

# PROPOSED RULES GOVERNING CIVIL DISCOVERY

by

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

### Background

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

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

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

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

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

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

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

### **Proportionality Is the Key Principle Underlying the Proposed Discovery Rules**

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

Proportionality will govern the scope of discovery under the proposed rules. Simply stated, it means that the cost of discovery should be proportional to what is at stake in the litigation. The concept of proportionality is not new. It has existed since 1987 (not as “proportionality” *per se*) in Rule 26(b)(3) (“The frequency or extent of the use of the discovery methods ... shall be limited by the court if it determines that: ... (C) the discovery is unduly burdensome or expensive, taking into account the needs of the case, the amount in controversy, limitations on the parties’ resources, and the importance of the issues at stake in the litigation.”) But proportionality has been largely overlooked by all of us who have operated for decades under the principle that a party who has relevant information must produce it. Under the proposed rules, proportionality will become the controlling factor for all discovery.

Proportionality exists if the following standards are met:

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

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

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

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

## **Disclosures**

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

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

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

## **Standard Discovery**

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

Standard discovery is limited. Each party may take up to 16 hours of depositions, with the proviso that a deposition of a party may not exceed seven hours and a deposition of any other witness may not exceed four hours. The number of interrogatories is limited to 15, and requests for production, and requests for admission are also limited to 25 each.

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

## **Extraordinary Discovery**

The committee recognizes that there will be some cases for which standard discovery is not sufficient or appropriate. For those cases, the proposed rules provide two avenues to obtain additional discovery. The first is by stipulation. The parties may stipulate to as much additional

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

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

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

### **Expert Discovery**

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

### **Disclosure and Discovery Flowsheet**

The following chart demonstrates how disclosure and discovery will proceed under the proposed rules.

## Disclosure and Discovery under Proposed Rules

