

Agenda

Advisory Committee on Rules of Civil Procedure

October 22, 2014

4:00 to 6:00 p.m.

Scott M. Matheson Courthouse

450 South State Street

Judicial Council Room

Administrative Office of the Courts, Suite N31

Welcome and approval of minutes.	Tab 1	Jonathan Hafen
Rule 7. Pleadings allowed; motions, memoranda, hearings, orders. Rule 54. Judgments; costs. Rule 58A. Entry of judgment; abstract of judgment. Form 22. Judgment	Tab 2	Tim Shea
Consideration of comments to Rules 5, 26, 30, 37 and 45.	Tab 3	Tim Shea
Rulemaking principles.	Tab 4	Jonathan Hafen
Rule 43. Evidence.	Tab 5	Tim Shea
Rule 63. Disability or disqualification of a judge.	Tab 6	Tim Shea
Small Claims Rule 14. Settlement offers.	Tab 7	Tim Shea

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

Meeting Schedule:

November 19, 2014

October 28, 2015

January 28, 2015

November 18, 2015

February 25, 2015

March 25, 2015

April 22, 2015

May 27, 2015

September 23, 2015

Tab 1

**UTAH SUPREME COURT ADVISORY COMMITTEE
ON RULES OF CIVIL PROCEDURE**

Meeting Minutes – September 24, 2014

Present: Rod N. Andreason, Hon. John L. Baxter, Scott S. Bell, Hon. James T. Blanch, Lincoln Davies, Hon. Evelyn J. Furse, Jonathan Hafen, Terrie T. McIntosh, Amber M. Mettler, Hon. Derek Pullan, Hon. Todd M. Shaughnessy, Timothy M. Shea, Leslie W. Slaugh, Trystan B. Smith, Paul Stancil, Hon. Kate Toomey, Barbara L. Townsend, Lori Wiffinden

Telephone: David W. Scofield

Staff: Timothy Shea, Heather M. Sneddon

Excused: Hon. Lyle R. Anderson, Sammi V. Anderson, Steve Marsden

Guest(s): Commissioner Michelle Blomquist

I. Welcome and introductions.

Jonathan Hafen welcomed the committee. Committee members and staff introduced themselves.

II. Rule 101. Motion practice before court commissioners.

Commissioner Michelle Blomquist presented the proposed changes to Rule 101, having received input from the lawyer community, the Subcommittee on Divorce, the Standing Committee on Children and Family Law, the Family Law Executive Committee, and the Board of District Court Judges.

Rule 101 governs the manner in which commissioners handle motion practice on domestic matters. Commissioner Blomquist explained that Rule 101 addresses the fact that commissioners hear 8-10 domestic matters each day, which often present issues and concerns that are not adequately addressed by the timeframes in Rule 7. Since 2010, the Subcommittee on Divorce has been receiving input from practitioners to propose changes to Rule 101 with the goals of streamlining divorce practice, addressing the issues that have been raised by practitioners regarding the current timeframes for filing and responding to motions, and making the timeframes consistent with the 7-day time periods that have been adopted elsewhere in the rules. Because of complaints from some practitioners regarding after-hours filing, the subcommittee proposes a 5:00pm deadline for all filings.

Commissioner Blomquist further explained that due to the large number of domestic matters heard by commissioners each day, the subcommittee requests a change to Rule 101 requiring practitioners to file voluminous exhibits as summaries pursuant to Rule 1006 of the Utah Rules of Evidence. The subcommittee also requests a page-limit on the total number of pages to be submitted with each memorandum, including affidavits, attachments and summaries, but excluding financial declarations and income verification. Upon consulting with the Board of District Court Judges, the subcommittee proposes a total page limit of 25 pages.

Other proposed changes to Rule 101 concern the requirements for affidavits and are otherwise meant to clarify the rule's requirements. The subcommittee would like to send the rule out for comment.

Discussion:

- Leslie Slaugh and Judge Pullan raised questions regarding line 78, which still references a total limit of 50 pages. Commissioner Blomquist informed the committee that the total limit requested by the subcommittee is actually 25 pages. That line will be changed to reflect a 25-page total, which will include up to 10 pages of argument for initial memoranda, as well as all attachments and summaries, with the exception of financial declarations and income verification. Many committee members discussed whether a 25-page limit will be followed by practitioners and enforced by commissioners, and the differences between civil and domestic practice, including the fact that commissioners are resolving factual issues upon motions. Judge Toomey suggested that the committee consider adding that overlength submissions will not be routinely granted, and that the limit on the total number of pages submitted to the court be applied to "each party."
- Judge Shaughnessy questioned whether the increase to a 28-day deadline for filing motions would restrict commissioners' ability to handle temporary order hearings. Commissioner Blomquist responded that a hearing currently cannot be set until 20 days after a motion is filed. In addition, most hearings are currently scheduled 3-4 weeks out. Quite a bit of debate has occurred regarding whether the deadline should be 21 or 28 days, but the consensus is 28 days. Commissioners still have the ability to hear and issue TROs when emergencies arise.
- Trystan Smith raised a concern regarding subsection (l) of Rule 101, and whether it is the current custom of commissioners not to require the presence of affiants or declarants at hearings. Commissioner Blomquist indicated that that is the custom, although it varies somewhat among commissioners. The intent of the addition is to clarify the rule.
- Leslie Slaugh raised the issue of whether a 5:00pm deadline should be imposed. Many committee members expressed their opinion that divorce lawyers should be subject to a midnight filing deadline, just like other practitioners. Mr. Shea advised the committee that the new Rule 6 permits e-filing up until midnight on the last day. Commissioner Blomquist mentioned that divorce practitioners' collective preference was to have a 5:00pm deadline, but the expanded timeframes in Rule 101 for filing and responding to motions may alleviate that issue.
- Mr. Slaugh also raised a concern regarding lines 19-22, which appear to permit the inclusion of additional factual material in a reply memorandum. In other areas of the law, reply memoranda are limited to argument. Judge Shaughnessy proposed that the language in Rule 7 regarding reply memoranda be adopted for Rule 101, i.e., a reply memorandum "shall be limited to rebuttal of matters raised in the memorandum in opposition."
- Mr. Slaugh indicated that one effect of the rule is that movants will have little or no incentive to file motions early given that deadlines are calculated from the hearing date as opposed to the date a motion is filed. Commissioner Blomquist explained that parties are able to schedule hearings rather quickly. Thus, for practical purposes, the manner in which deadlines are calculated does not make much of a difference.

- Judge Shaughnessy previewed his proposal regarding proposed orders in the context of Rule 101. Although Commissioner Blomquist sometimes receives proposed orders, typically she does not want them. She almost never uses them because they do not reflect stipulations that are made at the hearing. She does, however, need OSCs. Judge Shaughnessy and Mr. Hafen proposed that Rule 101 be left as is for now, leaving open the option to add a paragraph at the end regarding proposed orders.
- Mr. Shea recapped the committee's comments regarding Rule 101, suggesting that the rule be sent out for comment after further edits to reflect the language from Rule 7 regarding reply memoranda, a total page limit of 25 pages by "each party" on line 78, and the deletion of the 5:00pm deadline in subsection (j). Judge Toomey so moved. Judge Shaughnessy seconded. The motion carried, and Commissioner Blomquist was excused.

III. Case management pilot program.

Mr. Hafen began the discussion of the case management pilot program, indicating that significant feedback had been received regarding larger, complex case management concerns. Even with the new rules, larger cases are not reaching a timely disposition. To address that issue, some judges have expressed their willingness to be part of the case management pilot program, which will launch on January 1, 2015. Mr. Hafen is writing an article for the Utah Bar Journal to announce the program.

Judge Derek Pullan provided a brief explanation of the program. In summary, the rules do not accurately reflect what is happening in Tier 3 litigation. Parties are consistently stipulating around the requirements, which undermines rulemaking. While the Court does not want to alter what we've done, many of the complaints regarding Tier 3 litigation have merit. For example, if deposition limits are about to be reached, must parties return to Salt Lake City in the middle of a deposition in Chicago to obtain an order permitting extraordinary discovery before returning to take the remainder of the deposition? Judicial involvement in case management works, but to date, some judges have been reluctant to engage in active case management.

There is some tension between the pilot project and the proposed rule. While the proposed rule effectively removes judges from case management and creates limitations, the pilot program will implement a case management conference early in every Tier 3 case that is assigned to one of the volunteer judges in the program. Lead counsel will be expected to attend and parties will discuss what the case is about, what the discovery needs are, how issues might be narrowed, whether staged discovery is necessary, what the parties need from the court to assist in discovery disputes, and how to address e-discovery issues. The idea is that, as a result of the conference, parties will agree to deadlines, including a dispositive motion deadline, and those deadlines will be firm unless a true emergency arises. After 1-2 years of the program, the results from those cases will be compared to cases from a control group of judges who were not part of the program to determine whether we have developed a set of best practices that all trial judges can use. Judge Pullan is hoping that the program will confirm that judicial case management works and that the remainder of the bench will be persuaded to implement more active judicial case management.

Discussion:

- Judge Pullan mentioned that another judge from the Third District is needed for the program. The committee discussed whether a 100% civil calendar is required of volunteer judges for accurate comparisons to be made. The judges on the committee indicated that they will discuss the issue amongst themselves and attempt to locate another volunteer judge.
- Mr. Slauch suggested that more case management conferences may be necessary, as parties often do not know enough about the case in the beginning to set hard deadlines. Judge Pullan indicated that more conferences may be difficult to implement. If only soft deadlines are imposed up front, is there any point to judicial case management? The committee discussed this issue at length, as members raised concerns that we strike the right balance between receiving input from lawyers on deadlines once they understand their case and making adjustments as cases unfold, on one hand, and needing to impose hard deadlines if they are to be taken seriously, on the other.
- Paul Stancil expressed his enthusiasm for the pilot program, but had concerns:

(1) Fit: Tier 3 may not actually capture what we want to capture. Just because a lot of money is at stake doesn't necessarily reflect the dynamics of litigation. Mr. Smith likewise questioned whether the program is targeting the type of case that needs judicial management. Judge Pullan agreed, but questioned how we might tease out these issues in any other way that creates predictable lines. Prof. Stancil responded that the relevant, generalizable dynamic is cost disparity. That's where problems arise because parties engage in strategic behavior. Mr. Hafen mentioned that cost disparity would be difficult to determine. If the determination of which cases fall into the program is too complex, it will not work. Prof. Stancil confirmed that he is not suggesting a case-by-case determination.

Judge Pullan mentioned that Tier 3 cases will always receive active judicial case management, and perhaps parties in other cases can request it through a motion. Cost disparity will be an issue.

(2) If the pilot program is run by volunteer judges, it is likely to create the best possible scenario in terms of outcome. Will it be fair to generalize those outcomes to the bench as a whole?

(3) Is case resolution or time to trial the end we are trying to reach, or some other end like justice?

(4) Expand the measures of success to include party satisfaction. If the parties who participated in the program (as opposed to lawyers) enjoyed it more than those who went through the normal process, that may be a more powerful indicator that the program works than lawyers' opinions. Judge Toomey agreed with this point.

- Judge Shaughnessy suggested that if parties are told that they will not receive extensions, they will ask for more time than they need at the initial conference. Mr. Bell wondered whether that may still result in quicker resolution of cases than repeated extensions. Magistrate Judge Furse proposed setting higher standards for obtaining extensions. Rather than "good cause," she suggested "excusable neglect." Mr. Shea informed the committee that the pilot program proposes "exceptional and unanticipated circumstances" to obtain extensions.

- Mr. Smith asked what our next steps are after completing the pilot program. Mr. Hafen indicated that if we receive positive responses from lawyers, parties and judges, we will look at amending Rule 26. Mr. Shea mentioned that one of the goals is to see if judges can manage cases, and how many they can actively manage. Different cultures currently exist in different districts; for example, the Second District is doing much of this already. The Institute for the Advancement of the American Legal System produced an outline based on interviews with judges in the practice of managing complex cases, and we are using that outline as the starting point for our program.
- Mr. Bell raised a concern regarding the requirement for lead counsel to be present for the case management conference, as well as for motions and discovery disputes. It could be more expensive and take away experience opportunities for younger lawyers. Mr. Shea commented that it may give the parties the motivation to resolve the case by impinging on lead counsel's schedule, and the program is meant to encourage judges to make themselves available for telephone conferences. Magistrate Judge Furse expressed her preference that lead counsel attend hearings. Although she has encouraged younger lawyers to handle hearings to gain experience, she is curious as to whether requiring lead counsel to attend will elevate the issues more quickly and lead to quicker resolutions.
- Prof. Stancil raised the current debate on the federal level regarding proportional discovery. The federal advisory committee is considering amendments to Rule 26 to require judges to account for proportionality concerns as part of the initial discoverability piece. It is likely to end up in the federal rules. Mr. Hafen considers that good news, as the original paradigm was meant to achieve proportional discovery.
- Mr. Shea raised the Court's question of how we measure improving costs for the client. Data may be gathered from surveys and the court's case management system, but we need to determine how to best measure costs. Should lawyers in all Tier 3 cases, both control group and pilot program cases, be surveyed? The committee discussed this issue at length. Members raised many concerns: whether plaintiffs' lawyers in tort contingency cases track their time; whether surveys regarding costs would irritate lawyers; whether lawyers would accurately report costs; whether no data is better than inaccurate data; whether we would receive enough responses from lawyers to apply them across the board given that prior inquiries of this nature have not been successful; and whether the information might become public. Magistrate Judge Furse proposed that we consider using hearings and motions as proxies to estimate costs, assigning averages to each. Mr. Shea confirmed that the court's database can be queried to determine the number of deposition notices and motions filed, etc. Prof. Stancil commented that this could be done, and that the cost estimates would be pretty reliable. Mr. Hafen expressed the committee's general sentiment to go with Magistrate Judge Furse's proposal, with Prof. Stancil's input, to determine costs.
- Mr. Shea informed the committee that the Court has already given the green light to this pilot program. Mr. Hafen proposed that the committee eliminate the fee-reporting requirement, confer with the pilot judges and get the program launched. He will complete the Utah Bar Journal announcement regarding the program.

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

Rule 54. Judgments; costs.

**Rule 58A. Entry of judgment; abstract of judgment.
Form 22. Judgment.**

Mr. Shea reported that conversations with the Court have occurred because we are asking the Court to shift direction. Our proposal will be reviewed by the advisory committee for the Rules of Appellate Procedure. The Court would like to change the introductory phrase to Rule 7, lines 86-95, for clarity. Mr. Shea has rewritten the phrase to confirm that a decision is not final if the judge says it's not final in some manner. Otherwise, a decision is final when it is signed. Silence equals finality.

Discussion:

- Judge Shaughnessy raised a concern regarding the rule's language and the issue of "finality." Does use of the term "final" create ambiguity as to whether Rule 7(j)(1) pertains to a final order, i.e., the final word on a motion, but not necessarily a final *appealable* order? A ruling on a motion could be "final" but interlocutory. Mr. Shea suggested using the term "complete" throughout Rule 7 instead of "final," with which Judge Toomey agreed. Judge Shaughnessy responded that the rule needs to make clear that if a party wants a final appealable order, the party must look to Rule 58. Mr. Shea said that is included in a committee note. Magistrate Judge Furse suggested that the term "final" also brings into question the court's authority to revisit its decisions on motions. Mr. Shea and Judges Shaughnessy and Pullan commented that if the court asks a party to prepare a judgment following issuance of a memorandum decision, and no judgment is prepared, the memorandum decision served is final in 150 days. A party has 30 days from that date in which to appeal. Mr. Hafen questioned whether using "complete" would provide sufficient clarity and posited that perhaps a more explicit introduction that final appealable orders and judgments are governed by Rule 58A is in order. Mr. Shea proposed that "matter" on line 92 be changed to "motion," to avoid confusion regarding finality for the whole case.
- The committee also discussed the term "register of actions" in line 93 and its meaning. Mr. Shea said that the term is used elsewhere, and is intended to mean the docket.
- Mr. Shea will make further edits to Rule 7 incorporating the committee's comments, and prepare an advisory committee note that describes completeness as the disposition of a motion. Ms. McIntosh proposed that on line 89, the rule refer to a proposed order "confirming a decision on a motion."
- Judge Shaughnessy said that he was responsible for the naming conventions for memoranda under Rule 7, but now dislikes them as too long and unwieldy. The committee discussed amending lines 37-38 to reference "a Memorandum in Opposition to (or Opposing) . . .," and lines 52-53 to reference "Reply Memorandum in Support of Motion to . . ."

With respect to Rule 54, Mr. Shea reported that it is quite similar to its federal counterpart. Line 3 describes a judgment in an affirmative sense, which the federal rule does not do. The Court has suggested adding "any other order from which an appeal of right lies" to the end of lines 3 and 4 to distinguish it from a petition to appeal an interlocutory order. Mr. Hafen invited comments and suggestions from the committee.

Discussion:

- Judge Toomey proposed the addition of a rule regarding attorneys' fees. While there is a 14-day deadline to claim costs, there is no such deadline to claim fees, which creates a finality issue. Rule 73 might be an appropriate place to add a 14-day deadline to claim attorneys' fees.

Concerning Rule 58A, Mr. Shea reported that it is also similar to the federal counterpart. The Court agrees that setting out a judgment in a separate document is a sound approach to clearly marking the beginning of a party's right to appeal. The Court wants to use the term "judgment," but many statutes describe "orders" as resolving all issues for all parties. Changing the naming convention on a broad scale would be difficult. Thus, the proposed amendment references a document "ordinarily titled Judgment . . . or Decree." Mr. Shea also mentioned the exceptions to the requirement of a separate document, which are not actually judgments. As identified in subparagraph (b)(2), however, a separate document would not be required for judgments under Rule 54(b). Rule 54(c) sets forth the process for preparing a judgment, which will typically be undertaken by the parties. This differentiates our rule from the federal rule. The time of entry is modeled after the federal rule, however, and other stylistic changes have been made to the rule.

Discussion:

- Ms. McIntosh identified an omission in line 94; the language doesn't make sense. Mr. Shea may need to rearrange it. Mr. Bell suggested that the paragraph beginning with line 105 be moved to the end of the sentence that ends on line 100.
- Judges Toomey and Shaughnessy raised the issue of the amendments changing prior decisions of the Court, and proposed that an advisory committee note indicate that the amendments are in response to a directive from the Utah Supreme Court to resolve issues in the former rule.
- Judge Pullan questioned whether the exceptions in subparagraph (b) needed to remain in the rule, as they are not "exceptions" so much as they simply are not judgments. Many committee members offered their opinions on this issue, including that the federal rule includes these exceptions; listing them does not hurt; the exceptions provide clarification regarding post-judgment motion rulings, i.e., that a separate judgment is not required after that. Others believed that the exceptions create confusion rather than clarity. Judge Shaughnessy commented that with respect to post-trial motions, the denial of the motions triggers the appeal period as opposed to a "second" judgment, which must be clear. Judge Blanch asked how we provide that clarity without injecting confusion with respect to other orders. Mr. Shea directed the committee to Rule 4 of the Appellate Rules of Procedure, which explains that the time for parties to appeal from a judgment runs from the entry of the order disposing of post-trial motions.
- Judge Toomey proposed an addition to line 12: "every judgment or amended judgment *resolving a case.*" This would prevent parties from wrongly believing that the denial of a motion for leave to amend requires a separate judgment. Judge Shaughnessy suggested that in the committee note, under subsection (a), the committee explain what is covered, and then indicate that subsection (b) is modeled on the federal rule to make clear that a separate judgment is not required in those instances and the time to appeal runs from entry of an order denying post-trial motions. The committee should then refer practitioners to Rule 4 of the Appellate Rules of Procedure. Mr. Hafen and Judge Toomey agree.

V. Adjournment.

The meeting adjourned at 6:00pm. The next meeting will be held on October 22, 2014 at 4:00pm at the Administrative Office of the Courts.

Tab 2

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

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

3 (a)(1) a complaint;

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

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

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

7 (a)(5) a third party complaint

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

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

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

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

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

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

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

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

24 **(c) Form, name and content of motion.** The rules governing captions and other matters of form in
25 pleadings apply to motions and other papers. The moving party must title the motion substantially as:
26 “Motion to [short phrase describing the relief requested].” The motion, which shall include the supporting
27 memorandum, may not exceed 15 pages, not counting relevant portions of documents cited in the
28 motion. An approved over-length motion must include a table of contents and a table of authorities with
29 page references. The motion must include under appropriate headings and in the following order:

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

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

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

35 **(d) Name and content of memorandum ~~responding to~~ opposing the motion.** A nonmoving party
36 may file a memorandum ~~responding to~~ opposing the motion within 14 days after the motion is filed. The
37 nonmoving party must title the memorandum substantially as: “Memorandum ~~responding to~~ opposing the

38 motion to [short phrase describing the relief requested].” The memorandum may not exceed 15 pages,
39 not counting objections to evidence and relevant portions of documents cited in the memorandum. An
40 approved over-length memorandum must include a table of contents and a table of authorities with page
41 references. The memorandum must include under appropriate headings and in the following order:

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

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

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

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

49 **(e) Name and content of reply memorandum.** Within 7 days after the memorandum ~~responding to~~
50 opposing the motion is filed, the moving party may file a reply memorandum, which must be limited to
51 rebuttal of new matters raised in the memorandum ~~responding to~~ opposing the motion. The moving party
52 must title the memorandum substantially as “Reply Memorandum ~~replying to the memorandum~~
53 ~~responding to~~ supporting the motion to [short phrase describing the relief requested].” The memorandum
54 may not exceed 5 pages, not counting objections to evidence, response to objections, and relevant
55 portions of documents cited in the memorandum. The memorandum must include under appropriate
56 headings and in the following order:

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

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

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

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

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

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

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

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

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

87 **(j) Orders.**

88 ~~(j)(1) Signed order presumed final; direction to prepare a proposed order~~ **Decision and**
89 **order complete when signed; entered when recorded.** The court's decision, however designated,
90 on a motion is complete when signed by the judge. An order confirming the decision is complete
91 when signed by the judge. The decision or order is entered when recorded in the docket.

92 **(j)(2) Preparing and serving a proposed order.** If directed by the court, a party shall within 14
93 days prepare a proposed written order conforming to the court's ruling and serve the proposed order
94 on the other parties for review and approval as to form. If the party directed to prepare a proposed
95 written order fails to timely do so, any other party may prepare a proposed written order conforming to
96 the court's ruling and serve the proposed order on the other parties for review and approval as to
97 form. The court may prepare and serve an order.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

135 **(m) Motion in ~~responding~~ opposing memorandum or reply memorandum prohibited.** A party
136 may not make a motion in a memorandum ~~in response to~~ opposing a motion or in a reply memorandum.
137 A party who objects to evidence in another party's motion or memorandum may not move to strike that
138 evidence. The proper procedure is to include in the subsequent memorandum an objection to the
139 evidence.

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

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

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

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

- 148 (o)(3) motion to continue a hearing;
 149 (o)(4) motion to appoint a guardian ad litem;
 150 (o)(5) motion to substitute parties;
 151 (o)(6) motion to refer the action to or withdraw it from alternative dispute resolution under Rule 4-
 152 510.05;
 153 (o)(7) motion for a conference under Rule 16; and
 154 (o)(8) motion to approve a stipulation of the parties.

155 **Advisory Committee Notes [Add to existing notes]**

156 The 2015 changes to Rule 7 repeal and reenact the rule. Many of the provisions from the former Rule
 157 7 are preserved in the 2015 version, but there are many changes as well. The committee's intent is to
 158 bring more regularity to motion practice. Some of these features are found in Rule 7-1 of the U.S. District
 159 Court for the District of Utah:

- 160 • integrate the memorandum supporting a motion with the motion itself;
- 161 • describe more uniform motion titles;
- 162 • describe more uniform content in the memorandums;
- 163 • regulate the process for citing supplemental authority;
- 164 • prohibit proposed orders before a ruling, except for specified motions;
- 165 • move the special requirements for a motion for summary judgment to Rule 56;
- 166 • allow a limited statement of facts for specified motions;
- 167 • require an objection to evidence, rather than a motion to strike evidence; and
- 168 • require a counter-motion rather than a motion in the opposing memorandum.

169 In Central Utah Water Conservancy District v. King, 2013 UT 13 ¶27; the Supreme Court directed the
 170 committee to address the problem of undue delay when the parties fail to comply with former Rule 7(f)(2).
 171 A major objective of the of the 2015 amendments is to ~~codify the policies~~ continue the policy of clear
 172 expectations of the parties established in:

- 173 • Butler v. Corporation of The President of The Church of Jesus Christ of Latter-Day Saints,
 174 2014 UT 41
- 175 • Central Utah Water Conservancy District v. King, 2013 UT 13;
- 176 • Giusti v. Sterling Wentworth Corp., 2009 UT 2;
- 177 • Houghton v. Dep't of Health, 2008 UT 86; and
- 178 • Code v. Utah Dep't of Health, 2007 UT 43.

179 But to do so in a manner simpler than the "magic words" required under the former Rule 7(f)(2).

180 In these cases, the Supreme Court established a policy favoring a clear indication of whether a
 181 further document would be required from the parties after a judge's decision. The parties should not be
 182 required to guess what, if anything, should come next.

183 There were three ways to meet the test: sign the proposed order filed with the motion or
 184 memorandum; expressly state in the order that nothing further is required from the parties; or prepare the

185 order in one of the three ways described by the rule. The 2015 amendments remove a proposed order
186 from the process in most circumstances. The trend under the former rule was to include in every order an
187 indication that nothing further was required even when the order expressly directed a party to prepare a
188 further order. Or orders were being prepared in some manner other than the three described in the rule,
189 yet the order did not expressly state that nothing further was required. The order technically was not
190 complete, but everyone proceeded as if it were.

191 The 2015 amendments continue the policy of a bright-line test for a completed decision but do not
192 rely on conditions that might or might not be met. The one condition that can be counted on is the judge's
193 signature. Under the former rule, a completed decision was imposed by operation of law when the order
194 was prepared in one of three recognized ways. The 2015 rule imposes a completed decision or order by
195 operation of law when the decision or order is signed. Under the former rule, the judge's silence meant
196 that something further was required, unless the order was prepared in one of the three ways described in
197 Rule 7. The presumption in the 2015 amendments is the opposite: silence means that nothing further is
198 required from the parties. Judges can expressly require an order confirming a decision if one is needed in
199 a particular case.

200 The committee recognizes the many different forms a judge's decision might take. The committee
201 discussed defining "order," but decided against the attempt. There are too many variations. If written, the
202 document might be titled "order," "ruling," "opinion," "decision," "memorandum decision," etc. The decision
203 might not be written; an oral directive is an order. A clerk's minute entry of an oral decision is, when
204 signed by the judge, treated the same as a written order. The committee decided instead to use a phrase
205 of long standing from Rule 54(b)—"a decision, however designated"—in this rule and in Rule 58A. The
206 judge has decided the issue at hand. Whatever that decision is titled, it is complete when the judge signs
207 the document memorializing the decision. Whether there is a right to appeal is determined by whether the
208 decision—or subsequent order confirming the decision—is a judgment. That analysis is governed by Rule
209 54. When the judgment is entered and consequently the time in which to appeal are governed by Rule
210 58A.

211

1 **Rule 54. Judgments; costs.**

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

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

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

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

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

29 **(d) Costs.**

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

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

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

47 **(e) Interest and costs to be included in the judgment.** ~~The clerk must include in any judgment~~
48 ~~signed by him any interest on the verdict or decision from the time it was rendered, and the costs, if the~~
49 ~~same have been taxed or ascertained. The clerk must, within two days after the costs have been taxed or~~
50 ~~ascertained, in any case where not included in the judgment, insert the amount thereof in a blank left in~~
51 ~~the judgment for that purpose, and make a similar notation thereof in the register of actions and in the~~
52 ~~judgment docket.~~

53

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

2 ~~(a) Judgment upon the verdict of a jury.~~ Unless the court otherwise directs and subject to Rule
3 54(b), the clerk shall promptly sign and file the judgment upon the verdict of a jury. If there is a special
4 verdict or a general verdict accompanied by answers to interrogatories returned by a jury, the court shall
5 direct the appropriate judgment, which the clerk shall promptly sign and file.

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

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

12 (a) Separate document required. Every judgment and amended judgment must be set out in a
13 separate document ordinarily titled "Judgment"—or, as appropriate, "Decree."

14 (b) Separate document not required.

15 (b)(1) A separate document is not required for an order disposing of a post-judgment motion:

16 (b)(1)(A) for judgment under Rule 50(b);

17 (b)(1)(B) to amend or make additional findings under Rule 52(b);

18 (b)(1)(C) for a new trial, or to alter or amend the judgment, under Rule 59; or

19 (b)(1)(D) for relief under Rule 60.

20 (b)(2) A party may request that a judgment be set out in a separate document.

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

24 (d) Judge's signature; judgment filed with the clerk. Except as provided in paragraph (h) and Rule
25 55(b)(1), all judgments must be signed by the judge and filed with the clerk. The clerk must promptly
26 record all judgments in the docket.

27 (e) Time of entry of judgment.

28 (e)(1) If a separate document is not required, a judgment is complete and is entered when it is
29 signed by the judge and recorded in the docket.

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

32 (e)(2)(A) the judgment is set out in a separate document signed by the judge and recorded in
33 the docket; or

34 (e)(2)(B) 150 days have run from the clerk recording the decision, however designated, that
35 should have prompted the separate document.

36 ~~(d)-(f) Notice of judgment.~~ The party preparing the judgment shall promptly serve a copy of the
37 signed judgment on the other parties in the manner provided in Rule 5 and promptly file proof of service

38 with the court. Except as provided in Rule of Appellate Procedure 4(g), the time for filing a notice of
 39 appeal is not affected by this requirement.

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

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

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

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

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

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

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

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

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

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

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

61 **Advisory Committee Note**

62 The 2015 amendments to Rule 58A adopt the requirement, found in Rule 58 of the Federal Rules of
 63 Civil Procedure, that a judgment be set out in a separate document. In the past, problems have arisen
 64 when the district court entered a decision with dispositive language, but without the other formal elements
 65 of a judgment, resulting in uncertainty about whether the decision started the time for appeals. This
 66 problem was compounded by uncertainty under Rule 7 about whether the decision was the court's final
 67 ruling on the matter or whether the prevailing party was expected to prepare an order confirming the
 68 decision.

69 The 2015 amendments of Rule 7, Rule 54 and Rule 58 are intended to reduce this confusion by
 70 requiring "that there be a judgment set out on a separate document—distinct from any opinion or
 71 memorandum—which provides the basis for the entry of judgment." See Advisory Committee Notes to
 72 1963 Amendments to Fed. R. Civ. P. 58. Courts and practitioners are encouraged to use appropriate
 73 titles with separate documents intended to operate as judgments, such as "Judgment" or "Decree," and to
 74 avoid using such titles on documents that are not appealable. The parties should consider the form of

75 judgment included in the Appendix of Forms described in Rule 84. On the question of what constitutes a
 76 separate document, the Committee refers courts and practitioners to existing case law interpreting Fed.
 77 R. Civ. P. 58. For example, In re Cendant Corp., 454 F.3d 235, 242-244 (3d Cir. 2006) offers three
 78 criteria:

- 79 1) the judgment must be set forth in a document that is independent of the court’s opinion or decision;
 80 2) it must contain ordering clauses stating the relief to which the prevailing party is entitled, and not
 81 merely refer to orders made in other documents or state that a motion has been granted; and
 82 3) it must substantially omit recitation of facts, procedural history, and the reasons for disposing of the
 83 parties’ claims.

84 While “some trivial departures” from this criteria—such as a one-sentence explanation of reasoning, a
 85 single citation to authority, or a reference to a separate memorandum decision—“must be tolerated in the
 86 name of common sense,” any explanation must be “very sparse.” Kidd v. District of Columbia, 206 F.3d
 87 35, 39 (D.C. Cir. 2000).

88 The concurrent amendments to Rule 7 remove the separate document requirement formerly
 89 applicable to interlocutory orders. Henceforward, the separate document requirement will apply only to
 90 judgments, a change that should reduce the tendency to confuse judgments with other orders. Rule 7 has
 91 also been amended to modify the preparation of orders on motions. Under amended Rule 7(j), a written
 92 decision, however designated, is complete—is the judge’s last word on the motion—when it is signed,
 93 unless the court expressly requests a party to prepare an order confirming the decision. But this should
 94 not be confused with the need to prepare a separate judgment when the decision has the effect of
 95 disposing of all claims in the case. If a decision disposes of all claims in the action, a separate judgment is
 96 required whether or not the court directs a party to prepare an order confirming the decision.

97 Rule 58A is similar to Fed. R. Civ. P. 58 in listing the instances where a separate document is not
 98 required. The state rule differs from the federal rule regarding an order for attorney fees. Fed. R. Civ. P.
 99 58 includes an order for attorney fees as one of the orders not requiring a separate document. That
 100 particular order is omitted from the Utah rule because under Utah law a judgment does not become final
 101 for purposes of appeal until the trial court determines attorney fees. See ProMax Development
 102 Corporation v. Raile, 2000 UT 4, 998 P.2d 254. See also Utah Rule of Appellate Procedure 4, which
 103 states that the time in which to appeal post-trial motions is from the disposition of the motion.

104 In Butler v. Corporation of The President of the Church of Jesus Christ of Latter-Day Saints, 2014 UT
 105 41, the Supreme Court established the requirements of a judgment entered by means of a Rule 54(b)
 106 certification:

- 107 First, it must be entered in an action involving multiple claims or multiple parties. Second,
 108 it must have been entered on an order that would otherwise be appealable but for the fact
 109 that other claims or parties remain in the action. Third, the trial court, in its discretion,
 110 must make a determination that there is no just reason for delay of the appeal. Id. ¶28

111 To satisfy the second requirement, the Supreme Court in Butler included, in addition to other
112 requirements of appealability, the principle that the order must include one of the three indicia of finality
113 imposed by former Rule 7(f)(2): a proposed order was submitted with the supporting or opposing
114 memorandum; an order was prepared at the direction of the judge; the decision included an express
115 indication that a further order was not required. The 2015 amendments to Rule 7 replace these indicia
116 with the judge' signature. The 2015 amendments of Rule 7, Rule 54 and Rule 58A do not disturb the
117 principles established in Butler; they do make simpler the task of satisfying the requirement that the
118 interlocutory order be complete under Rule 7 before it can be certified under Rule 54.

119 State Rule 58A is also similar to Fed. R. Civ. P. 58 in determining the time of entry of judgment when
120 a separate document is required but not prepared. This situation involves the "hanging appeals" problem
121 that the Supreme Court asked this Committee to address in Central Utah Water Conservancy District v.
122 King, 2013 UT 13, ¶127. Under the 2015 amendments, if a separate document is required but is not
123 prepared, judgment is deemed to have been entered 150 days from the date the decision—or the order
124 confirming the decision—was entered on the docket.

125

Form 22. Judgment

[Caption as in Form 1]

The court has ordered that (check one):

plaintiff recover from defendant the amount of \$ _____, which includes prejudgment interest, plus post judgment interest at the rate of _____ % per year, plus costs.

plaintiff recover nothing, the action be dismissed on the merits, and defendant recover costs from plaintiff.

other:

Date

Sign here ►

Typed or Printed Name of Judge

Tab 3



Timothy M. Shea
Appellate Court Administrator

Andrea R. Martinez
Clerk of Court

Supreme Court of Utah

450 South State Street
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October 14, 2014

Matthew B. Durrant	Chief Justice
Ronald E. Nehring	Associate Chief Justice
Christine M. Durham	Justice
Jill N. Parrish	Justice
Thomas R. Lee	Justice

To: Civil Procedures Committee
From: Tim Shea *T. Shea*
Re: Comments to proposed rule amendments

The following rules were published for comment. They are ready for your final recommendations to the supreme court.

(1) RULE 5. SERVICE AND FILING OF PLEADINGS AND OTHER PAPERS.

Mr. Bogart says that the e-filing system does not notify the attorneys if a private document is filed in an otherwise public case. (Lines 51-52) I have been advised by Debra Moore:

The comment equates private with sealed, but they are treated differently in e-filing. As to private documents, only parties receive the notices, so the notices of electronic filing are still sent on private documents. Currently, one can't e-file at all on a case that's been sealed, so the NEFs aren't issued.

A motion to classify can be e-filed with any document, in which case the accompanying document is treated as private (i.e., the parties can access it but others can't) unless and until the judge denies the motion. If the motion seeks to classify the case as sealed, the case wouldn't be sealed until the judge grants the motion.

Mr. Rife believes that the rule should define "conformed" signature. (Line 113)

Mr. Jensen supports permitting service by email without first obtaining the person's consent. (Lines 55-56)

Superman argues that the rule should not require that a document be served before or on the same day as it is filed. His "11:58 pm" scenario is not particularly realistic, but his description of a motion for temporary orders being served with the petition for divorce is. (Line 48)

Superman opposes service by email without prior consent. (Lines 55-56) Since all attorneys are required to e-file documents, and e-filing itself satisfies the requirement to serve the document, his arguments apply only if a self-represented party e-mails the document to him. He argues that an attorney will never be able to serve a self-represented party by email. While some self-represented parties do not have an email address, those who do are required by Rule 10(a)(3) to include it on pleadings and other papers.

Superman opposes removing the provision that service is not effective if the sender learns that it has failed. (Lines 68-70) And he wants to retain service by fax. (Lines 57-58)

Mr. Young believes that service by email should require the consent of the person being served. (Lines 55-56)

Mr. Whittaker suggests several changes to the text and includes a suggested committee note.

(2) RULE 26. GENERAL PROVISIONS GOVERNING DISCLOSURE AND DISCOVERY.

Mr. Schriever is concerned that the amendments will limit the discretion of a judge to allow additional discovery. (Lines 221-225; 451; 453; 473; 479; 480; 484; 492-494) He believes that the reference to Rule 37 will require showing misconduct or non-disclosure by the non-moving party. I believe that this conclusion is mistaken. The change to Rule 26(c)(6) refers to the statement of discovery issues under Rule 37(a). Rule 37(a) does not require misconduct, bad faith or non-disclosure, although, under paragraph (a)(7), the judge can take those circumstances into account if the case presents them.

(3) RULE 30. DEPOSITIONS UPON ORAL QUESTIONS.

We received no comments.

(4) RULE 37. EXPEDITED STATEMENT OF DISCOVERY ISSUES; SANCTIONS; FAILURE TO ADMIT, TO ATTEND DEPOSITION OR TO PRESERVE EVIDENCE.

Mr. Dahl asks whether a statement of discovery issues will eliminate a motion for a protective order under Rule 45. The committee's intent is that it does. Other commenters also note the difference between Rule 37 (statement of discovery issues) and Rule 45(e) (motion for protective order and motion for an order to compel). Rule 45 was published after Rule 37. The wording was changed by the later amendments to "request" for protective order and "request" for an order to compel under the procedures of Rule 37. Line 100 of Rule 45, as published, included a requirement that the "motion shall be served..." I have changed this to "the objection or request shall be served..." Simply changing "motion" to "request" may not be sufficient, but "statement of discovery issues" does not seem to sufficiently specify the relief being requested. I am open to suggestions.

Mr. Sipos raises several hypothetical questions and points about which he is confused. First, he asks whether only a responding party files the statement of discovery issues. Clearly not. From line 37: "A party ... may request that the judge enter an order regarding any discovery issue..."

Next, he asks whether a statement of discovery issues is the sole method of asking for relief in the context of discovery. The committee's intent is that a statement of discovery issues be the sole method. Another commenter asks the same question. This will be the only method described in the rules. Apparently Rule 4-502 more expressly states that limitation.

Next, he asks whether a statement of discovery issues includes requests for extra ordinary discovery. Clearly it does. From line 40: "including ... extraordinary discovery under Rule 26."

Next, he claims confusion over the requirement to file an objection within 7 days. He apparently is not familiar with the recent change to Rule 6.

Next, he claims confusion about the description of "other attachments ... required by law" to be attached to the statement of discovery issues. Admittedly, this is a vague reference. It came about as a result of discussions with the judges of the Third District Court, some of whom thought that other law might dictate additional attachments, but there were no examples that I recall.

Next, he claims confusion about whether the potential orders in paragraph (a)(7) is an exhaustive list. Clearly the list is not exhaustive. From lines 74-77: "The court may enter orders regarding disclosure or discovery ... including one or more of the following..."

Next, he claims confusion about when costs or fees might be requested in a statement of discovery issues. The rule is drafted so that costs and fees can be recovered in any discovery dispute but that the court will not impose sanctions without a motion for sanctions. Paragraph (a)(8), lines 113-115.

Mr. Whittaker suggests several changes to the text.

Mr. Nadesan notes the difference between Rule 26 (motion to exclude evidence) and Rule 37 (statement of discovery issues). The amendments to Rule 26 also were published for comment after the

amendments to Rule 37. The paragraph he cites, Rule 26(d)(4), does not mention a motion to exclude evidence, but it is described this way in the committee note. A motion for extraordinary discovery in paragraph (c)(6) was changed to a request under Rule 37 by the later amendment, and, in the committee note, "discovery motions" was changed to "statement of discovery issues." (Rule 26, Lines 221-225; 451; 453; 473; 479; 480; 484; 492-494)

Mr. Nadesan argues against requiring a statement of proportionality when requesting that the court exclude evidence that was not disclosed. (Line 53) If the committee agrees, one approach is to add a condition to line 53: "unless the statement requests extraordinary discovery ..."

Mr. Nadesan notes that Rule 37 does not define "permitted" attachments in paragraphs (a)(2) and (a)(3). (Lines 46 and 58) The intent was to refer to the attachments permitted by paragraph (a)(4). He also recommends that the "disclosure at issue" be a required attachment in paragraph (a)(4). As drafted "only a copy of the request for discovery or the response at issue" must be attached.

Mr. Nadesan notes that it is not clear whether the procedure for bringing spoliation to the court's attention is a statement of discovery issues under Rule 37(a). (Lines 167-173) And he observes that Rule 37 fails to state that a statement of discovery issues is the sole means for addressing discovery disputes.

Mr. Bogart notes, regarding subpoenas, that "it seems burdensome to require a nonparty to come to the forum of the parties to seek protection, or to defend objections." (Lines 120-122) The committee decided to have the court in which the action is pending resolve all discovery issues.

(5) RULE 45. SUBPOENA.

Mr. Sanders recommends adding a minimum time for serving a third-party subpoena. (Lines 35-36) If the committee agrees, I recommend 7 days.

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

2 **(a) Service: When service is required.**

3 **(a)(1) Papers that must be served.** Except as otherwise provided in these rules
4 or as otherwise directed by the court, the following papers must be served on every
5 party:

6 (a)(1)(A) every a judgment;

7 (a)(1)(B) every an order required by its terms to that states it must be served;

8 (a)(1)(C) every a pleading subsequent to after the original complaint;

9 (a)(1)(D) every a paper relating to disclosure or discovery;

10 (a)(1)(E) every written motion a paper filed with the court other than one a
11 motion that may be heard ex parte; and

12 (a)(1)(F) every a written notice, appearance, demand, offer of judgment, and
13 or similar paper shall be served upon each of the parties.

14 **(a)(2) Serving parties in default.** No service ~~need be made on parties is~~
15 required on a party who is in default except that:

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

17 (a)(2)(B) a party in default for any reason other than for failure to appear ~~shall~~
18 must be served with all pleadings and papers as provided in paragraph (a)(1);

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

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

24 (a)(2)(E) ~~pleadings asserting new or additional claims for relief against a party~~
25 ~~in default for any reason shall~~ must be served ~~in the manner provided for service~~
26 ~~of summons in under~~ Rule 4 with pleadings asserting new or additional claims for
27 relief against the party.

28 **(a)(3) Service in actions begun by seizing property.** ~~If~~ If an action is begun by
29 seizure of seizing property, in which and no person is or need be named as
30 defendant, any service required ~~to be made prior to~~ before the filing of an answer,

31 claim or appearance shall must be made upon the person ~~having~~ who had custody
32 or possession of the property ~~at the time of its seizure~~ when it was seized.

33 **(b) Service: How service is made.**

34 **(b)(1) Whom to serve.** If a party is represented by an attorney, ~~service shall be~~
35 ~~made~~ a paper served under this rule must be served upon the attorney unless the
36 court orders service upon the party ~~is ordered by the court~~. If an attorney has filed a
37 Notice of Limited Appearance under Rule 75 and the papers being served relate to a
38 matter within the scope of the Notice, ~~service shall~~ Service must be made upon the
39 attorney and the party if

40 (b)(1)(A) an attorney has filed a Notice of Limited Appearance under Rule 75
41 and the papers being served relate to a matter within the scope of the Notice; or

42 (b)(1)(B) a final judgment has been entered in the action and more than 90
43 days has elapsed from the date a paper was last served on the attorney.

44 **(b)(1)(A) (b)(2) When to serve.** If a hearing is scheduled ~~5~~ 7 days or less from
45 the date of service, ~~the a party shall use the method~~ must serve a paper related to
46 the hearing by the method most likely to give prompt actual notice of the hearing be
47 promptly received. Otherwise, a party shall serve a paper under this rule: a paper
48 that is filed with the court must be served before or on the same day that it is filed.

49 **(b)(3) Methods of service.** A paper served under this rule may be served by:

50 ~~(b)(1)(A)(i) upon any person with an electronic filing account who is a party or~~
51 ~~attorney in the case by~~ (b)(3)(A) submitting the paper it for electronic filing if the
52 person being served has an electronic filing account;

53 ~~(b)(1)(A)(ii) by sending it by email to the person's last known email address~~
54 (b)(3)(B) emailing it to the email address provided by the party or attorney or to
55 the email address on file with the Utah State Bar, if that the person has agreed to
56 accept service by email or has an electronic filing account;

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

59 ~~(b)(1)(A)(iv) by~~ (b)(3)(C) mailing it to the person's last known address;

60 ~~(b)(1)(A)(v) by~~ (b)(3)(D) handing it to the person;

61 ~~(b)(1)(A)(vi) by (b)(3)(E)~~ leaving it at the person's office with a person in
62 charge or, if no one is in charge, leaving it in a receptacle intended for receiving
63 deliveries or in a conspicuous place; or

64 ~~(b)(1)(A)(vii) by (b)(3)(F)~~ leaving it at the person's dwelling house or usual
65 place of abode with a person of suitable age and discretion ~~then residing therein~~
66 who resides there.

67 ~~(b)(1)(B)~~ **(b)(4) When service is effective.** Service by mail, email or fax or
68 electronic means is complete upon sending. ~~Service by electronic means is not~~
69 ~~effective if the party making service learns that the attempted service did not reach~~
70 ~~the person to be served.~~

71 ~~(b)(2)~~ **(b)(5) Who serves.** Unless otherwise directed by the court:

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

74 ~~(b)(2)(B)~~ ~~(b)(5)(A)~~ every other pleading or paper required by this rule to be
75 served ~~shall~~ must be served by the party preparing it; and

76 ~~(b)(2)(C)~~ ~~(b)(5)(B)~~ an order or judgment prepared by the court ~~shall~~ will be
77 served by the court.

78 **(c) Service: N Serving numerous defendants.** ~~In any~~ If an action in which there is
79 involves an unusually large number of defendants, the court, upon motion or of its own
80 initiative, may order that:

81 ~~(c)(1) service of the a defendant's pleadings of the defendants and replies thereto~~
82 ~~need not be made as between to them do not need to be served on the other~~
83 ~~defendants; and that~~

84 ~~(c)(2) any cross-claim, counterclaim, or matter constituting an avoidance or~~
85 ~~affirmative defense contained therein shall be in a defendant's pleadings and replies to~~
86 ~~them are~~ deemed to be denied or avoided by all other parties; and that the

87 ~~(c)(3) filing of any such a defendant's pleadings and service thereof upon serving~~
88 them on the plaintiff constitutes notice of it them to the all other parties; and

89 ~~(c)(4) A a copy of every such the order shall~~ must be served upon the parties in such
90 manner and form as the court directs.

91 ~~(d) Filing.~~ All papers after the complaint required to be served upon a party shall be
92 filed with the court either before or within a reasonable time after service.

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

98 ~~(f)(d) Certificate of service.~~ Every pleading, order or A paper required by this rule
99 to be served, including electronically filed papers, shall must include a signed certificate
100 of service showing the name of the document served, the date and manner of service
101 and on whom it was served.

102 (e) Filing. Except as provided in Rule 7(f) and Rule 26(f), all papers after the
103 complaint that are required to be served must be filed with the court. Parties with an
104 electronic filing account must file a paper electronically. A party without an electronic
105 filing account may file a paper by delivering it to the clerk of the court or to a judge of the
106 court. Filing is complete upon the earliest of acceptance by the electronic filing system,
107 the clerk of court or the judge.

108 (f) Filing an affidavit or declaration. If a person files an affidavit or declaration, the
109 filer may:

110 (f)(1) electronically file the original affidavit with a notary acknowledgment as
111 provided by Utah Code Section 46-1-16(7);

112 (f)(2) electronically file a scanned image of the affidavit or declaration;

113 (f)(3) electronically file the affidavit or declaration with a conformed signature; or

114 (f)(4) if the filer does not have an e-filing account, present the original affidavit or
115 declaration to the clerk of the court, and the clerk will electronically file a scanned image
116 and return the original to the filer.

117 The filer must keep an original affidavit or declaration of anyone other than the filer safe
118 and available for inspection upon request until the action is concluded, including any
119 appeal or until the time in which to appeal has expired.

120 ~~(g) **Service by the court.** The court may serve papers by email on a party to the~~
121 ~~email address provided by the party or on an attorney to the email address on file with~~
122 ~~the Utah State Bar.~~

123 Advisory Committee Notes

124 ~~Rule 5(d) is amended to give the trial court the option, either on an ad hoc basis or~~
125 ~~by local rule, of ordering that discovery papers, depositions, written interrogatories,~~
126 ~~document requests, requests for admission, and answers and responses need not be~~
127 ~~filed unless required for specific use in the case. The committee is of the view that a~~
128 ~~local rule of the district courts on the subject should be encouraged.~~

129 The 1999 amendment to subdivision (b)(1)(B) does not authorize the court to
130 conduct a hearing with less than 5 days notice, but rather specifies the manner of
131 service of the notice when the court otherwise has that authority.

132 2001 amendments

133 Paragraph (b)(1)(A) has been changed to allow service by means other than U.S.
134 Mail and hand delivery if consented to in writing by the person to be served, i.e. the
135 attorney of the party. Electronic means include facsimile transmission, e-mail and other
136 possible electronic means.

137 While it is not necessary to file the written consent with the court, it would be
138 advisable to have the consent in the form of a stipulation suitable for filing and to file it
139 with the court.

140 ~~Paragraph (b)(1)(B) establishes when service by electronic means, if consented to in~~
141 ~~writing, is complete. The term "normal business hours" is intended to mean 8:00 a.m. to~~
142 ~~5:00 p.m. Monday through Friday, excluding legal holidays. If a fax or e-mail is received~~
143 ~~after 5:00 p.m., the service is deemed complete on the next business day.~~

144

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

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

4 **(a)(1) Initial disclosures.** Except in cases exempt under paragraph (a)(3), a party shall, without
5 waiting for a discovery request, serve on the 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 claims or
8 defenses, unless solely for impeachment, identifying the subjects of the information; and

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

48 **(a)(4)(B) Limits on expert discovery.** Further discovery may be obtained from an expert
49 witness either by deposition or by written report. A deposition shall not exceed four hours and the
50 party taking the deposition shall pay the expert's reasonable hourly fees for attendance at the
51 deposition. A report shall be signed by the expert and shall contain a complete statement of all
52 opinions the expert will offer at trial and the basis and reasons for them. Such an expert may not
53 testify in a party's case-in-chief concerning any matter not fairly disclosed in the report. The party
54 offering the expert shall pay the costs for the report.

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

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

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

74 (a)(4)(C)(iii) If the party who bears the burden of proof on an issue wants to designate
75 rebuttal expert witnesses it shall serve on the other parties the information required by
76 paragraph (a)(4)(A) within seven days after the later of (A) the date on which the election
77 under paragraph (a)(4)(C)(ii) is due, or (B) receipt of the written report or the taking of the
78 expert's deposition pursuant to paragraph (a)(4)(C)(ii). Within seven days thereafter, the party
79 opposing the expert may serve notice electing either a deposition of the expert pursuant to
80 paragraph (a)(4)(B) and Rule 30, or a written report pursuant to paragraph (a)(4)(B). The
81 deposition shall occur, or the report shall be served on the other parties, within 28 days after
82 the election is served on the other parties. If no election is served on the other parties, then
83 no further discovery of the expert shall be permitted.

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

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

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

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

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

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

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

106 (a)(5)(B) Disclosure required by paragraph (a)(5) shall be served on the other parties at least
107 28 days before trial. At least 14 days before trial, a party shall serve and file counter designations
108 of deposition testimony, objections and grounds for the objections to the use of a deposition and
109 to the admissibility of exhibits. Other than objections under Rules 402 and 403 of the Utah Rules
110 of Evidence, objections not listed are waived unless excused by the court for good cause.

111 **(b) Discovery scope.**

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

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

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

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

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

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

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

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

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

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

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

148 **(b)(6) Statement previously made about the action.** A party may obtain without the showing
149 required in paragraph (b)(5) a statement concerning the action or its subject matter previously made
150 by that party. Upon request, a person not a party may obtain without the required showing a
151 statement about the action or its subject matter previously made by that person. If the request is
152 refused, the person may move for a court order under Rule 37. A statement previously made is (A) a
153 written statement signed or approved by the person making it, or (B) a stenographic, mechanical,
154 electronic, or other recording, or a transcription thereof, which is a substantially verbatim recital of an
155 oral statement by the person making it and contemporaneously recorded.

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

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

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

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

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

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

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

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

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

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

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

182 **(b)(8)(B) Information produced.** If a party produces information that the party claims is
183 privileged or prepared in anticipation of litigation or for trial, the producing party may notify any
184 receiving party of the claim and the basis for it. After being notified, a receiving party must

185 promptly return, sequester, or destroy the specified information and any copies it has and may
 186 not use or disclose the information until the claim is resolved. A receiving party may promptly
 187 present the information to the court under seal for a determination of the claim. If the receiving
 188 party disclosed the information before being notified, it must take reasonable steps to retrieve it.
 189 The producing party must preserve the information until the claim is resolved.

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

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

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

201 **(c)(3) Definition of tiers for standard discovery.** Actions claiming \$50,000 or less in damages
 202 are permitted standard discovery as described for Tier 1. Actions claiming more than \$50,000 and
 203 less than \$300,000 in damages are permitted standard discovery as described for Tier 2. Actions
 204 claiming \$300,000 or more in damages are permitted standard discovery as described for Tier 3.
 205 Absent an accompanying damage claim for more than \$300,000, actions claiming non-monetary relief
 206 are permitted standard discovery as described for Tier 2.

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

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

Tier	Amount of Damages	Total Fact Deposition Hours	Rule 33 Interrogatories including all discrete subparts	Rule 34 Requests for Production	Rule 36 Requests for Admission	Days to Complete Standard Fact Discovery
1	\$50,000 or less	3	0	5	5	120

2	More than \$50,000 and less than \$300,000 or non-monetary relief	15	10	10	10	180
3	\$300,000 or more	30	20	20	20	210

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

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

220 (c)(6)(B) before the close of standard discovery and after reaching the limits of standard
 221 discovery imposed by these rules, a ~~motion request~~ for extraordinary discovery ~~setting forth the~~
 222 ~~reasons why the extraordinary discovery is necessary and proportional under paragraph (b)(2)~~
 223 ~~and certifying that the party has reviewed and approved a discovery budget and certifying that the~~
 224 ~~party has in good faith conferred or attempted to confer with the other party in an effort to achieve~~
 225 ~~a stipulation under Rule 37(a).~~

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

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

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

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

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

240 (d)(5) If a party learns that a disclosure or response is incomplete or incorrect in some important
 241 way, the party must timely serve on the other parties the additional or correct information if it has not

242 been made known to the other parties. The supplemental disclosure or response must state why the
243 additional or correct information was not previously provided.

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

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

255 **Advisory Committee Notes**

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

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

277 Subject to the foregoing qualifications, the summary of the witness's expected testimony should be
278 just that – a summary. The rule does not require prefiled testimony or detailed descriptions of everything

279 a witness might say at trial. On the other hand, it requires more than the broad, conclusory statements
280 that often were made under the prior version of Rule 26(a)(1)(e.g., “The witness will testify about the
281 events in question” or “The witness will testify on causation.”). The intent of this requirement is to give the
282 other side basic information concerning the subjects about which the witness is expected to testify at trial,
283 so that the other side may determine the witness’s relative importance in the case, whether the witness
284 should be interviewed or deposed, and whether additional documents or information concerning the
285 witness should be sought. This information is important because of the other discovery limits contained in
286 the 2011 amendments, particularly the limits on depositions.

287 Likewise, the documents that should be provided as part of the Rule 26(a)(1) disclosures are those
288 that a party reasonably believes it may use at trial, understanding that not all documents will be available
289 at the outset of a case. In this regard, it is important to remember that the duty to provide documents and
290 witness information is a continuing one, and disclosures must be promptly supplemented as new
291 evidence and witnesses become known as the case progresses.

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

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

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

313 The time periods for making Rule 26(a)(1) disclosures, and the presumptive deadlines for completing
314 fact discovery, are keyed to the filing of an answer. If a defendant files a motion to dismiss or other Rule

315 12(b) motion in lieu of an answer, these time periods normally would be not begin to run until that motion
316 is resolved.

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

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

336 Disclosures of expert testimony are made in sequence, with the party who bears the burden of proof
337 on the issue for which expert testimony will be offered going first. Within seven days after the close of fact
338 discovery, that party must disclose: (i) the expert's curriculum vitae identifying the expert's qualifications,
339 publications, and prior testimony; (ii) compensation information; (iii) a brief summary of the opinions the
340 expert will offer; and (iv) a complete copy of the expert's file for the case. The file should include all of the
341 facts and data that the expert has relied upon in forming the expert's opinions. If the expert has prepared
342 summaries of data, spreadsheets, charts, tables, or similar materials, they should be included. If the
343 expert has used software programs to make calculations or otherwise summarize or organize data, that
344 information and underlying formulas should be provided in native form so it can be analyzed and
345 understood. To the extent the expert is relying on depositions or materials produced in discovery, then a
346 list of the specific materials relied upon is sufficient. The committee recognizes that experts frequently will
347 prepare demonstrative exhibits or other aids to illustrate the expert's testimony at trial, and the costs for
348 preparing these materials can be substantial. For that reason, these types of demonstrative aids may be
349 prepared and disclosed later, as part of the Rule 26(a)(4) pretrial disclosures when trial is imminent.

350 Within seven days after this disclosure, the party opposing the retained expert may elect either a
351 deposition or a written report from the expert. A deposition is limited to four hours, which is not included in

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

363 The report or deposition must be completed within 28 days after the election is made. After this, the
364 party who does not bear the burden of proof on the issue for which expert testimony is offered must make
365 its corresponding disclosures and the opposing party may then elect either a deposition or a written
366 report. Under the deadlines contained in the rules, expert discovery should take less than three months to
367 complete. However, as with the other discovery rules, these deadlines can be altered by stipulation of the
368 parties or order of the court.

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

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

389 in the deposition and not in a separate expert deposition. Otherwise, the timing for disclosure of non-
390 retained expert opinions is the same as that for retained experts under Rule 26(a)(4)(C) and depends on
391 whether the party has the burden of proof or is responding to another expert. Rule 26(a)(3)(D) and
392 26(a)(1)(A)(ii) are not intended to elevate form over substance – all they require is that a party fairly
393 inform its opponent that opinion testimony may be offered from a particular witness. And because a party
394 who expects to offer this testimony normally cannot compel such a witness to prepare a written report,
395 further discovery must be done by interview or by deposition.

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

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

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

410 The concept of proportionality is not new. The prior rule permitted the Court to limit discovery
411 methods if it determined that “the discovery was unduly burdensome or expensive, taking into account the
412 needs of the case, the amount in controversy, limitations on the parties’ resources, and the importance of
413 the issues at stake in the litigation.” The Federal Rules of Civil Procedure contains a similar provision.
414 See Fed. R. Civ. P. 26(b)(2)(C). This method of limiting discovery, however, was rarely invoked either
415 under the Utah rules or federal rules.

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

422 The 2011 amendments establish three tiers of standard discovery in Rule 26(c). Ideally, rules of
423 procedure should be crafted to promote predictability for litigants. Rules should limit the need to resort to
424 judicial oversight. Tiered standard discovery seeks to achieve these ends. The “one-size-fits-all” system is

425 rejected. Tiered discovery signals to judges, attorneys, and parties the amount of discovery which by rule
426 is deemed proportional for cases with different amounts in controversy.

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

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

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

462 Despite the expectation that standard discovery according to the applicable tier should be adequate
463 in the typical case, the 2011 amendments contemplate there will be some cases for which standard
464 discovery is not sufficient or appropriate. In such cases, parties may conduct additional discovery that is
465 shown to be consistent with the principle of proportionality. There are two ways to obtain such additional
466 discovery. The first is by stipulation. If the parties can agree additional discovery is necessary, they may
467 stipulate to as much additional discovery as they desire, provided they stipulate the additional discovery is
468 proportional to what is at stake in the litigation and counsel for each party certifies that the party has
469 reviewed and approved a budget for additional discovery. Such a stipulation should be filed before the
470 close of the standard discovery time limit, but only after reaching the limits for that type of standard
471 discovery available under the rule. If these conditions are met, the Court will not second-guess the parties
472 and their counsel and must approve the stipulation.

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

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

495 **Consequences of failure to disclose.** Rule 26(d). If a party fails to disclose or to supplement timely
496 its discovery responses, that party cannot use the undisclosed witness, document, or material at any
497 hearing or trial, absent proof that non-disclosure was harmless or justified by good cause. More complete
498 disclosures increase the likelihood that the case will be resolved justly, speedily, and inexpensively. Not

499 being able to use evidence that a party fails properly to disclose provides a powerful incentive to make
500 complete disclosures. This is true only if trial courts hold parties to this standard. Accordingly, although a
501 trial court retains discretion to determine how properly to address this issue in a given case, the usual and
502 expected result should be exclusion of the evidence.

503 **Legislative Note**

504

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

2 (a) **When depositions may be taken; when leave required.** A party may depose a
3 party or witness by oral questions. A witness may not be deposed more than once in
4 standard discovery. An expert who has prepared a report disclosed under Rule
5 26(a)(4)(B) may not be deposed.

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

9 (b)(1) The party deposing a witness shall give reasonable notice in writing to
10 every other party. The notice shall state the date, time and place for the deposition
11 and the name and address of each witness. If the name of a witness is not known,
12 the notice shall describe the witness sufficiently to identify the person or state the
13 class or group to which the person belongs. The notice shall designate any
14 documents and tangible things to be produced by a witness. The notice shall
15 designate the officer who will 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,
20 and the party designating the recording method shall bear the cost of the recording.
21 The appearance or demeanor of witnesses or attorneys shall not be distorted
22 through 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
25 includes (A) the officer's name and business address; (B) the date, time and place of
26 the deposition; (C) the name of the witness; (D) the administration of the oath or
27 affirmation to the witness; and (E) an identification of all persons present. If the
28 deposition is recorded other than stenographically, the officer shall repeat items (A)
29 through (C) at the beginning of each unit of the recording medium. At the end of the

30 deposition, the officer shall state on the record that the deposition is complete and
31 shall state any stipulations.

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

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

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

48 **(c) Examination and cross-examination; objections.**

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

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

60 (d) **Limits.** During standard discovery, oral questioning of a nonparty shall not
61 exceed four hours, and oral questioning of a party shall not exceed seven hours.

62 (e) **Submission to witness; changes; signing.** Within 28 days after being notified
63 by the officer that the transcript or recording is available, a witness may sign a
64 statement of changes to the form or substance of the transcript or recording and the
65 reasons for the changes. The officer shall append any changes timely made by the
66 witness.

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

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

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

83 (f)(3) Upon payment of reasonable charges, the officer shall furnish a copy of the
84 record to any party or to the witness. ~~An official transcript of a recording made by~~
85 ~~non-stenographic means shall be prepared under Utah Rule of Appellate Procedure~~
86 ~~41(e).~~

87 (g) **Failure to attend or to serve subpoena; expenses.** If the party giving the
88 notice of a deposition fails to attend or fails to serve a subpoena upon a witness who
89 fails to attend, and another party attends in person or by attorney, the court may order

90 the party giving the notice to pay to the other party the reasonable costs, expenses and
91 attorney fees incurred.

92 (h) **Deposition in action pending in another state.** Any party to an action in
93 another state may take the deposition of any person within this state in the same
94 manner and subject to the same conditions and limitations as if such action were
95 pending in this state. Notice of the deposition shall be filed with the clerk of the court of
96 the county in which the person whose deposition is to be taken resides or is to be
97 served. Matters required to be submitted to the court shall be submitted to the court in
98 the county where the deposition is being taken.

99 (i) **Stipulations regarding deposition procedures.** The parties may by written
100 stipulation provide that depositions may be taken before any person, at any time or
101 place, upon any notice, and in any manner and when so taken may be used like other
102 depositions.

103

1 **Rule 37. ~~Discovery and disclosure motions~~ Expedited sStatement of discovery**
2 **issues; Sanctions; Failure to admit, to attend deposition or to preserve evidence.**

3 ~~(a) Motion for order compelling disclosure or discovery.~~

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

6 ~~(a)(1)(A) fails to disclose, fails to respond to a discovery request, or makes an~~
7 ~~evasive or incomplete disclosure or response to a request for discovery;~~

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

12 ~~(a)(1)(C) objects to a discovery request ;~~

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

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

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

20 ~~(a)(3) The moving party must attach a copy of the request for discovery, the~~
21 ~~disclosure, or the response at issue. The moving party must also attach a~~
22 ~~certification that the moving party has in good faith conferred or attempted to confer~~
23 ~~with the other affected parties in an effort to secure the disclosure or discovery~~
24 ~~without court action and that the discovery being sought is proportional under Rule~~
25 ~~26(b)(2).~~

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

27 ~~(b)(1) A party or the person from whom disclosure is required or discovery is~~
28 ~~sought may move for an order of protection. The moving party shall attach to the~~
29 ~~motion a copy of the request for discovery or the response at issue. The moving~~
30 ~~party shall also attach a certification that the moving party has in good faith~~

31 ~~conferred or attempted to confer with other affected parties to resolve the dispute~~
32 ~~without court action.~~

33 ~~(b)(2) If the motion raises issues of proportionality under Rule 26(b)(2), the party~~
34 ~~seeking the discovery has the burden of demonstrating that the information being~~
35 ~~sought is proportional.~~

36 **(a) Expedited Statement of discovery issues.**

37 (a)(1) A party or the person from whom discovery is sought may request that the
38 judge enter an order regarding any discovery issue, including:

39 (a)(1)(A) failure to disclose under Rule 26;

40 (a)(1)(B) extraordinary discovery under Rule 26;

41 (a)(1)(C) a subpoena under Rule 45;

42 (a)(1)(D) protection from discovery; or

43 (a)(1)(E) compelling discovery from a party who fails to make full and
44 complete discovery.

45 **(a)(2) Statement of discovery issues length and content.** The statement of
46 discovery issues must be no more than 4 pages, not including permitted
47 attachments, and must include in the following order:

48 (a)(2)(A) the relief sought and the grounds for the relief sought stated
49 succinctly and with particularity;

50 (a)(2)(B) a certification that the requesting party has in good faith conferred or
51 attempted to confer with the other affected parties in an effort to resolve the
52 dispute without court action;

53 (a)(2)(C) a statement regarding proportionality under Rule 26(b)(2); and

54 (a)(2)(D) if the statement requests extraordinary discovery, a statement
55 certifying that the party has reviewed and approved a discovery budget.

56 **(a)(3) Objection length and content.** No more than 7 days after the statement
57 is filed, any other party may file an objection to the statement of discovery issues.
58 The objection must be no more than 4 pages, not including permitted attachments,
59 and must address the issues raised in the statement.

60 (a)(4) Attachments. Unless other attachments are required by law, the party
61 filing the statement must attach to the statement only a copy of the request for
62 discovery or the response at issue. Any party objecting to the statement must attach
63 to the objection any required attachments that were omitted by the party filing the
64 statement.

65 (a)(5) Proposed order. Each party must file a proposed order concurrently with
66 its statement or objection.

67 (a)(6) Decision. Upon filing of the objection or expiration of the time to do so,
68 either party may and the party filing the statement must file a Request to Submit for
69 Decision under Rule 7(d). The court will promptly:

70 (a)(6)(A) decide the issues on the pleadings and papers;

71 (a)(6)(B) conduct a hearing by telephone conference or other electronic
72 communication; or

73 (a)(6)(C) order additional briefing and establish a briefing schedule.

74 ~~(e)~~ (a)(7) Orders. The court may ~~make~~ enter orders regarding disclosure or
75 discovery or to protect a party or person from discovery being conducted in bad faith or
76 from annoyance, embarrassment, oppression, or undue burden or expense, or to
77 achieve proportionality under Rule 26(b)(2), including one or more of the following:

78 ~~(e)(1)~~ (a)(7)(A) that the discovery not be had or that additional discovery be
79 had;

80 ~~(e)(2)~~ (a)(7)(B) that the discovery may be had only on specified terms and
81 conditions, including a designation of the time or place;

82 ~~(e)(3)~~ (a)(7)(C) that the discovery may be had only by a method of discovery
83 other than that selected by the party seeking discovery;

84 ~~(e)(4)~~ (a)(7)(D) that certain matters not be inquired into, or that the scope of
85 the discovery be limited to certain matters;

86 ~~(e)(5)~~ (a)(7)(E) that discovery be conducted with no one present except
87 persons designated by the court;

88 ~~(e)(6)~~ (a)(7)(F) that a deposition after being sealed be opened only by order of
89 the court;

90 ~~(e)(7)-(a)(7)(G)~~ that a trade secret or other confidential information not be
91 disclosed or be disclosed only in a designated way;

92 ~~(e)(8)-(a)(7)(H)~~ that the parties simultaneously ~~file~~ deliver specified documents
93 or information enclosed in sealed envelopes to be opened as directed by the
94 court;

95 ~~(e)(9)-(a)(7)(I)~~ that a question about a statement or opinion of fact or the
96 application of law to fact not be answered until after designated discovery has
97 been completed or until a pretrial conference or other later time; ~~or~~

98 ~~(e)(10)-(a)(7)(J)~~ that the costs, expenses and attorney fees of discovery be
99 allocated among the parties as justice requires; or

100 ~~(e)(11) If a protective order terminates a deposition, it shall be resumed only~~
101 ~~upon the order of the court in which the action is pending.~~

102 ~~(d) Expenses and sanctions for motions. If the motion to compel or for a~~
103 ~~protective order is granted or denied, or if a party provides disclosure or~~
104 ~~discovery or withdraws a disclosure or discovery request after a motion is filed,~~
105 ~~the court may order the party, witness or attorney to pay (a)(7)(K) that a party pay~~
106 ~~the other party's reasonable expenses costs and attorney fees incurred on~~
107 ~~account of the motion statement of discovery issues if the relief requested is~~
108 ~~granted or denied, or if a party provides discovery or withdraws a discovery~~
109 ~~request after a statement of discovery issues is filed and if the court finds that the~~
110 ~~party, witness, or attorney did not act in good faith or asserted a position that was~~
111 ~~not substantially justified. A motion to compel or for a protective order does not~~
112 ~~suspend or toll the time to complete standard discovery.~~

113 (a)(8) Request for sanctions prohibited. A statement of discovery issues or an
114 objection may include a request for costs and attorney fees but not a request for
115 sanctions.

116 (a)(9) Statement of discovery issues does not toll discovery time. A
117 statement of discovery issues does not suspend or toll the time to complete standard
118 discovery.

119 ~~(e) Failure to comply with order~~ (b) Motion for sanctions.

120 ~~(e)(1) Sanctions by court in district where deposition is taken. Failure to follow an~~
121 ~~order of the court in the district in which the deposition is being taken or where the~~
122 ~~document subpoena was served is contempt of that court.~~

123 ~~(e)(2) Sanctions by court in which action is pending.~~ Unless the court finds that the
124 failure was substantially justified, the court, ~~in which the action is pending upon motion,~~
125 may impose appropriate sanctions for the failure to follow its orders, including the
126 following:

127 ~~(e)(2)(A) (b)(1)~~ deem the matter or any other designated facts to be established
128 in accordance with the claim or defense of the party obtaining the order;

129 ~~(e)(2)(B) (b)(2)~~ prohibit the disobedient party from supporting or opposing
130 designated claims or defenses or from introducing designated matters into evidence;

131 ~~(e)(2)(C) (b)(3)~~ stay further proceedings until the order is obeyed;

132 ~~(e)(2)(D) (b)(4)~~ dismiss all or part of the action, strike all or part of the pleadings,
133 or render judgment by default on all or part of the action;

134 ~~(e)(2)(E) (b)(5)~~ order the party or the attorney to pay the reasonable expenses,
135 including attorney fees, caused by the failure;

136 ~~(e)(2)(F) (b)(6)~~ treat the failure to obey an order, other than an order to submit to
137 a physical or mental examination, as contempt of court; and

138 ~~(e)(2)(G) (b)(7)~~ instruct the jury regarding an adverse inference.

139 ~~(f) Expenses~~ **(c) Motion for attorney fees and expenses on failure to admit.** If a
140 party fails to admit the genuineness of ~~any a~~ document or the truth of ~~any a~~ matter as
141 requested under Rule 36, and if the party requesting the admissions proves the
142 genuineness of the document or the truth of the matter, the party requesting the
143 admissions may ~~apply to the court~~ file a motion for an order requiring the other party to
144 pay the reasonable attorney fees and expenses incurred in making that proof, ~~including~~
145 ~~reasonable attorney fees.~~ The court ~~shall make~~ must enter the order unless it finds that:

146 ~~(f)(1) (c)(1)~~ the request was held objectionable pursuant to Rule 36(a);

147 ~~(f)(2) (c)(2)~~ the admission sought was of no substantial importance;

148 ~~(f)(3) (c)(3)~~ there were reasonable grounds to believe that the party failing to
149 admit might prevail on the matter;

150 ~~(f)(4)-(c)(4)~~ that the request is was not proportional under Rule 26(b)(2); or

151 ~~(f)(5)-(c)(5)~~ there were other good reasons for the failure to admit.

152 ~~(g)~~ **(d) Motion for sanctions for failure of party to attend at own**

153 **deposition.** ~~The court on motion may take any action authorized by paragraph (e)(2) if~~

154 ~~if~~ a party or an officer, director, or managing agent of a party or a person designated

155 under Rule 30(b)(6) ~~or 34(a)~~ to testify on behalf of a party fails to appear before the

156 officer taking the deposition, after proper service of the notice, any other party may file a

157 motion for sanctions under paragraph (b). The failure to ~~act described in this paragraph~~

158 appear may not be excused on the ground that the discovery sought is objectionable

159 unless the party failing to ~~act~~ appear has ~~applied for a protective order~~ filed a statement

160 of discovery issues under paragraph ~~(b)~~ (a).

161 ~~(h)~~ **Failure to disclose.** ~~If a party fails to disclose a witness, document or other~~

162 ~~material, or to amend a prior response to discovery as required by Rule 26(d), that party~~

163 ~~shall not be permitted to use the witness, document or other material at any hearing~~

164 ~~unless the failure to disclose is harmless or the party shows good cause for the failure~~

165 ~~to disclose. In addition to or in lieu of this sanction, the court on motion may take any~~

166 ~~action authorized by paragraph (e)(2).~~

167 ~~(i)-(e)~~ **Failure to preserve evidence.** Nothing in this rule limits the inherent power of

168 the court to take any action authorized by paragraph ~~(e)(2)~~ (b) if a party destroys,

169 conceals, alters, tampers with or fails to preserve a document, tangible item, electronic

170 data or other evidence in violation of a duty. Absent exceptional circumstances, a court

171 may not impose sanctions under these rules on a party for failing to provide

172 electronically stored information lost as a result of the routine, good-faith operation of an

173 electronic information system.

174 **Advisory Committee Notes**

175 [Add to existing notes]

176 2014 Amendments.

177 Paragraph (a) adopts the expedited procedures for statements of discovery issues

178 formerly found in Rule 4-502 of the Code of Judicial Administration. Statements of

179 discovery issues replace discovery motions, and paragraph (a) governs unless the
180 judge orders otherwise.

181 Former paragraph (a)(2), which directed a motion for a discovery order against a
182 nonparty witness to be filed in the judicial district where the subpoena was served or
183 deposition was to be taken, has been deleted. A statement of discovery issues related
184 to a nonparty must be filed in the court in which the action is pending.

185 Former paragraph (h), which prohibited a party from using at a hearing information
186 not disclosed as required, was deleted because the effect of non-disclosure is
187 adequately governed by Rule 26(d). See also *The Townhomes At Pointe Meadows*
188 *Owners Association v. Pointe Meadows Townhomes, LLC*, 2014 UT App 52 ¶14. The
189 process for resolving disclosure issues is included in paragraph (a).

190

1 **Rule 45. Subpoena.**

2 **(a) Form; issuance.**

3 (a)(1) Every subpoena shall:

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

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

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

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

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

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

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

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

18 (a)(1)(E) include a notice to persons served with a subpoena in a form substantially similar to
19 the subpoena form **appended to these rules <http://www.utcourts.gov/resources/forms/subpoena/>.**

20 A subpoena may specify the form or forms in which electronically stored information is to be
21 produced.

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

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

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

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

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

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

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

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

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

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

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

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

50 **(d) Payment of production or copying costs.** The party or attorney responsible for issuing the
51 subpoena shall pay the reasonable cost of producing or copying documents, electronically stored
52 information or tangible things. Upon the request of any other party and the payment of reasonable costs,
53 the party or attorney responsible for issuing the subpoena shall provide to the requesting party copies of
54 all documents, electronically stored information or tangible things obtained in response to the subpoena
55 or shall make the tangible things available for inspection.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

99 (e)(5) If objection is made, or if a party ~~files a motion for requests~~ a protective order, the party or
100 attorney responsible for issuing the subpoena is not entitled to compliance but may ~~move for request~~
101 an order to compel compliance under Rule 37(a). The ~~motion-objection or request~~ shall be served on
102 the other parties and on the person subject to the subpoena. An order compelling compliance shall
103 protect the person subject to or affected by the subpoena from significant expense or harm. The court
104 may quash or modify the subpoena. If the party or attorney responsible for issuing the subpoena
105 shows a substantial need for the information that cannot be met without undue hardship, the court
106 may order compliance upon specified conditions.

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

108 (f)(1) A person commanded to copy and mail or deliver documents or electronically stored
109 information or to produce documents, electronically stored information or tangible things shall serve

110 on the party or attorney responsible for issuing the subpoena a declaration under penalty of law
111 stating in substance:

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

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

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

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

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

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

126 (f)(4) If the information produced in response to a subpoena is subject to a claim of privilege or of
127 protection as trial-preparation material, the person making the claim may notify any party who
128 received the information of the claim and the basis for it. After being notified, the party must promptly
129 return, sequester, or destroy the specified information and any copies of it and may not use or
130 disclose the information until the claim is resolved. A receiving party may promptly present the
131 information to the court under seal for a determination of the claim. If the receiving party disclosed the
132 information before being notified, it must take reasonable steps to retrieve the information. The
133 person who produced the information must preserve the information until the claim is resolved.

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

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

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

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

144 Advisory Committee Notes

145 To quash a subpoena, a party or a non-party affected by the subpoena should file a ~~motion request~~
146 for a protective order under the statement of discovery procedures in Rule 26 and a non-party affected by

147 ~~the subpoena should file an objection under this rule 37.~~ The non-party might be the person subpoenaed
148 or might be someone who has an interest in the testimony of the subpoenaed person or in the documents
149 or other materials ordered to be produced.
150

COMMENTS

(1) RULE 5

Re 5(b): service is effected by e-filing a document, presumably because the court system sends notice and access to a copy to all other counsel. In cases that are not private, filing a paper as private (under seal) will not necessarily generate a notice from the court so other counsel may not be aware of the filing.

Posted by J.Bogart May 12, 2014 11:17 AM

How are we defining "conformed signature"? We need the definition or a reference.

Posted by Knute Rife May 8, 2014 07:39 PM

The proposed change to URCP 005 is long overdue, especially allowing service by email for all documents where the attorney has an e-filing account. This change is strongly supported.

Posted by Michael A. Jensen May 7, 2014 12:42 PM

Some of the proposed changes to RULE 5 are scary at best, and should NOT be changed.

I am against the change in Rule 5 (b)(2)(A) (now Rule 5 [b][2]) that "a paper that is filed with the court must be served before or on the same day that it is filed". This rule is too general and does not fit every type of situation that may occur. There are times when you cannot serve another party on the same day that you file the document with the Court. What then, what happens? For example, you could be e-filing the documents at 11:58 p.m., with the Court and then dropping the papers in the mail to the other party shortly thereafter at say 12:00 a.m., which would be the next day. As long as the attached certificate of service states the date of service then why do we need such a rule as to require they are filed and served the same day? As another example- it is extremely common for a party to file a motion for temp orders in a family law case at the time the complaint/Petition is filed with the Court, then obtain a hearing date from the Court for that motion. The motion and notice of hearing along with the Complaint/Petition are then all sent out for personal service upon the opposing party. This rule would prohibit such common and efficient practice, which does not make sense. It's hard to see why this rule is being amended at all. Courts are not dumb. They have checks and procedures they follow to figure out if a paper was properly served and if enough time has been given before addressing it. Moreover, if there is a problem, the other party can simply object.

I am against the change in Rule 5 (b)(1)(A)(ii) which allows service upon a person without their consent by email if they have an electronic filing account. It is one thing to have your EFSP send/serve documents to an email address that you have given the EFSP and a completely different thing for an opposing party to send/serve you out of the blue documents directly via an email address, which is believed to be correct. The service of a document by email can only be safely accomplished through receiving the same from the EFSP or when permission is asked from and granted by the receiving party. There are several reasons why. (1) Often the email address that is given by the attorney to the EFSP is different than what is listed with the Bar or known by anyone else. This is because email addresses are subject to being compromised by SPAMMERS after time if the email address is generally given out and used by the public. Often people's email accounts are compromised and all of the email addresses they have stored in their address books are then passed around and used obtained by SPAMMERS or worse virus. So at our office we find that the only way to combat the spamming problem is to give our EFSP an email address that we do not disclose to anyone else and then every so often we have to change the email addresses we generally give out and use with the public. If someone does not have to ask for permission to serve a document to us via email then they might have an old address they are sending the

documents to and we will miss the service (please note that "old" can mean as much as a millisecond). (2) There is no tracking method to determine if the person that was served by email was actually served by email unless the same is done through an EFSP. (3) If the person who is being served was not asked by the servicer if it is okay to be served by email, then that person who is being served would not be aware of such an attempt and would not be looking for the arrival of the email. Conversely, if the person being served was asked if it is okay to serve via email, then if the email does not come then that person has enough awareness of the situation to follow-up on it and ask for it to be resent. That is why the rule that permission be granted existed in the first place, as it provided the necessary checks to insure that service would be received. (4) Updating the email address with the Utah Bar is not an instantaneous event, and takes time (an attorney just the other day told me that he had been trying to get the Bar to update his email address for over 2 weeks now, when explaining to me why the old email address that I had sent an email to had come back to me as being undeliverable). So in the meantime service is going to an old email address, and not being reached by the person, and such could be very costly for the attorney. Even if a change with the bar was instantaneous, there could still be problems. For example, a person looks on the Bar's webpage and sees an email address for an attorney. They then go and insert it into the paperwork they are working on. Meanwhile, unbeknownst to that person, the attorney goes to the Bar's website, and changes his/her email address. The person serving then sends the email out. Service is not received, but yet the Rule would say it was "served". Moreover, there is no way for anyone to know when the email address was changed... there is no tracking log, which also causes problems for everyone.

Bottom line here is that we are setting attorney's up for potential malpractice and at the very least doing a disservice to the people we serve. Service of a document upon another party should be taken VERY, VERY SERIOUSLY and the method employed should have the HIGHEST assurances that it will be received by the intended party. Why would we ever change this or weaken it?

On another note, this change in the rule will place attorneys at a disadvantage to pro se litigants. The pro se person will always be able to serve the attorney via email because the attorney will have an e-filing account, and the attorney will never be able to serve the pro se litigant via email if they don't agree to such. This is especially unfair in the area of discovery, where the documents can be voluminous and the cost to print can be high. The attorney will have to print the documents that are sent to him/her via email by the opposing party, at the attorney's own cost, and the attorney will also have to print the documents that he or she will be sending out to the pro se person at the attorney's own cost.

Rule 5 (b)(1)(B) removes the rule that service by electronic means is not effective if the party making service learns that the attempted service did not reach the person to be served.

WHY? In what circumstance would there ever be a good reason to ignore a return email stating the email was automatically denied by the email service for whatever reason (often for the reason that the email service automatically believed it was SPAM) or not delivered due to an error of some sort?

This is really a good rule to keep, and goes with the comments I wrote above.

Finally, I am against the removal of the ability to serve someone via fax if they agree to such (see Rule 5 [b][1][A][iii]). Why are we messing with this? Someone might not have or want service via email, but they have a fax and are willing to receive it by the same. Why are we taking away options here, especially one that, unlike email (as discussed above), at least has a verifiable confirmation that the document was sent and received by the person at that phone number, on the date and time indicated in the fax confirmation?

Posted by Superman! May 7, 2014 12:30 PM

I don't think it is a good idea to allow people to serve by email without consent. I understand that we must agree to service by email through the electronic filing system, but I prefer to receive discovery materials and other documents through mail, unless I have consented to service by email.

With electronic filing, we are already bombarded with emails and it is too easy for an email to slip through the cracks unless I am expecting, and have agreed, to receive documents through email.

I believe the better rule is to still require consent to receive documents through email.

Posted by Daniel Young May 7, 2014 09:25 AM

Lines 3-4: replace “Except as otherwise provided in these rules or as otherwise directed by the court” with “Unless these rules provide or the court orders otherwise” (avoid passive voice—Garner, 2.3)

Line 6: delete subparagraph (a)(1)(A) as unnecessary and duplicative of Rule 58A(d).

Line 7: either delete subparagraph (a)(1)(B) as unnecessary (the words “unless otherwise directed by the court” in (a)(1) should cover this provision)

Line 8: insert the word “filed” between the words “pleading” and “after”

Line 10: insert a comma after “court” and replace “other than” with “except”

Lines 12-13: delete subparagraph (a)(1)(F) as unnecessary and duplicative of (a)(1)(E).

Lines 16-27: consider replacing with the following for the sake of simplicity:

(a)(2)(A) a party in default for any reason other than for failure to appear must be served as provided in paragraph (a)(1);

(a)(2)(B) a party in default for any reason must be served under Rule 4 with a pleading that asserts a new claim for relief against that party; and

(a)(2)(C) a party in default for any reason must be served under Rule 5(b)(3) with:

(a)(2)(C)(i) notice of any hearing to determine the amount of damages to be entered against the defaulting party;

(a)(2)(C)(ii) notice of entry of judgment under Rule 58A(d);

(a)(2)(C)(iii) other papers as the court directs.

Line 16: replace “as ordered by the court” with “as the court orders” (avoid passive voice—Garner, 2.3)

Line 26: replace “pleadings asserting new or additional claims” with “a pleading that asserts a new claim” (avoid plurals—Garner, 2.1)

Line 39: insert a colon after the word “if”

Lines 44-48: Paragraph (b)(2) mixes up a method of service (method most likely to be promptly received) with the time to serve (must be served before or on the same day that it is filed). The word “otherwise” on line 7 doesn’t apply here, because the first part of the paragraph isn’t an exception—just like other papers, papers served within 7 days of a hearing “must be served before or on the same day that it is filed.” I recommend deleting the words “If a hearing is scheduled 7 days or less from the date of service, a party must serve a paper related to the hearing by the method most likely to be promptly received. Otherwise,” from this paragraph and inserting it into its own paragraph after (b)(3) as explain below.

Line 49: replace “A paper served under this rule may be served by:” with “A paper is served under this rule by:”

Line 64: insert “if the person has no office or the office is closed,” before the word “leaving.” This language is in the federal rule and would prevent a person from serving an attorney at his or her home during business hours.

Line 66: insert as separate subparagraph (b)(3)(#): “delivering it by any other means that the person consented to in writing.”

Line 67: insert as separate paragraph (b)(#): “Service within 7 days of hearing. If a hearing is scheduled 7 days or less from the date of service, a party must serve a paper related to the hearing by the method most likely to be promptly received.”

Line 68: replace “complete” with “effective” (it matches the heading)

Line 68: as indicated in the minutes, the committee inserted at the end of this sentence “Service by other means is effective upon delivery.”

Lines 71-77: (b)(5)(A) as unnecessary—this goes without saying based on (a)(1). The word “preparing” is problematic—it only really applies to proposed orders and judgments. It also calls into question whether a party must serve both a proposed order it prepared, and then serve it again after it was signed by the court. Consider changing (b)(5) as follows:

(b)(5) Service by the court. Unless the court directs otherwise, an order, judgment, or other paper filed by the court will be served by the court.

Line 75: replace “preparing” with “filing”

Line 76: replace “prepared” with “filed”

Line 76: replace “an order or judgment” with “an order, judgment, or other paper” (notices are routinely prepared and filed by the court)

Line 89: paragraph (c)(4) should not be grouped with (c)(1)-(3). Under the current version of the state rules and the federal rules, the language of (c)(4) states that a copy of an order directing parties the method of serving numerous defendants must be served on the parties as the court directs, not that the court may order that a copy of the order must be served on the parties. I would recommend revising the structure as follows: (c)—title only; the text of (c) into (c)(1); (c)(1)-(3) into (c)(1)(A)-(C); (c)(4) into (c)(2).

Lines 102-03: replace “all papers after the complaint that are required to be served” with “a paper after the complaint that is required to be served” (avoid plurals—Garner, 2.1)

Line 103: replace “Parties” with “A party” (avoid plurals—Garner, 2.1)

Line 105: delete “of the court” as unnecessary

Lines 105-06: delete “of the court” as unnecessary, insert who agrees to accept it for filing” after the word “judge”

Line 110: replace “the original affidavit with a notary acknowledgement” with “an electronically signed and acknowledged affidavit”

Line 111: replace “46-1-16(7)” with “46-4-205”

Line 114: replace “e-filing” with electronic filing”

Line 115: replace “clerk of the court, and the clerk will” with “clerk, who will”

Lines 117-19: This is a dangling section. I would recommend revising the structure of (f) as follows: (f)—title only; the text of (f) into (f)(1); (f)(1)-(4) into (f)(1)(A)-(d); lines 117-19 into (f)(2).

Lines 118-19: replace “, including any appeal or until the time in which to appeal has expired” with “and the time for appeal has expired or any appeal has terminated”

Lines 132-139: consider deleting as outdated.

Line 144: add the following explanatory notes:

2014 Amendments

Former subparagraph (b)(1)(A) was amended to allow service by email upon e-filers without the requirement of written consent. While e-filers could be electronically served with papers filed with the court, there was no equivalent means to electronically serve papers not filed with the court, such as discovery papers or proposed orders. The committee concluded that as e-filers already received notice of e-filed documents by email, the risk of e-filers failing to notice that they had been served with documents was small enough to tip the scales in favor of allowing parties the convenience of serving parties with discovery documents and proposed orders by email.

Former subparagraph (b)(1)(A) was also amended to remove explicit reference to service by fax. A party is still allowed to be served by a method not mentioned in these rules provided the party consents to the method of service in writing. While it is not necessary to file a written consent to a method of service with the court, a party may do so if it wishes.

Former subparagraph (b)(1)(B) was amended to remove the provision that service by electronic means is not effective if the party making service leads that the attempted service did not reach the person to be served. The committee concluded that rather than dealing with the consequences of retroactively invalidating service, the better course would be to treat a paper as served when sent and allow the district courts to deal with any problems with receiving notice on a case-by-case basis, much like they have done with service by mail. Despite the change, parties and attorneys are obliged upon learning that a party did not receive the served paper to promptly resend a paper by an alternate means of service.

Subdivision (f) was added to address the question of how to electronically file an affidavit or declaration of a person other than the e-filer. A conforming notary acknowledgement must contain the information listed in Utah Code Section 46-1-16(7) in or next to the notary's signature block.

The language throughout has been amended and reorganized to make the rule more easily understood.

Posted by Nathan Whittaker May 2, 2014 11:10 AM

(2) RULE 26

My concern is that the proposed change to Rule 26 will limit the discretion of the judge to allow additional discovery. The reference to Rule 37 will require some type of misconduct or non-disclosure by the non-moving party. There are situations when additional discovery is necessary despite full disclosure by the adverse party. I see no benefit in taking the discretion away from the judge to allow additional discovery if he or she is convinced the circumstances warrant it.

Posted by Ryan Schriever June 25, 2014 09:24 AM

(3) RULE 30

We received no comments.

(4) RULE 37

With the proposed change to URCP Rule 37, does this eliminate motions for protective orders all together. This would necessitate an amendment to Rule 45(e)(5) which permits a party to file a motion for protective order after being served with notice of a subpoena. Of course, as I currently read Rule 4-502, this amendment to Rule 45(e)(5) is already necessary.

Posted by Mark Dahl May 20, 2014 04:04 PM

Multiple comments about Proposed Rule 37:

1. Is the Discovery Statement truly intended only for responding parties? The Proposed Rule 37(a)(1) states that "A party or the person FROM WHOM DISCOVERY IS SOUGHT may request" But what if

the person “from whom discovery is sought” is the party engaging in improper conduct? What if the responding party is not providing responses, or gives incomplete or evasive responses, or gives disingenuous objections. Can the person who seeks the discovery file a discovery statement? If not, what is the requesting party’s recourse, a standard motion? If a requesting party can also use the Discovery Statement, revise the rule to so indicate.

2. Is the Discovery Statement an additional tool that can be used, or a mandatory initial mechanism to solve “any discovery dispute”? Proposed Rule 37(a)(1) states a party “may” request an order about “any discovery dispute”. But will this be enforced as the party “must” use this rule? I seem to recall that local rule version of this rule made it a mandatory pre-requisite before another discovery motion could be filed.

3. Are Discovery Statements to be used for requesting extra discovery? Adv. Comm. Note 1 states that “Statements of discovery issues replace discovery motions.” Are they intended to replace all discovery motions or only certain enumerated motions? If this is only truly intended to replace a subset of discovery motions, please clarify.

4. In Proposed Rule 37(a)(3), the use of 7 days is a bit confusing. I’ve never seen a 7 day time limit. The only time I’ve seen deadlines using multiples of 7 is when it’s been more than 10 days, i.e., 14, 28, etc. With a 7 day deadline, presumably the intervening weekends and holidays are not counted per Rule 6(a). This would capture two weekends if the statement is filed on Thursday or Friday. Is that intended?

5. I’m confused by Proposed Rule 37(a)(4). It states that “unless other attachments are required by law, the party filing the statement must attach to the statement only a copy of the request for discovery or the response at issue.” But with this being a new procedure, where else in the law might other attachments be required? And if something else is required, then does that mean that filing the request or response is no longer required? I recommend: (a) make it explicit here what attachments are required; and (b) if a copy of the request or response is always required, include that in a separate sentence, not the conditional sentence that starts with an “unless.”

6. I’m confused by Proposed Rule 37(a)(7). Is this intended to be an exhaustive list of what the court can order in response to Discovery Statements, or is it just a suggestive list? If it is an exhaustive list, then what is to be understood by Proposed Rule 37(a)(1)’s statement that Discovery Statement can be used for “any discovery dispute”? Can it be used for a dispute that does not require one of the enumerated orders currently in (a)(7)(A)-(K)? If the proposed list is not exhaustive, then I recommend adding an “other appropriate matters” option as Proposed Rule 37 (a)(7)(L), i.e., something like Current Rule 16(a)(14). Failure to do so will result in confusion about the court’s authority to issue orders.

7. I’m confused by Proposed Rule 37(a)(8). I’m struggling to understand when costs or fees might be requested in an Discovery Statement unless it is for the type of sanctionable conduct specified in Proposed Rule 37(b)-(e). Can you clarify this in the advisory committee notes?

Posted by Victor Sipos May 13, 2014 09:45 AM

Line 37: Consider changing “the person from whom discovery is sought” to the more indefinite “any person from whom discovery is sought.” This language conforms to Federal Rule 26(c)(1).

Line 38: Consider replacing the word “regarding” to “resolving” as it better describes the purpose of the order.

Lines 39–44: the wording of the list needs to be altered to make the phrasing of each of the list items consistent. Also, line 41 may be misread to suggest that a court order is required to obtain a subpoena. Consider amending as follows:

(a)(1)(A) compelling disclosure under Rule 26;

(a)(1)(B) granting extraordinary discovery under Rule 26;

(a)(1)(C) compelling compliance with or quashing a subpoena under Rule 45;

(a)(1)(D) protecting a party from discovery; or

(a)(1)(E) compelling discovery from a party who fails to make full and complete discovery.

Lines 74–99: While paragraph (a)(7) claims to be about orders, the list provided is only about protective orders (except for (K), addressed below). As the authority to make any order resolving discovery is clearly implied in (a)(1), I think all that this paragraph needs to be is an illustrative list of protective orders. Also, the language of the protective order list is outdated; I suggest adopting the updated versions of (a)(7)(A)–(H) that are in Federal Rule 26(c)(1), and updating (I) and (J) to match. Specifically, I would recommend changing these lines as follows:

(a)(7) Protective orders. The court may, for good cause, enter an order to protect a party or person from annoyance, embarrassment, oppression, undue burden or expense, or to achieve proportionality under Rule 26(b)(2), including one or more of the following:

(a)(7)(A) forbidding the disclosure or discovery;

(a)(7)(B) specifying terms, including time and place, for the disclosure or discovery;

(a)(7)(C) prescribing a discovery method other than the one selected by the party seeking discovery;

(a)(7)(D) forbidding inquiry into certain matters, or limiting the scope of disclosure or discovery to certain matters;

(a)(7)(E) designating the persons who may be present while the discovery is conducted;

(a)(7)(F) requiring that a deposition be sealed and opened only on court order;

(a)(7)(G) requiring that a trade secret or other confidential research, development, or commercial information not be revealed or be revealed only in a specified way;

(a)(7)(H) requiring that the parties simultaneously file specified documents or information in sealed envelopes, to be opened as the court directs;

(a)(7)(I) allowing a party to defer its answer to a question about a fact, the application of law to fact, or an opinion about either, until after designated discovery has been completed, a pretrial conference, or other later time; and

(a)(7)(J) allocating the costs, expenses, and attorney fees of discovery among the parties as justice requires.

Lines 105–112: Paragraph (a)(7) combines a list of protective orders with the provision for expenses and attorney fees. While these are all orders, all but one of them are a specific type of order, and the provision for expenses and attorney fees is likely to get lost or ignored as just another type of protective order. I would suggest moving it out into a paragraph (a)(#). Also, the word “costs” is confusing, as it usually refers to taxable costs under Rule 54(d). What I believe the drafters of the federal rule had in mind when they said “reasonable expenses, including attorney fees” was attorney fees and litigation expenses that are not normally taxable under 54(d). Third, the language of this provision only applies to a party paying another party’s expenses and fees—I see no good reason why non-parties should not be subject to this rule or be able to take advantage of it. Finally, the wording of this paragraph is awkward. Specifically, I would recommend changing these lines as follows:

(a)(#) Expenses and attorney fees. The court may order a party, person, or attorney to pay the reasonable expenses and attorney fees incurred by the other party or person on account of the statement of discovery issues if:

(a)(#)(A) the court rules against the party or person in deciding the statement of discovery issues, or the party or person provides the contested discovery or withdraws the contested discovery request after a statement of discovery issues is filed; and

(a)(#)(B) the court finds that the party, witness, or attorney did not act in good faith or asserted a position that was not substantially justified.

Line 114: replace “costs” with “expenses” for the reasons explained above.

Lines 127–138: this is a list of “appropriate sanctions for the failure to follow [the court’s] orders” and therefore is a list of nouns. This is supported by the fact that the main sentence that the list splinters off from already has a main verb, “may impose,” and so all other verbs must be in a non-finite form such as an infinitive, gerund, or participle. Therefore, the form of each item in the list should be in gerund (“[verb]+ing”) form, just as they are in Federal Rule 37(b)(2)(A).

Lines 139–145: This language is awkward and clunky. I would recommend adopting the wording of Federal Rule 37(c)(2), revised as follows:

If a party fails to admit what is requested under Rule 36 and [] the requesting party later proves a document to be genuine or the matter true, the requesting party may move that the party who failed to admit pay the reasonable expenses and attorney fees incurred in making that proof. The court must so order unless:

Lines 159–160: The phrase “filed a statement of discovery issues under paragraph (a)” is a little vague—consider replacing with “requested protection from discovery under subparagraph (a)(1)(D).”

Lines 183–184: The phrase “related to a nonparty” is vague—consider replacing with “brought by or against a nonparty”

Lines 185 & 189: replace “paragraph” with “subdivision” as per Garner, 3.2.

Line 187: italicize “see also”

Posted by Nathan Whittaker May 11, 2014 03:42 PM

First, the revised Rule 37(a) creates a conflict, or at least confusion, with Rule 26(d)(4). Rule 26 categorizes required disclosures -- governed by Rule 26(a) -- separately from discovery -- governed by Rule 26(b)). However, this distinction disappears in Rule 37. Under 37(a)(1)(a), if a party fails to disclose under Rule 26 (in other words fails to disclose initial disclosures, expert reports, or pretrial disclosures), the prejudiced party would need to file a statement of discovery issues under Rule 37(a) rather than a motion to exclude under Rule 26(d)(4), in order to prevent use of the undisclosed witness, document, or report at any hearing or trial. If the advisory committee intends that motions to exclude based on failure to make required Rule 26 disclosures, including pretrial disclosures, are discovery issues that must be addressed by Rule 37, this intent should be expressed more explicitly.

Second, Rule 37(a)(2) requires that the movant include a certification that the movant conferred or attempted to confer with the other affected parties in an effort to resolve the dispute without court action, as well as file a statement of proportionality under Rule 26(b)(2). In the context of enforcing Rule 26(d)(4), an effort to meet and confer may make sense solely to determine whether the failure to disclose was for good cause. A statement of proportionality does not.

Third, while 37(a)(4) defines required attachments, it fails to define a "permitted attachment" under 37(a)(2) and 37(a)(3). Rule 37(a)(4) should also probably be revised to identify the "disclosure at issue" as a required attachment.

Fourth, while Rule 37(e) allows the court to retain its the inherent authority to deal with spoliation issues, it is not clear whether the procedure for bringing spoliation to the court's attention is a statement of discovery issues under Rule 37(a).

Lastly, Rule 37 fails to state that the 37(a) statement of discovery issues is the sole means for addressing discovery disputes. In contrast, Rule 4-502 makes use of the statement mandatory when it states that "The parties shall do the following before filing with the court any discovery motion"

Posted by Karthik Nadesan May 9, 2014 01:53 PM

A statement of discovery issues re a nonparty is filed with the court before which the case is pending even when the nonparty is not within the jurisdiction of that court. That seems odd. This provision of 37 appears to conflict with 45(e)(5) which has the nonparty filing a motion for a protective order -- is that now a statement of discovery issues? It seems burdensome to require a nonparty to come to the forum of the parties to seek protection, or to defend objections. In any event, it would be helpful to get 37 and 45 in line with one another.

Posted by J.Bogart May 7, 2014 03:32 PM

URCP 45(e)(5) should be modified to comport with the changes to URCP 37. The current language in 45(e)(5) refers to a "motion for protective order" and ought to be changed consistent with the language referencing a "Statement of Discovery Issues".

Posted by Michael A. Jensen May 7, 2014 12:53 PM

(5) RULE 45

I think that the proposed change to Rule 45(b)(3) is helpful in that it requires prior service of the actual subpoena itself before it is issued. In my experience, I am frequently served with a notice of intent to subpoena from various individuals or entities, but I am still left wanting to know the precise scope of the subpoena.

My concern with this subsection, (Rule 45(b)(3)), is that while it clearly requires "delivery" or "actual notice before serving the subpoena," the rule remains silent on how much notice is appropriate. Some attorneys give 5 days notice; others 10 days; and still others 14 days; but what about instances when less than even 5 days is given? I don't think that the rule is satisfied if notice is given on the eve of issuing the subpoenas, but the rule doesn't necessarily say that either.

I think that it's noteworthy that the local rules for the federal district court here in Utah have addressed this issue by requiring at least 5 days' notice, (8 days if the notice is served by mail), under DUCivR 45-1 when serving subpoenas.

It seems that the recent changes in Utah's rules of civil procedure have been generally aimed at more closely mirroring the federal rules. Wouldn't that goal also be accomplished by including a provision into Utah's rules that addresses how much notice is required before issuing subpoenas? I think it would certainly be helpful.

Posted by Trevor Sanders July 17, 2014 11:18 AM

Tab 4

Principles of Rulemaking

(1) Certainty

The rules should provide a predictable process.

(2) Clarity

The rules should be written using plain language principles, adopting the federal style amendments when appropriate.

(3) Comprehensiveness

The rules should provide complete answers to questions about procedures.

(4) Consistency

The rules should be internally consistent. There is value to state rules that conform to the federal rules. Lawyers practicing in both courts benefit from a uniform procedure. The state courts can rely on a large body of federal caselaw. The state rules should establish procedures different from the federal rule only when there is a sound reason for doing so.

(5) Improvement

An amendment should solve an identifiable problem.

(6) Input

Before the 45-day comment period, the committee should try to obtain comments and suggestions from lawyers and judges who might be particularly affected by an amendment. The committee will consider all comments.

(7) Priority

The committee will assign a priority to each request to amend the rules. Requests from the Legislature, Supreme Court and Board of District Court Judges will take priority over other priorities. Within a priority, the committee will consider the requests in the order in which they are made, unless combining requests will better address the matter.

(8) Simplicity

The process established by the rule should reach its outcome as simply as possible while allowing every party an equitable opportunity to investigate and present its case. Exceptions and options should be limited and clearly stated.

(9) Stability

The rules should not be amended unless there is sufficient need.

Tab 5

1 **Rule 43. Evidence.**

2 (a) Form. In all trials, the testimony of witnesses shall be taken orally in open court, unless otherwise
3 provided by these rules, the Utah Rules of Evidence, or a statute of this state. ~~All evidence shall be~~
4 ~~admitted which is admissible under the Utah Rules of Evidence or other rules adopted by the Supreme~~
5 ~~Court. For good cause in compelling circumstances and with appropriate safeguards, the court may~~
6 permit testimony in open court by contemporaneous transmission from a different location.

7 (b) Evidence on motions. When a motion is based on facts not ~~appearing of in the~~ record the court
8 may hear the matter on affidavits, ~~presented by the respective parties, but the court may direct that the~~
9 ~~matter be heard wholly or partly on~~ declarations, oral testimony or depositions.

10

Tab 6

1 **Rule 63. Disability or disqualification of a judge.**

2 (a) **Substitute judge; Prior testimony.** If the judge to whom an action has been assigned is unable
3 to perform the duties required of the court under these rules, then any other judge of that district or any
4 judge assigned pursuant to Judicial Council rule is authorized to perform those duties. The judge to whom
5 the case is assigned may in the exercise of discretion rehear the evidence or some part of it.

6 (b) **Disqualification.**

7 (b)(1)(A) A party to any action or the party's attorney may file a motion to disqualify a judge. The
8 motion shall be accompanied by a certificate that the motion is filed in good faith and shall be supported
9 by an affidavit stating facts sufficient to show bias, prejudice or conflict of interest.

10 (b)(1)(B) The motion shall be filed after commencement of the action, but not later than 21 days after
11 the last of the following:

12 (b)(1)(B)(i) assignment of the action or hearing to the judge;

13 (b)(1)(B)(ii) appearance of the party or the party's attorney; or

14 (b)(1)(B)(iii) the date on which the moving party learns or with the exercise of reasonable diligence
15 should have learned of the grounds upon which the motion is based.

16 If the last event occurs fewer than 21 days prior to a hearing, the motion shall be filed as soon as
17 practicable.

18 (b)(1)(C) Signing the motion or affidavit constitutes a certificate under Rule 11 and subjects the party
19 or attorney to the procedures and sanctions of Rule 11. No party may file more than one motion to
20 disqualify in an action, unless the second or subsequent motion is based on circumstances that did not
21 exist at the time of the earlier motion.

22 (b)(2) The judge against whom the motion and affidavit are directed shall, without further hearing and
23 without a response or a request to submit for decision, enter an order granting the motion or certifying the
24 motion and affidavit to a reviewing judge. The judge shall take no further action in the case until the
25 motion is decided. If the judge grants the motion, the order shall direct the presiding judge of the court or,
26 if the court has no presiding judge, the presiding officer of the Judicial Council to assign another judge to
27 the action or hearing. The presiding judge of the court, any judge of the district, any judge of a court of
28 like jurisdiction, or the presiding officer of the Judicial Council may serve as the reviewing judge.

29 (b)(3)(A) If the reviewing judge finds that the motion and affidavit are timely filed, filed in good faith
30 and legally sufficient, the reviewing judge shall assign another judge to the action or hearing or request
31 the presiding judge or the presiding officer of the Judicial Council to do so.

32 (b)(3)(B) In determining issues of fact or of law, the reviewing judge may consider any part of the
33 record of the action and may request of the judge who is the subject of the motion and affidavit an
34 affidavit responsive to questions posed by the reviewing judge.

35 (b)(3)(C) The reviewing judge may deny a motion not filed in a timely manner.

36

Tab 7



Timothy M. Shea
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October 14, 2014

Matthew B. Durrant
Chief Justice
Ronald E. Nehring
Associate Chief Justice
Christine M. Durham
Justice
Jill N. Parrish
Justice
Thomas R. Lee
Justice

To: Civil Procedures Committee
From: Tim Shea *T. Shea*
Re: Small Claims Rule 14. Offer of judgment.

I have been encouraged to pursue this proposed rule one more time.

Addressing two of the points made at the May meeting. The rule's proponent would not have qualified to receive payment of costs under existing rules because the proponent did not prevail. The proponent's objective is to qualify for payment of costs incurred after an offer if the judgment (adjusted award) is not more favorable than the offer.

In the proponent's particular circumstance, the offeree was a municipality. In URCP 54(d), costs can be imposed on the "state of Utah, its officers and agencies ... only to the extent permitted by law." I do not know whether a municipality would be considered an "agency" of the state. Municipalities are "political subdivisions" of the state. Section 10-1-201. The phrase "agency of the state" appears to be critical; governmental units that are not state agencies can be held liable for costs. *Lyon v. Burton*, 5 P 3rd 616 (UT 2000) (Order Modifying Opinion on Denial of Rehearing June 30, 2000).

Because of my uncertainty about whether a municipality is an agency of the state, I do not know whether, under this rule, an offeror's costs incurred after an offer could be imposed on a municipality. As drafted, Rule 14 does not distinguish between government and non-government parties, nor should it. This rule alone may be sufficient to establish the policy being sought. If not, the proponent would have to seek legislation to authorize costs against municipalities and counties.

This draft of the rule has been amended from the previous draft to remove the requirement that the offer be made after the original judgment. That provision was included at the request of the Board of Justice Court Judges, but an offer after the judgment makes no sense. Once the court has entered a judgment, whether the creditor accepts an offer to pay less than all of it to satisfy the judgment is not the court's concern.

And I have added a note to the effect that the filing fee for the trial de novo is a cost occurring after the offer, but, to avoid liability for costs, the creditor-offeree's judgment after trial de novo only has to be more favorable than the offer. The creditor does not have to improve upon the original judgment in order to avoid liability for costs. I believe this is the result of the rule itself, but I've included it out of an abundance of caution.

copy: Rick Schwermer

1 **Rule 14. Settlement offers.**

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

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

9 (c) An offer made under this rule must:

10 (c)(1) be in writing;

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

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

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

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

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

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

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

24 Advisory Committee Notes

25 The filing fee for the trial de novo is a cost occurring after the offer, but, to avoid liability for costs, the
26 judgment creditor-offeree's judgment after trial de novo only has to be more favorable than the offer. The
27 judgment creditor does not have to improve upon the original judgment in order to avoid liability for costs.

28