

Agenda

Advisory Committee on Rules of Civil Procedure

February 24, 2010
4:00 to 6:00 p.m.

Administrative Office of the Courts
Scott M. Matheson Courthouse
450 South State Street
Education Room, Suite N31

Approval of minutes	Tab 1	Fran Wikstrom
Simplified Civil Procedures	Tab 2	Fran Wikstrom

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

Meeting Schedule

March 24, 2010
April 28, 2010
May 26, 2010
June 23, 2010
September 22, 2010
October 27, 2010
November 17, 2010

Tab 1

MINUTES

UTAH SUPREME COURT ADVISORY COMMITTEE ON THE RULES OF CIVIL PROCEDURE

Wednesday, January 27, 2010
Administrative Office of the Courts

Francis M. Wikstrom, Presiding

PRESENT: Francis M. Wikstrom, Trystan B. Smith, Barbara L. Townsend, Terrie T. McIntosh, Lori Woffinden, Steven Marsden, Janet B. Smith, Honorable David O. Neuffer, James T. Blanch, Thomas R. Lee, Lincoln L. Davies, W. Cullen Battle

TELEPHONE: Honorable Lyle R. Anderson, Honorable Derrek P. Pullan, Leslie W. Slaugh

EXCUSED: Honorable Anthony B. Quinn, Francis J. Carney, Jonathan O. Hafen

STAFF: Timothy M. Shea, Sammi V. Anderson

I. INTRODUCTIONS.

Pursuant to Utah Supreme Court Rule 11-101(4), the following Committee Members formally introduced themselves: Francis M. Wikstrom, Trystan B. Smith, Terrie T. McIntosh, Janet B. Smith, Barbara L. Townsend, W. Cullen Battle, Thomas Lee, James T. Blanch, Lori Woffinden, Honorable Lyle R. Anderson, Leslie W. Slaugh, Steven Marsden, Honorable Derrek P. Pullan and Lincoln L. Davies.

II. APPROVAL OF MINUTES.

Mr. Wikstrom called the meeting to order at 4:00 p.m., and entertained comments from the committee concerning the November 18, 2009 minutes. No comments were made and Mr. Wikstrom asked for a motion that the minutes be approved. The motion was duly made and seconded, and unanimously approved.

III. RULES 64D AND 64E. DEADLINE FOR OBJECTION TO WRITS.

Prior versions of the Rules contained a deadline by which a hearing was required after a judgment debtor filed an objection to a writ. Mr. Shea suggested adding to Rules 64D (Writ of Garnishment) and 64E (Writ of Execution) a deadline requiring a hearing within 14 days. The motion was duly made, seconded, and unanimously approved.

IV. RULE 108. OBJECTION TO COMMISSIONER'S RECOMMENDATION.

Mr. Shea explained that the proposed rules originated with the commissioners of the Second District Court and that the Judicial Council has now suggested it be considered as a rule of civil procedure. Mr. Shea led the discussion. Judge Neuffer pointed out that the procedure to object to a commissioner's recommendation must require the objector to do some work and to identify the specific basis for the objection. Otherwise, every party would object every time and it would be difficult for the trial court to ascertain the grounds for the challenge. Mr. Lee and other Committee members expressed concern that if a party requests an evidentiary hearing, one should be held and it should be mandatory. Ms. Townsend, a former family law practitioner, noted that proffers, as opposed to evidentiary hearings, are necessary as a function of limited judicial resources. If hearings are permitted, all parties will request them. Ms. Townsend explained that proffers are generally used in temporary order situations, such as temporary custody or support orders. Full blown evidentiary hearings for these matters are impractical.

Ms. Townsend recommended that the Committee invite family law practitioners that frequently face these issues to review the proposed amendments and to provide some practical feedback. Mr. Wikstrom and the Committee agreed that practitioner feedback would be useful. Mr. Shea agreed to make the edits discussed by the Committee and to circulate the potential amendments among the interested parties.

V. RULE 58(b). SATISFACTION OF JUDGMENT.

Mr. Shea led a discussion regarding changes to the rule. The amendment was intended to clarify the issue of ownership of the judgment, including that if the owner is not the original judgment creditor, proof of ownership must be filed. Mr. Shea's changes are based on the Committee's discussion at the November 18, 2009 meeting. The Committee discussed additional changes and again expressed concern regarding the "reasonable time" language. The Committee decided to eliminate the "reasonable time" language. A motion to approve Rule 58B as amended was seconded, and the motion carried. The proposal will be published for comment.

VI. SIMPLIFIED RULES OF CIVIL PROCEDURE.

Rule 1. Mr. Lee opined that the supremacy clause language ("All laws in conflict with these rules are of no force or effect.") in Rule 1, lines 8-9 (para. B), should be removed. The Committee agreed. That sentence to be removed.

Rule 3. Mr. Lee pointed out that rules of civil procedure cannot confer jurisdiction, and neither can filing a complaint. The Committee agreed. Changes to be made. Mr. Wikstrom noted that the big change in Rule 3 is the elimination of the 10 day summons.

Rule 4. Mr. Lee noted the absence of language in (c)(2) noting that judgment by default can be entered if complaint not answered in writing. The Committee agreed language to this effect should be included in the Summons. Ms. Smith raised questions regarding the "suitable age and discretion" language and what constitutes effective service thereunder. The Committee discussed the requirements that must be met to effect service if person refuses to accept service

and further discussed what persons can be served to effect service. With regard to service on a minor, the Committee decided to retain the provision permitting serving the person with whom the minor resides if the parents cannot be found within the state. Mr. Lee proposed changes to language addressing service on corporation. Judge Pullan asked if LLC's will be served in the same manner as corporations and, if so, whether language to that effect should be included. Mr. Lee pointed out that (d)(1)(E) addressed "unincorporated associations...subject to suit under a common name..." The Committee discussed whether to specifically include LLC's, LC's, LLP's, etc, to make it more express than "unincorporated association." Mr. Slauch noted the new changes in Federal Rules do not address this issue.

Rule 8. Mr. Wikstrom led the discussion regarding more particularized fact pleading and the compromise language settled upon at the last meeting. Mr. Lee pointed out the problems with getting too close to old, technical code pleading requirements, and that specific times, places, people and events may not always be material to the action. The Committee renewed the concern that a cottage industry in motions to dismiss not be encouraged. Ms. Smith suggested that the language in the rule be illustrative, rather than mandatory. The Committee discussed the alternative of solving the specificity problem with the disclosures, rather than the pleading requirements. Judge Pullan noted that if the material facts come out early through disclosures, perhaps changes to the pleading requirements are less germane. Mr. Wikstrom proposed changes based upon this discussion and the Committee approved. Mr. Lee offered to draft some language for the Advisory Committee Note.

Rule 16. The Committee discussed whether parties would be mandated to attend pre-trial conferences. Judge Neuffer suggested leaving it to the Court's discretion whether to require parties to attend. Mr. Shea indicated that Rule 16 is intended to apply to conferences generally, not to any one type specifically.

Rule 26. The Committee discussed several items regarding Rule 26. These items included: the standard governing the relevance of information to be disclosed under the initial disclosures and subsequent discovery, issues that could arise where a party knows the witnesses they will call but do not have access to those witnesses, the provision that deals with statements or admissions regarding subject matter of the action, proportionality and how it impacts the disclosures and additional discovery, the factors to be considered in reaching a conclusion as to what additional discovery is warranted under a proportionality analysis, protective orders and cost-shifting provisions. Judge Pullan agreed to draft an advisory note on the relevance standard. Mr. Shea indicated he would make the changes discussed and circulate the revisions in advance of the next meeting.

Rule 35. Mr. Wikstrom led a brief discussion regarding physical examinations. The Committee determined that if the examiner is going to testify, the examiner will have to be disclosed under the expert disclosure requirements.

VII. ADJOURNMENT.

The meeting adjourned at 6:00 p.m. The next meeting will be held at 4:00 p.m. on Wednesday, February 24, 2010, at the Administrative Office of the Courts.

Tab 2

1 **Rule 1. General provisions.**

2 (a) Scope of rules. These rules ~~shall~~ govern the procedure in the courts of the state
3 of Utah in all actions, ~~suits, and proceedings~~ of a civil nature, whether cognizable at law
4 or in equity, and in all ~~special~~ statutory proceedings, except as governed by other rules
5 promulgated by this court or enacted by the Legislature and except as stated in Rule 81.
6 They shall be liberally construed and applied to ~~secure~~ achieve the just, speedy, and
7 inexpensive determination of every action.

8 ~~(b) Effective date. These rules shall take effect on January 1, 1950; and thereafter all~~
9 ~~laws in conflict therewith shall be of no further force or effect. They~~ These rules govern
10 all ~~proceedings in~~ actions brought after they take effect and ~~also~~ all further proceedings
11 in actions then pending, ~~except to the extent that if,~~ in the opinion of the court, ~~their~~
12 ~~application applying a rule~~ in ~~a particular an~~ action pending when the rules takes effect
13 would not be feasible or would work injustice, ~~in which event~~ the former procedure
14 applies.

15 Advisory Committee Notes

16

1 **Rule 3. Commencement of action.**

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

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

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

18 Advisory Committee Notes

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

28 ~~Paragraph (a). This paragraph eliminates the requirement that a copy of the~~
29 ~~complaint be deposited with the clerk for the defendant whose address is unknown.~~
30 ~~Paragraph (b) of the former rule, which permitted the plaintiff to deposit copies of the~~
31 ~~complaint with the clerk for defendants not otherwise served with a copy at the time of~~

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

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

1 **Rule 4. Process.**

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

4 (b)(i) ~~Time of sService. In an action commenced under Rule 3(a)(1), the~~ The
5 summons ~~together with and~~ a copy of the complaint shall be served no later than 120
6 days after ~~the filing of~~ the complaint is filed unless the court allows a longer period of
7 time for good cause ~~shown~~. If the summons and complaint are not timely served, the
8 action shall be dismissed, without prejudice on application of any party or upon the
9 court's own initiative.

10 (b)(ii) In any action ~~brought~~ against two or more defendants, ~~on which if~~ service has
11 been timely ~~obtained~~ made upon one of them,

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

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

14 (c) Contents of summons.

15 (c)(1) The summons shall contain the name of the court, the address of the court,
16 the names of the parties to the action, and the county in which it is brought. It shall be
17 directed to the defendant, state the name, address and telephone number of the
18 plaintiff's attorney, if any, and otherwise the plaintiff's address and telephone number. It
19 shall state the time within which the defendant ~~is required to~~ must answer the complaint
20 in writing, and shall notify the defendant that ~~in case of failure to do so,~~ judgment by
21 default will be ~~rendered~~ entered against the defendant for failure to answer the
22 complaint in writing. It shall state either that the complaint is on file with the court or that
23 ~~the complaint will be filed with the court within ten days of service.~~

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

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

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

33 (d)(1) Personal service. The summons and complaint may be served in any state or
34 judicial district of the United States by the sheriff or constable or by the deputy of either,
35 by a United States Marshal or by the marshal's deputy, or by ~~any other~~ person 18 years
36 of age or older at the time of service and not a party to the action or a party's attorney. ~~If~~
37 ~~the person to be served refuses to accept a copy of the process, service shall be~~
38 ~~sufficient if the person serving the same shall state the name of the process and offer to~~
39 ~~deliver a copy thereof.~~ Personal service shall be made as follows:

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

47 (d)(1)(B) Upon ~~an infant (being a person under 14 years)~~ a minor, by delivering a
48 copy of the summons and ~~the~~ complaint to the ~~infant~~ minor and ~~also~~ to the ~~infant's~~
49 ~~father, mother~~ minor's parent or guardian or, if none can be found within the state, then
50 to any person having the care and control of the ~~infant~~ minor, or with whom the ~~infant~~
51 ~~minor~~ resides, or in whose service the infant is employed;

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

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

62 person's designee ~~or to the guardian or conservator of the individual to be served if one~~
63 ~~has been appointed, who shall, in any case, promptly deliver the process to the~~
64 ~~individual served;~~

65 (d)(1)(E) Upon ~~any~~ corporation not ~~herein~~-otherwise provided for, upon a partnership
66 or upon an unincorporated association or business entity which is subject to suit under a
67 common name, by delivering a copy of the summons and ~~the~~-complaint to an officer, a
68 managing ~~or agent,~~ general agent, or other agent authorized by appointment or by law
69 to receive service of process and, if ~~the agent is one authorized by statute to receive~~
70 ~~service and the statute so requires,~~ required by law by also mailing a copy of the
71 summons and the complaint to the ~~defendant~~ entity and to any other person required by
72 statute to be served. If no such officer or agent can be found within the state, and the
73 defendant has, ~~or advertises or holds itself out as having,~~ an office or place of business
74 ~~within the state or elsewhere, or does business within this state or elsewhere,~~ then upon
75 the person in charge of such office or place of business;

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

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

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

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

85 (d)(1)(J) Upon the state of Utah, ~~in such cases as by law are authorized to be~~
86 ~~brought against the state,~~ by delivering a copy of the summons and ~~the~~-complaint to the
87 attorney general and any other person or agency required by statute to be served; and

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

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

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

96 (d)(2)(A) The summons and complaint may be served upon an individual other than
97 one covered by paragraphs (d)(1)(B) or (d)(1)(C) by mail or commercial courier service
98 ~~in any state or judicial district of the United States provided if~~ the defendant signs a
99 document indicating receipt.

100 (d)(2)(B) The summons and complaint may be served upon an entity covered by
101 paragraphs (d)(1)(E) through (d)(1)(I) by mail or commercial courier service ~~in any state~~
102 ~~or judicial district of the United States provided if the~~ defendant's agent ~~authorized by~~
103 ~~appointment or by law to receive service of process~~ signs a document indicating receipt.

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

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

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

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

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

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

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

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

124 (d)(4) Other service.

125 (d)(4)(A) ~~Where the identity or whereabouts of~~ If the person to be served ~~are~~
126 ~~unknown and cannot be ascertained cannot be served~~ through reasonable diligence,
127 ~~where or if~~ service upon all of the ~~individual~~ parties is impracticable under the
128 circumstances, ~~or where there exists good cause to believe that the person to be served~~
129 ~~is avoiding service of process~~, the party seeking service ~~of process~~ may file a motion
130 supported by affidavit requesting an order allowing service by ~~publication or by some~~
131 other means. The supporting affidavit shall set forth the efforts made to identify, locate
132 or serve the party ~~to be served~~, or the circumstances which make it impracticable to
133 serve all of the ~~individual~~ parties.

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

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

147 (e) Proof of Service.

148 (e)(1) ~~If service is not waived, the~~ The person effecting service shall file proof with
149 the court. The proof of service must state the date, place, and manner of service. Proof
150 of service made pursuant to paragraph (d)(2) shall include a receipt signed by the
151 defendant or defendant's agent ~~authorized by appointment or by law to receive service~~
152 ~~of process~~. If service is made by a person other than by an attorney, the sheriff or

153 constable, or by the deputy of either, by a United States Marshal or by the marshal's
154 deputy, the proof of service shall be made by affidavit.

155 (e)(2) Proof of service in a foreign country shall be made as ~~prescribed~~ provided in
156 these rules ~~for service within this state~~, or by the law of the foreign country, or by order
157 of the court. ~~When service is made pursuant to paragraph (d)(3)(C), proof~~ Proof of
158 service under paragraph (d)(3)(B)(iii) shall include a receipt signed by the addressee or
159 other evidence of delivery to the addressee satisfactory to the court.

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

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

163 (f)(1) A plaintiff may request a ~~defendant subject to service under paragraph (d)~~
164 person other than a minor or a protected person to waive service of ~~a the~~ summons and
165 complaint. The request to waive service and the summons and complaint shall be
166 mailed, e-mailed or delivered to the person upon whom service is authorized under
167 paragraph (d). ~~It shall include a copy of the complaint, The request~~ shall allow the
168 defendant at least ~~20-21~~ 20-21 days from the date on which the request is sent to return the
169 waiver, or ~~30-28~~ 30-28 days if addressed to a defendant person outside of the United States,
170 and shall be substantially in the form of the Notice of Lawsuit and Request for Waiver of
171 Service of Summons set forth in the Appendix of Forms attached to these rules.

172 (f)(2) A defendant who timely returns a waiver ~~is not required to~~ must respond to the
173 complaint ~~until 45~~ within 42 days after the date on which the request for waiver of
174 service was mailed, e-mailed or delivered ~~to the defendant~~, or ~~60-56~~ 60-56 days after that date
175 if addressed to a defendant person outside of the United States.

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

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

182 Advisory Committee Notes

183

1 **Rule 8. General rules of pleadings.**

2 (a) Claims for relief. ~~A pleading which sets forth a claim for relief, whether an An~~
3 original claim, counterclaim, cross-claim or third-party claim, shall contain ~~(1)~~ a simple,
4 short and plain:

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

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

7 ~~(2) a (a)(3) demand for judgment for ~~the specified~~ relief ~~to which he deems himself~~~~
8 ~~entitled~~. Relief in the alternative or of several different types may be demanded.

9 (b) Defenses; form of denials. A party shall state in simple, short and plain terms his
10 any defenses to each claim asserted and shall admit or deny the ~~averments upon which~~
11 ~~the adverse party relies~~ statements in the claim. ~~If he is A party~~ without knowledge or
12 information sufficient to form a belief ~~as to about~~ the truth of ~~an averment, he a~~
13 statement shall so state, and this has the effect of a denial. Denials shall fairly meet the
14 substance of the ~~averments statements~~ denied. ~~When a pleader intends in good faith to~~
15 ~~deny only a part or a qualification of an averment, he shall specify so much of it as is~~
16 ~~true and material and shall deny only the remainder. Unless the pleader intends in good~~
17 ~~faith to controvert all the averments of the preceding pleading, he may make his denials~~
18 ~~as specific denials of designated averments or paragraphs, or he may generally deny all~~
19 ~~the averments except such designated averments or paragraphs as he expressly~~
20 ~~admits; but, when he does so intend to controvert all its averments, he may do so by~~
21 ~~general denial subject to the obligations set forth in Rule 11. A party may deny all of the~~
22 statements in a claim by general denial. A party may specify the statement or part of a
23 statement that is admitted and deny the rest. A party may specify the statement or part
24 of a statement that is denied and admit the rest.

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

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

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

29 (c)(3) a demand for relief.

30 ~~In pleading to a preceding pleading, a A party shall set forth affirmatively in a~~
31 responsive pleading accord and satisfaction, arbitration and award, assumption of risk,

32 contributory negligence, discharge in bankruptcy, duress, estoppel, failure of
33 consideration, fraud, illegality, injury by fellow servant, laches, license, payment,
34 release, res judicata, statute of frauds, statute of limitations, waiver, and any other
35 matter constituting an avoidance or affirmative defense. ~~When-If~~ a party ~~has~~ mistakenly
36 ~~designated-designates~~ a defense as a counterclaim or a counterclaim as a defense, the
37 court, on terms, ~~if justice so requires, shall~~ may treat the pleadings as if ~~there-the~~
38 ~~defense or counterclaim~~ had been ~~a properly-designation~~ designated.

39 (d) Effect of failure to deny. ~~Averments-Statements~~ in a pleading to which a
40 responsive pleading is required, other than ~~those-as-to-statements-of~~ the amount of
41 damage, are admitted ~~when-if~~ not denied in the responsive pleading. ~~Averments~~
42 ~~Statements~~ in a pleading to which no responsive pleading is required or permitted ~~shall~~
43 ~~be-taken-as-are-deemed~~ denied or avoided.

44 (e) ~~Pleading to be concise and direct; c~~Consistency.

45 ~~(e)(1) Each averment of a pleading shall be simple, concise, and direct. No technical~~
46 ~~forms of pleading or motions are required.~~

47 ~~(e)(2) A party may set forth two or more statements of state~~ a claim or defense
48 alternately or hypothetically, either in one count or defense or in separate counts or
49 defenses. ~~When two or more-If~~ statements are made in the alternative and one of them
50 ~~if made independently would be~~ is sufficient, the pleading is not made insufficient by the
51 insufficiency of ~~one or more of the-an~~ alternative statements. A party may ~~also-state as~~
52 ~~many-separate-legal and equitable~~ claims or legal and equitable defenses ~~as he has~~
53 regardless of consistency ~~and whether based on legal or on equitable grounds or on~~
54 ~~both. All statements shall be made subject to the obligations set forth in Rule 11.~~

55 (f) Construction of pleadings. All pleadings shall be ~~so~~-construed ~~as~~-to do substantial
56 justice.

57 Advisory Committee Notes

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

Rule 16. Pretrial conferences, ~~scheduling, and management conferences.~~

(a) Pretrial conferences. ~~In any action, the~~ The court, in its discretion or upon motion ~~of a party,~~ may direct the attorneys ~~for and, when appropriate,~~ the parties ~~and any unrepresented parties~~ to appear ~~before it for a conference or conferences before trial~~ for such purposes as:

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

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

(a)(3) discouraging wasteful pretrial activities;

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

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

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

~~(b) Scheduling and management conference and orders. In any action, in addition to any other pretrial conferences that may be scheduled, the court, upon its own motion or upon the motion of a party, may conduct a scheduling and management conference. The attorneys and unrepresented parties shall appear at the scheduling and management conference in person or by remote electronic means. Regardless whether a scheduling and management conference is held, on motion of a party the court shall enter a scheduling order that governs the time:~~

~~(b)(1)-(a)(7) establishing the time~~ to join other parties and to amend the pleadings;

~~(b)(2)-(a)(8) establishing the time~~ to file motions; ~~and~~

~~(b)(3)-(a)(9) establishing the time~~ to complete discovery.;

~~The scheduling order may also include:~~

~~(b)(4) modifications of the times for disclosures under Rules 26(a) and 26(e)(1) and of the extent of discovery to be permitted~~ (a)(10) extending fact discovery;

~~(b)(5)-(a)(11) the date or dates for conferences before trial, a pretrial and final pretrial conferences;~~ and trial; ~~and~~

~~(b)(6)-(a)(12) provisions for preservation, disclosure or discovery of electronically stored information;~~

~~(b)(7)-(a)(13) any agreements the parties reach for asserting claims of privilege or of protection as trial-preparation material after production; and~~

32 ~~(b)(8)-(a)(14)~~ any other appropriate matters ~~appropriate in the circumstances of the~~
33 ~~case.~~

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

38 (c) Final pretrial ~~or settlement~~ conferences. ~~In any action where a final pretrial~~
39 ~~conference has been ordered, it~~ The court, in its discretion or upon motion, may direct
40 the attorneys and, when appropriate, the parties to appear for such purposes as
41 settlement and trial management. The conference shall be held as close to the time of
42 trial as reasonable under the circumstances. ~~The conference shall be attended by at~~
43 ~~least one of the attorneys who will conduct the trial for each of the parties, and the~~
44 ~~attorneys attending the pretrial, unless waived by the court, shall have available, either~~
45 ~~in person or by telephone, the appropriate parties who have authority to make binding~~
46 ~~decisions regarding settlement.~~

47 (d) Sanctions. If a party or a party's attorney fails to obey ~~a scheduling or pretrial an~~
48 order, if ~~no appearance is made on behalf of~~ a party ~~at a scheduling or pretrial or a~~
49 ~~party's attorney fails to attend a~~ conference, if a party or a party's attorney is
50 substantially unprepared to participate in ~~the a~~ conference, or if a party or a party's
51 attorney fails to participate in good faith, the court, upon motion or its own initiative, may
52 take any action authorized by Rule 37(b)(2).

53 Advisory Committee Notes

54

1 **Rule 26. General provisions governing disclosure and discovery.**

2 (a) ~~Required disclosures; Discovery methods. This rule applies unless changed or~~
3 ~~supplemented by a rule governing disclosure and discovery in a practice area.~~

4 (a)(1) Initial disclosures. Except in cases exempt under ~~subdivision paragraph~~ (a)(2)
5 ~~and except as otherwise stipulated or directed by order~~, a party shall, without awaiting
6 ~~for~~ a discovery request, provide to other parties:

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

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

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

13 (a)(1)(B) a copy of, ~~or a description by category and location of~~, all discoverable
14 documents, data compilations, electronically stored information, and tangible things in
15 the possession, ~~custody~~, or control of the party ~~supporting its claims or defenses, unless~~
16 ~~solely for impeachment that the party may offer in its case in chief;~~

17 (a)(1)(C) a computation of any ~~category of~~ damages claimed ~~by the disclosing party,~~
18 ~~making available for inspection and copying as under Rule 34 and a copy of~~ all
19 discoverable documents or ~~other~~ evidentiary material on which such computation is
20 based, including materials ~~bearing on about~~ the nature and extent of injuries suffered;
21 ~~and~~

22 (a)(1)(D) ~~for inspection and copying as under Rule 34 a copy of~~ any insurance
23 agreement under which any person ~~carrying on an insurance business~~ may be liable to
24 satisfy part or all of a judgment ~~which may be entered in the case~~ or to indemnify or
25 reimburse for payments made to satisfy the judgment; ~~and~~

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

27 ~~Unless otherwise stipulated by the parties or ordered by the court, the (a)(1)(G) The~~
28 disclosures required by ~~subdivision paragraph~~ (a)(1) shall be made:

29 ~~(a)(1)(G)(i) by the plaintiff~~ within 14 days after ~~service of~~ the ~~meeting of the parties~~
30 ~~under subdivision (f) first answer to the complaint; and~~

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

33 ~~Unless otherwise stipulated by the parties or ordered by the court, a party joined~~
34 ~~after the meeting of the parties shall make these disclosures within 30 days after being~~
35 ~~served. A party shall make initial disclosures based on the information then reasonably~~
36 ~~available and is not excused from making disclosures because the party has not fully~~
37 ~~completed the investigation of the case or because the party challenges the sufficiency~~
38 ~~of another party's disclosures or because another party has not made disclosures.~~

39 (a)(2) Exemptions.

40 (a)(2)(A) The requirements of subdivision paragraph (a)(1) ~~and subdivision (f)~~ do not
41 apply to actions:

42 ~~(a)(2)(A)(i) based on contract in which the amount demanded in the pleadings is~~
43 ~~\$20,000 or less;~~

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

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

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

48 ~~(a)(2)(A)(v)~~ (a)(2)(A)(iv) for water rights general adjudication under Title 73, Chapter
49 4; ~~and~~

50 ~~(a)(2)(A)(vi) in which any party not admitted to practice law in Utah is not~~
51 ~~represented by counsel.~~

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

54 (a)(3) Disclosure of expert testimony.

55 (a)(3)(A) A party shall, disclose without waiting for a discovery request, provide to
56 other parties the identity of any person who may be used at trial to present evidence
57 under Rules 702, 703, or 705 of the Utah Rules of Evidence, and a copy of

58 ~~(a)(3)(B) Unless otherwise stipulated by the parties or ordered by the court, this~~
59 ~~disclosure shall, with respect to a witness who is retained or specially employed to~~
60 ~~provide expert testimony in the case or whose duties as an employee of the party~~
61 ~~regularly involve giving expert testimony, be accompanied by a written report prepared~~

62 and signed by the witness or party. An expert witness may not testify in a party's case-
63 in-chief concerning any matter not contained in the report. The report shall contain the
64 subject matter on which the expert is expected to testify; the substance of the facts and
65 opinions to which the expert is expected to testify; a summary of the grounds for each
66 opinion; the qualifications of the witness, including a list of all publications authored by
67 the witness within the preceding ten years; the compensation to be paid for the study
68 and testimony; and a listing of any other cases in which the witness has testified as an
69 expert at trial or by deposition within the preceding four years.

70 ~~(a)(3)(C) Unless otherwise stipulated by the parties or ordered by the court, the~~
71 ~~disclosures (a)(3)(B) Disclosure~~ required by ~~subdivision paragraph~~ (a)(3) shall be made
72 within ~~30-28~~ days after the expiration of fact discovery as provided by ~~subdivision~~
73 ~~paragraph~~ (d) or, if the evidence is intended solely to contradict ~~or rebut~~ evidence ~~on the~~
74 ~~same subject matter identified by another party~~ under paragraph ~~(3)(B)~~ (a)(3)(A), within
75 ~~60-56~~ days after ~~the~~ disclosure ~~made~~ by the other party.

76 (a)(4) Pretrial disclosures. A party shall, without waiting for a discovery request,
77 provide to other parties ~~the following information regarding the evidence that it may~~
78 ~~present at trial other than solely for impeachment:~~

79 (a)(4)(A) the name and, if not previously provided, the address and telephone
80 number of each witness, unless solely for impeachment, separately identifying
81 witnesses the party ~~expects to present will call~~ and witnesses the party may call ~~if the~~
82 ~~need arises;~~

83 (a)(4)(B) ~~the designation the name~~ of witnesses whose testimony is expected to be
84 presented by ~~means transcript~~ of a deposition and, ~~if not taken stenographically,~~ a copy
85 ~~of the~~ transcript ~~of the pertinent portions of the deposition testimony;~~ and

86 (a)(4)(C) ~~an appropriate~~ identification of each ~~document or other~~ exhibit, including
87 summaries of other evidence, unless solely for impeachment, separately identifying
88 those which the party ~~expects to will~~ offer and those which the party may offer ~~if the~~
89 ~~need arises.~~

90 ~~Unless otherwise stipulated by the parties or ordered by the court, the disclosures~~
91 ~~(A)(4)(D) Disclosure~~ required by ~~subdivision paragraph~~ (a)(4) shall be made at least ~~30~~
92 ~~28~~ days before trial. ~~Within 14 days thereafter, unless a different time is specified by the~~

93 ~~court. At least 14 days before trial, a party may shall~~ serve and file ~~a list disclosing (i)~~
94 ~~any objections and grounds for the objections~~ to the use ~~under Rule 32(a)~~ of a
95 deposition ~~designated by another party under subparagraph (B) and (ii) any objection,~~
96 ~~together with the grounds therefor, that may be made~~ to the admissibility of ~~materials~~
97 ~~identified under subparagraph (C) exhibits. Objections not so disclosed, other Other~~
98 than objections under Rules 402 and 403 of the Utah Rules of Evidence, ~~shall be~~
99 ~~deemed objections not listed are~~ waived unless excused by the court for good cause
100 ~~shown.~~

101 ~~(a)(5) Form of disclosures. Unless otherwise stipulated by the parties or ordered by~~
102 ~~the court, all disclosures under paragraphs (1), (3) and (4) shall be made in writing,~~
103 ~~signed and served.~~

104 ~~(a)(6) Methods to discover additional matter. Parties may obtain discovery by one or~~
105 ~~more of the following methods: depositions upon oral examination or written questions;~~
106 ~~written interrogatories; production of documents or things or permission to enter upon~~
107 ~~land or other property, for inspection and other purposes; physical and mental~~
108 ~~examinations; and requests for admission.~~

109 ~~(b) Discovery scope and limits. Unless otherwise limited by order of the court in~~
110 ~~accordance with these rules, the scope of discovery is as follows:~~

111 ~~(b)(1) In general. Parties may obtain discovery regarding discover~~ any matter, not
112 privileged, which is relevant to ~~the subject matter involved in the pending action,~~
113 ~~whether it relates to~~ the claim or defense of ~~the any~~ party ~~seeking discovery or to the~~
114 ~~claim or defense of any other party,~~ including the existence, description, nature,
115 custody, condition, and location of any books, documents, or other tangible things and
116 the identity and location of persons having knowledge of any discoverable matter. ~~It is~~
117 ~~not ground for objection that the information sought will be inadmissible at the trial if the~~
118 ~~information sought appears reasonably calculated to lead to the discovery of admissible~~
119 ~~evidence. For good cause, the court may order broader discovery.~~

120 ~~(b)(2) A party need not provide discovery of electronically stored information from~~
121 sources that the party identifies as not reasonably accessible because of undue burden
122 or cost. The party shall expressly make any claim that the source is not reasonably
123 accessible, describing the source, the nature and extent of the burden, the nature of the

124 information not provided, and any other information that will enable other parties to
125 ~~assess-evaluate~~ the claim. On motion to compel discovery or for a protective order, the
126 party from whom discovery is sought must show that the information is not reasonably
127 accessible because of undue burden or cost. If that showing is made, the court may
128 order discovery from such sources if the requesting party shows good cause,
129 ~~considering the limitations of subsection (b)(3)~~. The court may specify conditions for the
130 discovery.

131 ~~(b)(3) Limitations. The frequency or extent of use of the discovery methods set forth~~
132 ~~in Subdivision (a)(6) shall be limited by the court if it determines that:~~

133 ~~(b)(3)(A) the discovery sought is unreasonably cumulative or duplicative, or is~~
134 ~~obtainable from some other source that is more convenient, less burdensome, or less~~
135 ~~expensive;~~

136 ~~(b)(3)(B) the party seeking discovery has had ample opportunity by discovery in the~~
137 ~~action to obtain the information sought; or~~

138 ~~(b)(3)(C) the discovery is unduly burdensome or expensive, taking into account the~~
139 ~~needs of the case, the amount in controversy, limitations on the parties' resources, and~~
140 ~~the importance of the issues at stake in the litigation. The court may act upon its own~~
141 ~~initiative after reasonable notice or pursuant to a motion under Subdivision (c).~~

142 ~~(b)(4) (b)(3) Trial preparation: Materials. Subject to the provisions of Subdivision~~
143 ~~(b)(5) of this rule, a A party may obtain discovery of otherwise discoverable documents~~
144 ~~and tangible things otherwise discoverable under Subdivision (b)(1) of this rule and~~
145 ~~prepared in anticipation of litigation or for trial by or for another party or by or for that~~
146 ~~other party's representative (including the party's attorney, consultant, surety,~~
147 ~~indemnitor, insurer, or agent) only upon a showing that the party seeking discovery has~~
148 ~~substantial need of the materials in the preparation of to prepare the case and that the~~
149 ~~party is unable without undue hardship to obtain the-substantially equivalent of the~~
150 ~~materials by other means. In ordering discovery of such materials when the required~~
151 ~~showing has been made, the court shall protect against disclosure of the mental~~
152 ~~impressions, conclusions, opinions, or legal theories of an attorney or other~~
153 ~~representative of a party concerning the litigation.~~

154 (b)(4) Statement previously made about the action. A party may obtain without the
155 required showing a statement concerning the action or its subject matter previously
156 made by that party. Upon request, a person not a party may obtain without the required
157 showing a statement concerning about the action or its subject matter previously made
158 by that person. If the request is refused, the person may move for a court order. ~~The~~
159 ~~provisions of under~~ Rule 37(a)(4) ~~apply to the award of expenses incurred in relation to~~
160 ~~the motion. For purposes of this paragraph, a A~~ statement previously made is (A) a
161 written statement signed or ~~otherwise adopted or~~ approved by the person making it, or
162 (B) a ~~stenographic, mechanical, electrical, or other recording, or a transcription thereof,~~
163 ~~which is a substantially verbatim recital of an contemporaneously recorded~~ oral
164 statement by the person making it ~~and contemporaneously recorded~~ or a transcript
165 thereof.

166 ~~(b)(5) Trial preparation: Experts.~~

167 ~~(b)(5)(A) A party may depose any person who has been identified as an expert~~
168 ~~whose opinions may be presented at trial. If a report is required under subdivision~~
169 ~~(a)(3)(B), any deposition shall be conducted within 60 days after the report is provided.~~

170 ~~(b)(5)(B) A party may discover facts known or opinions held by an expert who has~~
171 ~~been retained or specially employed by another party in anticipation of litigation or~~
172 ~~preparation for trial and who is not expected to be called as a witness at trial, only as~~
173 ~~provided in Rule 35(b) or upon a showing of exceptional circumstances under which it is~~
174 ~~impracticable for the party seeking discovery to obtain facts or opinions on the same~~
175 ~~subject by other means.~~

176 ~~(b)(5)(C) Unless manifest injustice would result,~~

177 ~~(b)(5)(C)(i) The court shall require that the party seeking discovery pay the expert a~~
178 ~~reasonable fee for time spent in responding to discovery under Subdivision (b)(5) of this~~
179 ~~rule; and~~

180 ~~(b)(5)(C)(ii) With respect to discovery obtained under Subdivision (b)(5)(A) of this~~
181 ~~rule the court may require, and with respect to discovery obtained under Subdivision~~
182 ~~(b)(5)(B) of this rule the court shall require, the party seeking discovery to pay the other~~
183 ~~party a fair portion of the fees and expenses reasonably incurred by the latter party in~~
184 ~~obtaining facts and opinions from the expert.~~

185 ~~(b)(6)-(b)(5)~~ Claims of Privilege or Protection of Trial Preparation Materials.

186 ~~(b)(6)(A)-(b)(5)(A)~~ Information withheld. ~~When-If~~ a party withholds discoverable
187 information ~~otherwise discoverable under these rules~~ by claiming that it is privileged or
188 subject to protection as trial preparation material prepared in anticipation of litigation or
189 for trial, the party shall make the claim expressly and shall describe the nature of the
190 documents, communications, or things not produced ~~or disclosed~~ in a manner that,
191 without revealing the information itself ~~privileged or protected~~, will enable other parties
192 to ~~assess the applicability of the privilege or protection~~ evaluate the claim.

193 ~~(b)(6)(B)-(b)(5)(B)~~ Information produced. If a party produces information ~~is produced~~
194 ~~in discovery~~ that ~~is subject to a~~ the party ~~claims~~ of is ~~privileged~~ or ~~of protection as trial-~~
195 ~~preparation material prepared in anticipation of litigation or for trial~~, the producing party
196 ~~making the claim~~ may notify any receiving party ~~that received the information~~ of the
197 claim and the basis for it. After being notified, a receiving party must promptly return,
198 sequester, or destroy the specified information and any copies it has and may not use
199 or disclose the information until the claim is resolved. A receiving party may promptly
200 present the information to the court under seal for a determination of the claim. If the
201 receiving party disclosed the information before being notified, it must take reasonable
202 steps to retrieve it. The producing party must preserve the information until the claim is
203 resolved.

204 (c) Proportionality; Pprotective orders.

205 (c)(1) Discovery must be proportional to the case. The court may consider the
206 following factors:

207 (c)(1)(A) the amount in controversy;

208 (c)(1)(B) the complexity of the case;

209 (c)(1)(C) the importance of the issues;

210 (c)(1)(D) the importance of the information;

211 (c)(1)(E) the relevance of the information;

212 (c)(1)(F) the parties' relative access to the information;

213 (c)(1)(G) the discovery already had in the case;

214 (c)(1)(H) the expense of the discovery;

215 (c)(1)(I) the burden on the party requesting discovery;

216 (c)(1)(J) the burden on the party providing discovery;

217 (c)(1)(K) the needs of the case;

218 (c)(1)(L) whether the discovery limits allow a fair opportunity for discovery;

219 (c)(1)(M) whether the discovery is available from another source that is more
220 convenient, less burdensome, or less expensive;

221 (c)(1)(N) whether the discovery is cumulative of disclosures or other discovery; and

222 (c)(1)(O) any other factor identified by the court.

223 ~~Upon motion by a (c)(2) A party or by the person from whom discovery is sought,~~
224 ~~accompanied by~~ may move for an order of protection from discovery. The movant shall
225 attach to the motion a copy of the request for discovery or the response which is at
226 issue and a certification that the movant has in good faith conferred or attempted to
227 confer with other affected parties ~~in an effort~~ to resolve the dispute without court action,
228 ~~and for good cause shown, the~~ The court ~~in which the action is pending or alternatively,~~
229 ~~on matters relating to a deposition, the court in the district where the deposition is to be~~
230 ~~taken~~ may make any order ~~which justice requires~~ to protect a party or person from
231 discovery being conducted in bad faith or from annoyance, embarrassment, oppression,
232 or undue burden or expense, or to achieve proportionality, including one or more of the
233 following:

234 ~~(e)(1)-(c)(2)(A)~~ (c)(2)(A) that the discovery not be had;

235 ~~(e)(2)-(c)(2)(B)~~ (c)(2)(B) that the discovery may be had only on specified terms and
236 conditions, including a designation of the time or place;

237 (c)(2)(C) that a question about a statement or opinion of fact or the application of law
238 to fact not be answered until after designated discovery has been completed or until a
239 pretrial conference or other later time;

240 ~~(e)(3)-(c)(2)(D)~~ (c)(2)(D) that the discovery may be had only by a method of discovery other
241 than that selected by the party seeking discovery;

242 ~~(e)(4)-(c)(2)(E)~~ (c)(2)(E) that certain matters not be inquired into, or that the scope of the
243 discovery be limited to certain matters;

244 ~~(e)(5)-(c)(2)(F)~~ (c)(2)(F) that discovery be conducted with no one present except persons
245 designated by the court;

246 ~~(e)(6)-(c)(2)(G)~~ that a deposition after being sealed be opened only by order of the
247 court;

248 ~~(e)(7)-(c)(2)(H)~~ that a trade secret or other confidential research, development, or
249 commercial information not be disclosed or be disclosed only in a designated way;

250 ~~(e)(8)-(c)(2)(I)~~ that the parties simultaneously file specified documents or information
251 enclosed in sealed envelopes to be opened as directed by the court.

252 (c)(3) The court may allocate the costs, expenses and attorney fees of discovery to
253 achieve proportionality.

254 (c)(4) If the order terminates a deposition, it shall be resumed only upon the order of
255 the court in which the action is pending.

256 (c)(5) If the motion for a protective order is denied in whole or in part, the court may,
257 on such terms and conditions as are just, order that any party or person provide or
258 permit discovery. ~~The provisions of~~ Rule 37(a)(4) applyes to the award of expenses
259 incurred in relation to the motion.

260 (d) Sequence and timing of discovery.

261 (d)(1) Discovery shall be in two stages. Initial fact discovery shall be completed
262 within 150 days after the defendant's first disclosure is made and the parties shall follow
263 the limits established in Rules 30, 33, 34 and 36. Methods of discovery may be used in
264 any sequence and the fact that a party is conducting discovery shall not delay any other
265 party's discovery. Except for cases exempt under subdivision paragraph (a)(2), ~~except~~
266 ~~as authorized under these rules, or unless otherwise stipulated by the parties or ordered~~
267 ~~by the court,~~ a party may not seek discovery from any source before ~~the parties have~~
268 ~~met and conferred as required by subdivision (f).~~ Unless otherwise stipulated by the
269 ~~parties or ordered by the court, fact discovery shall be completed within 240 days after~~
270 ~~the first answer is filed. Unless the court upon motion, for the convenience of parties~~
271 ~~and witnesses and in the interests of justice, orders otherwise, methods of discovery~~
272 ~~may be used in any sequence and the fact that a party is conducting discovery, whether~~
273 ~~by deposition or otherwise, shall not operate to delay any other party's discovery that~~
274 party's initial disclosure obligations are satisfied.

275 (d)(2) To obtain discovery beyond the limits established by these rules, a party shall
276 file:

277 (d)(2)(A) before the close of the initial fact discovery, a stipulated notice of extended
278 discovery and a statement signed by the parties and lawyers that the additional
279 discovery is necessary and proportionate and that each party has reviewed and
280 approved a discovery budget; or

281 (d)(2)(B) before the close of the initial fact discovery and after reaching the limits of
282 initial discovery imposed by these rules, a motion for extended discovery and a
283 statement signed by the party and lawyer that the additional discovery is necessary and
284 proportionate and that the party has reviewed and approved a discovery budget.

285 (e) ~~Supplementation of responses. Standard for disclosure or response; disclosure~~
286 ~~or response by an organization; failure to disclose; initial and supplemental disclosures~~
287 ~~and responses. A party who has made a disclosure under subdivision (a) or responded~~
288 ~~to a request for discovery with a response is under a duty to supplement the disclosure~~
289 ~~or response to include information thereafter acquired if ordered by the court or in the~~
290 ~~following circumstances:~~

291 ~~(e)(1) A party is under a duty to supplement at appropriate intervals disclosures~~
292 ~~under subdivision (a) if the~~

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

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

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

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

306 (e)(5) If a party learns that in some material respect the information disclosed a
307 disclosure or response is incomplete or incorrect and if in some important way, the party

308 must timely provide the additional or corrective information if it has not otherwise been
309 made known to the other parties ~~during the discovery process or in writing. With respect~~
310 ~~to testimony of an expert from whom a report is required under subdivision (a)(3)(B) the~~
311 ~~duty extends both to information contained in the report and to information provided~~
312 ~~through a deposition of the expert. The supplemental disclosure or response must state~~
313 why the additional or correct information was not previously provided.

314 ~~(e)(2) A party is under a duty seasonably to amend a prior response to an~~
315 ~~interrogatory, request for production, or request for admission if the party learns that the~~
316 ~~response is in some material respect incomplete or incorrect and if the additional or~~
317 ~~corrective information has not otherwise been made known to the other parties during~~
318 ~~the discovery process or in writing.~~

319 ~~(f) Discovery and scheduling conference.~~

320 ~~The following applies to all cases not exempt under subdivision (a)(2), except as~~
321 ~~otherwise stipulated or directed by order.~~

322 ~~(f)(1) The parties shall, as soon as practicable after commencement of the action,~~
323 ~~meet in person or by telephone to discuss the nature and basis of their claims and~~
324 ~~defenses, to discuss the possibilities for settlement of the action, to make or arrange for~~
325 ~~the disclosures required by subdivision (a)(1), to discuss any issues relating to~~
326 ~~preserving discoverable information and to develop a stipulated discovery plan.~~
327 ~~Plaintiff's counsel shall schedule the meeting. The attorneys of record shall be present~~
328 ~~at the meeting and shall attempt in good faith to agree upon the discovery plan.~~

329 ~~(f)(2) The plan shall include:~~

330 ~~(f)(2)(A) what changes should be made in the timing, form, or requirement for~~
331 ~~disclosures under subdivision (a), including a statement as to when disclosures under~~
332 ~~subdivision (a)(1) were made or will be made;~~

333 ~~(f)(2)(B) the subjects on which discovery may be needed, when discovery should be~~
334 ~~completed, whether discovery should be conducted in phases and whether discovery~~
335 ~~should be limited to particular issues;~~

336 ~~(f)(2)(C) any issues relating to preservation, disclosure or discovery of electronically~~
337 ~~stored information, including the form or forms in which it should be produced;~~

338 ~~(f)(2)(D) any issues relating to claims of privilege or of protection as trial preparation~~
339 ~~material, including if the parties agree on a procedure to assert such claims after~~
340 ~~production whether to ask the court to include their agreement in an order;~~

341 ~~(f)(2)(E) what changes should be made in the limitations on discovery imposed~~
342 ~~under these rules, and what other limitations should be imposed;~~

343 ~~(f)(2)(F) the deadline for filing the description of the factual and legal basis for~~
344 ~~allocating fault to a non-party and the identity of the non-party; and~~

345 ~~(f)(2)(G) any other orders that should be entered by the court.~~

346 ~~(f)(3) Plaintiff's counsel shall submit to the court within 14 days after the meeting and~~
347 ~~in any event no more than 60 days after the first answer is filed a proposed form of~~
348 ~~order in conformity with the parties' stipulated discovery plan. The proposed form of~~
349 ~~order shall also include each of the subjects listed in Rule 16(b)(1)-(8), except that the~~
350 ~~date or dates for pretrial conferences, final pretrial conference and trial shall be~~
351 ~~scheduled with the court or may be deferred until the close of discovery. If the parties~~
352 ~~are unable to agree to the terms of a discovery plan or any part thereof, the plaintiff~~
353 ~~shall and any party may move the court for entry of a discovery order on any topic on~~
354 ~~which the parties are unable to agree. Unless otherwise ordered by the court, the~~
355 ~~presumptions established by these rules shall govern any subject not included within~~
356 ~~the parties' stipulated discovery plan.~~

357 ~~(f)(4) Any party may request a scheduling and management conference or order~~
358 ~~under Rule 16(b).~~

359 ~~(f)(5) A party joined after the meeting of the parties is bound by the stipulated~~
360 ~~discovery plan and discovery order, unless the court orders on stipulation or motion a~~
361 ~~modification of the discovery plan and order. The stipulation or motion shall be filed~~
362 ~~within a reasonable time after joinder.~~

363 ~~(g)-(f) Signing of discovery requests, responses, and objections. Every disclosure,~~
364 ~~request for discovery, or response to a request for discovery or and objection thereto~~
365 ~~made by a party to a request for discovery shall be in writing and signed by at least one~~
366 ~~attorney of record or by the party if the party is not represented, whose address shall be~~
367 ~~stated. The signature of the attorney or party constitutes is a certification that the person~~
368 ~~has read the request, response, or objection and that to the best of the person's~~

369 ~~knowledge, information, and belief formed after reasonable inquiry it is: (1) consistent~~
370 ~~with these rules and warranted by existing law or a good faith argument for the~~
371 ~~extension, modification, or reversal of existing law; (2) not interposed for any improper~~
372 ~~purpose, such as to harass or to cause unnecessary delay or needless increase in the~~
373 ~~cost of litigation; and (3) not unreasonable or unduly burdensome or expensive, given~~
374 ~~the needs of the case, the discovery already had in the case, the amount in controversy,~~
375 ~~and the importance of the issues at stake in the litigation, under Rule 11.~~ If a request, or
376 ~~response, or objection~~ is not signed, ~~it shall be stricken unless it is signed promptly after~~
377 ~~the omission is called to the attention of the party making the request, response, or~~
378 ~~objection, and a party shall not be obligated does not need~~ to take any action with
379 respect to it ~~until it is signed~~.

380 If a certification is made in violation of the rule, the court, upon motion or upon its
381 own initiative, ~~shall impose upon the person who made the certification, the party on~~
382 ~~whose behalf the request, response, or objection is made, or both, an appropriate~~
383 ~~sanction, which may include an order to pay the amount of the reasonable expenses~~
384 ~~incurred because of the violation, including a reasonable attorney fee may take any~~
385 ~~action authorized by Rule 11 or Rule 37(b)(2).~~

386 ~~(h)-(g)~~ Deposition ~~where in~~ action pending in another state. Any party to an action ~~or~~
387 ~~proceeding~~ in another state may take the deposition of any person within this state, in
388 the same manner and subject to the same conditions and limitations as if such action ~~or~~
389 ~~proceeding~~ were pending in this state, ~~provided that in order to obtain a subpoena the~~
390 ~~notice of the taking of such~~. Notice of the deposition shall be filed with the clerk of the
391 court of the county in which the person whose deposition is to be taken resides or is to
392 be served, ~~and provided further that all matters arising during the taking of such~~
393 ~~deposition which by the rules are~~. Matters required to be submitted to the court shall be
394 submitted to the court in the county where the deposition is being taken.

395 ~~(i)-(h)~~ Filing.

396 ~~(i)(1) Unless otherwise~~ Except as required by these rules or ordered by the court, a
397 party shall not file with the court a disclosures, ~~or a~~ requests for discovery ~~with the court~~
398 or a response to a request for discovery, but shall file only the ~~original~~ certificate of
399 service stating that the disclosures, ~~or~~ requests for discovery ~~have or response has~~

400 been served on the other parties and the date of service. ~~Unless otherwise ordered by~~
401 ~~the court, a party shall not file a response to a request for discovery with the court, but~~
402 ~~shall file only the original certificate of service stating that the response has been served~~
403 ~~on the other parties and the date of service. Except as provided in Rule 30(f)(1), Rule~~
404 ~~32 or unless otherwise ordered by the court, depositions shall not be filed with the court.~~

405 ~~(i)(2) A party filing a motion under subdivision (c) or a motion under Rule 37(a) shall~~
406 ~~attach to the motion a copy of the request for discovery or the response which is at~~
407 ~~issue.~~

408 Advisory Committee Notes

409

410 Suggested by the Institute. Statement of concept only.

411 Rule 26B. Disclosure and discovery in personal injury actions.

412 In actions claiming damages for personal injuries, the claimant shall disclose the
413 names and addresses of health care providers who have provided care for the condition
414 for which damages are sought within five years prior to the date of injury, and shall
415 produce all records from those providers or shall provide a waiver allowing the opposing
416 party to obtain those records, subject to automatic protective provisions that restrict the
417 use of the materials to the instant litigation. The defending party shall provide copies of
418 all applicable insurance policies, and any insurance claims documents that address the
419 facts of the case.

420

421 Rule 26C. Disclosure and discovery in employment actions.

422 In actions seeking damages for loss of employment, the claimant shall disclose the
423 names and addresses of employers for five years prior to the date of disclosure, all
424 documents reflective of claimant's efforts to find employment following departure from
425 the defending party's employ; and written waivers allowing the defending party to obtain
426 the claimant's personnel files from each such employer, subject to automatic protective
427 provisions that restrict the use of the materials to the instant litigation. The defending
428 party shall produce the claimant's personnel files and all applicable personnel policies
429 and employee handbooks;

430

431 [Rule 26D. Disclosure and discovery in nnnnn.](#)

432

433 [Advisory committee note: \(b\)\(1\) relevant means evidentiary relevance 401 and 402.](#)

434

Advisory Committee Note—URCP 26(b)

(b) *Scope of Discovery.* The 2010 amendment narrows the scope of discovery. A party is no longer entitled to discover information merely because it appears calculated to lead to the discovery of admissible evidence. Rather, parties may discover any matter, not privileged, which is relevant to the claim or defense of any party.

The term “relevant” under this rule has the same meaning as in Rule 401 of the Utah Rules of Evidence. Thus, information is discoverable if it has any tendency to make a fact of consequence to a claim or defense, more probable or less probable than it would be without the information.

Upon request, the Court may order discovery of any matter relevant to the “subject matter of the action.” This provision broadens the “relevant to a claim or defense” standard. For example, it would permit a party to discover information relevant to impeachment of a witness.

The Court has authority to limit discovery requests which are not proportional to the case, even though the request seeks information relevant to a claim or defense, or to the subject matter of the action. This limitation on discovery is patterned after the Rules of Evidence. Rule 403 permits the Court to exclude relevant evidence to prevent, among other things, undue delay, waste of time, or needless presentation of cumulative evidence. In the same way, the proportionality requirement in Subsection (c) may limit the scope of otherwise discoverable information.

Fran & Derek:

In reviewing the advisory committee note that Derek sent and re-reading our draft rule, I am concerned that despite our best efforts to date we may not have managed to limit discovery as well as we might. I would like to outline here some concerns about the current revision to the proposed Rule 26 and advisory note and to make a few suggestions on some changes.

First, I am not sure that the adoption of a Rule 401 standard of relevance gets us very far. Moore's Federal Practice indicates that "information sought for the purpose of impeachment is almost always relevant to the claims or defenses the parties have asserted," given that "the credibility of the testimony of live witnesses" is often "at the heart of the proof of a party's claim or defense." (Moore's s 26.41[9][a]) The Rule 401 standard is a very low bar; impeachment evidence seems to clearly meet that standard. (Id. (citing Weinstein's Federal Evidence))

In fact, there may be some instances in which the articulation of a Rule 401 standard is confusing and unhelpful. Our rule, for example, follows the federal rule in making "the identity and location" of witnesses and documents fair game in discovery. The mere existence or location of witnesses or documents would not be relevant under Rule 401, however, so the articulation of a Rule 401 standard may cause confusion. The longstanding provision allowing discovery of matter that is "reasonably calculated to lead to the discovery of admissible evidence" seems aimed at this kind of discovery. I understand and agree with the goal of limiting discovery, but deleting this provision

while keeping the notion of the discoverability of the identity and location of witnesses and documents may not help, since without this provision the court may think it lacks the capacity to curtail such discovery as unreasonable. I suggest that we put this provision back into the rule and rephrase it to allow discovery that is "reasonably calculated to lead to the discovery of admissible evidence and consistent with the standards of proportionality set forth herein."

As Derek and I discussed on the phone yesterday, I think it is really the "proportionality" provision of our draft rule that does most of the work, but I'm not sure that our draft does a good job of articulating that standard in a useful way. Maybe I'm missing something, but it seems to me that the proportionality standard belongs in sub-section (b) where we define the scope of discovery, not (or at least not just) in sub-section (c). I suggest that we provide a relevance standard incorporating the proportionality principles that applies both to discovery regarding claims and defenses and regarding the subject matter of the action. After all, I don't think the distinction between relevance to claims and defenses and relevance to subject matter has provided a very useful tool for limiting discovery in the federal courts, since most everything relevant to the subject matter can be deemed relevant to claims and defenses. Specifically, I suggest that we provide in (b) that "Parties may discover any matter, not privileged, which is relevant to the claim or defense of any party and consistent with the standards of proportionality set forth in sub-section (c)." (We could also add a similar standard for discovery relevant to subject matter on order of the court.)

As for the proportionality standard itself, it seems to me that we should give some thought to defining what we mean by "proportionality." The federal rule says that a court should limit the frequency or extent of discovery if it determines that (i) the discovery is unreasonably cumulative or duplicative or can be obtained from another source that is more convenient; (ii) the party seeking discovery has had ample opportunity to obtain the information by discovery in the action; or (iii) the burden or expense of the proposed discovery outweighs its likely benefit, considering the needs of the case, the amount in controversy, the parties' resources, the importance of the issues at stake in the action, and the importance of the discovery in resolving the issues." Our approach simply suggests that "proportionality" is the goal and lists a bunch of factors. There are some aspects of the federal standard that I prefer, including the fact that it is more specific in how the factors relate to each other.

I suggest that we take that aspect of the federal rule but retain some of the aspects of our rule that make it harder to abuse the discovery process. For example, I like the idea of using proportionality to define the scope of discovery instead of as a standard the judge can use to limit discovery. This would allow the recipient of a discovery request to object on proportionality grounds and force the issue that way. (The downside to that is the satellite litigation problem, but I tend to think that the benefits would outweigh the costs.) At the same time, I think we could soften some of the federal language to make it more useful for our purposes. Here is some proposed language:

"A discovery request may be objectionable under principles of proportionality if (i) the subject of the request is unreasonably cumulative or duplicative or can be obtained from another source that is more convenient; (ii) the party seeking discovery has had

sufficient opportunity to obtain the information by discovery in the action or otherwise; or (iii) the burden or expense of the proposed discovery outweighs its likely benefit, 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."

I have put the additional language I am proposing to add to the federal rule in bold. It seems to me that the other factors we had listed in the prior proposed version of the rule are encompassed by other factors and are unnecessary.

I hope that is of some help. Thanks for reading this far. Best,

Tom

1 **Rule 26A. Disclosure in domestic relations actions.**

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

53 Advisory Committee Notes

54 (c)(3): Refer to statutory definition

1 **Rule 29. Stipulations regarding disclosure and discovery procedure.**

2 ~~Unless the court orders otherwise, the~~ The parties may ~~by written stipulation~~

3 ~~(1) provide that depositions may be taken before any person, at any time or place,~~
4 ~~upon any notice, and in any manner and when so taken may be used like other~~
5 ~~depositions, and~~

6 ~~(2) modify the procedures provided by these rules for disclosure and discovery,~~
7 ~~except that stipulations~~ by filing, before the close of the initial fact discovery, a stipulated
8 notice of extended discovery and a statement signed by the parties and lawyers that the
9 additional discovery is necessary and proportionate and that each party has reviewed
10 and approved a discovery budget. Stipulations extending the time for or limits of
11 disclosure or discovery require ~~the court~~ approval ~~of the court~~ if ~~they~~ the extension
12 would interfere with ~~the time set a court order~~ for completion of discovery or with the
13 date of a hearing or trial.

14 Advisory Committee Notes

15

1 **Rule 30. Depositions ~~upon oral examination.~~**

2 (a) When depositions may be taken; ~~W~~when leave required; no deposition of expert
3 witnesses. A party may depose a party or witness by oral or written questioning. A
4 witness may not be deposed more than once. A person who may present evidence
5 under Rules 702, 703, or 705 of the Utah Rules of Evidence may not be deposed.

6 ~~(a)(1) A party may take the testimony of any person, including a party, by deposition~~
7 ~~upon oral examination without leave of court except as provided in paragraph (2). The~~
8 ~~attendance of witnesses may be compelled by subpoena as provided in Rule 45.~~

9 ~~(a)(2) A party must obtain leave of court, which shall be granted to the extent~~
10 ~~consistent with the principles stated in Rule 26(b)(3), if the person to be examined is~~
11 ~~confined in prison or if, without the written stipulation of the parties:~~

12 ~~(a)(2)(A) a proposed deposition would result in more than ten depositions being~~
13 ~~taken under this rule or Rule 31 by the plaintiffs, or by the defendants, or by third-party~~
14 ~~defendants;~~

15 ~~(a)(2)(B) the person to be examined already has been deposed in the case; or~~

16 ~~(a)(2)(C) a party seeks to take a deposition before the time specified in Rule 26(d)~~
17 ~~unless the notice contains a certification, with supporting facts, that the person to be~~
18 ~~examined is expected to leave the state and will be unavailable for examination unless~~
19 ~~deposed before that time. The party or party's attorney shall sign the notice, and the~~
20 ~~signature constitutes a certification subject to the sanctions provided by Rule 11.~~

21 (b) Notice of examination deposition; general requirements; special notice; non-
22 stenographic recording; production of documents and things; deposition of organization;
23 deposition by telephone; written questions.

24 (b)(1) ~~A~~ The party ~~desiring to take the deposition of any person upon oral~~
25 ~~examination deposing a witness~~ shall give reasonable notice in writing to every other
26 party ~~to the action~~. The notice shall state the date, time and place for ~~taking~~ the
27 deposition and the name and address of each ~~person to be examined witness~~, ~~if~~
28 ~~known, and, if~~ If the name of a witness is not known, ~~a general description sufficient the~~
29 notice shall describe the witness sufficiently to identify the person or state the particular
30 class or group to which the person belongs. ~~If a subpoena duces tecum is to be served~~
31 ~~on the person to be examined, the designation of the materials to be produced as set~~

32 ~~forth in the subpoena shall be attached to or included in the notice. The notice shall~~
33 ~~designate any documents and tangible things to be produced by a witness. The notice~~
34 ~~shall designate the officer who will conduct the deposition.~~

35 (b)(2) The ~~party taking the deposition shall state in the~~ notice shall designate the
36 method by which the ~~testimony shall deposition will~~ be recorded. ~~Unless the court~~
37 ~~orders otherwise, it~~ With prior notice to the officer, witness and other parties, any party
38 may designate a recording method in addition to the method designated in the notice.
39 Depositions may be recorded by sound, sound-and-visual, or stenographic means, and
40 the party ~~taking the deposition designating the recording method~~ shall bear the cost of
41 the recording. The appearance or demeanor of witnesses or attorneys shall not be
42 distorted through recording techniques.

43 ~~(b)(3) With prior notice to the deponent and other parties, any party may designate~~
44 ~~another method to record the deponent's testimony in addition to the method specified~~
45 ~~by the person taking the deposition. The additional record or transcript shall be made at~~
46 ~~that party's expense unless the court otherwise orders.~~

47 ~~(b)(4) Unless otherwise agreed by the parties, a (b)(3)~~ A deposition shall be
48 conducted before an officer appointed or designated under Rule 28 and shall begin with
49 a statement on the record by the officer that includes (A) the officer's name and
50 business address; (B) the date, time and place of the deposition; (C) the name of the
51 deponent witness; (D) the administration of the oath or affirmation to the ~~deponent~~
52 witness; and (E) an identification of all persons present. If the deposition is recorded
53 other than stenographically, the officer shall repeat items (A) through (C) at the
54 beginning of each unit of ~~tape or other the~~ recording medium. ~~The appearance or~~
55 ~~demeanor of deponents or attorneys shall not be distorted through camera or sound-~~
56 ~~recording techniques.~~ At the end of the deposition, the officer shall state on the record
57 that the deposition is complete and shall ~~set forth state~~ any stipulations ~~made by~~
58 ~~counsel concerning the custody of the transcript or recording and the exhibits, or~~
59 ~~concerning other pertinent matters.~~

60 ~~(b)(5)-(b)(4)~~ The notice to a party deponent witness may be accompanied by a
61 request ~~made in compliance with under~~ Rule 34 for the production of documents and
62 tangible things at the ~~taking of the~~ deposition. The procedure of Rule 34 shall apply to

63 the request. The attendance of a nonparty witness may be compelled by subpoena
64 under Rule 45. Documents and tangible things to be produced shall be stated in the
65 subpoena.

66 ~~(b)(6)-(b)(5)~~ A party may ~~in the notice and in a subpoena~~ name as the ~~deponent~~
67 witness a ~~public or private~~ corporation, a partnership, an association, or a governmental
68 agency, ~~and~~ describe with reasonable particularity the matters on which examination
69 questioning is requested. ~~In that event,~~ and direct the organization ~~so named shall to~~
70 designate one or more officers, directors, managing agents, or other persons ~~who~~
71 ~~consent~~ to testify on its behalf ~~and may set forth.~~ The organization shall state, for each
72 person designated, the matters on which the person will testify. A subpoena shall advise
73 a nonparty organization of its duty to make such a designation. ~~The persons so~~
74 ~~designated shall testify as to matters known or reasonably available to the organization.~~
75 ~~This Subdivision (b)(6) does not preclude taking a deposition by any other procedure~~
76 ~~authorized in these rules.~~

77 ~~(b)(7) The parties may stipulate in writing or the court may upon motion order that a~~
78 ~~(b)(6)~~ A deposition may be taken by remote electronic means. ~~For the purposes of this~~
79 ~~rule and Rules 28(a), 37(b)(1), and 45(d), a~~ A deposition taken by remote electronic
80 means is considered to be taken at the place where the ~~deponent witness is to~~ answers
81 questions.

82 (b)(7) A party taking a deposition using written question shall include the written
83 questions with the notice or subpoena and serve them on:

84 (b)(7)(A) the parties;

85 (b)(7)(B) the witness if that person is not a party; and

86 (b)(7)(C) the officer.

87 (b)(7)(D) Within 14 days after the questions are served, a party may serve cross
88 questions. Within 7 days after being served with cross questions, a party may serve
89 redirect questions. Within 7 days after being served with redirect questions, a party may
90 serve recross questions.

91 (b)(7)(E) The officer shall ask any written questions.

92 (c) Examination and cross-examination; ~~record of examination; oath;~~ objections.

93 ~~(c)(1) Examination and cross-examination Questioning~~ of witnesses may proceed as
94 permitted at the trial under ~~the provisions of~~ the Utah Rules of Evidence, except Rules
95 103 and 615. ~~The officer before whom the deposition is to be taken shall put the~~
96 ~~witnesses on oath or affirmation and shall personally, or by someone acting under the~~
97 ~~officer's direction and in the officer's presence, record the testimony of the witness.~~

98 ~~(c)(2) All objections made at the time of the examination to the qualifications of the~~
99 ~~officer taking the deposition, to the manner of taking it, to the evidence presented, or to~~
100 ~~the conduct of any party and any other objection to the proceedings shall be noted by~~
101 ~~the officer upon the record of the deposition recorded, but the examination-questioning~~
102 ~~shall proceed, with and the testimony being taken subject to the objections. In lieu of~~
103 ~~participating in the oral examination, parties may serve written questions in a sealed~~
104 ~~envelope on the party taking the deposition, and the party taking the deposition shall~~
105 ~~transmit them to the officer, who shall propound them to the witness and record the~~
106 ~~answers verbatim.~~

107 ~~(d) Schedule and duration; motion to terminate or limit examination.~~

108 ~~(d)(1) Any objection to evidence during a deposition shall be stated concisely and in~~
109 ~~a non-argumentative and non-suggestive manner. A person may instruct a deponent~~
110 ~~witness not to answer only when necessary to preserve a privilege, to enforce a~~
111 ~~limitation on evidence directed by the court, or to present a motion for a protective order~~
112 ~~under paragraph (4) Rule 26(c). Upon demand of the objecting party or witness, the~~
113 ~~deposition shall be suspended for the time necessary to make a motion. The party~~
114 ~~taking the deposition may complete or adjourn the deposition before moving for an~~
115 ~~order to compel discovery under Rule 37.~~

116 ~~(d)(2) Unless otherwise authorized by the court or stipulated by the parties, a~~
117 ~~deposition is limited to one day of seven hours. The court must allow additional time~~
118 ~~consistent with Rule 26(b)(2) if needed for a fair examination of the deponent or if the~~
119 ~~deponent or another person, or other circumstance, impedes or delays the examination.~~

120 ~~(d)(3) If the court finds that any impediment, delay, or other conduct has frustrated~~
121 ~~the fair examination of the deponent, it may impose upon the persons responsible an~~
122 ~~appropriate sanction, including the reasonable costs and attorney fees incurred by any~~
123 ~~parties as a result thereof.~~

124 ~~(d)(4) At any time during the taking of the deposition, on motion of a party or of the~~
125 ~~deponent and upon a showing that the examination is being conducted in bad faith or in~~
126 ~~such manner as unreasonably to annoy, embarrass, or oppress the deponent or party,~~
127 ~~the court in which the action is pending or the court in the district where the deposition is~~
128 ~~being taken may order the officer conducting the examination to cease forthwith from~~
129 ~~taking the deposition, or may limit the scope and manner of the taking of the deposition~~
130 ~~as provided in Rule 26(c). If the order made terminates the examination, it shall be~~
131 ~~resumed thereafter only upon the order of the court in which the action is pending. Upon~~
132 ~~demand of the objecting party or deponent, the taking of the deposition shall be~~
133 ~~suspended for the time necessary to make a motion for an order. The provisions of Rule~~
134 ~~37(a)(4) apply to the award of expenses incurred in relation to the motion.~~

135 (d) Limits. During initial fact discovery, each side (plaintiffs collectively, defendants
136 collectively, and third-party defendants collectively) is limited to 20 hours of deposition
137 by oral questioning. Oral questioning of a nonparty shall not exceed four hours, and oral
138 questioning of a party shall not exceed seven hours. A deposition by written questioning
139 shall not cumulatively exceed 15 questions, including discrete subparts, by the plaintiffs
140 collectively, by the defendants collectively or by third-party defendants collectively.

141 ~~(e) Submission to witness; changes; signing. If requested by the deponent or a party~~
142 ~~before completion of the deposition, the deponent shall have 30 Within 28 days after~~
143 ~~being notified by the officer that the transcript or recording is available, in which to~~
144 ~~review the transcript or recording and, if there are changes in form or substance, to a~~
145 ~~witness may sign a statement reciting such of changes to the form or substance of the~~
146 ~~transcript or recording and the reasons given by the deponent for making them for the~~
147 ~~changes. The officer shall indicate in the certificate prescribed by subdivision (f)(1)~~
148 ~~whether any review was requested and, if so, shall append any changes timely made by~~
149 ~~the deponent during the period allowed witness.~~

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

151 ~~(f)(1) The transcript or other recording of the deposition made in accordance with~~
152 ~~this rule shall be the record of the deposition. The officer shall record the deposition or~~
153 ~~direct another person present to record the deposition. The officer shall sign a~~
154 ~~certificate, to accompany the record of the deposition, that the witness was duly sworn~~

155 ~~under oath or affirmation~~ and that the ~~transcript or other recording record~~ is a true
156 record of the ~~testimony given by the witness deposition~~. ~~Unless otherwise ordered by~~
157 ~~the court, the~~ The officer shall keep a copy of the record. The officer shall securely seal
158 the record ~~of the deposition in an envelope~~ endorsed with the title of the action and
159 marked "Deposition of (name). Do not open." and shall promptly send the sealed record
160 ~~of the deposition~~ to the attorney or the party who ~~arranged for the transcript or other~~
161 ~~record to be made~~ designated the recording method. If the party taking the deposition is
162 ~~not represented by an attorney, the record of the deposition shall be sent to the clerk of~~
163 ~~the court for filing unless otherwise ordered by the court.~~ An attorney or party receiving
164 the record ~~of the deposition~~ shall store it under conditions that will protect it against loss,
165 destruction, tampering, or deterioration.

166 (f)(2) ~~Documents~~ Every party may inspect and copy documents and things produced
167 for inspection ~~during the examination of the witness shall, upon and must have a fair~~
168 opportunity to compare copies and originals. Upon the request of a party, documents
169 and things produced for inspection shall be marked for identification and ~~annexed~~
170 added to the record ~~of the deposition and may be inspected and copied by any party,~~
171 ~~except that, if~~ If the person producing the materials ~~desires witness wants~~ to retain them
172 the originals, that person ~~may (A) shall~~ offer ~~copies the originals~~ to be copied, marked
173 for identification and ~~annexed~~ added to the record ~~of the deposition and to serve~~
174 ~~thereafter as originals, if the person affords to all parties fair opportunity to verify the~~
175 ~~copies by comparison with the originals, or (B) offer the originals to be marked for~~
176 ~~identification, after giving to each party an opportunity to inspect and copy them, in~~
177 ~~which event the originals may be used in the same manner as if annexed to the record~~
178 ~~of the deposition. Any party may move for an order that the originals be annexed to and~~
179 ~~returned with the record of the deposition to the court, pending final disposition of the~~
180 ~~case.~~

181 (f)(3) ~~Unless otherwise ordered by the court or agreed by the parties, the officer shall~~
182 ~~retain stenographic notes of any depositions taken stenographically or a copy of the~~
183 ~~recording of any deposition taken by another method.~~ Upon payment of reasonable
184 charges ~~therefor~~, the officer shall furnish a copy of the record ~~of the deposition~~ to any
185 party or to the ~~deponent~~ witness. ~~Any party or the deponent may arrange for a~~

186 ~~transcription to be made from the recording of a deposition taken~~ An official transcript of
187 a recording made by non-stenographic means shall be prepared under Utah Rule of
188 Appellate Procedure 11(e).

189 (g) Failure to attend or to serve subpoena; expenses.

190 ~~(g)(1) If the party giving the notice of the taking of a deposition fails to attend and~~
191 ~~proceed therewith or fails to serve a subpoena upon a witness who fails to attend, and~~
192 another party attends in person or by attorney ~~pursuant to the notice~~, the court may
193 order the party giving the notice to pay to ~~such the~~ other party the reasonable costs,
194 ~~expenses incurred by him and his attorney in attending, including reasonable attorney's~~
195 ~~fees and attorney fees incurred.~~

196 ~~(g)(2) If the party giving the notice of the taking of a deposition of a witness fails to~~
197 ~~serve a subpoena upon him and the witness because of such failure does not attend,~~
198 ~~and if another party attends in person or by attorney because he expects the deposition~~
199 ~~of that witness to be taken, the court may order the party giving the notice to pay to~~
200 ~~such other party the reasonable expenses incurred by him and his attorney in attending,~~
201 ~~including reasonable attorney's fees.~~

202 Advisory Committee Notes

203

1 ~~Rule 31. Depositions upon written questions.~~

2 ~~(a) Serving questions; notice.~~

3 ~~(a)(1) A party may take the testimony of any person, including a party, by deposition~~
4 ~~upon written questions without leave of court except as provided in paragraph (2). an~~
5 ~~opposing yThe attendance of witnesses may be compelled by the use of subpoena as~~
6 ~~provided in Rule 45.~~

7 ~~(a)(2) A party must obtain leave of court, which shall be granted to the extent~~
8 ~~consistent with the principles stated in Rule 26(b)(2), if the person to be examined is~~
9 ~~confined in prison or if, without the written stipulation of the parties,~~

10 ~~(a)(2)(A) a proposed deposition would result in more than ten depositions being~~
11 ~~taken under this rule or Rule 30 by the plaintiffs, or by the defendants, or by third-party~~
12 ~~defendants;~~

13 ~~(a)(2)(B) the person to be examined has already been deposed in the case; or~~

14 ~~(a)(2)(C) a party seeks to take a deposition before the time specified in Rule 26(d).~~

15 ~~(a)(3) A party desiring to take a deposition upon written questions shall serve them~~
16 ~~upon every other party with a notice stating (1) the name and address of the person~~
17 ~~who is to answer them, if known, and if the name is not known, a general description~~
18 ~~sufficient to identify him or the particular class or group to which he belongs, and (2) the~~
19 ~~name or descriptive title and address of the officer before whom the deposition is to be~~
20 ~~taken. A deposition upon written questions may be taken of a public or private~~
21 ~~corporation or a partnership or association or governmental agency in accordance with~~
22 ~~the provisions of Rule 30(b)(6).~~

23 ~~(a)(4) Within 14 days after the notice and written questions are served, a party may~~
24 ~~serve cross questions upon all other parties. Within 7 days after being served with cross~~
25 ~~questions, a party may serve redirect questions upon all other parties. Within 7 days~~
26 ~~after being served with redirect questions, a party may serve recross questions upon all~~
27 ~~other parties. The court may for cause shown enlarge or shorten the time.~~

28 ~~(b) Officer to take responses and prepare record. A copy of the notice and copies of~~
29 ~~all questions served shall be delivered by the party taking the deposition to the officer~~
30 ~~designated in the notice, who shall proceed promptly, in the manner provided by Rule~~

31 ~~30(c), (e), and (f), attaching to the deposition the copy of the notice and the questions~~
32 ~~received.~~

33 ~~Advisory Committee Notes~~

34

1 **Rule 33. Interrogatories Written questions to parties.**

2 (a) Availability; procedures for use. ~~Without leave of court or written stipulation,~~
3 During initial fact discovery, any party may serve upon any other party up to 15 written
4 interrogatories, not exceeding 25 in number questions, including all discrete subparts, ~~to~~
5 ~~be answered by the party served or, if the party served is a public or private corporation,~~
6 ~~a partnership, an association, or a governmental agency, by any officer or agent, who~~
7 ~~shall furnish such information as is available to the party. Leave to serve additional~~
8 ~~interrogatories shall be granted to the extent consistent with the principles of Rule~~
9 ~~26(b)(3). Without leave of court or written stipulation, interrogatories may not be served~~
10 ~~before the time specified in Rule 26(d).~~

11 (b) Answers and objections.

12 ~~(b)(1) Each interrogatory question shall be answered separately and fully in writing~~
13 ~~under oath, or affirmation unless it is objected to, ~~in which event the objecting~~ If a~~
14 ~~question is objected to, the party shall state the reasons for the objection ~~and. Any~~~~
15 ~~reason not stated is waived unless excused by the court for good cause. The party shall~~
16 ~~answer to the extent the interrogatory any part of a question that is not objectionable. A~~
17 ~~question is not objectionable merely because an answer involves an opinion or~~
18 ~~argument that relates to fact or the application of law to fact.~~

19 ~~(b)(2) The answering party shall serve the answers ~~are to be signed by the person~~~~
20 ~~making them, and the objections signed by the attorney making them and objections~~
21 ~~within 28 days after service of the questions.~~

22 ~~(b)(3) The party upon whom the interrogatories have been served shall serve a copy~~
23 ~~of the answers and objections, if any, within 30 days after the service of the~~
24 ~~interrogatories. A shorter or longer time may be ordered by the court or, in the absence~~
25 ~~of such an order, agreed to in writing by the parties subject to Rule 29.~~

26 ~~(b)(4) All grounds for an objection to an interrogatory shall be stated with specificity.~~
27 ~~Any ground not stated in a timely objection is waived unless the party's failure to object~~
28 ~~is excused by the court for good cause shown.~~

29 ~~(b)(5) The party submitting the interrogatories may move for an order under Rule~~
30 ~~37(a) with respect to any objection to or other failure to answer an interrogatory.~~

31 (c) Scope; use at trial. Interrogatories Questions may relate to any discoverable
32 ~~matters which can be inquired into under Rule 26(b), and the answers.~~ Answers may be
33 used ~~to the extent as~~ permitted by the Rules of Evidence.

34 ~~An interrogatory otherwise proper is not necessarily objectionable merely because~~
35 ~~an answer to the interrogatory involves an opinion or contention that relates to fact or~~
36 ~~the application of law to fact, but the court may order that such an interrogatory need~~
37 ~~not be answered until after designated discovery has been completed or until a pretrial~~
38 ~~conference or other later time.~~

39 (d) Option to produce business records. ~~Where if~~ the answer to ~~an interrogatory a~~
40 question may be ~~derived or ascertained from~~ found by inspecting the answering party's
41 business records, including electronically stored information, ~~of the party upon whom~~
42 ~~the interrogatory has been served or from an examination, audit, or inspection of such~~
43 ~~business records, including a compilation, abstract, or summary thereof~~ and the burden
44 of ~~deriving or ascertaining finding~~ the answer is substantially the same for ~~the party~~
45 ~~serving the interrogatory as for the party served~~ both parties, it is a sufficient answer to
46 ~~such interrogatory to specify the answering party may identify~~ the records from which
47 the answer may be ~~derived or ascertained and to afford to~~ found. ~~The answering party~~
48 must give the asking party ~~serving the interrogatory~~ reasonable opportunity to examine,
49 audit, or inspect such inspect the records and to make copies, compilations, abstracts,
50 or summaries. ~~A specification shall be~~ The answering party must identify the records in
51 sufficient detail to permit the ~~interrogating asking~~ party to locate and to identify; them as
52 readily as ~~can~~ the answering party ~~served, the records from which the answer may be~~
53 ascertained.

54 Advisory Committee Notes

55

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

3 (a) Scope. ~~Any party may serve on any other party a request~~

4 (a)(1) ~~Any party may serve on any other party a request~~ to produce and permit the
5 ~~requesting~~ party ~~making the request, or someone acting on his behalf,~~ to inspect, copy,
6 test or sample any designated discoverable documents, ~~or~~ electronically stored
7 information or tangible things (including writings, drawings, graphs, charts, photographs,
8 sound recordings, images, and other data or data compilations stored in any medium
9 from which information can be obtained, translated, if necessary, by the respondent into
10 reasonably usable form), ~~or to inspect, copy, test or sample any designated tangible~~
11 ~~things which constitute or contain matters within the scope of Rule 26(b) and which are~~
12 in the possession, ~~custody~~ or control of the responding party ~~upon whom the request is~~
13 ~~served; or.~~

14 (a)(2) ~~Any party may serve on any other party a request~~ to permit entry upon
15 designated ~~land or other~~ property in the possession or control of the responding party
16 ~~upon whom the request is served~~ for the purpose of ~~inspection and inspecting,~~
17 measuring, surveying, photographing, testing, or sampling the property or any
18 designated discoverable object or operation ~~thereon, within the scope of Rule 26(b) on~~
19 ~~the property.~~

20 (b) Procedure and limitations.

21 (b)(1) The request shall ~~set forth~~ identify the items to be inspected ~~either~~ by
22 individual item or by category, and describe each item and category with reasonable
23 particularity. During initial fact discovery, the request shall not cumulatively include more
24 than 25 distinct items or categories of items. The request shall specify a reasonable
25 date, time, place, and manner of making the inspection and performing the related acts.
26 The request may specify the form or forms in which electronically stored information is
27 to be produced. ~~Without leave of court or written stipulation, a request may not be~~
28 ~~served before the time specified in Rule 26(d).~~

29 (b)(2) The responding party ~~upon whom the request is served~~ shall serve a written
30 response within 30-28 days after ~~the~~ service of the request. ~~A shorter or longer time~~
31 ~~may be directed by the court or, in the absence of such an order, agreed to in writing by~~

32 ~~the parties, subject to Rule 29.~~ The response shall state, with respect to each item or
33 category, that inspection and related activities acts will be permitted as requested,
34 unless or that the request is objected to, ~~including an objection to the requested form or~~
35 ~~forms for producing electronically stored information, stating~~ If the party objects to a
36 request, the party must state the reasons for the objection. ~~If objection is made to part of~~
37 ~~an item or category, the part shall be specified and inspection permitted of the~~
38 ~~remaining parts. If objection is made~~ Any reason not stated is waived unless excused by
39 the court for good cause. The party shall identify and permit inspection of any part of a
40 request that is not objectionable. If the party objects to the requested form or forms for
41 producing electronically stored information -- or if no form was specified in the request --
42 the responding party must state the form or forms it intends to use. ~~The party submitting~~
43 ~~the request may move for an order under Rule 37(a) with respect to any objection to or~~
44 ~~other failure to respond to the request or any part thereof, or any failure to permit~~
45 ~~inspection as requested.~~

46 ~~(b)(3) Unless the parties otherwise agree or the court otherwise orders:~~

47 (c) Form of documents and electronically stored information.

48 ~~(b)(3)(A) a~~ (c)(1) A party who produces documents for inspection shall produce them
49 as they are kept in the usual course of business or shall organize and label them to
50 correspond with the categories in the request;

51 ~~(b)(3)(B) if~~ (c)(2) If a request does not specify the form or forms for producing
52 electronically stored information, a responding party must produce the information in a
53 form or forms in which it is ordinarily maintained or in a form or forms that are
54 reasonably usable; ~~and~~

55 ~~(b)(3)(C) a~~ (c)(3) A party need not produce the same electronically stored
56 information in more than one form.

57 ~~(c) Persons not parties. This rule does not preclude an independent action against a~~
58 ~~person not a party for production of documents and things and permission to enter upon~~
59 ~~land.~~

60 Advisory Committee Notes

61

1 **Rule 35. Physical and mental examination of persons.**

2 (a) Order for examination. When the mental or physical condition ~~(including the~~
3 ~~blood group) or attribute~~ of a party or of a person in the custody or ~~under the legal~~
4 control of a party is in controversy, the court ~~in which the action is pending~~ may order
5 the party or person to submit to a physical or mental examination by a suitably licensed
6 or certified examiner or to produce for examination the person in the party's custody or
7 ~~legal~~ control, unless the party is unable to produce the person for examination. The
8 order may be made only on motion for good cause shown, ~~and upon notice to the~~
9 ~~person to be examined and to all parties and~~ All papers related to the motion and notice
10 of any hearing shall be served on a nonparty to be examined. The order shall specify
11 the time, place, manner, conditions, and scope of the examination and the person ~~or~~
12 ~~persons~~ by whom ~~it the examination~~ is to be made. The person being examined may
13 record the examination unless the party requesting the examination shows that the
14 recording would unduly interfere with the examination.

15 ~~(b) Report of examining physician.~~

16 ~~(b)(1) If requested by a party against whom an order is made under Rule 35(a) or~~
17 ~~the person examined, the party causing the examination to be made shall deliver to the~~
18 ~~person examined and/or the other party a copy of a detailed written report of the~~
19 ~~examiner setting out the examiner's findings, including results of all tests made,~~
20 ~~diagnosis and conclusions, together with like reports of all earlier examinations of the~~
21 ~~same condition. After delivery the party causing the examination shall be entitled upon~~
22 ~~request to receive from the party against whom the order is made a like report of any~~
23 ~~examination, previously or thereafter made, of the same condition, unless, in the case of~~
24 ~~a report of examination of a person not a party, the party shows that the report cannot~~
25 ~~be obtained. The court on motion may order delivery of a report on such terms as are~~
26 ~~just. If an examiner fails or refuses to make a report, the court on motion may take any~~
27 ~~action authorized by Rule 37(b)(2).~~

28 ~~(b)(2) (b) Waiver of privilege.~~ By requesting and obtaining ~~a report of the~~
29 ~~examination so ordered or by taking the deposition of the examiner~~ the examiner's
30 report, the party examined waives any privilege the party may have in that action or any
31 other involving the same controversy, regarding the testimony of every other person

32 who has examined or may thereafter examine the party ~~in respect of about~~ the same
33 ~~mental or physical~~ condition. **Question: Delete all of (b) and instead: If the party**
34 **requesting the examination wishes to call the examiner as a witness, the party shall**
35 **disclose an expert report as required by Rule 26(a)(3).**

36 ~~(b)(3) This subdivision applies to examinations made by agreement of the parties,~~
37 ~~unless the agreement expressly provides otherwise. This subdivision does not preclude~~
38 ~~discovery of a report of any other examiner or the taking of a deposition of an examiner~~
39 ~~in accordance with the provisions of any other rule.~~

40 ~~(c) Right of party examined to other medical reports. At the time of making an order~~
41 ~~to submit to an examination under Subdivision (a), the court shall, upon motion of the~~
42 ~~party to be examined, order the party seeking such examination to furnish to the party to~~
43 ~~be examined a report of any examination previously made or medical treatment~~
44 ~~previously given by any examiner employed directly or indirectly by the party seeking~~
45 ~~the order for a physical or mental examination, or at whose instance or request such~~
46 ~~medical examination or treatment has previously been conducted.~~

47 ~~(d) (c) Sanctions.~~

48 ~~(d)(1) If a party or a person in the custody or under the legal control of a party fails to~~
49 ~~obey an order entered under Subdivision paragraph (a), the court on motion may take~~
50 ~~any action authorized by Rule 37(b)(2), except that the failure cannot be treated as~~
51 ~~contempt of court.~~

52 ~~(d)(2) If a party fails to obey an order entered under Subdivision (c), the court on~~
53 ~~motion may take any action authorized by Rule 37(b)(2).~~

54

1 **Rule 36. Request for admission.**

2 (a) Request for admission.

3 ~~(a)(1)~~ A party may serve upon any other party a written request ~~for the admission,~~
4 ~~for purpose of the pending action only, of to admit~~ the truth of any discoverable matters
5 ~~within the scope of Rule 26(b)~~ set forth in the request ~~that, including the genuineness of~~
6 any document. The matter must relate to statements or opinions of fact or of the
7 application of law to fact, ~~including the genuineness of any documents described in the~~
8 request. Each matter shall be separately stated. During initial fact discovery, a party
9 may not request admission of more than 25 matters. A copy of the document shall be
10 served with the request unless it has already been furnished or made available for
11 inspection and copying. The request ~~for admission shall contain a notice advising notify~~
12 the responding party ~~to whom the request is made that, pursuant to Rule 36, the~~
13 matters shall will be deemed admitted unless ~~said request is responded to the party~~
14 responds within ~~30-28~~ days after service of the request ~~or within such shorter or longer~~
15 time as the court may allow. Copies of documents shall be served with the request
16 unless they have been or are otherwise furnished or made available for inspection and
17 copying. Without leave of court or written stipulation, requests for admission may not be
18 served before the time specified in Rule 26(d).

19 (b) Answer or objection.

20 ~~(b)(1) (a)(2)~~ Each matter of which an admission is requested shall be separately set
21 ~~forth.~~ The matter is admitted unless, within ~~thirty-28~~ days after service of the request, ~~or~~
22 ~~within such shorter or longer time as the court may allow,~~ the responding party ~~to whom~~
23 ~~the request is directed~~ serves upon the requesting party ~~requesting the admission a~~
24 written answer or objection, ~~addressed to the matter, signed by the party or by his~~
25 ~~attorney, but, unless the court shortens the time, a defendant shall not be required to~~
26 ~~serve answers or objections before the expiration of 45 days after service of the~~
27 ~~summons and complaint upon him. If objection is made, the reasons therefor shall be~~
28 ~~stated. The answer shall specifically deny the matter or set forth in detail the reasons~~
29 ~~why the answering party cannot truthfully admit or deny the matter. A denial shall fairly~~
30 ~~meet the substance of the requested admission, and when good faith requires that a~~
31 party qualify his answer or deny only a part of the matter of which an admission is

32 requested, he shall specify so much of it as is true and qualify or deny the remainder.
33 An answering party may not give lack of information or knowledge as a reason for
34 failure to admit or deny unless he states that he has made reasonable inquiry and that
35 the information known or readily obtainable by him is insufficient to enable him to admit
36 or deny. A party who considers that a matter of which an admission has been requested
37 presents a genuine issue for trial may not, on that ground alone, object to the request;
38 he may, subject to the provisions of Rule 37(c), deny the matter or set forth reasons
39 why he cannot admit or deny it.

40 ~~(a)(3) The party who has requested the admissions may move to determine the~~
41 ~~sufficiency of the answers or objections. Unless the court determines that an objection~~
42 ~~is justified, it shall order that an answer be served. If the court determines that an~~
43 ~~answer does not comply with the requirements of this rule, it may order either that the~~
44 ~~matter is admitted or that an amended answer be served. The court may, in lieu of~~
45 ~~these orders, determine that final disposition of the request be made at a pretrial~~
46 ~~conference or at a designated time prior to trial. The provisions of Rule 37(a)(4) apply to~~
47 ~~the award of expenses incurred in relation to the motion.~~

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

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

60 (c) Sanctions for failure to admit. If a party fails to admit the truth of any discoverable
61 matter set forth in the request, and if the requesting party proves the truth of the matter,
62 the requesting party may move for an order requiring the other party to pay the

63 reasonable expenses of proving the matter, including reasonable attorney fees. The
64 court shall enter the order unless it finds that:

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

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

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

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

70 ~~(b)-(d)~~ Effect of admission. Any matter admitted under this rule is conclusively
71 established unless the court on motion permits withdrawal or amendment of the
72 admission. ~~Subject to the provisions of Rule 16 governing amendment of a pretrial~~
73 ~~order, the~~ The court may permit withdrawal or amendment ~~when if~~ the presentation of
74 the merits of the action will be ~~subverted thereby promoted~~ and ~~the party who obtained~~
75 ~~the admission fails to satisfy the court that~~ withdrawal or amendment will not prejudice
76 ~~him in maintaining his action or defense on the merits~~ the requesting party. Any
77 admission ~~made by a party~~ under this rule is for the purpose of the pending action ;
78 ~~and It~~ is not an admission ~~by him~~ for any other purpose, nor may it be used ~~against him~~
79 in any other ~~proceeding action~~.

80 Advisory Committee Notes

81

1 **Rule 37. Failure to make or cooperate in disclosure or discovery; sanctions.**

2 (a) Motion for order compelling disclosure or discovery. ~~A party, upon reasonable~~
3 ~~notice to other parties and all persons affected thereby, may apply for an order~~
4 ~~compelling discovery as follows:~~

5 ~~(a)(1) Appropriate court. An application for an order to a party may be made to the~~
6 ~~court in which the action is pending, or, on matters relating to a deposition, to the court~~
7 ~~in the district where the deposition is being taken. An application for an order to a~~
8 ~~deponent who is not a party shall be made to the court in the district where the~~
9 ~~deposition is being taken.~~

10 ~~(a)(2)-(a)(1) Motion.~~

11 ~~(a)(2)(A) If a party fails to make a disclosure required by Rule 26(a), any other A~~
12 ~~party may move to compel disclosure or discovery and for appropriate sanctions if~~
13 ~~another party:~~

14 ~~(a)(1)(A) makes an evasive, incomplete or insufficient disclosure or response to a~~
15 ~~request for discovery;~~

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

20 ~~(a)(1)(C) objects to a request for discovery;~~

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

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

23 ~~(a)(2) Appropriate court. A motion may be made to the court in which the action is~~
24 ~~pending, or, on matters relating to a deposition, to the court in the district where the~~
25 ~~deposition is being taken. A motion for an order to a nonparty witness shall be made to~~
26 ~~the court in the district where the deposition is being taken.~~

27 ~~(a)(3) The motion must include movant must attach a copy of the request for~~
28 ~~discovery or the response at issue and~~ a certification that the movant has in good faith
29 conferred or attempted to confer with the party not making the disclosure or discovery in
30 an effort to secure the disclosure or discovery without court action.

31 ~~(a)(2)(B) If a deponent fails to answer a question propounded or submitted under~~
32 ~~Rule 30 or 31, or a corporation or other entity fails to make a designation under Rule~~
33 ~~30(b)(6) or 31(a), or a party fails to answer an interrogatory submitted under Rule 33, or~~
34 ~~if a party, in response to a request for inspection submitted under Rule 34, fails to~~
35 ~~respond that inspection will be permitted as requested or fails to permit inspection as~~
36 ~~requested, the discovering party may move for an order compelling an answer, or a~~
37 ~~designation, or an order compelling inspection in accordance with the request. The~~
38 ~~motion must include a certification that the movant has in good faith conferred or~~
39 ~~attempted to confer with the person or party failing to make the discovery in an effort to~~
40 ~~secure the information or material without court action. When taking a deposition on oral~~
41 ~~examination, the proponent of the question may complete or adjourn the examination~~
42 ~~before applying for an order.~~

43 ~~(a)(3) Evasive or incomplete disclosure, answer, or response. For purposes of this~~
44 ~~subdivision an evasive or incomplete disclosure, answer, or response is to be treated as~~
45 ~~a failure to disclose, answer, or respond.~~

46 (a)(4) Expenses and sanctions.

47 (a)(4)(A) If the motion is granted, or if the disclosure or ~~requested~~ discovery is
48 provided after the motion was filed, the court shall, after opportunity for ~~hearing~~
49 response, require the party or deponent witness whose conduct necessitated the motion
50 or the party or attorney advising such conduct or both of them to pay to the moving
51 party the reasonable expenses incurred in obtaining the order, including attorney fees,
52 unless the court finds that the ~~motion was filed without the~~ movant's first making did not
53 make a good faith effort to obtain the disclosure or discovery without court action, or
54 that the ~~opposing party's~~ nondisclosure, response, or objection was substantially
55 justified, or that other circumstances make an award of expenses unjust.

56 (a)(4)(B) If the motion is denied, the court may enter any protective order authorized
57 under Rule 26(c) and shall, after opportunity for ~~hearing response~~, require the moving
58 party or the attorney or both of them to pay to the party or deponent witness who
59 opposed the motion the reasonable expenses incurred in opposing the motion, including
60 attorney fees, unless the court finds that ~~the making of~~ the motion was substantially
61 justified or that other circumstances make an award of expenses unjust.

62 (a)(4)(C) If the motion is granted in part and denied in part, the court may enter any
63 protective order authorized under Rule 26(c) and may, after opportunity for ~~hearing~~
64 response, apportion the reasonable expenses incurred in relation to the motion among
65 the parties and persons in a just manner.

66 (b) Failure to comply with order.

67 (b)(1) Sanctions by court in district where deposition is taken. ~~If a deponent fails to~~
68 ~~be sworn or to answer a question after being directed to do so by~~ Failure to follow an
69 order of the court in the district in which the deposition is being taken, ~~the failure may be~~
70 ~~considered a~~ is contempt of that court.

71 (b)(2) Sanctions by court in which action is pending. ~~If a party fails to obey an order~~
72 ~~entered under Rule 16(b) or if a party or an officer, director, or managing agent of a~~
73 ~~party or a person designated under Rule 30(b)(6) or 31(a) to testify on behalf of a party~~
74 ~~fails to obey an order to provide or permit discovery, including an order made under~~
75 ~~Subdivision (a) of this rule or Rule 35, unless~~ Unless the court finds that the failure was
76 substantially justified, the court in which the action is pending may take such action in
77 regard to the failure to follow its orders as are just, including the following:

78 (b)(2)(A) deem the matter or any other designated facts to be established ~~for the~~
79 ~~purposes of the action~~ in accordance with the claim of the party obtaining the order;

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

82 (b)(2)(C) ~~strike pleadings or parts thereof~~, stay further proceedings until the order is
83 obeyed;

84 (b)(2)(D) dismiss all or part of the action ~~or proceeding or any part thereof~~, strike all
85 or part of the pleadings, or render judgment by default ~~against the disobedient party on~~
86 all or part of the action;

87 ~~(b)(2)(D)~~ (b)(2)(E) order the party or the attorney to pay the reasonable expenses,
88 including attorney fees, caused by the failure;

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

91 ~~(b)(2)(F)~~ (b)(2)(G) instruct the jury regarding an adverse inference.

92 ~~(c) Expenses on failure to admit. If a party fails to admit the genuineness of any~~
93 ~~document or the truth of any matter as requested under Rule 36, and if the party~~
94 ~~requesting the admissions thereafter proves the genuineness of the document or the~~
95 ~~truth of the matter, the party requesting the admissions may apply to the court for an~~
96 ~~order requiring the other party to pay the reasonable expenses incurred in making that~~
97 ~~proof, including reasonable attorney fees. The court shall make the order unless it finds~~
98 ~~that (1) the request was held objectionable pursuant to Rule 36(a), or (2) the admission~~
99 ~~sought was of no substantial importance, or (3) the party failing to admit had reasonable~~
100 ~~ground to believe that he might prevail on the matter, or (4) there was other good~~
101 ~~reason for the failure to admit.~~

102 ~~(d) Failure of party to attend at own deposition or serve answers to interrogatories or~~
103 ~~respond to request for inspection. If a party or an officer, director, or managing agent of~~
104 ~~a party or a person designated under Rule 30(b)(6) or 31(a) to testify on behalf of a~~
105 ~~party fails (1) to appear before the officer who is to take the deposition, after being~~
106 ~~served with a proper notice, or (2) to serve answers or objections to interrogatories~~
107 ~~submitted under Rule 33, after proper service of the interrogatories, or (3) to serve a~~
108 ~~written response to a request for inspection submitted under Rule 34, after proper~~
109 ~~service of the request, the court on motion may take any action authorized by~~
110 ~~Subdivision (b)(2).~~

111 ~~The failure to act described in this subdivision may not be excused on the ground~~
112 ~~that the discovery sought is objectionable unless the party failing to act has applied for a~~
113 ~~protective order as provided by Rule 26(c).~~

114 ~~(e) Failure to participate in the framing of a discovery plan. If a party or attorney fails~~
115 ~~to participate in good faith in the framing of a discovery plan by agreement as is~~
116 ~~required by Rule 26(f), the court on motion may take any action authorized by~~
117 ~~Subdivision (b)(2).~~

118 ~~(f) Failure to disclose. If a party fails to disclose a witness, document or other~~
119 ~~material as required by Rule 26(a) or Rule 26(e)(1), or to amend a prior response to~~
120 ~~discovery as required by Rule 26(e)(2), that party shall not be permitted to use the~~
121 ~~witness, document or other material at any hearing unless the failure to disclose is~~
122 ~~harmless or the party shows good cause for the failure to disclose. In addition to or in~~

123 ~~lieu of this sanction, the court on motion may take any action authorized by Subdivision~~
124 ~~(b)(2).~~

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

132 Advisory Committee Notes

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