and distribution pursuant to UCJA 11-103(2)–(3).

VI. RULE 37

The committee next considered the proposed revision to Rule 37. This proposal had been tabled in the February 2014 meeting in order to prepare a draft for review that addressed the concerns raised at that meeting.

Discussion. Mr. Shea summarized the major changes made from the previous draft as follows:

- Subdivision (a), which explained the grounds for seeking an expedited discovery motion, was revised to remove the specific grounds for compelling discovery and was merged into paragraph (1) of former subdivision (b);

- Subdivision (c), which provided for specific protective orders, was merged into paragraph (7) of former subdivision (b);

- Subdivision (d), which provided for an award of costs and attorney fees upon a showing of bad faith or lack of substantial justification, was merged into subparagraph (7)(H) of former subdivision (b);

- The term "expedited discovery motion" was replaced with "expedited statement of discovery issues," and the wording of the procedure was changed to remove any language of motion practice;

- "Engag[ing] in outrageous behavior during discovery" was added to "fail[ure] to follow a court order" as grounds for seeking sanctions under former subdivision (e); and

- Subdivision (h), which precluded a party from using a witness or item of evidence that was not timely disclosed, was removed and an advisory committee note was added to explain that it was removed because "the effect of non-disclosure is adequately governed by Rule 26(d) and the process for resolving disclosure issues is included in paragraph (a)."

Mr. Shea further noted that the Utah Court of Appeals recently ruled in *Pointe Meadows Owners Association v. Point Meadows Townhomes*, 2014 UT App 52, ¶ 14 (mem.), that exclusion of untimely disclosed witnesses and evidence is not an affirmative sanction, but rather occurs automatically by operation of law unless affirmative relief is granted by the district court upon a showing of good cause. It would therefore be appropriate to remove subdivision (h) from the rule entitled "Discovery Sanctions."

Judge Pullan pointed out that there were two subparagraphs labeled (a)(7)(H) and that the second one should be (K). Professor Davies noted that there was an extra "the" on line 154. Mr. Slaugh asked whether the language of lines 105–110 should be more explicit about ordering the party, witness or attorney to pay costs and attorney fees. Other members agreed and noted that the phrasing of that subparagraph was not consistent with the previous subparagraphs in the list.

Judge Pullan suggested changing the language "engages in outrageous behavior during discovery" in line 126 to "engages in willful, bad-faith, or persistent dilatory tactics frustrating the judicial process." This language would match the standard applied by case law. *See Welsh v. Hospital Corp. of Utah*, 2010 UT App 171, ¶ 9, 235 P.3d 791 ("Before a trial court can impose discovery sanctions under Rule 37, the court must find on the part of the noncomplying party willfulness, bad faith, fault, or persistent dilatory tactics frustrating the judicial process."). Mr. Whittaker expressed his concern that applying sanctions to conduct other than failure to follow an order would be a substantial change, and it may be better to rely upon the court's inherent authority to impose sanctions for bad-faith, dilatory, or vexatious conduct. Judge Pullan responded by saying that case law already applies discovery sanctions to such conduct, so it would not be a substantial change in existing law.

Judge Shaughnessy suggested that the language "Unless the court finds that the failure was substantially justified" be restored to the draft. This language has been interpreted in case law to apply the requirement to find willfulness, bad faith, fault, or persistent dilatory conduct before entering discovery sanctions. If the language is kept, the case law applying the standard will be kept along with it.

Mr. Battle asked if the rule on expedited statements of discovery issues prohibits filing a motion to compel under Rule 7. Several members responded that it prohibited making a request for relief with respect to the listed discovery issues except by proceeding in accordance with the expedited procedures. Mr. Battle noted that the language in paragraph (a)(1) that a party "*may* request" might be ambiguous on that point.

Mr. Whittaker expressed his concern that the proposed draft has removed the statement of grounds for seeking an order to compel and a protective order that are subdivisions (a) and (b) of the existing version of the rule. He was especially concerned about the removal of the provision that the party seeking discovery has the burden to prove proportionality. Mr. Shea noted that the current list of grounds for seeking an order to compel is illustrative, not exhaustive. In addition, the proposed rule includes a list of protective orders in paragraph (a)(7), and the burden-of-proof provision is still in Rule 26(b)(3).

Mr. Slaugh noted that there was not language regarding the purpose for entering a protective order, namely, "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)," and recommended that the language be restored to lines 75–77. Judge Shaughnessy agreed that this language needed to be restored, but otherwise was of the opinion that the current draft adequately expressed the standards for compelling discovery or entering a protective order. The committee must be careful to remove any suggestion that a motion under Rule 7 to compel or for a protective order is appropriate.

Mr. Whittaker asked the committee whether a "statement of discovery issues" was really the best term to use. As the expedited discovery process was a request for an order, it fits the definition of a motion. Calling the paper to be filed a "statement" also leads to odd and stilted language in the rule—for example, lines 54–55 currently read: "if the *statement* requests extraordinary discovery, [it must include] a *statement* certifying that the party has reviewed

and approved a discovery budget." While he understood that the committee wanted to avoid any hint that a motion under Rule 7 would be in order, he suggested that using a synonym of motion such as "application" may be preferable. Judge Shaughnessy responded that when the UCJA provision was first drafted as a rule for the Third District, he had coined the term "statement of discovery issues." He later advocated changing the term to something else, but he could not convince his fellow judges. Judge Pullan added that he was one of the judges that Judge Shaughnessy failed to convince, and that the term was working to ensure that these types of issues were not brought as Rule 7 motions.

Committee Action. It was moved and seconded that Rule 37 be revised as proposed in the proposed revision contained in the meeting materials, incorporating the following amendments:

- Lines 54–55: replace "a statement certifying that" with "a certification that"
- Lines 75–77: Restore the words "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),"
- Line 105: replace "(a)(7)(H)" with "(a)(7)(K)"
- Lines 105–110: change the wording to be consistent with the phrasing of (a)(7)(A)–(J), and to clarify that the court may order a *party, witness, or attorney to pay* costs and attorney fees.
- Lines 123–27: remove the underlined words in lines 125–27 and restore the following language (with the stricken words omitted): "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:"
- Line 154: delete "The"

The motion carried unanimously on voice vote. The proposed revisions to Rule 37 were thereby approved for submission to the Administrative Office of Courts for publication and distribution pursuant to UCJA 11-103(2)–(3).

VII. ADJOURNMENT

Mr. Hafen noted that as presently scheduled, the next meeting conflicts with a conference for the district court judges at Bryce Canyon. Because of the plan to discuss the pilot program at the next meeting, Mr. Hafen asked if it would be better to hold the next meeting a week later than currently scheduled. The committee generally agreed to moving the date of the next meeting. The committee adjourned at 6:02 p.m. The next meeting will be held on April 30, 2014 at 4:00 p.m. at the Administrative Office of the Courts.

Tab 2

Tier 3 Case Management Pilot Program

(1) Screening

All tier 3 cases assigned to a participating judge:

Second District

- Brent West

Third District

- Todd Shaughnessy
- Kate Toomey

Fourth District

- Derek Pullan

Notify parties that the case is being assigned to the pilot program; that the default discovery limits apply, but that the judge will schedule a Rule 16 conference for the purpose of entering a case management order, including discovery limits. The conference will be held soon after the date the defendant's initial disclosures are due.

As used in this outline, "lawyer" means "party" if the party is self-represented.

(2) Rule 16 conference

Date. Schedule the conference when the first answer is filed for a date soon after the date the defendant's initial disclosures are due. Disclosures are due 42 days after the first answer is filed.

Lead counsel. Require lead counsel to participate in person. Limit participation by telephone or video conference to exceptional circumstances.

Detailed statement. Require lawyers to file a written, detailed statement of the case, including the factual claims and legal theories. Use them and the other papers to try to narrow the disputed issues.

Prepare for the conference. Gather as much information about the case as the papers will provide.

Explore settlement. Explore settlement early and periodically throughout the pretrial process.

Proportional discovery. Encourage the lawyers to show that the amount, methods and duration of discovery are proportional to the case, and, if they are, allow what the lawyers request. Do not allow the lawyers to dictate the pace at which a case will move; encourage them to reasonably and accurately inform you of what they need, and proceed based on that information. Recognize the value of their judgment in establishing discovery and other due dates.

Prioritize discovery. Focus on where to begin discovery:

- What are the core issues?
- What information about those issues is needed (not just wanted)?
- What information is needed to make intelligent settlement negotiations possible?
- What are the best sources for that information? Who are the critical witnesses? What are the critical documents?
- What is a reasonable timeline for obtaining that information?

Phased discovery. If the initial discovery does not produce settlement, proceed with further discovery, but continue to focus on priorities and proportionality. Be open to structuring discovery in a way that makes sense.

Discovery disputes. Assist the lawyers with their discovery disputes. Permit the lawyers quick and easy access to you when the case begins to deviate from the management order.

(3) Case management order

(a) Discovery

Memorialize the agreements and decisions from the case management conference.

(b) Schedule due dates for various stages in the case

Status conferences. Schedule a periodic status conference (monthly, bi-monthly, quarterly, semi-annually) as needed. Keep it short and simple. By telephone is fine. Recognize that, if the case is progressing smoothly under the management order, “hands-off” is a legitimate management tool. The call itself will remind the lawyers that you are managing the case. The primary purpose of the call is to reassure yourself that the management plan is on track. A secondary purpose is to remove excuses for requests for continuances.

Amended pleadings.

Joinder.

Fact discovery. Schedule a status conference at the close of fact discovery in order to schedule a trial and a pretrial conference.

Expert discovery.

Dispositive motions.

Standards for continuances. Advise in the order that the scheduled dates are firm and that continuances—even if stipulated—will be not be granted, except for exceptional and unanticipated circumstances.

(c) Professionalism and civility

Professionalism among lawyers has been shown to help move the case forward and to help settlement. Advise in the order and verbally that you expect professionalism, courtesy and respect at all times. If lawyers become contentious, consider:

- an off-the-record discussion with counsel;
- an on-the-record discussion with counsel; and
- sanctions, if all else fails.

(4) Settlement

Explore settlement early and periodically throughout the pretrial process. Periodically discussing settlement gives lawyers the cover needed, with clients and opposing counsel, to avoid the appearance of negotiating from a position of weakness.

Ask: “What are the prospects of settlement?” “What do you need to know in order to consider settlement?”

Partner with another judge for a mediated settlement conference.

(5) Discovery disputes

Require lead counsel to participate.

Follow Rule 37, expedited statement of discovery issues.

Consider using a technique in which a party does not file any papers, but rather meets with the judge and other parties, in person or by phone, to resolve the dispute. At the conference the judge is part mediator, part decision maker: encouraging the lawyers toward an agreement where possible; but imposing a decision as needed. Consider using this technique for motions beyond discovery disputes.

Rule on the dispute promptly. Avoid taking the matter under advisement.

(6) Motions

Lead counsel. Require lead counsel to participate.

Motions in limine. Permit the motion to be filed no sooner than 28 days before the pretrial conference and no later than 14 days before. Encourage the lawyers, instead of filing a motion, to confer and discuss how any issues might be raised and resolved during the pretrial conference. Rule on motions in limine at the pretrial conference to leave the lawyers time during which they can determine how their case is going to unfold at trial.

Motion for summary judgment. Encourage the lawyers not to file a motion for summary judgment unless the lawyer has a good faith belief that there are no relevant facts in dispute and that the moving party is entitled to judgment as a matter of law.

Permit no more than one motion per party. Require a joint statement of undisputed facts.

Permit the motion to be filed no sooner than completion of expert discovery (not including rebuttal experts) and no later than 14 days after completion of expert discovery (not including rebuttal experts). Keep the beginning and end date reasonably close together because there are likely to be cross-motions, and it is best to resolve as much as possible in a single order.

Otherwise follow Rule 56.

(7) Pretrial and trial

The best case management technique is a firm trial date and a ready judge. Knowing a case will go to trial will result in resolution, whether or not it is by trial.

Schedule a status conference at the close of fact discovery, and schedule a firm trial date, pretrial conference date and dispositive motion deadline.

If you need to set more than one case for trial on a particular date, partner with another judge to try the case that you cannot.

(8) Tracking cases

- Tickler for status conferences and other deadlines
- List of issues pending for judge's decision

(9) Measures of success

- Party satisfaction
- Lawyer satisfaction
- Judge satisfaction
- Reduced cost to reach disposition
- Reduced time to reach disposition

(10) Transition to scale

Observe cases for indicators showing a need for case management. Consider using these indicators to screen cases for case management. For example:

- multiple parties
- multiple claims
- case type (commercial litigation, tortious injury, etc.)
- lawyers or parties known to be contentious
- self-represented parties

Observe what role staff (law clerk, case manager) can play.

Observe how well the program works for self-represented parties.

Tab 3

Rule 7. Pleadings allowed; motions, memoranda, hearings, orders.

(a) **Pleadings.** Only these pleadings are allowed:

(a)(1) a complaint;

(a)(2) an answer to a complaint;

(a)(3) an answer to a counterclaim designated as a counterclaim;

(a)(4) an answer to a cross claim;

(a)(5) a third party complaint

(a)(6) an answer to a third party complaint; and

(a)(7) a reply to an answer if permitted by the court.

(b) **Motions.** A request for an order must be made by motion. The motion must be in writing, unless made during a hearing or trial, must state the relief requested, and must state the grounds for the relief requested. Except for the following, a motion must be made in accordance with this rule.

(b)(1) A motion made in proceedings before a court commissioner must follow the procedures of Rule 101.

(b)(2) A request under Rule 26 for extraordinary discovery must follow the expedited statement of discovery procedures of Rule 37(a).

(b)(3) A request under Rule 37 for a protective order or for an order compelling disclosure or discovery—but not a motion for sanctions—must follow the expedited statement of discovery procedures of Rule 37(a).

(b)(4) A request under Rule 45 to quash a subpoena must follow the expedited statement of discovery procedures of Rule 37(a).

(b)(5) A motion for summary judgment must follow the procedures of this rule, supplemented by the requirements of Rule 56.

(c) **Form, name and content of motion.** The rules governing captions and other matters of form in pleadings apply to motions and other papers. The movant must title the motion substantially as: “Motion to [short phrase describing the relief requested].” The motion may not exceed 15 pages, not counting relevant portions of documents cited in the motion. An approved over-length motion must include a table of contents

and a table of authorities with page references. The motion must include under appropriate headings and in the following order:

(c)(1) a concise statement of the relief requested and the grounds for the relief requested;

(c)(2) one or more sections that include a concise statement of the relevant facts claimed by the movant and argument citing authority for the relief requested; and

(c)(3) relevant portions of documents cited, such as affidavits or discovery materials or opinions, statutes or rules.

(d) **Name and content of memorandum responding to the motion.** A nonmovant may file a memorandum responding to the motion within 14 days after the motion is filed. The nonmovant must title the memorandum substantially as: “Memorandum responding to the motion to [short phrase describing the relief requested].” The memorandum may not exceed 15 pages, not counting objections to evidence and relevant portions of documents cited in the memorandum. An approved over-length memorandum must include a table of contents and a table of authorities with page references. The memorandum must include under appropriate headings and in the following order:

(d)(1) a concise statement of the party’s preferred disposition of the motion and the grounds supporting that disposition;

(d)(2) one or more sections that include a concise statement of the relevant facts claimed by the nonmovant and argument citing authority for that disposition;

(d)(3) objections to evidence in the motion, citing authority for the objection; and

(d)(4) relevant portions of documents cited in the memorandum, such as affidavits or discovery materials or opinions, statutes or rules.

(e) **Name and content of reply memorandum.** Within 7 days after the memorandum responding to the motion is filed, the movant may file a reply memorandum, which must be limited to rebuttal of new matters raised in the memorandum responding to the motion. The movant must title the memorandum substantially as “Memorandum replying to the memorandum responding to the motion to [short phrase describing the relief requested].” The memorandum may not exceed 5

pages, not counting objections to evidence, response to objections, and relevant portions of documents cited in the memorandum. The memorandum must include under appropriate headings and in the following order:

(e)(1) a concise statement of the new matter raised in the memorandum responding to the motion;

(e)(2) one or more sections that include a concise statement of the relevant facts claimed by the movant and argument citing authority rebutting the new matter;

(e)(3) objections to evidence in the memorandum responding to the motion, citing authority for the objection; and

(e)(4) response to objections made in the memorandum responding to the motion, citing authority for the response;

(e)(5) relevant portions of documents cited in the memorandum, such as affidavits or discovery materials or opinions, statutes or rules.

(f) **Response to objections made in the reply memorandum.** If the reply memorandum includes an objection to evidence, the nonmovant may file a response to the objection no later than 7 days after the reply memorandum is filed.

(g) **Request to submit for decision.** When briefing is complete or the time for briefing has expired, either party may and the movant must file a “Request to Submit for Decision.” The request to submit for decision must state the date on which the motion was filed, the date the memorandum responding to the motion, if any, was filed, the date the reply memorandum, if any, was filed, and whether a hearing has been requested. If no party files a request, the motion will not be submitted for decision.

(h) **Hearings.** The court may hold a hearing on any motion. A party may request a hearing in the motion, in a memorandum or in the request to submit for decision. A request for hearing must be separately identified in the caption of the document containing the request. The court must grant a request for a hearing on a motion under Rule 56 or a motion that would dispose of the action or any claim or defense in the action unless the court finds that the motion or response to the motion is frivolous or the issue has been authoritatively decided.

(i) **Notice of supplemental authority.** A party may file notice of citation to significant authority that comes to the party's attention after the party's motion or memorandum has been filed or after oral argument but before decision. The notice must state—without argument—citation to the authority, the page of the motion or memorandum or the point orally argued to which the authority applies, and the reason the authority is relevant. Any other party may promptly file a response, but the court may rule on the motion without a response. The response must comply with this paragraph.

(j) **Orders.**

(j)(1) **Signed order presumed final; direction to prepare a proposed order.** Absent a direction to prepare a proposed order, or unless otherwise stated, the order:

(j)(1)(A) is the court's final ruling on the matter when it is signed by the judge; and

(j)(1)(B) is entered when it is memorialized in a writing signed by the judge and recorded in the register of actions.

If the court directs a party to prepare a proposed order, a ruling is not final until the court signs a written order after the proposed order is filed.

(j)(2) **Preparing and serving a proposed order.** If directed by the court a party shall prepare a proposed written order conforming to the court's ruling and serve the proposed order on the other parties for review and approval as to form. If the party directed to prepare a proposed written order fails to timely do so, any other party may prepare a proposed written order conforming to the court's ruling and serve the proposed order on the other parties for review and approval as to form. The court may prepare and serve an order.

(j)(3) **Effect of approval as to form of the order.** A party's approval as to form of a proposed order certifies that the proposed order accurately reflects the court's ruling. Approval as to form does not waive objections to the substance of the order.

(j)(4) **Objecting to a proposed order.** A party may object to the form of the proposed order by filing an objection within 7 days after the order is served.

(j)(5) **Filing proposed order.** The party preparing a proposed order must file it:

(j)(5)(A) after all other parties have approved the form of the order; (The party preparing the proposed order must indicate the means by which approval was received: in person; by telephone; by signature; by email; etc.)

(j)(5)(B) after the time to object to the form of the order has expired; (The party preparing the proposed order must also file a certificate of service of the proposed order.) or

(j)(5)(C) within 2 days after a party has objected to the form of the order. (The party preparing the proposed order may also file a response to the objection.)

(j)(6) **Proposed order before decision prohibited; exceptions.** Except as provided, a party may not file a proposed order concurrently with a motion or a memorandum or a request to submit for decision. A proposed order must be filed. with:

(j)(6)(A) a stipulated motion;

(j)(6)(B) an ex parte motion;

(j)(6)(C) an expedited statement of discovery issues under Rule 37(b); and

(j)(6)(D) the request to submit for decision a motion in which a memorandum responding to the motion has not been filed.

(j)(7) **Ex parte orders.** Except as otherwise provided by these rules, an order made without notice to the other parties can be vacated or modified by the judge who made it with or without notice.

(j)(8) **Order to pay money.** An order to pay money can be enforced in the same manner as if it were a judgment.

(k) **Stipulated motions.** A party seeking relief that has been agreed to by the other parties may file a stipulated motion which must:

(k)(1) be titled substantially as: “Stipulated motion to [short phrase describing the relief requested];

(k)(2) include a concise statement of the relief requested and the grounds for the relief requested;

(k)(3) include the signed stipulation in or attached to the motion; and

(k)(4) be accompanied by a proposed order that has been approved by the other parties.

(l) **Ex parte motions.** If a statute or rule permits a motion to be filed without serving the motion on the other parties, the party seeking relief may file a an ex parte motion which must:

(l)(1) be titled substantially as: “Ex parte motion to [short phrase describing the relief requested];

(l)(2) include a concise statement of the relief requested and the grounds for the relief requested;

(l)(3) include the statute or rule authorizing the ex parte motion; and

(l)(4) be accompanied by a proposed order.

(m) **Motion in responding memorandum or reply memorandum prohibited.** A party may not make a motion in a memorandum. A party who objects to evidence in another party’s motion or memorandum may not move to strike that evidence. The proper procedure is to include in the subsequent memorandum an objection to the evidence.

(n) **Over-length motion or memorandum.** The court may permit a party to file an over-length motion or memorandum upon ex parte motion and a showing of good cause.

(o) **Limited statement of facts and authority.** No statement of facts and legal authorities beyond the concise statement of the relief requested and the grounds for the relief requested required in paragraph (c) is required for the following motions:

(o)(1) motion to allow an over-length motion or memorandum;

(o)(2) motion to extend the time to perform an act, if the motion is filed before the time to perform the act has expired;

(o)(3) motion to continue a hearing;

(o)(4) motion to appoint a guardian ad litem;

(o)(5) motion to substitute parties;

(o)(6) motion to refer the action to or withdraw it from alternative dispute resolution under Rule 4-510.05;

(o)(7) motion for a conference under Rule 16; and

(o)(8) motion to approve a stipulation of the parties.

Advisory Committee Notes

[Add to existing notes]

The purpose of the 2014 amendments is to:

(1) combine a motion and its supporting memorandum into one document, as in the federal court;

(2) eliminate motions to strike evidence relied upon to support or respond to a motion;

(3) substantially reduce proposed orders;

(4) bring regularity to motion practice; and .

(5) codify the policy of “completeness” established in:

Central Utah Water Conservancy District v. King, 2013 UT 13;

Giusti v. Sterling Wentworth Corp., 2009 UT 2;

Houghton v. Dep't of Health, 2008 UT 86; and

Code v. Utah Dept of Health, 2007 UT 43.

In these four cases, the Supreme Court established a policy favoring a clear indication of whether some further document would be required from the parties after a judge’s decision. The parties should not be required to guess about what, if anything, should come next. The test from the caselaw was supported by former Rule 7(f)(2), but its application created some problems.

There were two ways to meet the test: prepare the order in one of the three ways described by the rule; or expressly state that nothing further is required from the parties. The problem, essentially, was that orders were being prepared in some manner other than the three described in the rule, yet the order did not expressly state than nothing further was required. The order technically was not complete, but everyone proceeded as if it was.

The 2014 amendments continue the policy of a bright-line test for a completed decision but do not rely on conditions that might or might not be met. The one condition that can be counted on is the judge's signature. Under the former rule, a completed

decision was imposed by operation of law when the order was prepared in one of three ways. The 2014 rule imposes a completed decision by operation of law when the order is signed.

There are too many ways in which an order can be prepared for an exhaustive list of when nothing further is required. Whether an order is prepared in one of the approved ways is sometimes difficult to determine, and reliance on that conclusion is risky. The trend under the former rule was to include in every order an indication that nothing further was required.

Under the former rule, the judge's silence meant that something further was required, unless the order was prepared in one of the three ways described in Rule 7. The presumption in the 2014 amendments is the opposite: silence means that nothing further is required from the parties. Judges can expressly require more if that is what is needed in a particular case.

Rule 54. Judgments; costs.

(a) **Definition; form.** "Judgment" as used in these rules includes a decree and any order that adjudicates all claims and the rights and liabilities of all parties or other order from which an appeal lies. A judgment ~~need~~ should not contain a recital of pleadings, the report of a master, or the record of prior proceedings. ~~Judgments shall state whether they are entered upon trial, stipulation, motion or the court's initiative; and, unless otherwise directed by the court, a judgment shall not include any matter by reference.~~

(b) **Judgment upon multiple claims and/or involving multiple parties.** When an action presents more than one claim for relief ~~is presented in an action, —~~whether as a claim, counterclaim, cross claim, or third party claim~~, —~~and/or when multiple parties are involved, the court may ~~direct the entry of a final~~ enter judgment as to one or more but fewer than all of the claims or parties only ~~upon an express determination by~~ if the court expressly states that there is no just reason for delay ~~and upon an express direction for the entry of judgment~~. ~~In the absence of such determination and direction~~ Otherwise, any order or other ~~form of~~ decision, however designated, that adjudicates fewer than all the claims or the rights and liabilities of fewer than all the parties ~~shall not terminate~~ does not end the action as to any of the claims or parties, and ~~the order or other form of decision is subject to revision~~ may be changed at any time before the entry of judgment adjudicating all the claims and the rights and liabilities of all the parties.

(c) **Demand for judgment.** A default judgment must not differ in kind from, or exceed in amount, what is demanded in the pleadings. Every other judgment should grant the relief to which each party is entitled, even if the party has not demanded that relief in its pleadings.

~~(c)(1) **Generally.** Except as to a party against whom a judgment is entered by default, and except as provided in Rule 8(a), every final judgment shall grant the relief to which the party in whose favor it is rendered is entitled, even if the party has not demanded such relief in his pleadings. It may be given for or against one or more of several claimants; and it may, when the justice of the case requires it, determine the ultimate rights of the parties on each side as between or among themselves.~~

~~(c)(2) **Judgment by default.** A judgment by default shall not be different in kind from, or exceed in amount, that specifically prayed for in the demand for judgment.~~

(d) **Costs.**

(d)(1) **To whom awarded.** ~~Except when express provision therefor is made either in a statute of this state or in these rules, costs shall be allowed as of course to the prevailing party unless the court otherwise directs; provided, however, where an appeal or other proceeding for review is taken, costs of the action, other than costs in connection with such appeal or other proceeding for review, shall abide the final determination of the cause.~~ Unless a statute, these rules, or a court order provides otherwise, costs should be allowed to the prevailing party. Costs against the state of Utah, its officers and agencies ~~shall~~ may be imposed only to the extent permitted by law.

(d)(2) **How assessed.** The party who claims ~~his~~ costs must within 14 days after the entry of judgment file and serve ~~upon the adverse party against whom costs are claimed, a copy of~~ a verified memorandum of ~~the items of his~~ costs ~~and necessary disbursements in the action, and file with the court a like memorandum thereof duly verified stating that to affiant's knowledge the items are correct, and that the disbursements have been necessarily incurred in the action or proceeding~~. A party dissatisfied with the costs claimed may, within 7 days after service of the memorandum of costs, ~~file a motion to have~~ object to the bill of costs ~~taxed by the court~~.

A memorandum of costs served and filed after the verdict, or at the time of or subsequent to the service and filing of the findings of fact and conclusions of law, but before the entry of judgment, ~~shall nevertheless be considered as~~ is deemed served and filed on the date judgment is entered.

~~(e) **Interest and costs to be included in the judgment.** The clerk must include in any judgment signed by him any interest on the verdict or decision from the time it was rendered, and the costs, if the same have been taxed or ascertained. The clerk must, within two days after the costs have been taxed or ascertained, in any case where not included in the judgment, insert the amount thereof in a blank left in the judgment for~~

~~that purpose, and make a similar notation thereof in the register of actions and in the judgment docket.~~

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

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

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

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

(a) **Separate document required.** Every judgment and amended judgment must be set out in a separate document, but, unless a separate document is requested by a party, a separate document is not required for an order disposing of a motion:

(a)(1) for judgment under Rule 50(b);

(a)(2) to amend or make additional findings under Rule 52(b);

(a)(3) for a new trial, or to alter or amend the judgment, under Rule 59;

(a)(4) for relief under Rule 60; or

(a)(5) for attorney's fees under Rule 73.

(b) **Preparing a judgment.** Unless the court prepares the judgment, the prevailing party must prepare and serve a proposed judgment within 14 days after the jury verdict or after the court’s decision in the same manner as a proposed order under Rule 7(j).

(c) **Judge’s signature; judgment filed with the clerk.** Except as provided in paragraph (g) and Rule 55(b)(1), all judgments must be signed by the judge and filed with the clerk. The clerk must promptly record all judgments in the register of actions.

(d) **Time of entry of judgment.**

(d)(1) If a separate document is not required, a judgment is complete and is entered when it is signed by the judge and recorded in the register of actions.

(d)(2) If a separate document is required, a judgment is complete and is entered at the earlier of these events:

(d)(2)(A) the judgment is set out in a separate document signed by the judge and recorded in the register of actions; or

(d)(2)(B) 150 days have run from the clerk recording the adjudication that should have prompted the separate document.

~~(d)~~ (e) **Notice of judgment.** The party preparing the judgment ~~shall~~ must promptly serve a copy of the signed judgment on the other parties in the manner provided in Rule 5 and promptly file proof of service with the court. Except as provided in Rule of Appellate Procedure 4(g), the time for filing a notice of appeal is not affected by this requirement.

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

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

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

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

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

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

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

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

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

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

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

Tab 4

Timothy M. Shea
Appellate Court Administrator

Andrea R. Martinez
Clerk of Court

Supreme Court of Utah

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Salt Lake City, Utah 84114-0210

Appellate Clerks' Office
Telephone (801) 578-3900
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To: Civil Procedures Committee
From: Tim Shea
Date: April 21, 2014
Re: Rules 26 and 45

Now that Rule 37 is settled, there was a suggestion a while back to include in Rules 26 and 45 references to the new procedures. In addition to those changes, Ed Havas has requested that notice of a third party subpoena duces tecum include the subpoena itself. (Rule 45, Line 41).

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, 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 served on the other parties:

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

(a)(2)(B) by the defendant within 42 days after 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, 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 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 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)(C)(ii) The party who does not bear the burden of proof on the issue for which expert testimony is offered 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)(i) is due, or (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 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)(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 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, 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 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 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
2	More than $50,000 and less than $300,000 or non-monetary relief	15	10	10	10	180
3	$300,000 or more	30	20	20	20	210

(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~~ request 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~~ under Rule 37(a).

(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 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

Disclosure requirements and timing. Rule 26(a)(1). The 2011 amendments seek to reduce discovery costs by requiring each party to produce, at an early stage in the case, and without a discovery request, all of the documents and physical evidence the party may offer in its case-in-chief and the names of witnesses the party may call in its case-in-chief, with a description of their expected testimony. In this respect, the amendments build on the initial disclosure requirements of the prior rules. In addition to the disclosures required by the prior version of Rule 26(a)(1), a party must disclose each fact witness the party may call in its case-in-chief and a summary of the witness's expected testimony, a copy of all documents the party may offer in its case-in-chief, and all documents to which a party refers in its pleadings.

Not all information will be known at the outset of a case. If discovery is serving its proper purpose, additional witnesses, documents, and other information will be identified. The scope and the level of detail required in the initial Rule 26(a)(1) disclosures should be viewed in light of this reality. A party is not required to interview every witness it ultimately may call at trial in order to provide a summary of the witness's expected testimony. As the information becomes known, it should be disclosed. No summaries are required for adverse parties, including management level employees of business entities, because opposing lawyers are unable to interview them and their testimony is available to their own counsel. For uncooperative or hostile witnesses any summary of expected testimony would necessarily be limited to the subject areas the witness is reasonably expected to testify about. For example, defense counsel may be unable to interview a treating physician, so the initial summary may only disclose that the witness will be questioned concerning the plaintiff's diagnosis, treatment and prognosis. After medical records have been obtained, the summary may be expanded or refined.

Subject to the foregoing qualifications, the summary of the witness's expected testimony should be just that – a summary. The rule does not require prefiled testimony or detailed descriptions of everything a witness might say at trial. On the other hand, it requires more than the broad, conclusory statements that often were made under the prior version of Rule 26(a)(1)(e.g., "The witness will testify about the events in question" or "The witness will testify on causation."). The intent of this requirement is to give the other side basic information concerning the subjects about which the witness is expected to testify at trial, so that the other side may determine the witness's relative importance in the case, whether the witness should be interviewed or deposed, and whether additional documents or information concerning the witness should be sought. This information is important because of the other discovery limits contained in the 2011 amendments, particularly the limits on depositions.

Likewise, the documents that should be provided as part of the Rule 26(a)(1) disclosures are those that a party reasonably believes it may use at trial, understanding that not all documents will be available at the outset of a case. In this regard, it is

important to remember that the duty to provide documents and witness information is a continuing one, and disclosures must be promptly supplemented as new evidence and witnesses become known as the case progresses.

The amendments also require parties to provide more information about damages early in the case. Too often, the subject of damages is deferred until late in the case. Early disclosure of damages information is important. Among other things, it is a critical factor in determining proportionality. The committee recognizes that damages often require additional discovery, and typically are the subject of expert testimony. The Rule is not intended to require expert disclosures at the outset of a case. At the same time, the subject of damages should not simply be deferred until expert discovery. Parties should make a good faith attempt to compute damages to the extent it is possible to do so and must in any event provide all discoverable information on the subject, including materials related to the nature and extent of the damages.

The penalty for failing to make timely disclosures is that the evidence may not be used in the party's case-in-chief. To make the disclosure requirement meaningful, and to discourage sandbagging, parties must know that if they fail to disclose important information that is helpful to their case, they will not be able to use that information at trial. The courts will be expected to enforce them unless the failure is harmless or the party shows good cause for the failure.

The 2011 amendments also change the time for making these required disclosures. Because the plaintiff controls when it brings the action, plaintiffs must make their disclosures within 14 days after service of the first answer. A defendant is required to make its disclosures within 28 days after the plaintiff's first disclosure or after that defendant's appearance, whichever is later. The purpose of early disclosure is to have all parties present the evidence they expect to use to prove their claims or defenses, thereby giving the opposing party the ability to better evaluate the case and determine what additional discovery is necessary and proportional.

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.

Finally, the 2011 amendments eliminate two categories of actions that previously were exempt from the mandatory disclosure requirements. Specifically, the amendments eliminate the prior exemption for contract actions in which the amount claimed is $20,000 or less, and actions in which any party is proceeding pro se. In the committee's view, these types of actions will benefit from the early disclosure requirements and the overall reduced cost of discovery.

Expert disclosures and timing. Rule 26(a)(3). Expert discovery has become an ever-increasing component of discovery cost. The prior rules sought to eliminate some of these costs by requiring the written disclosure of the expert's opinions and other background information. However, because the expert was not required to sign these disclosures, and because experts often were allowed to deviate from the opinions disclosed, attorneys typically would take the expert's deposition to ensure the expert would not offer "surprise" testimony at trial, thereby increasing rather than decreasing the overall cost. The amendments seek to remedy this and other costs associated with expert discovery by, among other things, allowing the opponent to choose either a deposition of the expert or a written report, but not both; in the case of written reports, requiring more comprehensive disclosures, signed by the expert, and making clear that experts will not be allowed to testify beyond what is fairly disclosed in a report, all with the goal of making reports a reliable substitute for depositions; and incorporating a rule that protects from discovery most communications between an attorney and retained expert. Discovery of expert opinions and testimony is automatic under Rule 26(a)(3) and parties are not required to serve interrogatories or use other discovery devices to obtain this information.

Disclosures of expert testimony are made in sequence, with the party who bears the burden of proof on the issue for which expert testimony will be offered going first. Within seven days after the close of fact discovery, that party must disclose: (i) the expert's curriculum vitae identifying the expert's qualifications, publications, and prior testimony; (ii) compensation information; (iii) a brief summary of the opinions the expert will offer;

and (iv) a complete copy of the expert's file for the case. The file should include all of the facts and data that the expert has relied upon in forming the expert's opinions. If the expert has prepared summaries of data, spreadsheets, charts, tables, or similar materials, they should be included. If the expert has used software programs to make calculations or otherwise summarize or organize data, that information and underlying formulas should be provided in native form so it can be analyzed and understood. To the extent the expert is relying on depositions or materials produced in discovery, then a list of the specific materials relied upon is sufficient. The committee recognizes that experts frequently will prepare demonstrative exhibits or other aids to illustrate the expert's testimony at trial, and the costs for preparing these materials can be substantial. For that reason, these types of demonstrative aids may be prepared and disclosed later, as part of the Rule 26(a)(4) pretrial disclosures when trial is imminent.

Within seven days after this disclosure, the party opposing the retained expert may elect either a deposition or a written report from the expert. A deposition is limited to four hours, which is not included in the deposition hours under Rule 26(c)(5), and the party taking it must pay the expert's hourly fee for attending the deposition. If a party elects a written report, the expert must provide a signed report containing a complete statement of all opinions the expert will express and the basis and reasons for them. The intent is not to require a verbatim transcript of exactly what the expert will say at trial; instead the expert must fairly disclose the substance of and basis for each opinion the expert will offer. The expert may not testify in a party's case in chief concerning any matter that is not fairly disclosed in the report. To achieve the goal of making reports a reliable substitute for depositions, courts are expected to enforce this requirement. If a party elects a deposition, rather than a report, it is up to the party to ask the necessary questions to "lock in" the expert's testimony. But the expert is expected to be fully prepared on all aspects of his/her trial testimony at the time of the deposition and may not leave the door open for additional testimony by qualifying answers to deposition questions.

The report or deposition must be completed within 28 days after the election is made. After this, the party who does not bear the burden of proof on the issue for which

expert testimony is offered must make its corresponding disclosures and the opposing party may then elect either a deposition or a written report. Under the deadlines contained in the rules, expert discovery should take less than three months to complete. However, as with the other discovery rules, these deadlines can be altered by stipulation of the parties or order of the court.

The amendments also address the issue of testimony from non-retained experts, such as treating physicians, police officers, or employees with special expertise, who are not retained or specially employed to provide expert testimony, or whose duties as an employee do not regularly involve giving expert testimony. This issue was addressed by the Supreme Court in Drew v. Lee, 2011 UT 15, wherein the court held that reports under the prior version of Rule 26(a)(3) are not required for treating physicians.

There are a number of difficulties inherent in disclosing expert testimony that may be offered from fact witnesses. First, there is often not a clear line between fact and expert testimony. Many fact witnesses have scientific, technical or other specialized knowledge, and their testimony about the events in question often will cross into the area of expert testimony. The rules are not intended to erect artificial barriers to the admissibility of such testimony. Second, many of these fact witnesses will not be within the control of the party who plans to call them at trial. These witnesses may not be cooperative, and may not be willing to discuss opinions they have with counsel. Where this is the case, disclosures will necessarily be more limited. On the other hand, consistent with the overall purpose of the 2011 amendments, a party should receive advance notice if their opponent will solicit expert opinions from a particular witness so they can plan their case accordingly. In an effort to strike an appropriate balance, the rules require that such witnesses be identified and the information about their anticipated testimony should include that which is required under Rule 26(a)(1)(A)(ii), which should include any opinion testimony that a party expects to elicit from them at trial. If a party has disclosed possible opinion testimony in its Rule 26(a)(1)(A)(ii) disclosures, that party is not required to prepare a separate Rule 26(a)(3)(D) disclosure for the witness. And if that disclosure is made in advance of the witness's deposition, those opinions should be explored in the deposition and not in a separate expert

deposition. Otherwise, the timing for disclosure of non-retained expert opinions is the same as that for retained experts under Rule 26(a)(4)(C) and depends on whether the party has the burden of proof or is responding to another expert. Rule 26(a)(3)(D) and 26(a)(1)(A)(ii) are not intended to elevate form over substance – all they require is that a party fairly inform its opponent that opinion testimony may be offered from a particular witness. And because a party who expects to offer this testimony normally cannot compel such a witness to prepare a written report, further discovery must be done by interview or by deposition.

Finally, the amendments include a new Rule 26(b)(7) that protects from discovery draft expert reports and, with limited exception, communications between an attorney and an expert. These changes are modeled after the recent changes to the Federal Rules of Civil Procedure and are intended to address the unnecessary and costly procedures that often were employed in order to protect such information from discovery, and to reduce "satellite litigation" over such issues.

Scope of discovery—Proportionality. Rule 26(b). Proportionality is the principle governing the scope of discovery. Simply stated, it means that the cost of discovery should be proportional to what is at stake in the litigation.

In the past, the scope of discovery was governed by "relevance" or the "likelihood to lead to discovery of admissible evidence." These broad standards may have secured just results by allowing a party to discover all facts relevant to the litigation. However, they did little to advance two equally important objectives of the rules of civil procedure—the speedy and inexpensive resolution of every action. Accordingly, the former standards governing the scope of discovery have been replaced with the proportionality standards in subpart (b)(1).

The concept of proportionality is not new. The prior rule permitted the Court to limit discovery methods if it determined that "the discovery was unduly burdensome or expensive, taking into account the needs of the case, the amount in controversy, limitations on the parties' resources, and the importance of the issues at stake in the litigation." The Federal Rules of Civil Procedure contains a similar provision. See Fed.

R. Civ. P. 26(b)(2)(C). This method of limiting discovery, however, was rarely invoked either under the Utah rules or federal rules.

Under the prior rule, the party objecting to the discovery request had the burden of proving that a discovery request was not proportional. The new rule changes the burden of proof. Today, the party seeking discovery beyond the scope of "standard" discovery has the burden of showing that the request is "relevant to the claim or defense of any party" and that the request satisfies the standards of proportionality. As before, ultimate admissibility is not an appropriate objection to a discovery request so long as the proportionality standard and other requirements are met.

The 2011 amendments establish three tiers of standard discovery in Rule 26(c). Ideally, rules of procedure should be crafted to promote predictability for litigants. Rules should limit the need to resort to judicial oversight. Tiered standard discovery seeks to achieve these ends. The "one-size-fits-all" system is rejected. Tiered discovery signals to judges, attorneys, and parties the amount of discovery which by rule is deemed proportional for cases with different amounts in controversy.

Any system of rules which permits the facts and circumstances of each case to inform procedure cannot eliminate uncertainty. Ultimately, the trial court has broad discretion in deciding whether a discovery request is proportional. The proportionality standards in subpart (b)(2) and the discovery tiers in subpart (c) mitigate uncertainty by guiding that discretion. The proper application of the proportionality standards will be defined over time by trial and appellate courts.

Standard and extraordinary discovery. Rule 26(c). As a counterpart to requiring more detailed disclosures under Rule 26(a), the 2011 amendments place new limitations on additional discovery the parties may conduct. Because the committee expects the enhanced disclosure requirements will automatically permit each party to learn the witnesses and evidence the opposing side will offer in its case-in-chief, additional discovery should serve the more limited function of permitting parties to find witnesses, documents, and other evidentiary materials that are harmful, rather than helpful, to the opponent's case.

Rule 26(c) provides for three separate "tiers" of limited, "standard" discovery that are presumed to be proportional to the amount and issues in controversy in the action, and that the parties may conduct as a matter of right. An aggregation of all damages sought by all parties in an action dictates the applicable tier of standard discovery, whether such damages are sought by way of a complaint, counterclaim, or otherwise. The tiers of standard discovery are set forth in a chart that is embedded in the body of the rule itself. "Tier 1" describes a minimal amount of standard discovery that is presumed proportional for cases involving damages of $50,000 or less. "Tier 2" sets forth larger limits on standard discovery that are applicable in cases involving damages above $50,000 but less than $300,000. Finally, "Tier 3" prescribes still greater standard discovery for actions involving damages in excess of $300,000. Deposition hours are charged to a side for the time spent asking questions of the witness. In a particular deposition, one side may use two hours while the other side uses only 30 minutes. The tiers also provide presumptive limitations on the time within which standard discovery should be completed, which limitations similarly increase with the amount of damages at issue. ~~Discovery motions~~ An expedited statement of discovery issues will not toll the period. Parties are expected to be reasonable and accomplish as much as they can during standard discovery. ~~The motions~~ An expedited statement of discovery issues may result in additional discovery and sanctions at the expense of a party who unreasonably fails to respond or otherwise frustrates discovery. After the expiration of the applicable time limitation, a case is presumed to be ready for trial. Actions for non-monetary relief, such as injunctive relief, are subject to the standard discovery limitations of Tier 2, absent an accompanying monetary claim of $300,000 or more, in which case Tier 3 applies. The committee determined these standard discovery limitations based on the expectation that for the majority of cases filed in the Utah State Courts, the magnitude of available discovery and applicable time parameters available under the three-tiered system should be sufficient for cases involving the respective amounts of damages.

Despite the expectation that standard discovery according to the applicable tier should be adequate in the typical case, the 2011 amendments contemplate there will be

some cases for which standard discovery is not sufficient or appropriate. In such cases, parties may conduct additional discovery that is shown to be consistent with the principle of proportionality. There are two ways to obtain such additional discovery. The first is by stipulation. If the parties can agree additional discovery is necessary, they may stipulate to as much additional discovery as they desire, provided they stipulate the additional discovery is proportional to what is at stake in the litigation and counsel for each party certifies that the party has reviewed and approved a budget for additional discovery. Such a stipulation should be filed before the close of the standard discovery time limit, but only after reaching the limits for that type of standard discovery available under the rule. If these conditions are met, the Court will not second-guess the parties and their counsel and must approve the stipulation.

The second method to obtain additional discovery is by ~~motion~~ an expedited statement of discovery issues. The committee recognizes there will be some cases in which additional discovery is appropriate, but the parties cannot agree to the scope of such additional discovery. These may include, among other categories, large and factually complex cases and cases in which there is a significant disparity in the parties' access to information, such that one party legitimately has a greater need than the other party for additional discovery in order to prepare properly for trial. To prevent a party from taking advantage of this situation, the 2011 amendments allow any party to ~~move the Court for~~ request additional discovery. As with stipulations for extraordinary discovery, a party ~~filing a motion for~~ requesting extraordinary discovery should do so before the close of the standard discovery time limit, but only after the moving party has reached the limits for that type of standard discovery available to it under the rule. By taking advantage of this discovery, counsel should be better equipped to articulate for the court what additional discovery is needed and why. The requesting party ~~making such a motion~~ must demonstrate that the additional discovery is proportional and certify that the party has reviewed and approved a discovery budget. The burden to show the need for additional discovery, and to demonstrate relevance and proportionality, always falls on the party seeking additional discovery. However, cases in which such additional discovery is appropriate do exist, and it is important for courts to recognize they can and

should permit additional discovery in appropriate cases, commensurate with the complexity and magnitude of the dispute.

Protective order language moved to Rule 37. The 2011 amendments delete in its entirety the prior language of Rule 26(c) governing motions for protective orders. The substance of that language is now found in Rule 37. The committee determined it was preferable to cover ~~motions~~ requests for an order to compel, ~~motions for~~ a protective orders, and ~~motions for discovery~~ sanctions in a single rule, rather than two separate rules. ~~Accordingly, Rule 37 now governs these motions and orders.~~

Consequences of failure to disclose. Rule 26(d). If a party fails to disclose or to supplement timely its discovery responses, that party cannot use the undisclosed witness, document, or material at any hearing or trial, absent proof that non-disclosure was harmless or justified by good cause. More complete disclosures increase the likelihood that the case will be resolved justly, speedily, and inexpensively. Not being able to use evidence that a party fails properly to disclose provides a powerful incentive to make complete disclosures. This is true only if trial courts hold parties to this standard. Accordingly, although a trial court retains discretion to determine how properly to address this issue in a given case, the usual and expected result should be exclusion of the evidence.

Legislative Note

Rule 45. Subpoena.

(a) **Form; issuance.**

(a)(1) Every subpoena shall:

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

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

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

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

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

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

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

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

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

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

(b) **Service; fees; prior notice.**

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

(b)(2) If the subpoena commands a person's appearance, the party or attorney responsible for issuing the subpoena shall tender with the subpoena the fees for one day's attendance and the mileage allowed by law. When the subpoena is issued on behalf of the United States, or this state, or any officer or agency of either, fees and mileage need not be tendered.

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

(c) **Appearance; resident; non-resident.**

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

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

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

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

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

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

(d) **Payment of production or copying costs.** The party or attorney responsible for issuing the subpoena shall pay the reasonable cost of producing or copying documents,

electronically stored information or tangible things. Upon the request of any other party and the payment of reasonable costs, the party or attorney responsible for issuing the subpoena shall provide to the requesting party copies of all documents, electronically stored information or tangible things obtained in response to the subpoena or shall make the tangible things available for inspection.

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

(e)(1) The party or attorney responsible for issuing a subpoena shall take reasonable steps to avoid imposing an undue burden or expense on the person subject to the subpoena. The court shall enforce this duty and impose upon the party or attorney in breach of this duty an appropriate sanction, which may include, but is not limited to, lost earnings and a reasonable attorney fee.

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

(e)(3) The person subject to the subpoena or a non-party affected by the subpoena may object under Rule 37 if the subpoena:

(e)(3)(A) fails to allow reasonable time for compliance;

(e)(3)(B) requires a resident of this state to appear at other than a trial or hearing in a county in which the person does not reside, is not employed, or does not transact business in person;

(e)(3)(C) requires a non-resident of this state to appear at other than a trial or hearing in a county other than the county in which the person was served;

(e)(3)(D) requires the person to disclose privileged or other protected matter and no exception or waiver applies;

(e)(3)(E) requires the person to disclose a trade secret or other confidential research, development, or commercial information;

(e)(3)(F) subjects the person to an undue burden or cost;

(e)(3)(G) requires the person to produce electronically stored information in a form or forms to which the person objects;

(e)(3)(H) requires the person to provide electronically stored information from sources that the person identifies as not reasonably accessible because of undue burden or cost; or

(e)(3)(I) requires the person to disclose an unretained expert's opinion or information not describing specific events or occurrences in dispute and resulting from the expert's study that was not made at the request of a party.

(e)(4)(A) If the person subject to the subpoena or a non-party affected by the subpoena objects, the objection must be made before the date for compliance.

(e)(4)(B) The objection shall be stated in a concise, non-conclusory manner.

(e)(4)(C) If the objection is that the information commanded by the subpoena is privileged or protected and no exception or waiver applies, or requires the person to disclose a trade secret or other confidential research, development, or commercial information, the objection shall sufficiently describe the nature of the documents, communications, or things not produced to enable the party or attorney responsible for issuing the subpoena to contest the objection.

(e)(4)(D) If the objection is that the electronically stored information is from sources that are not reasonably accessible because of undue burden or cost, the person from whom discovery is sought must show that the information sought is not reasonably accessible because of undue burden or cost.

(e)(4)(E) The objection shall be served on the party or attorney responsible for issuing the subpoena. The party or attorney responsible for issuing the subpoena shall serve a copy of the objection on the other parties.

(e)(5) If objection is made, or if a party files a motion for a protective order, the party or attorney responsible for issuing the subpoena is not entitled to compliance but may ~~move for~~ request an order to compel compliance under Rule 37. The motion shall be served on the other parties and on the person subject to the subpoena. An order compelling compliance shall protect the person subject to or affected by the subpoena from significant expense or harm. The court may

quash or modify the subpoena. If the party or attorney responsible for issuing the subpoena shows a substantial need for the information that cannot be met without undue hardship, the court may order compliance upon specified conditions.

(f) **Duties in responding to subpoena.**

(f)(1) A person commanded to copy and mail or deliver documents or electronically stored information or to produce documents, electronically stored information or tangible things shall serve on the party or attorney responsible for issuing the subpoena a declaration under penalty of law stating in substance:

(f)(1)(A) that the declarant has knowledge of the facts contained in the declaration;

(f)(1)(B) that the documents, electronically stored information or tangible things copied or produced are a full and complete response to the subpoena;

(f)(1)(C) that the documents, electronically stored information or tangible things are the originals or that a copy is a true copy of the original; and

(f)(1)(D) the reasonable cost of copying or producing the documents, electronically stored information or tangible things.

(f)(2) A person commanded to copy and mail or deliver documents or electronically stored information or to produce documents, electronically stored information or tangible things shall copy or produce them as they are kept in the usual course of business or shall organize and label them to correspond with the categories in the subpoena.

(f)(3) If a subpoena does not specify the form or forms for producing electronically stored information, a person responding to a subpoena must produce the information in the form or forms in which the person ordinarily maintains it or in a form or forms that are reasonably usable.

(f)(4) If the information produced in response to a subpoena is subject to a claim of privilege or of protection as trial-preparation material, the person making the claim may notify any party who received the information of the claim and the basis for it. After being notified, the party must promptly return, sequester, or destroy the

specified information and any copies of it and may not use or disclose the information until the claim is resolved. A receiving party may promptly present the information to the court under seal for a determination of the claim. If the receiving party disclosed the information before being notified, it must take reasonable steps to retrieve the information. The person who produced the information must preserve the information until the claim is resolved.

(g) **Contempt.** Failure by any person without adequate excuse to obey a subpoena served upon that person is punishable as contempt of court.

(h) **Procedure when witness evades service or fails to attend.** If a witness evades service of a subpoena or fails to attend after service of a subpoena, the court may issue a warrant to the sheriff of the county to arrest the witness and bring the witness before the court.

(i) **Procedure when witness is confined in jail.** If the witness is a prisoner, a party may move for an order to examine the witness in the jail or prison or to produce the witness before the court or officer for the purpose of being orally examined.

(j) **Subpoena unnecessary.** A person present in court or before a judicial officer may be required to testify in the same manner as if the person were in attendance upon a subpoena.

Advisory Committee Notes

To quash a subpoena, a party or a non-party affected by the subpoena should file a ~~motion~~ request for a protective order under the expedited statement of discovery procedures in Rule ~~26~~ 37~~and a non-party affected by the subpoena should file an objection under this rule~~. The non-party might be the person subpoenaed or might be someone who has an interest in the testimony of the subpoenaed person or in the documents or other materials ordered to be produced.

Tab 5

Rule 56. Summary judgment.

(a) **Motion for summary judgment or partial summary judgment.** A party may move for summary judgment, identifying each claim or defense—or the part of each claim or defense—on which summary judgment is sought. The court ~~shall~~ must grant summary judgment if the moving party shows that there is no genuine dispute as to any material fact and the moving party is entitled to judgment as a matter of law. The court should state on the record the reasons for granting or denying the motion. The motion and memoranda must follow Rule 7 as supplemented below.

(a)(1) Instead of a statement of the facts under Rule 7(c)(2), a motion for summary judgment must contain a statement of material facts claimed not to be genuinely disputed. Each fact must be separately stated in numbered paragraphs and supported by citing to materials in the record under paragraph (c)(1) of this rule.

(a)(2) Instead of a statement of the facts under Rule 7(d)(2), a memorandum opposing the motion must include a verbatim restatement of each of the moving party's facts that is disputed with an explanation of the grounds for the dispute supported by citing to materials in the record under paragraph (c)(1) of this rule. The memorandum may contain a separate statement of additional facts in dispute, which must be separately stated in numbered paragraphs and similarly supported.

(a)(3) The motion and the memorandum opposing the motion may contain a concise statement of facts and allegations for the limited purpose of providing background and context for the case, dispute, and motion. The statement of facts or allegations may cite supporting evidence.

(a)(4) Each fact set forth in the motion or in the memorandum opposing the motion that is not disputed is deemed admitted for the purposes of the motion.

(b) **Time to file a motion.** A party may file a motion for summary judgment at any time until 30 days after the close of all discovery.

(c) **Procedures.**

(c)(1) **Supporting factual positions**. A party asserting that a fact cannot be genuinely disputed or is genuinely disputed must support the assertion by:

(c)(1)(A) citing to particular parts of materials in the record, including depositions, documents, electronically stored information, affidavits or declarations, stipulations (including those made for purposes of the motion only), admissions, interrogatory answers, or other materials; or

(c)(1)(B) showing that the materials cited do not establish the absence or presence of a genuine dispute, or that an adverse party cannot produce admissible evidence to support the fact.

(c)(2) **Objection that a fact is not supported by admissible evidence**. A party may object that the material cited to support or dispute a fact cannot be presented in a form that would be admissible in evidence.

(c)(3) **Materials not cited**. The court need consider only the cited materials, but it may consider other materials in the record.

(c)(4) **Affidavits or declarations**. An affidavit or declaration used to support or oppose a motion must be made on personal knowledge, must set out facts that would be admissible in evidence, and must show that the affiant or declarant is competent to testify on the matters stated.

(d) **When facts are unavailable to the non-moving party.** If a non-moving party shows by affidavit or declaration that, for specified reasons, it cannot present facts essential to justify its opposition, the court may:

(d)(1) defer considering the motion or deny it;

(d)(2) allow time to obtain affidavits or declarations or to take discovery; or

(d)(3) issue any other appropriate order.

(e) **Failing to properly support or address a fact.** If a party fails to properly support an assertion of fact or fails to properly address another party's assertion of fact as required by Rule 56(c), the court may:

(e)(1) give an opportunity to properly support or address the fact;

(e)(2) consider the fact undisputed for purposes of the motion;

(e)(3) grant summary judgment if the motion and supporting materials—including the facts considered undisputed—show that the moving party is entitled to it; or

(e)(4) issue any other appropriate order.

(f) **Judgment independent of the motion.** After giving notice and a reasonable time to respond, the court may:

(f)(1) grant summary judgment for a non-moving party;

(f)(2) grant the motion on grounds not raised by a party; or

(f)(3) consider summary judgment on its own after identifying for the parties material facts that may not be genuinely in dispute.

(g) **Failing to grant all the requested relief.** If the court does not grant all the relief requested by the motion, it may enter an order stating any material fact—including an item of damages or other relief—that is not genuinely in dispute and treating the fact as established in the case.

(h) **Affidavit or declaration submitted in bad faith.** If satisfied that an affidavit or declaration under this rule is submitted in bad faith or solely for delay, the court—after notice and a reasonable time to respond—may order the submitting party to pay the other party the reasonable expenses, including attorney's fees, it incurred as a result. ~~An~~ The court may also hold an offending party or attorney ~~may also be held~~ in contempt or ~~subjected to~~ order other appropriate sanctions.

Advisor Committee Notes

The objective of the 2014 amendment is to adopt the style of Federal Rule of Civil Procedure 56 without changing the substantive Utah law. The 2014 amendment also moves to this rule the special briefing requirements of motions for summary judgment formerly found in Rule 7.

Nothing in these changes should be interpreted as changing the line of Utah cases that the party with the burden of proof on an issue must meet its initial burden to present materials in the record establishing that no genuine issue of material fact exists and that the party with the burden of proof is entitled to judgment as a matter of law. Only then must the party without the burden of proof demonstrate that there is a genuine dispute as to a material fact. Orvis v. Johnson, 2008 UT 2, Harline v. Barker, 912 P.2d 433 (Utah 1996), K & T, Inc. v. Koroulis, 888 P.2d 623, (Utah 1994)—contrary to the holding in Celotex Corp. v. Catrett, 477 U.S. 317, 106 S. Ct. 2548, 91 L. Ed. 2d 265 (1986).

Tab 6

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To: Civil Procedures Committee
From: Tim Shea
Date: April 21, 2014
Re: Process for motion for order to show cause

The Board of District Court Judges has proposed a rule within the code of judicial administration, Rule 10-1-602, to govern the process for orders to show cause. The draft rule has been published for comment. As with the expedited process for discovery motions, the Board's and the Judicial Council's intent is to have this process ultimately included within the rules of civil procedure and repeal the provision from the code of judicial administration.

I have used as the baseline the rule proposed by the Board. I recommend several amendments to simplify the text. Whatever draft is approved by the committee would of course be entirely new text.

Rule 7A. Motion for order to show cause.

(a) **Motion.** ~~A party who seeks to~~ To enforce an order or a judgment ~~of a court against an opposing~~ a party may file an ex parte motion for an order to show cause following the procedures of this rule. ~~The motion must be filed with the same court and in the same case in which that order or judgment was entered. The motion shall be made only on an ex parte basis, and the procedures of Rule 7 of the Utah Rules of Civil Procedure shall not apply.~~

(b) **Affidavit.** The motion ~~for an order to show cause~~ must be accompanied by at least one ~~supporting~~ affidavit or declaration under Utah Code Section 78B-5-705~~. Each supporting affidavit must be~~ based on personal knowledge and ~~must~~ setting forth admissible facts and not mere conclusions sufficient to show cause to believe a party has violated an order or judgment. At least one ~~supporting~~ affidavit or declaration must state the title and date of entry of the order or judgment which the moving party seeks to enforce.

(c) **Order to show cause.** The motion ~~for an order to show cause~~ must be accompanied by ~~the~~ a proposed order to show cause, which ~~shall~~ must:

(c)(1) state the title and date of entry of the order or judgment which the moving party seeks to enforce;

(c)(2) ~~specify~~ state the relief sought by the moving party;

(c)(3) state whether the moving party has requested that the ~~opposing~~ non-moving party be held in contempt and, if ~~such a request has been made~~ so, ~~recite~~ state that the ~~sanctions~~ penalties for contempt may include, but are not limited to, a fine of up to $1000 ~~or less~~ and ~~a~~ confinement in jail ~~commitment of~~ for up to 30 days ~~or less~~.

(c)(4) order the ~~opposing~~ non-moving party to ~~make a first appearance in court~~ appear personally or through counsel at a ~~specific~~ stated date, time and place ~~and, then and there,~~ to explain ~~why or~~ whether the ~~opposing~~ non-moving party acted or failed to act in compliance with ~~such~~ the order or judgment;

~~(c)(4) order the opposing party to appear personally or through legal counsel at the first appearance;~~

(c)(5) state that no written response ~~to the motion and order to show cause~~ is required;

(c)(6) state that the ~~first appearance shall not be the~~ hearing is not an evidentiary hearing, but ~~shall be~~ is for the purpose of determining:

(c)(6)(A) whether the ~~opposing~~ non-moving party ~~contests~~ denies the ~~allegations~~ claims made by the moving party;

(c)(6)(B) whether an evidentiary hearing is ~~necessary~~ needed;

(c)(6)(C) the ~~specific~~ issues ~~to be resolved through an evidentiary hearing~~ on which evidence may be submitted; and

(c)(6)(D) the estimated length of ~~any such~~ an evidentiary hearing.

(d) **Service.** If the court ~~grants the motion and issues~~ enters an order to show cause, the moving party must have the order, the motion and all ~~supporting~~ affidavits and declarations served upon the ~~opposing~~ non-moving party~~. Service shall be made~~ in the manner ~~prescribed~~ for service of a summons and complaint at least 7 days before the hearing.~~, unless the moving party shows~~ For good cause ~~for~~ the court may order that service ~~to~~ be made ~~by mailing or delivery to the opposing party's~~ on the non-moving party's counsel of record ~~and the court so orders~~. The ~~date of the opposing party's first appearance on the order to show cause may not be sooner than five days after service thereof, unless~~ court may order less than 7 days notice of the hearing if:

(d)(1) the motion requests an earlier ~~first appearance~~ date; and

(d)(2) it clearly appears from specific facts shown by the declarations or affidavits that immediate and irreparable ~~injury, loss, or damage~~ harm will result to the moving party if the ~~first appearance~~ hearing is not held sooner ~~than five days after service of the order to show cause; and~~

~~(d)(3) the court agrees to an earlier first appearance date~~.

(e) **First ~~appearance~~ hearing.** ~~The opposing party's first appearance on the order to show cause, at the date, time and place stated therein, shall not be the evidentiary hearing.~~ At the ~~first appearance~~ hearing, the court ~~shall~~ will determine:

(e)(1) whether the ~~opposing~~ non-moving party ~~contests~~ denies the ~~allegations~~ claims made by the moving party;

(e)(2) whether an evidentiary hearing is ~~necessary~~ needed;

(e)(3) the ~~specific~~ issues ~~to be resolved through an evidentiary hearing~~ on which evidence may be submitted; and

(e)(4) the estimated length of ~~any such~~ an evidentiary hearing.

The court may enter an order regarding any claim that the non-moving party does not deny. The court may order the parties to file memoranda on legal issues before the evidentiary hearing. Memoranda must follow the requirements of Rule 7. ~~If the opposing party does not contest the allegations made by the moving party, the court may proceed at the first appearance as the circumstances require.~~

(f) **Evidentiary hearing.** ~~At the evidentiary hearing on a contested order to show cause, the moving party shall~~ The moving party bears the burden of proof on all ~~allegations which are~~ claims made in ~~support of~~ the ~~order~~ motion.

(g) **Limitations.** An motion for an order to show cause may not be ~~requested in order to obtain an original order or judgment; for example, an order to show cause may not be~~ used to obtain a temporary restraining order or ~~to establish~~ a temporary order~~s~~ in a divorce case or any other original order or judgment. ~~This rule shall apply only in civil actions, and shall not be applied to orders to show cause in criminal actions.~~ This rule does not apply to an order to show cause issued by ~~a~~ the court on its own initiative. This rule does not apply to a motion for an order to show cause from a court commissioner.

Tab 7

Rule 14. Settlement offers.

(a) Unless otherwise specified, an offer made under this rule is an offer to resolve all claims in the action between the parties to the date of the offer, including costs, interest and, if attorney fees are permitted by law or contract, attorney fees.

(b) If the adjusted award is not more favorable than the offer, the offeror is not liable for costs, prejudgment interest or attorney fees incurred by the offeree after the offer, and the offeree must pay the offeror's costs incurred after the offer. The court may suspend the application of this rule to prevent manifest injustice.

(c) An offer made under this rule must:

(c)(1) be in writing;

(c)(2) expressly refer to this rule;

(c)(3) be made after the judgment and before the notice of appeal;

(c)(4) remain open for at least 10 days; and

(c)(5) be served on the offeree under Rule 5 of the Rules of Civil Procedure.

(d) Acceptance of the offer must be in writing and served on the offeror under Rule 5 of the Rules of Civil Procedure. Upon acceptance, either party may file the offer and acceptance with a proposed judgment.

(e) "Adjusted award" means the amount awarded by the judge after trial de novo and, unless excluded by the offer, the offeree's costs and interest incurred before the offer, and, if attorney fees are permitted by law or contract and not excluded by the offer, the offeree's reasonable attorney fees incurred before the offer. If the offeree's attorney fees are subject to a contingency fee agreement, the court shall determine a reasonable attorney fee for the period preceding the offer.

(f) The offeror’s costs includes the filing fee and other costs for an appeal to a trial de novo.

Tab 8

Rule 68. Settlement offers.

(a) Unless otherwise specified, an offer made under this rule is an offer to resolve all claims in the action between the parties to the date of the offer, including costs, interest and, if attorney fees are permitted by law or contract, attorney fees.

(b) If the adjusted award is not more favorable than the offer, the offeror is not liable for costs, prejudgment interest or attorney fees incurred by the offeree after the offer, and the offeree shall pay theofferor's costs incurred after the offer. The court may suspend the application of this rule to prevent manifest injustice.

(c) An offer made under this rule shall:

(c)(1) be in writing;

(c)(2) expressly refer to this rule;

(c)(3) be made more than 10 days before trial;

(c)(4) remain open for at least 10 days; and

(c)(5) be served on the offeree under Rule 5.

Acceptance of the offer shall be in writing and served on the offeror under Rule 5. Upon acceptance, either party may file the offer and acceptance with a proposed judgment under Rule 58A.

(d) "Adjusted award" means the amount awarded by the finder of fact and, unless excluded by the offer, the offeree's costs and interest incurred before the offer, and, if attorney fees are permitted by law or contract and not excluded by the offer, the offeree's reasonable attorney fees incurred before the offer. If the offeree's attorney fees are subject to a contingency fee agreement, the court shall determine a reasonable attorney fee for the period preceding the offer.

Advisory Committee Note

For a cause of action for personal injury or wrongful death arising on or after July 1, 2014, a party may not be awarded prejudgment interest on special damages in a Tier 1 case if:

(1) the party does not make a settlement offer;

(2) the settlement offer is tendered less than 60 days before trial; or

(3) the settlement offer is greater than or equal to one and one-third times the judgment awarded at trial.

See Section 78B-5-824. Although the statute does not directly affect settlement offers made under Rule 68, parties should be aware of the limitation a settlement offer has on prejudgment interest in some cases.

PREJUDGMENT INTEREST REVISIONS

2014 GENERAL SESSION

STATE OF UTAH

Chief Sponsor: Stephen H. Urquhart

House Sponsor: Mike K. McKell

LONG TITLE

General Description:

This bill requires that in order for a plaintiff to receive prejudgment interest, the plaintiff shall have tendered an offer of settlement.

Highlighted Provisions:

This bill:

- requires a plaintiff to have tendered an offer of settlement before claiming prejudgment interest on a verdict;
- provides that prejudgment interest is only calculated from the date of a qualifying offer;
- sets limits on the award of prejudgment interest based upon the offer of settlement amount vis-a-vis the verdict amount;
- sets the percentage rate the court shall use to calculate prejudgment interest at two percentage points above the prime rate; and
- sets 5% and 10% as the limits on the rates the court uses.

Money Appropriated in this Bill:

None

Other Special Clauses:

None

Utah Code Sections Affected:

AMENDS:

78B-5-824, as last amended by Laws of Utah 2009, Chapter 276

Be it enacted by the Legislature of the state of Utah:

Section 1. Section **78B-5-824** is amended to read:

78B-5-824. Personal injury judgments -- Interest authorized.

(1) In all actions brought to recover damages for personal injuries sustained by any person, caused by the negligence or willful intent of another person, corporation, association, or partnership, and whether the injury was fatal or otherwise, the plaintiff, including a counterclaim plaintiff or a crossclaim plaintiff, in the complaint may claim interest on special damages actually incurred [~~from the date of the occurrence of the act giving rise to the cause of action~~].

[~~(2) It is the duty of the court, in entering judgment for plaintiff in that action, to add to the amount of special damages actually incurred that are assessed by the verdict of the jury, or found by the court, prejudgment interest on that amount calculated at 7.5% simple interest per annum, from the date of the occurrence of the act giving rise to the cause of action to the date of entering the judgment, and to include it in that judgment.~~]

(2) A plaintiff, including a counterclaim plaintiff or a crossclaim plaintiff, seeking to recover damages for personal injury or wrongful death may claim prejudgment interest if for cases classified as tier 1, pursuant to the Utah Rules of Civil Procedure, the plaintiff tenders:

(a) a written settlement demand, including settlement demands under Utah Rule of Civil Procedure 68; and

(b) the amount of the demand does not exceed 1-1/3 of the amount of the judgment eventually awarded at trial.

(3) For purposes of this statute, the determining offer and counteroffer shall be the last written offer or counteroffer timely tendered by a party, provided that the offer or counteroffer is tendered at least 60 days before trial.

(4) Cases classified as tier 2 or tier 3 by the Utah Rules of Civil Procedure or submitted to binding arbitration in accordance with Sections 18-1-4 and 31A-22-321 are not subject to the requirements outlined in Subsection (2).

(5) (a) Any prejudgment interest shall be computed as simple interest. For first special

damages incurred during the year of the occurrence of the act giving rise to the cause of action, any prejudgment interest shall be computed as simple interest accruing from the date on which the first date special damages were actually incurred.

(b) For special damages incurred in successive years, prejudgment interest shall be calculated from January 1 of each year special damages were incurred. The court shall calculate prejudgment interest using a per annum rate, which is two percentage points above the prime rate, as published by the Board of Governors of the Federal Reserve System on the first business day in January of the calendar year in which the judgment is entered. The prejudgment interest rate applied to all cases may not be lower than 5% or higher than 10%.

[~~(3)~~] (6) As used in this section, "special damages actually incurred" does not include damages for future medical expenses, loss of future wages, or loss of future earning capacity.

(7) This section applies to any cause of action arising on or after July 1, 2014.