

Agenda

Advisory Committee on Rules of Civil Procedure

April 28, 2010
4:00 to 6:00 p.m.

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

Approval of minutes	Tab 1	Fran Wikstrom
Recognition of Anthony Quinn and Anthony Schofield		Associate Chief Justice Matthew Durrant
Simplified Civil Procedures	Tab 2	Fran Wikstrom

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

Meeting Schedule

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, March 24, 2010
Administrative Office of the Courts

Francis M. Wikstrom, Presiding

PRESENT: Francis M. Wikstrom, Terrie T. McIntosh, Lincoln L. Davies, Jonathan O. Hafen, Francis J. Carney, Thomas R. Lee, Cullen Battle, Barbara L. Townsend, Leslie W. Slauch, Trystan B. Smith, Honorable Derek P. Pullan, Honorable Reuben Renstrom, Janet H. Smith

EXCUSED: James T. Blanch, Honorable Anthony B. Quinn, Honorable Lyle R. Anderson, Honorable David O. Nuffer, David W. Scofield, Todd M. Shaughnessy, Anthony W. Schofield, Steven Marsden, Sammi V. Anderson, Lori Woffinden

STAFF: Tim Shea, Matty Branch

I. APPROVAL OF MINUTES.

Mr. Wikstrom called the meeting to order at 4:00 p.m., and entertained comments from the committee concerning the February 24, 2010 minutes. Mr. Carney noted a spelling correction and with that change, a motion was duly made and seconded that the minutes be approved. Hearing no further comments, the minutes were unanimously approved.

II. CONSIDERATION OF RULES FOR FINAL ACTION: RULES 58B, 64D AND 64E.

Mr. Shea brought Rules 58B, 64D and 64E to the committee for final action.

The committee debated the public comment suggesting a revision to Rule 64D(h)(2), which would allow the Court to deny a request for an evidentiary hearing if a plaintiff's or defendant's reply does not raise a proper challenge or claim. Several committee members compared the proposed revision to the Court's power under Rule 7(e) to deny a request for hearing under Rule 56. Judge Pullan, however, expressed his concerns about due process and the deprivation of property without a hearing. He used the example of an unsophisticated pro se party who fails to properly indicate in his/her grounds for a hearing in the reply who is then denied his request under the proposed revision.

After further discussion, Mr. Wikstrom called for a motion concerning the suggested revision. Receiving no motion, the committee declined to adopt the suggested revision.

The committee also unanimously approved separating by commas the clause “a copy of the garnishee’s answers” in Rule 64D(h)(1).

III. RULE 6. TIME.

Mr. Shea brought Rule 6 to the committee.

Electronic filing is scheduled to be available statewide the first week of August 2010. The committee debated whether it should wait to adopt the amendments to Rule 6 until after electronic filing was in place. It further debated whether to mandate electronic filing as a part of the amendments.

Several committee members raised concerns about practitioners mailing pleadings to take advantage of the time periods in the amendments if electronic filing was not mandated. The committee further discussed the need to evaluate any inefficiencies in electronic filing, after it is available, statewide before making it mandatory.

The committee agreed to wait until after August 2010 to revisit the amendments to Rule 6.

IV. SIMPLIFIED PROCEDURES.

The committee continued its discussions regarding the simplified rules.

Ms. Smith suggested and the committee agreed to revise the last sentence Rule 1(a) to state: “If, in the opinion of the court, applying the rule would be unjust the former procedure applies.”

The committee continued its discussions regarding the scope of discovery and proportionality. Mr. Lee questioned the purposes of the second two sentences in Rule 26(b)(1). Mr. Lee also asked what the committee hoped to accomplish by (1) allowing a party upon a showing of good cause to seek broader discovery? and (2) whether the phrase “[d]iscovery and discovery requests are proportional” was intended to define what was discoverable?

The committee debated the need to allow a party to seek broader discovery beyond matters relevant to the claims or defenses of the parties. Mr. Lee suggested striking the second two sentences of subsection (b)(1) and revising the first sentence of Rule 26(b)(1) to state: “Parties may discover any matter, not privileged, which is relevant to the claim or defense of any party, if the discovery satisfies the standards of proportionality set forth below.” The committee unanimously agreed to the above revisions.

Mr. Davies observed that the second sentence of subsection (b)(2), which referenced Rule 26(c) Protective orders, appeared awkward and should be revised. The committee discussed whether to change the title of subsection (c) from protective orders to discovery orders. Mr. Shea also suggested moving the provisions of Rule 26(c) to Rule 37.

Mr. Shea proposed revising the second sentence of subsection (b)(2) to state: “The Court may enter orders described in Rule 37 to achieve proportionality.” The committee agreed.

Mr. Wikstrom asked Mr. Shea to prepare a revised Rule 37 that incorporated the provisions of Rule 26(c). Mr. Hafen agreed to work with Mr. Shea to incorporate the provisions of Rule 26(c) into Rule 37 for the committee’s future consideration.

Ms. Townsend directed the committee’s attention to Rule 26(d)(1). She suggested deleting the first sentence, which states “Discovery shall be in two stages.” She noted and the committee agreed that it was not the committee’s intent to imply that parties are entitled to seek discovery beyond the 150 days noted in subsection (d)(1). The committee agreed.

The committee also debated the appropriate titles for subsections (d)(1) and (2). Mr. Wikstrom indicated that the objective should be to emphasize the limitation. Mr. Lee suggested titling subsection (d)(1), Standard Discovery. Mr. Battle suggested titling subsection (d)(2), Extraordinary Discovery. The committee discussed the use of the term extraordinary to indicate to practitioners that absent compelling circumstances, discovery should be completed within the 150 day limit set forth in subsection (d)(1). The committee agreed to the titles referenced above. The committee also agreed to remove the references to “fact” discovery.

Mr. Slauch questioned why parties should not be able to stipulate to an extension of discovery under subsection (d)(2)(A), after the close of initial discovery? The committee debated whether it should adopt a revision allowing for such a stipulation. Several committee members indicated that parties, absent a formal stipulation, may informally agree to engage in discovery, despite the limitations of subsection (d)(2)(A). Mr. Wikstrom and Judge Pullan also noted the limitation is no different than any other bright-line rule.

Finally, Mr. Wikstrom directed the committee’s attention to Rule 30 and expert depositions. The committee debated the prohibition on depositions for any witness who may present evidence under Rules 702, 703, or 705 of the Utah Rules of Evidence.

Mr. Battle began by questioning whether the prohibition would ultimately serve the committee’s purposes. He suggested in medical malpractice cases plaintiff’s lawyers in particular want to take expert depositions to settle cases. Mr. Carney agreed. He suggested that parties even in light of this rule would take expert depositions by informal stipulation.

Mr. Hafen suggested allowing expert discovery under Rule 26(d)(2), Extraordinary Discovery. The committee debated whether it should include an exception in Rule 30 for expert depositions by stipulation or allow for expert depositions under Rule 26(d)(2).

Mr. Carney also questioned whether a non-retained expert could be deposed under Rule 30. The committee agreed to look at Rule 26(a)(3)(A) and the designation of retained and non-retained experts in the context of Rule 30.

The committee agreed to revisit Rule 30 at the next meeting.

V. ADJOURNMENT.

The meeting adjourned at 6:00 p.m. The next meeting of the committee will be held at 4:00 p.m. on Wednesday, April 28, 2010, at the Administrative Office of the Courts.

Tab 2

1 **Rule 1. General provisions.**

2 (a) Scope of rules. These rules govern the procedure in the courts of the state of
3 Utah in all actions of a civil nature, whether cognizable at law or in equity, and in all
4 statutory proceedings, except as governed by other rules promulgated by this court or
5 enacted by the Legislature and except as stated in Rule 81. They shall be liberally
6 construed and applied to achieve the just, speedy, and inexpensive determination of
7 every action. These rules govern all actions brought after they take effect and all further
8 proceedings in actions then pending. If, in the opinion of the court, applying a rule in an
9 action pending when the rule takes effect would not be feasible or would be unjust, the
10 former procedure applies.

11 Advisory Committee Notes

12

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

2 (a) How commenced. A civil action is commenced by filing a complaint with the
3 court.

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

10 Advisory Committee Notes

11

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) Service. The summons and a copy of the complaint shall be served no later
5 than 120 days after the complaint is filed unless the court allows a longer period of time
6 for good cause. If the summons and complaint are not timely served, the action shall be
7 dismissed without prejudice on application of any party or upon the court's own initiative.

8 (b)(ii) In an action against two or more defendants, if service has been timely made
9 upon one of them,

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

11 (b)(ii)(B) the others may be served or appear at any time before trial.

12 (c) Contents of summons.

13 (c)(1) The summons shall contain the name of the court, the address of the court,
14 the names of the parties to the action, and the county in which it is brought. It shall be
15 directed to the defendant, state the name, address and telephone number of the
16 plaintiff's attorney, if any, and otherwise the plaintiff's address and telephone number. It
17 shall state the time within which the defendant must answer the complaint in writing,
18 and shall notify the defendant that judgment by default will be entered against the
19 defendant for failure to answer the complaint in writing.

20 (c)(2) If service is made by publication of the summons without the complaint, the
21 summons shall also briefly state the subject matter of the action, the relief demanded,
22 and that the complaint is on file with the court.

23 (d) Method of Service. Unless waived under paragraph (f), service of the summons
24 and complaint shall be by one of the following methods:

25 (d)(1) Personal service. The summons and complaint may be served in any state or
26 judicial district of the United States by the sheriff or constable or by the deputy of either,
27 by a United States Marshal or by the marshal's deputy, or by a person 18 years of age
28 or older at the time of service and not a party to the action or a party's attorney.
29 Personal service shall be made as follows:

30 (d)(1)(A) Upon any individual other than one covered by paragraphs (B), (C) or (D),
31 by delivering a copy of the summons and complaint to the individual personally, or by

32 delivering them to a person of suitable age and discretion residing at the individual's
33 dwelling or by delivering them to an agent authorized by appointment or by law to
34 receive service of process;

35 (d)(1)(B) Upon a minor, by delivering a copy of the summons and complaint to the
36 minor and to the minor's parent or guardian or, if none can be found within the state,
37 then to any person having the care and control of the minor, or with whom the minor
38 resides;

39 (d)(1)(C) Upon a protected person judicially declared incapacitated, by delivering a
40 copy of the summons and complaint to the protected person and to the person's
41 guardian or conservator;

42 (d)(1)(D) Upon an individual incarcerated or committed at a facility operated by the
43 state or any of its political subdivisions, by delivering a copy of the summons and
44 complaint to the person's guardian or conservator, if one has been appointed, or to the
45 person who has the care, custody, or control of the individual to be served, or to that
46 person's designee;

47 (d)(1)(E) Upon a corporation not otherwise provided for, upon a partnership or upon
48 an unincorporated association or business entity which is subject to suit under a
49 common name, by delivering a copy of the summons and complaint to an officer, a
50 managing agent, general agent, or other agent authorized by appointment or by law to
51 receive service of process and, if required by law by also mailing a copy of the
52 summons and the complaint to the entity and to any other person required by statute to
53 be served. If no such officer or agent can be found within the state, and the defendant
54 has an office or place of business then upon the person in charge of such office or place
55 of business;

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

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

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

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

64 (d)(1)(J) Upon the state of Utah, by delivering a copy of the summons and complaint
65 to the attorney general and any other person or agency required by statute to be
66 served; and

67 (d)(1)(K) Upon a department or agency of the state of Utah, or upon any public
68 board, commission or body, by delivering a copy of the summons and complaint to any
69 member of its governing board, or to its executive employee or secretary.

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

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

74 (d)(2)(A) The summons and complaint may be served upon an individual other than
75 one covered by paragraphs (d)(1)(B) or (d)(1)(C) by mail or commercial courier service
76 if the defendant signs a document indicating receipt.

77 (d)(2)(B) The summons and complaint may be served upon an entity covered by
78 paragraphs (d)(1)(E) through (d)(1)(I) by mail or commercial courier service if the
79 defendant's agent signs a document indicating receipt.

80 (d)(2)(C) Service by mail or commercial courier service is complete on the date the
81 receipt is signed.

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

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

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

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

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

94 (d)(3)(B)(iii) unless prohibited by the law of the foreign country, by delivery to the
95 individual personally or by any form of mail requiring a signed receipt, to be addressed
96 and dispatched by the clerk of the court to the party to be served; or

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

99 (d)(4) Other service.

100 (d)(4)(A) If the person to be served cannot be served through reasonable diligence,
101 or if service upon all of the parties is impracticable under the circumstances, the party
102 seeking service may file a motion supported by affidavit requesting an order allowing
103 service by other means. The supporting affidavit shall set forth the efforts made to
104 identify, locate or serve the party or the circumstances which make it impracticable to
105 serve all of the parties.

106 (d)(4)(B) If the motion is granted, the court shall order service by other means
107 reasonably calculated under all the circumstances to notify the party of the action. The
108 order shall specify the content of the process to be served and the event that constitutes
109 completion of service.

110 (e) Proof of Service.

111 (e)(1) The person effecting service shall file proof with the court. The proof of service
112 must state the date, place, and manner of service. Proof of service made pursuant to
113 paragraph (d)(2) shall include a receipt signed by the defendant or defendant's agent. If
114 service is made by a person other than by an attorney, the sheriff or constable, or by the
115 deputy of either, by a United States Marshal or by the marshal's deputy, the proof of
116 service shall be made by affidavit.

117 (e)(2) Proof of service in a foreign country shall be made as provided in these rules,
118 or by the law of the foreign country, or by order of the court. Proof of service under
119 paragraph (d)(3)(B)(iii) shall include a receipt signed by the addressee or other
120 evidence of delivery to the addressee satisfactory to the court.

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

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

124 (f)(1) A plaintiff may request a person other than a minor or a protected person to
125 waive service of the summons and complaint. The request to waive service and the
126 summons and complaint shall be mailed, e-mailed or delivered to the person upon
127 whom service is authorized under paragraph (d). The request shall allow the defendant
128 at least 21 days from the date on which the request is sent to return the waiver, or 28
129 days if addressed to a person outside of the United States, and shall be substantially in
130 the form of the Notice of Lawsuit and Request for Waiver of Service of Summons set
131 forth in the Appendix of Forms attached to these rules.

132 (f)(2) A defendant who timely returns a waiver must respond to the complaint within
133 42 days after the date on which the request for waiver of service was mailed, e-mailed
134 or delivered, or 56 days after that date if addressed to a person outside of the United
135 States.

136 (f)(3) A defendant who waives service of the summons and complaint does not
137 thereby make any other waiver.

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

141 Advisory Committee Notes

142

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

2 (a) Claims for relief. An original claim, counterclaim, cross-claim or third-party claim
3 shall contain a simple, short and plain:

4 (a)(1) statement of facts showing that the party is entitled to relief;

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

6 (a)(3) demand for judgment for specified relief. Relief in the alternative or of several
7 different types may be demanded.

8 (b) Defenses; form of denials. A party shall state in simple, short and plain terms any
9 defenses to each claim asserted and shall admit or deny the statements in the claim. A
10 party without knowledge or information sufficient to form a belief about the truth of a
11 statement shall so state, and this has the effect of a denial. Denials shall fairly meet the
12 substance of the statements denied. A party may deny all of the statements in a claim
13 by general denial. A party may specify the statement or part of a statement that is
14 admitted and deny the rest. A party may specify the statement or part of a statement
15 that is denied and admit the rest.

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

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

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

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

21 A party shall set forth affirmatively in a responsive pleading accord and satisfaction,
22 arbitration and award, assumption of risk, contributory negligence, discharge in
23 bankruptcy, duress, estoppel, failure of consideration, fraud, illegality, injury by fellow
24 servant, laches, license, payment, release, res judicata, statute of frauds, statute of
25 limitations, waiver, and any other matter constituting an avoidance or affirmative
26 defense. If a party mistakenly designates a defense as a counterclaim or a counterclaim
27 as a defense, the court, on terms, may treat the pleadings as if the defense or
28 counterclaim had been properly designated.

29 (d) Effect of failure to deny. Statements in a pleading to which a responsive pleading
30 is required, other than statements of the amount of damage, are admitted if not denied

31 in the responsive pleading. Statements in a pleading to which no responsive pleading is
32 required or permitted are deemed denied or avoided.

33 (e) Consistency. A party may state a claim or defense alternately or hypothetically,
34 either in one count or defense or in separate counts or defenses. If statements are
35 made in the alternative and one of them is sufficient, the pleading is not made
36 insufficient by the insufficiency of an alternative statement. A party may state legal and
37 equitable claims or legal and equitable defenses regardless of consistency.

38 (f) Construction of pleadings. All pleadings shall be construed to do substantial
39 justice.

40 Advisory Committee Notes

41 By requiring a party to plead the “facts” (rather than the former “claims”) showing
42 that the party is entitled to relief, the committee does not intend to put in place the old
43 technical pleading requirements of fact pleading. Rather, the committee intends that the
44 pleadings, both claims and defenses, should provide more and earlier notice of the facts
45 alleged by a party with less reliance on discovery. We don’t mean Twombly.

46

1 **Rule 16. Pretrial conferences.**

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

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

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

7 (a)(3) discouraging wasteful pretrial activities;

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

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

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

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

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

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

14 (a)(10) extending fact discovery;

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

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

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

20 (a)(14) any other appropriate matters.

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

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

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

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

34 Advisory Committee Notes

35

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

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

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

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

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

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

12 (a)(1)(A)(iii) each witness who may be used at trial to present evidence under Rules
13 702, 703, or 705 of the Utah Rules of Evidence;

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

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

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

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

24 (a)(1)(F) The disclosures required by paragraph (a)(1) shall be made:

25 (a)(1)(F)(i) by the plaintiff within 14 days after service of the first answer to the
26 complaint; and

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

29 (a)(2) Exemptions.

30 (a)(2)(A) Unless otherwise ordered by the court or agreed to by the parties, the
31 requirements of paragraph (a)(1) do not apply to actions:

32 (a)(2)(A)(i) for judicial review of adjudicative proceedings or rule making proceedings
33 of an administrative agency;

34 (a)(2)(A)(ii) governed by Rule 65B or Rule 65C;

35 (a)(2)(A)(iii) to enforce an arbitration award;

36 (a)(2)(A)(iv) for water rights general adjudication under Title 73, Chapter 4.

37 (a)(2)(B) In an exempt action, the matters subject to disclosure under paragraph
38 (a)(1) are subject to discovery under paragraph (b).

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

40 (a)(3)(A) A party shall, without waiting for a discovery request, provide to other
41 parties a copy of a written report of any person who may be used at trial to present
42 evidence under Rules 702, 703, or 705 of the Utah Rules of Evidence and who is
43 retained or specially employed to provide expert testimony in the case or whose duties
44 as an employee of the party regularly involve giving expert testimony. The report shall
45 be signed by the expert and contain the subject matter on which the expert expects to
46 testify; the substance of the facts and opinions to which the expert expects to testify; a
47 summary of the grounds for each opinion; the qualifications of the expert, including a list
48 of all publications authored within the preceding ten years; the compensation to be paid
49 for the study and testimony; and a list of any other cases in which the expert has
50 testified as an expert at trial or by deposition within the preceding four years. Such an
51 expert may not testify in a party's case-in-chief concerning any matter not contained in
52 the report.

53 (a)(3)(B) Disclosure required by paragraph (a)(3) shall be made within 28 days after
54 the expiration of fact discovery as provided by paragraph (d) or, if the evidence is
55 intended solely to contradict evidence under paragraph (a)(3)(A), within 56 days after
56 disclosure by the other party.

57 (a)(4) Pretrial disclosures. A party shall, without waiting for a discovery request,
58 provide to other parties:

59 (a)(4)(A) the name and, if not previously provided, the address and telephone
60 number of each witness, unless solely for impeachment, separately identifying
61 witnesses the party will call and witnesses the party may call;

62 (a)(4)(B) the name of witnesses whose testimony is expected to be presented by
63 transcript of a deposition and a copy of the transcript; and

64 (a)(4)(C) identification of each exhibit, including summaries of other evidence, unless
65 solely for impeachment, separately identifying those which the party will offer and those
66 which the party may offer.

67 (a)(4)(D) Disclosure required by paragraph (a)(4) shall be made at least 28 days
68 before trial. At least 14 days before trial, a party shall serve and file objections and
69 grounds for the objections to the use of a deposition and to the admissibility of exhibits.
70 Other than objections under Rules 402 and 403 of the Utah Rules of Evidence,
71 objections not listed are waived unless excused by the court for good cause.

72 (b) Discovery scope.

73 (b)(1) In general. Parties may discover any matter, not privileged, which is relevant
74 to the claim or defense of any party if the discovery satisfies the standards of
75 proportionality set forth below. Discovery and discovery requests are proportional if:

76 (b)(1)(A) the likely benefits of the proposed discovery outweigh the burden or
77 expense;

78 (b)(1)(B) the discovery is consistent with the overall case management and will
79 further the just, speedy and inexpensive determination of the case;

80 (b)(1)(C) the discovery is reasonable, considering the needs of the case, the amount
81 in controversy, the complexity of the case, the parties' resources, the importance of the
82 issues, and the importance of the discovery in resolving the issues;

83 (b)(1)(D) the discovery is not unreasonably cumulative or duplicative;

84 (b)(1)(E) the information cannot be obtained from another source that is more
85 convenient, less burdensome or less expensive; and

86 (b)(1)(F) the party seeking discovery has not had sufficient opportunity to obtain the
87 information by discovery or otherwise, taking into account the parties' relative access to
88 the information.

89 (b)(2) The party seeking discovery has the burden of showing proportionality. To
90 ensure proportionality, the court may enter orders described in Rule 37.

91 (b)(3) A party need not provide discovery of electronically stored information from
92 sources that the party identifies as not reasonably accessible because of undue burden

93 or cost. The party shall expressly make any claim that the source is not reasonably
94 accessible, describing the source, the nature and extent of the burden, the nature of the
95 information not provided, and any other information that will enable other parties to
96 evaluate the claim. On motion to compel discovery or for a protective order, the party
97 from whom discovery is sought must show that the information is not reasonably
98 accessible because of undue burden or cost. If that showing is made, the court may
99 order discovery from such sources if the requesting party shows good cause. The court
100 may specify conditions for the discovery.

101 (b)(4) Trial preparation materials. A party may obtain otherwise discoverable
102 documents and tangible things prepared in anticipation of litigation or for trial by or for
103 another party or by or for that other party's representative (including the party's attorney,
104 consultant, surety, indemnitor, insurer, or agent) only upon a showing that the party
105 seeking discovery has substantial need of the materials and that the party is unable
106 without undue hardship to obtain substantially equivalent materials by other means. In
107 ordering discovery of such materials, the court shall protect against disclosure of the
108 mental impressions, conclusions, opinions, or legal theories of an attorney or other
109 representative of a party.

110 (b)(5) Statement previously made about the action. A party may obtain without the
111 showing required in paragraph (b)(4) a statement concerning the action or its subject
112 matter previously made by that party. Upon request, a person not a party may obtain
113 without the required showing a statement about the action or its subject matter
114 previously made by that person. If the request is refused, the person may move for a
115 court order under Rule 37. A statement previously made is (A) a written statement
116 signed or approved by the person making it, or (B) a stenographic, mechanical,
117 electrical, or other recording, or a transcription thereof, which is a substantially verbatim
118 recital of an oral statement by the person making it and contemporaneously recorded.

119 (b)(6) Claims of Privilege or Protection of Trial Preparation Materials.

120 (b)(6)(A) Information withheld. If a party withholds discoverable information by
121 claiming that it is privileged or prepared in anticipation of litigation or for trial, the party
122 shall make the claim expressly and shall describe the nature of the documents,

123 communications, or things not produced in a manner that, without revealing the
124 information itself, will enable other parties to evaluate the claim.

125 (b)(6)(B) Information produced. If a party produces information that the party claims
126 is privileged or prepared in anticipation of litigation or for trial, the producing party may
127 notify any receiving party of the claim and the basis for it. After being notified, a
128 receiving party must promptly return, sequester, or destroy the specified information and
129 any copies it has and may not use or disclose the information until the claim is resolved.
130 A receiving party may promptly present the information to the court under seal for a
131 determination of the claim. If the receiving party disclosed the information before being
132 notified, it must take reasonable steps to retrieve it. The producing party must preserve
133 the information until the claim is resolved.

134 (c) Sequence and timing of discovery.

135 (c)(1) Standard discovery. Standard discovery shall be completed within 150 days
136 after the defendant's first disclosure is made and the parties shall follow the limits
137 established in Rules 30, 33, 34 and 36. Methods of discovery may be used in any
138 sequence and the fact that a party is conducting discovery shall not delay any other
139 party's discovery. Except for cases exempt under paragraph (a)(2), a party may not
140 seek discovery from any source before that party's initial disclosure obligations are
141 satisfied.

142 (c)(2) Extraordinary discovery. To obtain discovery beyond the limits established in
143 Paragraph (c)(1), a party shall file:

144 (c)(2)(A) before the close of standard discovery, a stipulation of extraordinary
145 discovery and a statement signed by the parties and attorneys that extraordinary
146 discovery is necessary and proportional and that each party has reviewed and approved
147 a discovery budget; or

148 (c)(2)(B) before the close of the standard discovery and after reaching the limits of
149 standard discovery imposed by these rules, a motion for extraordinary discovery and a
150 statement signed by the party and attorney that the extraordinary discovery is
151 necessary and proportional and that the party has reviewed and approved a discovery
152 budget.

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

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

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

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

164 (d)(4) If a party fails to disclose or to timely supplement a disclosure or response to
165 discovery, that party may not use the undisclosed witness, document or material at any
166 hearing or trial unless the failure is harmless or the party shows good cause for the
167 failure.

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

173 (e) Signing discovery requests, responses, and objections. Every disclosure, request
174 for discovery, response to a request for discovery and objection to a request for
175 discovery shall be in writing and signed by at least one attorney of record or by the party
176 if the party is not represented. The signature of the attorney or party is a certification
177 under Rule 11. If a request or response is not signed, a party does not need to take any
178 action with respect to it. If a certification is made in violation of the rule, the court, upon
179 motion or upon its own initiative, may take any action authorized by Rule 11 or Rule
180 37(b)(2).

181 (f) Filing. Except as required by these rules or ordered by the court, a party shall not
182 file with the court a disclosure, a request for discovery or a response to a request for

183 discovery, but shall file only the certificate of service stating that the disclosure, request
184 for discovery or response has been served on the other parties and the date of service.

185 Advisory Committee Notes

186

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

55

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

2 The parties may modify these rules for disclosure and discovery by filing, before the
3 close of standard discovery, a stipulated notice of extraordinary discovery and a
4 statement signed by the parties and lawyers that the extraordinary discovery is
5 necessary and proportionate and that each party has reviewed and approved a
6 discovery budget. Stipulations extending the time for or limits of disclosure or discovery
7 require court approval if the extension would interfere with a court order for completion
8 of discovery or with the date of a hearing or trial.

9 Advisory Committee Notes

10

1 **Rule 30. Depositions upon oral questions.**

2 (a) When depositions may be taken; when leave required; no deposition of expert
3 witnesses. A party may depose a party or witness by oral questions. A witness may not
4 be deposed more than once in standard discovery. An expert who has prepared a
5 report disclosed under Rule 26(a)(3) may not be deposed.

6 (b) Notice of deposition; general requirements; special notice; non-stenographic
7 recording; production of documents and things; deposition of organization; deposition by
8 telephone.

9 (b)(1) The party deposing a witness shall give reasonable notice in writing to every
10 other party. The notice shall state the date, time and place for the deposition and the
11 name and address of each witness. If the name of a witness is not known, the notice
12 shall describe the witness sufficiently to identify the person or state the class or group to
13 which the person belongs. The notice shall designate any documents and tangible
14 things to be produced by a witness. The notice shall designate the officer who will
15 conduct the deposition.

16 (b)(2) The notice shall designate the method by which the deposition will be
17 recorded. With prior notice to the officer, witness and other parties, any party may
18 designate a recording method in addition to the method designated in the notice.
19 Depositions may be recorded by sound, sound-and-visual, or stenographic means, and
20 the party designating the recording method shall bear the cost of the recording. The
21 appearance or demeanor of witnesses or attorneys shall not be distorted through
22 recording techniques.

23 (b)(3) A deposition shall be conducted before an officer appointed or designated
24 under Rule 28 and shall begin with a statement on the record by the officer that includes
25 (A) the officer's name and business address; (B) the date, time and place of the
26 deposition; (C) the name of the witness; (D) the administration of the oath or affirmation
27 to the witness; and (E) an identification of all persons present. If the deposition is
28 recorded other than stenographically, the officer shall repeat items (A) through (C) at
29 the beginning of each unit of the recording medium. At the end of the deposition, the
30 officer shall state on the record that the deposition is complete and shall state any
31 stipulations.

32 (b)(4) The notice to a party witness may be accompanied by a request under Rule
33 34 for the production of documents and tangible things at the deposition. The procedure
34 of Rule 34 shall apply to the request. The attendance of a nonparty witness may be
35 compelled by subpoena under Rule 45. Documents and tangible things to be produced
36 shall be stated in the subpoena.

37 (b)(5) A deposition may be taken by remote electronic means. A deposition taken by
38 remote electronic means is considered to be taken at the place where the witness
39 answers questions.

40 (b)(6) A party may name as the witness a corporation, a partnership, an association,
41 or a governmental agency, describe with reasonable particularity the matters on which
42 questioning is requested, and direct the organization to designate one or more officers,
43 directors, managing agents, or other persons to testify on its behalf. The organization
44 shall state, for each person designated, the matters on which the person will testify. A
45 subpoena shall advise a nonparty organization of its duty to make such a designation.

46 (c) Examination and cross-examination; objections.

47 (c)(1) Questioning of witnesses may proceed as permitted at the trial under the Utah
48 Rules of Evidence, except Rules 103 and 615.

49 (c)(2) All objections shall be recorded, but the questioning shall proceed, and the
50 testimony taken subject to the objections. Any objection shall be stated concisely and in
51 a non-argumentative and non-suggestive manner. A person may instruct a witness not
52 to answer only to preserve a privilege, to enforce a limitation on evidence directed by
53 the court, or to present a motion for a protective order under Rule 26(c). Upon demand
54 of the objecting party or witness, the deposition shall be suspended for the time
55 necessary to make a motion. The party taking the deposition may complete or adjourn
56 the deposition before moving for an order to compel discovery under Rule 37.

57 (d) Limits. During standard discovery, each side (plaintiffs collectively, defendants
58 collectively, and third-party defendants collectively) is limited to 20 hours of deposition
59 by oral questioning. Oral questioning of a nonparty shall not exceed four hours, and oral
60 questioning of a party shall not exceed seven hours.

61 (e) Submission to witness; changes; signing. Within 28 days after being notified by
62 the officer that the transcript or recording is available, a witness may sign a statement of

63 changes to the form or substance of the transcript or recording and the reasons for the
64 changes. The officer shall append any changes timely made by the witness.

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

66 (f)(1) The officer shall record the deposition or direct another person present to
67 record the deposition. The officer shall sign a certificate, to accompany the record, that
68 the witness was under oath or affirmation and that the record is a true record of the
69 deposition. The officer shall keep a copy of the record. The officer shall securely seal
70 the record endorsed with the title of the action and marked "Deposition of (name). Do
71 not open." and shall promptly send the sealed record to the attorney or the party who
72 designated the recording method. An attorney or party receiving the record shall store it
73 under conditions that will protect it against loss, destruction, tampering, or deterioration.

74 (f)(2) Every party may inspect and copy documents and things produced for
75 inspection and must have a fair opportunity to compare copies and originals. Upon the
76 request of a party, documents and things produced for inspection shall be marked for
77 identification and added to the record. If the witness wants to retain the originals, that
78 person shall offer the originals to be copied, marked for identification and added to the
79 record.

80 (f)(3) Upon payment of reasonable charges, the officer shall furnish a copy of the
81 record to any party or to the witness. An official transcript of a recording made by non-
82 stenographic means shall be prepared under Utah Rule of Appellate Procedure 11(e).

83 (g) Failure to attend or to serve subpoena; expenses. If the party giving the notice of
84 a deposition fails to attend or fails to serve a subpoena upon a witness who fails to
85 attend, and another party attends in person or by attorney, the court may order the party
86 giving the notice to pay to the other party the reasonable costs, expenses and attorney
87 fees incurred.

88 (h) Deposition in action pending in another state. Any party to an action in another
89 state may take the deposition of any person within this state in the same manner and
90 subject to the same conditions and limitations as if such action were pending in this
91 state. Notice of the deposition shall be filed with the clerk of the court of the county in
92 which the person whose deposition is to be taken resides or is to be served. Matters

93 required to be submitted to the court shall be submitted to the court in the county where
94 the deposition is being taken.

95 Advisory Committee Notes

96

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

2 (a) A party may depose a party or witness by written questions. Rules 30 and 45
3 apply to depositions upon written questions, except insofar as by their nature they are
4 clearly inapplicable.

5 (b) A party taking a deposition using written questions shall serve on the parties a
6 notice which includes the name or description and address of the deponent, the name
7 or descriptive title of the officer before whom the deposition will be taken, and the
8 questions to be asked.

9 (c) Within 14 days after the questions are served, a party may serve cross
10 questions. Within 7 days after being served with cross questions, a party may serve
11 redirect questions. Within 7 days after being served with redirect questions, a party may
12 serve re-cross questions.

13 (d) A copy of the notice and copies of all questions served shall be delivered by the
14 party taking the deposition to the designated officer who shall proceed promptly to ask
15 the questions and prepare a record of the responses.

16 (e) During standard discovery, a deposition by written questioning shall not
17 cumulatively exceed 15 questions, including discrete subparts, by the plaintiffs
18 collectively, by the defendants collectively or by third-party defendants collectively.

19 Advisory Committee Notes

20

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

2 (a) Availability; procedures for use. During standard discovery, any party may serve
3 upon any other party up to 15 written interrogatories, including all discrete subparts.

4 (b) Answers and objections. The responding party shall serve a written response
5 within 28 days after service of the interrogatories. The responding party shall restate the
6 interrogatory before responding to it. Each interrogatory shall be answered separately
7 and fully in writing under oath or affirmation, unless it is objected to. If an interrogatory is
8 objected to, the party shall state the reasons for the objection. Any reason not stated is
9 waived unless excused by the court for good cause. An interrogatory is not
10 objectionable merely because an answer involves an opinion or argument that relates to
11 fact or the application of law to fact. The party shall answer any part of an interrogatory
12 that is not objectionable.

13 (c) Scope; use at trial. Interrogatories may relate to any discoverable matter.
14 Answers may be used as permitted by the Rules of Evidence.

15 (d) Option to produce business records. If the answer to an interrogatory may be
16 found by inspecting the answering party's business records, including electronically
17 stored information, and the burden of finding the answer is substantially the same for
18 both parties, the answering party may identify the records from which the answer may
19 be found. The answering party must give the asking party reasonable opportunity to
20 inspect the records and to make copies, compilations, or summaries. The answering
21 party must identify the records in sufficient detail to permit the asking party to locate and
22 to identify them as readily as the answering party.

23 Advisory Committee Notes

24

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

3 (a) Scope.

4 (a)(1) Any party may serve on any other party a request to produce and permit the
5 requesting party to inspect, copy, test or sample any designated discoverable
6 documents, electronically stored information or tangible things (including writings,
7 drawings, graphs, charts, photographs, sound recordings, images, and other data or
8 data compilations stored in any medium from which information can be obtained,
9 translated, if necessary, by the respondent into reasonably usable form) in the
10 possession or control of the responding party .

11 (a)(2) Any party may serve on any other party a request to permit entry upon
12 designated property in the possession or control of the responding party for the purpose
13 of inspecting, measuring, surveying, photographing, testing, or sampling the property or
14 any designated discoverable object or operation on the property.

15 (b) Procedure and limitations.

16 (b)(1) The request shall identify the items to be inspected by individual item or by
17 category, and describe each item and category with reasonable particularity. During
18 standard discovery, the request shall not cumulatively include more than 25 distinct
19 items or categories of items. The request shall specify a reasonable date, time, place,
20 and manner of making the inspection and performing the related acts. The request may
21 specify the form or forms in which electronically stored information is to be produced.

22 (b)(2) The responding party shall serve a written response within 28 days after
23 service of the request. The responding party shall restate the request before responding
24 to it. The response shall state, with respect to each item or category, that inspection and
25 related acts will be permitted as requested, or that the request is objected to. If the party
26 objects to a request, the party must state the reasons for the objection. Any reason not
27 stated is waived unless excused by the court for good cause. The party shall identify
28 and permit inspection of any part of a request that is not objectionable. If the party
29 objects to the requested form or forms for producing electronically stored information --
30 or if no form was specified in the request -- the responding party must state the form or
31 forms it intends to use.

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

33 (c)(1) A party who produces documents for inspection shall produce them as they
34 are kept in the usual course of business or shall organize and label them to correspond
35 with the categories in the request.

36 (c)(2) If a request does not specify the form or forms for producing electronically
37 stored information, a responding party must produce the information in a form or forms
38 in which it is ordinarily maintained or in a form or forms that are reasonably usable.

39 (c)(3) A party need not produce the same electronically stored information in more
40 than one form.

41 Advisory Committee Notes

42

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

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

13 (b) Examiner as witness. If the party requesting the examination wishes to call the
14 examiner as a witness, the party shall disclose an expert report as required by Rule
15 26(a)(3), and shall also disclose all expert reports disclosed and transcripts of any
16 expert testimony given during the prior four years.

17 (c) Sanctions. If a party or a person in the custody or under the legal control of a
18 party fails to obey an order entered under paragraph (a), the court on motion may take
19 any action authorized by Rule 37(b)(2), except that the failure cannot be treated as
20 contempt of court.

21

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

2 (a) Request for admission. A party may serve upon any other party a written request
3 to admit the truth of any discoverable matter set forth in the request, including the
4 genuineness of any document. The matter must relate to statements or opinions of fact
5 or of the application of law to fact. Each matter shall be separately stated. During
6 standard discovery, a party may not request admission of more than 25 matters. A copy
7 of the document shall be served with the request unless it has already been furnished or
8 made available for inspection and copying. The request shall notify the responding party
9 that the matters will be deemed admitted unless the party responds within 28 days after
10 service of the request.

11 (b) Answer or objection.

12 (b)(1) The matter is admitted unless, within 28 days after service of the request, the
13 responding party serves upon the requesting party a written response.

14 (b)(2) The responding party shall restate the request before responding to it. Unless
15 the answering party objects to a matter, the party must admit or deny the matter or state
16 in detail the reasons why the party cannot truthfully admit or deny. The party shall
17 restate the request before answering. A party may identify the part of a matter which is
18 true and deny the rest. A denial shall fairly meet the substance of the request. Lack of
19 information is not a reason for failure to admit or deny unless the information known or
20 reasonably available is insufficient to form an admission or denial. If the truth of a matter
21 is a genuine issue for trial, the answering party may deny the matter or state the
22 reasons for the failure to admit or deny.

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

27 (c) Sanctions for failure to admit. If a party fails to admit the truth of any discoverable
28 matter set forth in the request, and if the requesting party proves the truth of the matter,
29 the requesting party may move for an order requiring the other party to pay the
30 reasonable expenses of proving the matter, including reasonable attorney fees. The
31 court shall enter the order unless it finds that:

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

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

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

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

37 (d) Effect of admission. Any matter admitted under this rule is conclusively
38 established unless the court on motion permits withdrawal or amendment of the
39 admission. The court may permit withdrawal or amendment if the presentation of the
40 merits of the action will be promoted and withdrawal or amendment will not prejudice
41 the requesting party. Any admission under this rule is for the purpose of the pending
42 action only. It is not an admission for any other purpose, nor may it be used in any other
43 action.

44 Advisory Committee Notes

45

1 **Rule 37. Discovery and disclosure motions; Sanctions.**

2 (a) Motion for order compelling disclosure or discovery.

3 (a)(1) Motion. A party may move to compel disclosure or discovery and for
4 appropriate sanctions if another party:

5 (a)(1)(A) makes an evasive, incomplete or insufficient disclosure or response to a
6 request for discovery;

7 (a)(1)(B) fails to disclose, fails to respond to a discovery request, fails to supplement
8 a disclosure or response or makes a supplemental disclosure or response without an
9 adequate explanation of why the additional or correct information was not previously
10 provided;

11 (a)(1)(C) objects to a request for discovery;

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

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

14 (a)(2) Appropriate court. A motion may be made to the court in which the action is
15 pending, or, on matters relating to a deposition, to the court in the district where the
16 deposition is being taken. A motion for an order to a nonparty witness shall be made to
17 the court in the district where the deposition is being taken.

18 (a)(3) The movant must attach a copy of the request for discovery, request for
19 disclosure, or the response at issue. The movant must also attach a certification that the
20 movant has in good faith conferred or attempted to confer with the party not making the
21 disclosure or discovery in an effort to secure the disclosure or discovery without court
22 action and that the disclosure or discovery being sought is proportional under Rule
23 26(b)(1).

24 (b) Protective orders.

25 (b)(1) A party or the person from whom discovery or disclosure is sought may move
26 for an order of protection from discovery. The movant shall attach to the motion a copy
27 of the request for discovery, the request for disclosure, or the response at issue. The
28 movant shall also attach a certification that the movant has in good faith conferred or
29 attempted to confer with other affected parties to resolve the dispute without court
30 action. The court may make any order to protect a party or person from discovery being
31 conducted in bad faith or from annoyance, embarrassment, oppression, or undue

32 burden or expense, or to achieve proportionality under Rule 26(b)(1), including one or
33 more of the following:

34 (b)(1)(A) that the discovery not be had;

35 (b)(1)(B) that the discovery may be had only on specified terms and conditions,
36 including a designation of the time or place;

37 (b)(1)(C) that the discovery may be had only by a method of discovery other than
38 that selected by the party seeking discovery;

39 (b)(1)(D) that certain matters not be inquired into, or that the scope of the discovery
40 be limited to certain matters;

41 (b)(1)(E) that discovery be conducted with no one present except persons
42 designated by the court;

43 (b)(1)(F) that a deposition after being sealed be opened only by order of the court;

44 (b)(1)(G) that a trade secret or other confidential research, development, or
45 commercial information not be disclosed or be disclosed only in a designated way;

46 (b)(1)(H) that the parties simultaneously file specified documents or information
47 enclosed in sealed envelopes to be opened as directed by the court;

48 (b)(1)(I) that a question about a statement or opinion of fact or the application of law
49 to fact not be answered until after designated discovery has been completed or until a
50 pretrial conference or other later time; or

51 (b)(1)(J) that the costs, expenses and attorney fees of discovery be allocated among
52 the parties as justice requires.

53 (b)(2) If the protective order terminates a deposition, it shall be resumed only upon
54 the order of the court in which the action is pending.

55 (b)(3) If the motion raises issues of proportionality under Rule 26(b)(1), the party
56 opposing the motion has the burden of demonstrating that the discovery or disclosure
57 being sought is proportional.

58 (c) Expenses and sanctions for motions.

59 (c)(1) If the motion to compel or for protective order is granted, or if a party changed
60 its position by providing the disclosure or discovery after a motion to compel is filed or
61 by withdrawing a discovery or disclosure request after a motion for protective order is
62 filed, the court shall, after opportunity for response, require the party or witness whose

63 conduct necessitated the motion or the party or attorney advising such conduct or both
64 of them to pay to the prevailing party the reasonable expenses incurred in obtaining the
65 order or opposing the motion, including attorney fees, unless the court finds that the
66 non-prevailing party sought or opposed the discovery or disclosure in good faith,, or that
67 other circumstances make an award of expenses unjust.

68 (c)(2) If a motion to compel is denied, the court may enter any protective order
69 authorized under subsection (b) of this Rule. If a motion for protective order is denied,
70 the court may enter any order to compel authorized under subsection (a) of this Rule.
71 this Rule.

72 (c)(3) If a motion to compel or a motion for protective order is granted in part and
73 denied in part, the court may enter any order authorized under this Rule and may, after
74 opportunity for response, apportion the reasonable expenses incurred in relation to the
75 motion among the parties and persons in a just manner.

76 (d) Failure to comply with order.

77 (d)(1) Sanctions by court in district where deposition is taken. Failure to follow an
78 order of the court in the district in which the deposition is being taken is contempt of that
79 court.

80 (d)(2) Sanctions by court in which action is pending. Unless the court finds that the
81 failure was substantially justified, the court in which the action is pending may take such
82 action in regard to the failure to follow its orders as are just, including the following:

83 (d)(2)(A) deem the matter or any other designated facts to be established in
84 accordance with the claim or defense of the party obtaining the order;

85 (d)(2)(B) prohibit the disobedient party from supporting or opposing designated
86 claims or defenses or from introducing designated matters into evidence;

87 (d)(2)(C) stay further proceedings until the order is obeyed;

88 (d)(2)(D) dismiss all or part of the action, strike all or part of the pleadings, or render
89 judgment by default on all or part of the action;

90 (d)(2)(E) order the party or the attorney to pay the reasonable expenses, including
91 attorney fees, caused by the failure;

92 (d)(2)(F) treat the failure to obey an order, other than an order to submit to a physical
93 or mental examination, as contempt of court; and

94 (d)(2)(G) instruct the jury regarding an adverse inference.

95 (e) Expenses on failure to admit. If a party fails to admit the genuineness of any
96 document or the truth of any matter as requested under Rule 36, and if the party
97 requesting the admissions thereafter proves the genuineness of the document or the
98 truth of the matter, the party requesting the admissions may apply to the court for an
99 order requiring the other party to pay the reasonable expenses incurred in making that
100 proof, including reasonable attorney fees. The court shall make the order unless it finds
101 that (1) the request was held objectionable pursuant to Rule 36(a), or (2) the admission
102 sought was of no substantial importance, or (3) the party failing to admit had reasonable
103 ground to believe that he might prevail on the matter, or (4) that the request is not
104 proportional under Rule 26(b)(1), or (5) there was other good reason for the failure to
105 admit.

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

115 The failure to act described in this subdivision may not be excused on the ground
116 that the discovery sought is objectionable unless the party failing to act has applied for a
117 protective order as provided by subsection (b) of this Rule.

118 (g) Failure to participate in the framing of a discovery plan. If a party or attorney fails
119 to participate in good faith in the framing of a discovery plan by agreement as is
120 required by Rule 26(f), the court on motion may take any action authorized by
121 Subdivision (d)(2).

122 (h) Failure to disclose. If a party fails to disclose a witness, document or other
123 material as required by Rule 26(a) or Rule 26(e)(1), or to amend a prior response to
124 discovery as required by Rule 26(e)(2), that party shall not be permitted to use the

125 witness, document or other material at any hearing unless the failure to disclose is
126 harmless or the party shows good cause for the failure to disclose. In addition to or in
127 lieu of this sanction, the court on motion may take any action authorized by Subdivision
128 (d)(2).

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

136 Advisory Committee Notes

137