

1987

Janice Faye Carter, et al. v. Utah Power and Light Co., et al.; Society of Professional Journalists, KUTV Inc., Kearns-Tribune Co., The Standard Corp., Bonneville International Inc., and United Television Inc. : Reply Brief

Utah Supreme Court

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DOCKET NO.

BRIEF

870340

IN THE SUPREME COURT
OF THE STATE OF UTAH

JANICE FAYE CARTER, et al., :
Plaintiffs, :
v. : CASE NO. 870340
UTAH POWER & LIGHT CO., et al., : PRIORITY NO. 14b
Defendants/Appellants. :
SOCIETY OF PROFESSIONAL :
JOURNALISTS, KUTV, INC., :
KEARNS-TRIBUNE CORP., DESERET :
NEWS PUBLISHING CO., THE STANDARD :
CORP., BONNEVILLE INTERNATIONAL, :
INC., and UNITED TELEVISION, INC., :
Intervenors/Respondents.

APPELLANT'S REPLY BRIEF

APPEAL FROM THE FOURTH JUDICIAL DISTRICT COURT, UTAH COUNTY
THE HONORABLE CULLEN Y. CHRISTENSEN, PRESIDING

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CORRECTED LIST OF PARTIES

A. DEFENDANT/APPELLANT

Utah Power & Light Co.

B. INTERVENORS/RESPONDENTS

Society of Professional Journalists. KUTV, Inc..
Kearns-Tribune Corp., Deseret News Publishing Co.,
The Standard Corp., Bonneville International, Inc..*
and United Television, Inc.*

C. DEFENDANT (NOT A PARTY TO THIS APPEAL)

Savage Industries, Inc.

D. PLAINTIFFS (NOT PARTIES TO THIS APPEAL)

Janice Faye Carter, individually and as guardian ad litem for Charity L. Carter, Emily F. Carter, Carey Ann Carter, and Curtis A. Carter, II; Kathy Nelson Riddle, individually and as guardian ad litem for Randy Blake Riddle, Lisa Ann Riddle, Brandon Scott Riddle; and Scott Grant Riddle, Elizabeth Ann Robinson, individually and as guardian ad litem for Jacob Clive Robinson, Brigit T. Robinson, and Erica Lynn Robinson; Sherry Lynn Johansen, individually and as guardian ad litem for Jennifer Lynn Johansen; Sherrie Payne Ellis, individually and as guardian ad litem for Lori A. Ellis, Kelly Ellis, and Curtis James Ellis; Allana L. Yates as guardian ad litem for Timothy Keith Curtis; Lester Walls, Sr. and SallyJean Walls; Michelle J. Curry, individually and as guardian ad litem for Travis Layne Curry, Christopher Thomas Curry, and Collin Douglas Curry; Ramona Lee Waldoch, individually; Bonnie S. Bennett, individually and as guardian ad litem for Jennifer Ann Bennett, Patrick Bert Bennett, Nicole Rae Bennett, and Sandra Lyn Bennett; Joy Bertuzzi, individually and as guardian ad litem for Jay Michael Bertuzzi, Jeffrey Scott Bertuzzi, and Jeremy Paul Bertuzzi; Christine P. Dickinson as guardian ad litem for Kay Brenda Jennings and Tara Nicole Jennings; Virginia Irene Camberlango, individually and as guardian ad litem for Ricci William Camberlango and Tiffany Dawn Camberlango; Edward P. Saintz, Jr., and Dolores M. Saintz, Leslie Jacobs; and Carolyn Wright as guardian ad litem for Ted Alex Poulos, Jr.

*These parties were omitted from previous filings made in this appeal.

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*Note that UP&L obtained leave of court to file a 35-page Reply Brief. See Order Granting Leave for UP&L to Submit Overlength Reply Memorandum (Mar. 3, 1988) (Durham, J.) (attached as Addendum "D").

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I. SUMMARY OF ARGUMENT

This appeal asks the Court to determine when the public has the right to obtain depositions taken in private civil litigation. By applying the Utah Writings Act in his decision below, Judge Christensen held that depositions become public immediately when they are filed with the court clerk. Utah Power & Light Co. ["UP&L"] has appealed that decision, arguing (1) that the Writings Act should not apply to unpublished depositions and (2) that depositions should become public only when they are used in adjudication. See Appellant's Brief at 12 [hereinafter "App. Brief at ____."]

The responding news media ["media"] opened a four-pronged attack on UP&L's position. Not only did the media argue that Utah's Writings Act mandates public access when depositions are filed with the court clerk, but also that immediate public access upon filing is required by the common law, by the Utah Rules of Civil Procedure, and by the Utah and U.S. Constitutions.

The media's response confirms the split in authority discussed in UP&L's original brief. See App. Brief at 20 & n.4. However, the media's analysis is largely distinguishable and, at times, misleading.¹ In citing an extensive body of case law,

¹Perhaps most misleading is the media's reference to two student law review notes as if they were articles written by experienced jurists or scholars. See Respondents' Brief at vi, 17, 28, 33, 35, and 44 [hereinafter "Res. Brief at ____"]. The Uniform System of Citation specifically states that such materials

the media fail to recognize the distinction between the right of access to records used in court proceedings and the right to obtain pretrial discovery. At the same time, they fail to note crucial differences in the procedural context behind cases indicating that depositions are public. In failing to note the procedural context of decisions they cite, the media inaccurately indicate that depositions not used in adjudication are typically open to the public.

In reality, by longstanding custom derived from the Utah Rules of Civil Procedure, depositions have not been accessible to the public when filed with the court clerk unless they are published through motion or through their use in adjudication. This custom is consistent with the practice in a substantial number of jurisdictions throughout the United States. More importantly, this custom is consistent with the better reasoned view that, until used in adjudication, pretrial depositions should not be subject to a right of public access. Such a view facilitates open discovery and aids in the settlement of disputes.

are to be designated as student work by their citation, and that student authors should not be named. A Uniform System of Citation 91 (14th ed. 1986). This misleading citation is not trivial. A note written by third-year law student Anne E. Cohen is extensively quoted as an authority on legal history, Res. Brief at 27-28, on the rules of civil procedure, id. at 33, 35, and on the Constitution, id. at 43-44. Law student Nagareda is cited as an authority on the jurisprudence of Justice Scalia. Id. at 17 n.7.

II. ARGUMENT

A. UNDER AMERICAN AND UTAH COMMON LAW, DEPOSITIONS ARE NOT OPEN TO THE PUBLIC UNTIL USED IN ADJUDICATION.

In their responding brief, the media attempt to overwhelm with lengthy citation to case authority supporting a common law right of access to judicial proceedings. UP&L does not dispute this common law right. However, the media fail to recognize that this right of access extends only to pretrial discovery used in adjudication.

1. Historically, Pretrial Discovery Was Not Open to the Public.

The media emphasize the longstanding tradition providing for a common law right of access to court records. However, their analysis misses the crucial point that this right of access did not extend to pretrial discovery. As one commentary explains, a historical examination "reveals that the presumption of access to court records does not apply to pretrial documents." Recent Development -- Public Access to Civil Court Records: A Common Law Approach, 39 Vanderbilt Law Review 1465, 1494 (1986). Concurring, the D.C. Circuit explains that the common law rule is "that there is no right of public access to prejudgment records in civil cases." In re Reporters Committee for Freedom of the Press, 773 F.2d 1325, 1334 (D.C. Cir. 1985). Stating this common law view, one 19th-century court explained: "The public have no rights to any information on private suits till they come up for public hearing or action in open court." Park v. Detroit Free Press Co.,

'72 Mich. 560, 568-69, 40 N.W. 731, 734 (1888). Indeed, as the D.C. Circuit points out, the decision cited by the media in support of the historic right of public access, Ex parte Drawbaugh, 2 App. D.C. 404 (1894) (see Res. Brief at 10-11), made a distinction between "the right to inspect judicial records after trial" from the right to inspect "papers merely filed, but before any action had thereon by the court." In re Reporters Comm., 773 F.2d at 1333 (citing Drawbaugh, 1 App. D.C. at 407) (emphasis in original). The Drawbaugh court and other early decisions held that public "access is not a matter of right before judgment except to the extent that material is disclosed at trial." Id. at 1334 n.7 (emphasis in original).

2. Under the Common Law, Depositions Not Used in Adjudication Are Not Subject to a Right of Public Access.

After discussing the general common law right of public access, the media argue that pretrial depositions are included within that right, claiming that pretrial depositions are public documents before they are used in adjudication. See Res. Brief at 14-25. This is simply not the case. One commentator, whose work was cited with approval by the U.S. Supreme Court, 467 U.S. at 33, explains the lack of support for a general right of public access to discovery. After analyzing judicial precedent through 1983, he concluded: "[T]here is no persuasive legal support for an unfettered constitutional or common law right of general public access to civil discovery materials." Marcus, Myth and Reality in Protective Order Litigation, 69 Cornell L. Rev. 1, 29 (1983)

[hereinafter "Marcus, Protective Order Litigation at ____"]. He also explained: "[P]retrial proceedings are analytically distinct from actual trial proceedings for purposes of public disclosure and . . . material disclosed in private litigation, even if filed in court, is not presumptively public." Id. at 33 n.136.

The U.S. Supreme Court has addressed this issue at length:

[P]retrial depositions and interrogatories are not public components of a civil trial. Such proceedings were not open to the public at common law . . . and in general, they are conducted in private as a matter of modern practice. . . . Much of the information that surfaces during pretrial discovery may be unrelated, or only tangentially related, to the underlying cause of action. Therefore, restraints placed on discovered, but not yet admitted, information are not a restriction on a traditionally public source of information.

Seattle Times Co. v. Rhinehart, 467 U.S. 20, 33 (1984) (cites omitted).²

The common law touchstone for a right of public access to pretrial discovery is the use of that discovery in adjudication. A case relied upon heavily by the media recognizes this common law rule: "This common law right of access to judicial records

²The media and the trial court point out that the Rhinehart court did not deal with access to depositions on file with the court. Rather it held that the defendant newspaper had no First Amendment right to publish information obtained through discovery. See Res. Brief at 15; Record on Appeal at 4836 [hereinafter "Record at ____"]. UP&L recognizes the scope of the Rhinehart decision and has accurately stated its holding. See App. Brief at 21. However, Rhinehart applies to the instant case because, as a necessary part of its holding, it discusses the private nature of discovery.

appears to be limited to those documents actually relied upon by a court in reaching a determination." See In re Agent Orange Product Liability Litigation, 104 F.R.D. 559, 567 (E.D.N.Y. 1985).³

UP&L has cited four circuit courts of appeals (1st, 6th, 11th, and D.C.) which hold that pretrial discovery is private or require the fruits of discovery to be used in adjudication before they are subject to a right of public access. See App. Brief at 20-23. A review of these cases reveals that they carry forward the common law distinction between material used in adjudication and material never placed before the court.

This Court should reject the media's attempt to discredit and distinguish those cases.

In its attack on the First Circuit decision cited by UP&L, Anderson v. Cryovac, 805 F.2d 1 (1st Cir. 1986), both the media and the trial court decision argue that the court required "good cause" denial of a public right of access to depositions. See Res. Brief at 13; Record at 4837. A reading of Cryovac refutes this assertion. The decision plainly held that "there is no constitutional or common law right of access" to "documents submitted to the court for its use in deciding discovery motions." 805 F.2d at 14. A review of Cryovac indicates that the

³This case is distinguished on other grounds in part B.2., infra. Its analysis of Fed. R. Civ. P. 5(d) is shown to be flawed in part C.1., infra.

real reason for restricting access to those documents was the absence of any common law or constitutional right of access, not its finding of "good cause." Id. at 10-14.⁴

The media does not deny that the Sixth Circuit viewed the admission of documents into evidence as crucial in an analysis of the right to access. See United States v. Beckham, 789 F.2d 401, 411 (6th Cir. 1986).

At the same time, the media does not deny that United States v. Anderson, 799 F.2d 1438 (11th Cir. 1986), cert. denied sub nom. Tribune Co. v. United States, 107 S.Ct. 1567 (1987), held that pretrial discovery is private. However, the media attempts to argue that Anderson is contradicted by two other Eleventh Circuit decisions: Wilson v. American Motors Corp., 759 F.2d 1568 (11th Cir. 1985) and In re Alexander Grant & Co. Litigation, 820 F.2d 352 (11th Cir. 1987). When read in context, neither decision contradicts UP&L's position. The Wilson court allowed public

⁴Cryovac is not contradicted by In re Coord. Pretrial Proc. in Petroleum Antitrust Lit., 101 F.R.D. 34, 43 (C.D. Cal. 1984), to the extent that Petroleum Antitrust is read to require public access to all materials submitted to the court for use in adjudication. Both decisions can be read to hold that such materials are public -- a position consistent with the common law right of public access to discovery. See part A, supra. However, Petroleum Antitrust should be rejected to the extent that it is read to hold that a right of access applies to all documents in an attorney's file which possibly should have been submitted for the court to consider. The adversary system assures each litigant the opportunity to put before the court what best supports his or her position. The press should not have the right to analyze the work product of attorneys to determine what documents those attorneys should have submitted in litigation. Cf. Utah R. Civ. P. 26(b)(3).

access to depositions, but the dispute in Wilson "actually went to trial, and, at least prior to the settlement agreement, the transcript of that trial was part of the public record." 759 F.2d 1571. At the trial, the pretrial discovery became part of the public record, in part, because "many depositions were read to the jury." Id. at 1570. Thus, the court's grant of public access to "depositions duly filed" was a grant of access to depositions used in adjudication.

On the surface, the second Eleventh Circuit decision referred to by the media, In re Alexander Grant & Co. Litigation, 820 F.2d 352 (11th Cir. 1987), indicates that filing is the basis for a right of public access. However, an analysis of the procedural context of Grant shows that, in the Southern District of Florida where Grant was litigated, depositions are not filed until they "are to be used at trial or are necessary to a pretrial or post trial motion." S.D. Fla. R. 10.I.3 & 10.I.1. Because, in Grant, depositions were only "duly filed" when they are used in adjudication, the decision actually supports the common law view that pretrial discovery is not subject to public access until used in adjudication.

Finally, the media attack both Justice Scalia and his decision in In re Reporters Committee for Freedom of the Press, 773 F.2d 1325 (D.C. Cir. 1985). In pointing out that the decision approved a temporary denial of access to documents, the media fail to note that the denial was only temporary because the case had actually been adjudicated. Because the decision considered the

"admission of evidence as the touchstone of a First Amendment right of access," id. at 1338, the depositions would not ultimately have been made public if the depositions had not been used in adjudication. Moreover, it is crucial to note that both the dissent and majority agreed that a right of access only attaches to documents used in adjudication -- the dissent finding the right of access to be contemporaneous. Id. at 1342-56.

Contrary to the media's argument that discovery is presumptively public, most jurisdictions support the common law right of privacy for pretrial discovery through their local procedural rules. Many U.S. district courts have special rules limiting public access to deposition transcripts that are on file with the court. These rules typically state that a transcript will remain sealed even though it is on file.⁵ At the same time, the local rules of 55 U.S. district courts provide that depositions shall not be filed with the court until they are used

⁵See, e.g., [REDACTED]
[REDACTED] D. Conn. R. 13(b) (depositions withheld from public inspection); D. Kan. R. 17(c) (deposition opened at request of attorney of record); D. Mass. R. 15(b) (deposition opened at request of attorney of record) D. N.D. R. 13 (deposition opened only on order of court); S.D. Ohio R. 4.2.2 (deposition opened only at direction of court or request of attorney of record); N.D. Okla. R. 15 (deposition opened by order of court or on written application by attorney of record); W.D. Wis. R. 19 (deposition opened only on request of party); D. Wyo. R. 215(c) (deposition opened on application by attorney of record, then immediately resealed); see also Marcus, Protective Order Litigation, supra, at 13-14 & n.62. [These rules are attached as Addendum "E".]

in adjudication, unless filing is ordered by the court or is requested by the parties.⁶ A few other districts express this as a permissive non-filing rule,⁷ and one jurisdiction affirmatively provides that depositions are not to be filed until the day of trial.⁸ Many state rules are similar.⁹ However, as of 1983, only one U.S. district court had a rule providing the public with access to discovery not on file with the court. See Marcus, Protective Order Litigation, supra, at 14 n.61 (referring to D. Or. R. 120-4(b)).

⁶S.D. Ala. R. 17; M.D. Ala. R. 16B; D. Alaska R. 8(A); D. Ariz. R. 3(2); E.D. Ark. R. 3(f); W.D. Ark. R. 3(f); E.D. Cal. R. 250; C.D. Cal. R. 8.3; N.D. Cal. R. 229; C. Conn. R. 13(b); D. Del. R. 4.1E(1); S.D. Fla. R. 10(I)(1); M.D. Fla. R. 3.03(d); N.D. Ga. R. 225-3(a); S.D. Ga. R. 7.4(e) & 7.5; D. Hawaii R. 230-2(a); D. Idaho R. 7-104; C.D. Ill. R. 13(A),(C),(D); S.D. Ill. R. 16(a),(c); N.D. Ind. R. 15(a),(c); S.D. Ind. R. 15(a),(c); N.D. Iowa R. 2.3(.1),(.2); S.D. Iowa R. 2.3(.1),(.2); D. Kan. R. 17(g); E.D. La. R. 7.4; W.D. La. R. 10.1(c); D. Me. R. 16(d); D. Md. R. 6A; E.D. Mich. R. 16(g); N.D. & S.D. Miss. R. 6(e); W.D. Mo. R. 3B; D. Mont. R. 200-3(a); D. Nebr. R. 9B; D. Nev. R. 190-1(g); D. N.H. R. 14(a); D. N.J. R. 15D; D. N.M. R. 8(b); D. N.Y. R. 18; E.D. N.C. R. 3.08 M.D.N.C.R. 205(2); D. Ore. R. 120-4; E.D. Pa. R. 24(c); M.D. Pa. R. 402.2(a); D. R.I. R. 14(b); D. S.C. R. 10.01, 11.00; E.D. Tenn. R. 11.1; M.D. Tenn. R. 9(c); N.D. Tex. R. 6.a(b); S.D. Tex. R. 10F; W.D. Tex. R. 300-1; W.D. Wash. R. 5(d); N.D. W.Va. R. 2.08(b); S.D. W.Va. R. 2.04(b); E.D. Wisc. R. 5.04(a). [These rules are attached as Addendum "F".]

⁷See, e.g., S.D. Cal. R. 231-5 & -6; D. P.R. R. 315; D. Vt. R. 4E [Addendum "G"].

⁸See D. Mo. R. 9(B) [Addendum "H"].

⁹See, e.g., Cal. Civ. Code § 2019(f)(1) (depositions not to be filed until used by court); Fla. R. Civ. P. 1.310(f)(3) (depositions filed only when used by the court in adjudication).

3. Utah Has Followed the Common Law Practice of Denying Public Access to Depositions Until They Are Used in Adjudication.

Utah courts have adopted the common law principle of privacy for depositions by providing that depositions must be published to come before the trial court. See Utah R. Civ. P. 32(d); Reliable Furniture Co. v. Fidelity and Guaranty Insurance Underwriters, Inc., 12 Utah 2d 160, 280 P.2d 135, 135 (1963); App. Brief at 13-17. In practice, Utah court clerks have kept filed depositions private until the time of publication. Such was the case with the Carter depositions. When the media attempted to gain access to them, they were told that the depositions had been sealed -- not because there was a specific court order sealing them, but because they were unpublished.¹⁰ See Affidavit of Dwayne Case at ¶ 4.¹¹ According to the Chief Deputy Clerk

¹⁰In the proceedings below, UP&L mistakenly stated that "[a]t the time of settlement, the entire judicial record in Carter was sealed by order of the court." Record at 4659 (UP&L's Memorandum in Opposition to Motion to Unseal Judicial Records at 2 (filed May 28, 1987)). Actually, only the settlement agreement as it related to minor litigants was sealed by order of the court. See Record at 4535-54.

UP&L's mistaken statement, however, had no effect on the argument before the trial court, because the depositions were under the seal provided by Utah R. Civ. P. 30(f)(1), and the court was aware of that fact through its continuing supervision of the proceedings.

¹¹Even though the Affidavit of Dwayne Case was not a part of the record below, this Court should consider it in support of UP&L's appeal because its only purpose is to inform this Court about the practice of the Fourth District Court Clerk's Office in Utah County. This Court should take judicial notice of the fact that a judge is aware of the practice in his own courthouse. See Utah R. Evid. 201. [Affidavit is attached as Addendum "I".]

of the Court in Provo, unpublished depositions are not considered part of the public record until they are ordered published by the court, id. at ¶ 3 (a policy ostensibly contradicting Judge Christensen's Memorandum Decision below, see Record at 4831-4840).^{1 2}

UP&L relied on this practice in its pretrial litigation. While protective orders were entered regarding document production and other aspects of the proceedings, see Record at 1320-22. 1342-44 & 1366-69, neither side sought a protective order preventing the public from obtaining copies of the depositions. The practice, in accord with the common law, was that those depositions would be private -- until they were published by motion or through their use in adjudication.^{1 3}

^{1 2}Ironically, shortly after holding that the Carter depositions were public, the Fourth Judicial District amended its local rules to prevent public access to depositions. On August 31, 1987 (just 17 days after issuing the decision below), the court added the following language to Administrative Order No. 21:

Depositions taken pursuant to the rules of civil procedure shall not be filed with the court except on order of the court for good cause shown. . . . Any party moving for the publication of the deposition shall provide the court with the original or copy in their possession at the time the motion to publish is made.

(emphasis added)

^{1 3}This Court's recent decision in Trail Mountain Coal Co. v. Arco Coal Sales Co., 73 Utah Adv. Rep. 51 (Jan. 7, 1988), does not contradict the general Utah practice of denying the public access to unpublished depositions. In Trail Mountain, this Court held that the work product privilege did not apply to depositions.

Trail Mountain is distinguishable from the instant case, because the party seeking the depositions needed them for use in litigation. Although apparently not recognized by the litigants (the point was not argued), the plaintiffs had a right to the

B. THE AUTHORITIES CITED BY THE MEDIA IN FAVOR OF PUBLIC ACCESS ARE LARGELY DISTINGUISHABLE.

The media have cited several cases in their attempt to argue for a right of access under the common law and under the Utah Rules of Civil Procedure. The cases they cite, however, are largely distinguishable on their facts or because they are based upon a procedural context that is different than that in Utah. Moreover, this Court should not view as persuasive the commentaries cited by the media.

1. Cases Originating in a Differing Procedural Context.

The media have made a fundamental error in their citation of many cases from other jurisdictions. They have failed to recognize that any court statement about the public nature of

defendants' depositions in Trail Mountain under a doctrine developed by the U.S. Supreme Court in Ex parte Uppercu, 239 U.S. 435 (1915). Uppercu held that "absent a question of privilege a litigant who needs court records that may be of evidentiary value to his case cannot be denied access to them, even though they were sealed by the court in a different proceeding." Note, Nonparty Access to Discovery Materials in the Federal Courts, 94 Harv. L. Rev. 1064, 1092-93 (1981); see also Olympic Refining Co. v. Carter, 332 F.2d 260 (9th Cir.), cert. denied, 379 U.S. 900 (1964). Thus, the plaintiffs in Trail Mountain had a right to the defendants' depositions that is not enjoyed by the press and public generally. Moreover, the interlocutory appeal in Trail Mountain is based upon the assumption that the plaintiffs were unable to obtain the relevant depositions from the court clerk. Presumably the depositions had been filed under Utah R. Civ. P. 30(f)(1). (The Seventh Judicial District has no non-filing rule.) If the depositions had been subject to a right of public access, the plaintiffs would have obtained them from the court clerk -- rather than through the discovery process.

discovery is based upon the procedural rules behind the decision. Any implications drawn from such statements must be viewed in the proper context.

Many cases cited by the media originate in jurisdictions whose rules provide that depositions are not to be filed unless the deposition is to be used in adjudication. For example, the Florida Rules of Civil Procedure provide:

A copy of a deposition may be filed only:

(A) By a party or the witness when the contents of the deposition must be considered by the court on any matter pending before the court.
. . .

(B) If the court determines that a deposition previously transcribed is necessary for the determination of a matter pending before the court, the court may order that a copy be filed by any party.

Rule 1.310(f)(3). Because depositions in this type of jurisdiction are filed only when used in adjudication, filing accompanies the touchstone that makes the discovery public. Thus, statements by courts in these jurisdictions that depositions on file are "public records" should not be seen as contradicting UP&L's position.

Cases which should be read in light of local rules which provide that discovery shall not be filed until used in adjudication are the media's decisions from Florida state

courts,¹⁴ California state courts,¹⁵ the Eastern District of Pennsylvania,¹⁶ and the Southern District of Florida.¹⁷

2. Cases Distinguishable on Their Facts.

Many of the cases cited by the media in favor of a presumptive right of access should not be controlling because they are distinguishable on their facts. One of the distinguishing

¹⁴In re Florida Rules of Civil Procedure, 403 So.2d 926, 927 (Fla. 1981); News-Press Pub. Co., Inc. v. State, 345 So.2d 865, 867 (Fla. App. 1977); Palm Beach Newspapers, Inc. v. Burk, 504 So.2d 378 (Fla.), cert. denied, 108 S.Ct. 346 (1987); Palm Beach Newspapers, Inc. v. Burk, 471 So.2d 571 (Fla. App. 1985), approved, 504 So.2d 378 (Fla. 1987); Ocala Star Banner Corp. v. Sturgis, 388 So.2d 1267 (Fla. App. 1980); Tallahassee Democrat, Inc. v. Willis, 370 So.2d 867 (Fla. App. 1979).

¹⁵Cal. Civ. Code § 2019(f)(1) provides: "Depositions shall not be filed unless and until their contents become relevant to an issue in the trial or other pending proceedings at which time the court may order that the deposition . . . be filed as part of the record." Decisions cited by the media originating in this context are Garcia v. Sterling, 176 Cal.App.3d 17, 221 Cal. Rptr. 349 (1985) and Mary R. v. B. & R. Corp., 149 Cal.App.3d 308, 196 Cal. Rptr. 871, 875 (1983).

¹⁶E.D. Pa. R. 24(a) provides that "depositions . . . shall not be filed with the court," while E.D. Pa. R. 24(c) provides that, if needed for trial or motion the relevant portions of the depositions should be submitted or read into the record. The case cited by the media arising in this district is C.P.C. Partnership Bardot Plastics v. P.T.R., Inc., 96 F.R.D. 184 (E.D. Pa. 1982).

¹⁷S.D. Fla. R. 10.I.1 provides that "[t]he original of all depositions upon oral examination shall be retained by the party taking such deposition," and S.D. Fla. R. 10.I.3 states that such portions of the depositions used in adjudication are to be filed. The case cited by the media originating in this context is In re Alexander Grant & Co. Litigation, 820 F.2d 352 (11th Cir. 1987).

features of several of these cases is that they involve the fruits of discovery that were actually used at trial. For example, the discussion above pointed out that Wilson v. American Motors Corp., 759 F.2d 1568 (3rd Cir. 1986), dealt with public access to depositions that had been used at trial. See part A.2., supra. Likewise, United States v. Martin, 746 F.2d 964 (3rd Cir. 1984), dealt with transcripts of tapes that had been used in open trial, but had not been admitted into evidence. Id. at 968-69. In the instant case, none of the depositions sought by the media have ever been used at trial.

Another distinguishable case is Krause v. Rhodes, 671 F.2d 212 (6th Cir.), cert. denied sub nom. Attorney General v. Krause, 459 U.S. 823 (1982). Krause is distinguishable for three reasons. First, most of the depositions and other discovery material were undoubtedly used in adjudication because two trials had been held. Id. at 214-15. Second, the multiple actions in Krause were completely resolved, id. at 219 -- unlike Carter, in which UP&L has asserted products liability actions against manufacturers of products that caused the Wilberg fire. Third, the discovery materials produced in Krause were compiled "by law enforcement agencies" acting in their official functions. Id. at 213. The Carter depositions deal with a mine that was privately owned and managed (even though publicly regulated).

Also distinguishable is Sharjah Investment Co. (U.K.) Ltd. v. P.C. Telemart, Inc., 107 F.R.D. 81 (S.D.N.Y. 1985). In

Sharjah, the plaintiffs sought to disclose deposition transcripts to the Securities and Exchange Commission, id. at 82 -- unlike the instant action, in which both the plaintiffs and UP&L argued for privacy. Sharjah did not involve a question of public access. In addition, Sharjah should be disregarded because it completely ignored the controlling precedent of Seattle Times v. Rhinehart, which also dealt with a challenge to a protective order.

Rhinehart stated that pretrial discovery was private, 467 U.S. at 33, thereby contradicting and effectively overruling American Telephone & Telegraph Co. v. Grady, 594 F.2d 594 (7th Cir.), cert. denied, 440 U.S. 971 (1979),¹⁸ the authority cited in Sharjah for the proposition that pretrial discovery is public.¹⁹

The holding in the Arizona Supreme Court decision cited by the media, Lewis R. Pyle Memorial Hospital v. Superior Court, 149 Ariz. 193, 717 P.2d 872 (1986), supports UP&L's position. In Pyle, the court determined that, because there is no public right of access to discovery, there is no common law right for non-parties to attend depositions. 717 P.2d at 876.

¹⁸Even if it had not been subsequently contradicted by Rhinehart, Grady is analytically weak on its own terms. It states that pretrial discovery is "public" based solely upon the authority of Fed. R. Civ. P. 26(c). Without any analysis, Grady contradicted the common law tradition which holds that discovery is private until and in adjudication. See Part A, supra.

¹⁹This analysis also urges a rejection of Phillips Petroleum Co. v. Pickens, 1985 Fed. Sec. L. Rep. (CCH) ¶ 92,042 (N.D. Tex. Apr. 5, 1985), a decision that also cited the faulty authority of Grady.

Finally, the Agent Orange cases are both distinguishable. See In re Agent Orange Product Liability Litigation, 821 F.2d 129 (2d Cir. 1987); In re Agent Orange Product Liability Litigation, 105 F.R.D. 559 (E.D.N.Y. 1985), aff'd, 821 F.2d 139 (2d Cir. 1987). The Agent Orange litigation was a class action lawsuit, while all parties were directly represented by counsel in Carter. Because non-representative members of a class do not have the ability to consult with counsel and review the fruits of discovery as a directly represented litigant can, there are equities favoring access to class action discovery that simply do not apply to non-class-action cases.

3. Authorities That Should Be Considered Unpersuasive.

The media have also cited several commentaries to support their position. For various reasons, the commentaries should not be persuasive. First, the media quote from 21 C.J.S. Courts § 226 was misleading. See Res. Brief at 22. A reading of the context and full statement of this source indicates that the quote supports UP&L's position. The media deleted the following crucial underlined portion of the quote to give the misleading impression that the passage does not refer to depositions admitted into evidence: "[I]t is held that pleadings and depositions or other forms of written evidence in a case constitute part of the court record." 21 C.J.S. Courts § 226 (emphasis added). The fact that non-admitted depositions are not judicial records is confirmed by the following quote from the same source: "Unless made so by

agreed statement, or the like, affidavits, depositions, and matters of parol evidence have been held to constitute no part of the record." Id.

This court should likewise not consider persuasive the statement of Professors Wright and Miller that a deposition is "ordinarily" a public document open to inspection after it is filed with the clerk. See 8 Wright & Miller, Federal Practice and Procedure, Civil § 2042 (1980). The statement is contradicted by the extensive body of subsequent case law cited above by UP&L, which indicates that depositions not used in adjudication are private. See part A, supra. This statement is apparently based upon the same analytical error that was made by the media: It is based on supporting authority from a procedural context different from that in most of America. The authorities cited in support of the statement either (1) arise in jurisdictions with rules providing for publication upon filing, see, e.g., Burnham Chemical Co. v. Borax Consolidated, 7 F.R.D. 341, 343 (N.D.Cal 1974) (Based on a local rule that provided for "opening the original deposition as soon as filed and permitting inspection." N.D. Cal. R. 18), or (2) arise in the antitrust context, which is governed by a Federal statute mandating public attendance at depositions. See U.S. v. International Business Machines Corp., 66 F.R.D. 219 (S.D.N.Y. 1974) (15 U.S.C. § 30). Besides failing to recognize this procedural context of these cases it cites, Wright and Miller's broad statement fails to recognize that discovery is private in most jurisdictions until used in adjudication.

Likewise, this court should put into context the media's extensive citations to the Cohen "article" from the Columbia Law Review. This "article" is merely a note written by third-year law student Anne E. Cohen, and it should be considered as such. See fn. 1, supra.

C. THE UTAH RULES OF CIVIL PROCEDURE SHOULD NOT CREATE A STATUTORY RIGHT OF ACCESS TO PRETRIAL DEPOSITIONS.

Raising an issue not discussed in the trial court opinion, the media argue that Utah R. Civ. P. 5(d) and 26(c) create a statutory right of access to pretrial discovery. At the same time, they argue that Rule 30(f) implies nothing about the privacy of depositions. This Court should reject these arguments.

1. Rule 5(d) Should Not Be Interpreted In Utah to Create a Statutory Right of Access to Depositions Not Used in Adjudication.

The idea that Utah R. Civ. P. 5(d) creates a statutory right of access to unpublished depositions is based upon the precedent set by two valid cases²⁰ -- one of which affirms the other. See In re Agent Orange Product Liability Litigation, 821 F.2d 129 (2d Cir. 1987) [Agent Orange II]; In re Agent Orange Product Liability Litigation, 105 F.R.D. 559 (E.D.N.Y. 1985)

²⁰A third case found a right of access under Fed. R. Civ. P. 5(d), but it was vacated in light of the Supreme Court's opinion in Seattle Times Co. v. Rhinehart. See Tavoulareas v. Washington Post Co., 724 F.2d 1010 (D.C. Cir. 1984), reh'g en banc, opinion vacated, 737 F.2d 1170 (D.C. Cir. 1984).

[Agent Orange I], aff'd, 821 F.2d 139 (2d Cir. 1987). The basis for this 5(d) right is not the rule itself: The rule merely states that the court may order discovery not to be filed at the court. Rather, the 5(d) right of access is implied from the 1980 advisory committee notes, which provide in part that discovery materials "are sometimes of interest to those who may have no access to them except by a requirement of filing, such as members of a class, litigants similarly situated, or the public generally." Because of this statement, the Agent Orange cases presume that virtually all discovery materials are public. See 821 F.2d at 145-46; 104 F.R.D. at 567-68.

However, the Agent Orange analysis of the Advisory Committee intent is flawed. This flaw is revealed by examining the 1978 proposed amendments that resulted in the current Rule 5(d), which show that the committee only intended to allow access to "public records." The 1978 comment explains: "It is intended that the court may order filing on its own motion at the request of a person who is not a party who desires access to public records. . . ." Proposed Rule 5(d) Advisory Committee Note, Preliminary Draft of Proposed Amendment to Fed. R. Civ. P., 77 F.R.D. 613, 622-23 (1978) (emphasis added). From this comment, it should be apparent that the Committee intended to assure access only to what were externally defined as "public records." The definition of when depositions become "public records" is supplied by the common law, which provides that they become public through their use in adjudication. See part A, supra. Thus, for example,

the committee would have been concerned that depositions used at trial might not be filed, and therefore made its statement in the Rule 5(d) notes. The Agent Orange cases are simply wrong in their inference that the advisory committee note intended to define when depositions become public.

Even if the Agent Orange cases were not analytically flawed, they should not be followed in Utah. A review of the Minutes of the Utah Advisory Committee on Rules of Civil Procedure reveals that, when they discussed and voted to recommend Rule 5(d), there was no mention of assuring a public right of access to discovery. See Minutes of the Advisory Committee on the Rules of Civil Procedure (May 8, 1985) at 3-4 [included in Addendum "J"]. The Utah Advisory Committee was apparently concerned only about storage problems and whether a uniform state filing policy should be adopted. See id.; Utah R. Civ. P. 5(d), advisory committee note. There is no indication that the committee wanted to assure a right of public access to discovery. Indeed, by recommending adoption of Utah R. Civ. P. 32(d), the Utah committee presumed that depositions on file must be published -- or made public -- in order to be placed before the court. Thus, no presumption that discovery is public should be read into Utah R. Civ. P. 5(d).

2. Rule 26(c) Should Not Be Construed to Create a Statutory Right of Access.

The media also cite a handful of cases which assert that Fed. R. Civ. P. 26(c) implies that all discovery is open. Wrongly stating that no authority contradicts this view, see Res. Brief at

33, the media miss the point that their Rule 26 analysis is contradicted by the body of case law and the Utah practice holding that depositions become public only when they are used in adjudication.²¹ Their Rule 26 analysis also ignores that protective orders are needed even though discovery is private, because litigants often need to insure that their opponents will not disseminate the fruits of discovery to third parties.²² See Marcus, Protective Order Litigation, supra, at 7-8.

²¹The Rule 26(c) analysis of the Agent Orange cases evidences a flawed interpretation of Seattle Times v. Rhinehart. It wrongly assumes that the protective order in Rhinehart was designed to limit the public from gaining access to information. See Agent Orange I, 104 F.R.D. at 507 ("The [Supreme] Court approved the trial court's finding . . . that the respondent had shown good cause to require a protective order shielding certain information from public view."); Agent Orange II, 821 F.2d at 145-46. Actually, the order was entered to prevent the defendant Seattle Times from publishing to third parties what it obtained through discovery. See Rhinehart, 467 U.S. at 27 ("The order prohibited petitioners from publishing, disseminating, or using the information in any way except to prepare for and try the case.") The proper inference that may be drawn from Rhinehart is that, absent a protective order, a litigant may make use of material obtained in discovery for purposes other than trial preparation (perhaps by selling trade secrets or publishing membership lists obtained in discovery). The improper inference that the Rhinehart protective order (based upon a requirement of good cause) prevented public access to discovery leads to the improper conclusion that, absent good cause, discovery is public. A recent case to accept this flawed analysis is Avirgan v. Hull, Misc. No. 87-252, slip. op. (D.D.C. Dec 9, 1987).

²²The media pose the question: "Why is there a Rule 26(c)(6), providing authority for a court to order 'that a deposition after being sealed may be opened only by order of the court,' if filed depositions are, as a matter of course, 'sealed' and to be inaccessible unless used in adjudication?" See Res. Brief at 34-35. The simple answer: Sensitive deposition statements (e.g., trade secrets, family information involving minors) become a part of the public record when used, even in part, in adjudication. Rule 26(c)(6) provides a way to for the court to keep sealed potentially damaging information after the common law right of public access becomes applicable.

3. Rule 30(f)(1) Is One Basis for Utah's Practice of Denying Public Access to Depositions Until They Are Used in Adjudication.

The Carter depositions were sealed and filed pursuant to the requirements of Utah R. Civ. P. 30(f)(1). Because of that seal and because those depositions were never published, the Utah County Court Clerk denied the media access to those depositions. See Affidavit of Dwayne Case at ¶ 4. Thus, the practice in the Fourth Judicial District is that Rule 30(f) helps ensure that depositions are private until published.

The media cite two cases for the proposition that the sealing requirement of Rule 30(f)(1) is not designed to ensure privacy. See C.P.C. Partnership Bardot Plastics v. P.T.R., Inc., 96 F.R.D. 184 (E.D. Pa. 1982); Tallahassee Democrat, Inc. v. Willis, 370 So.2d 867 (Fla. App. 1979). Both are distinguishable because they come from jurisdictions which provide that depositions are not to be filed until they are used in adjudication. See E.D. Pa. R. 24(a) & (c); Fla. R. Civ. P. 1.310(f)(3). If depositions are used at trial immediately after filing, the sealing requirement has little meaning. However, if depositions are filed well before being used by the court as they typically are in Utah, then the Rule 30(f)(1) seal helps ensure privacy.

Finally, the media cite cases indicating that parties to litigation have a right of access to depositions generated by their own litigation. See Res. Brief at 29-30. These cases do not contradict UP&L's position. The fact that pre-adjudication

depositions are not subject to public access does not mean that parties of record are denied access to them.

D. THE UTAH WRITINGS ACT SHOULD NOT APPLY TO DEPOSITIONS NOT USED IN ADJUDICATION.

The media have argued that the Utah Writings Act, Utah Code Ann. §§ 78-26-1 & -2 (1987), should make the Carter depositions subject public access. By implication, if this view is adopted, all depositions filed with any court in Utah would be considered public unless they were made private through protective orders.^{2 3} The media argue that the Act requires this result because depositions not used in adjudication are both "judicial records" and "public records" under the terms of the act. Such an argument should be rejected.

1. Depositions Not Used in Adjudication Are Not "Judicial Records."

The media claim that this Court has never defined "judicial records" within the meaning of the Writings Act, Utah Code Ann. § 78-26-1 (1987). While this Court has never defined this term in direct reference to the Writings Act, it has described when depositions become part of the court record. This

^{2 3}Because the current Utah practice is to consider unpublished depositions to be private, see part A.3., supra, many unpublished depositions containing sensitive materials are undoubtedly filed with Utah court clerks without accompanying protective orders. This Court should be aware that the sudden reversal of policy that could accompany an affirmance would leave the privacy of many current and former litigants unprotected.

Court has made clear that unpublished depositions "are not in the record before the trial court," even if they are filed with the court clerk. See Reliable Furniture Co. v. Fidelity and Guaranty Insurance Underwriters, Inc., 14 Utah 2d 160, 280 P.2d 135, 135 (1963); App. Brief at 13-17. The process of publication (by motion or use in adjudication) is required to place the deposition into the record before the trier of fact. See id. Thus, unpublished depositions are not "in the record before the court, so they should not be considered "judicial records."

The media criticize this analysis by claiming that is "obvious, but irrelevant to the issue here." Res. Brief at 14 n.5. This response appears to be based upon the media's mistaken view that UP&L's discussion of the process required to place a deposition into the judicial record has nothing to do with the question of whether an item is defined as a "judicial record." The media's view is contradicted by the plain terms of the case law cited by UP&L, which speaks directly to the question of whether a deposition is "in the record before the trial court." Reliable Furniture, 280 P.2d at 135.

Moreover, the media's view that publication is irrelevant evidences a misunderstanding of both the common meaning of "publication" and the process itself. The term "publish" means to make public. See, e.g., Cobbs v. Patterson, 152 So.2d 151, 153, 275 Ala. 84 (1963). At the same time, publication is relevant to the right of public access under the Writings Act, because it occurs at the time a deposition is placed before the

court as a "judicial record" under the common law. Publication can occur automatically under Utah R. Civ. P. 32(d), or by motion. Publication under Rule 32(d) coincides with use of the deposition in adjudication, while publication by motion also typically occurs just before depositions are used at trial or in support a motion. Thus, under either process, publication coincides with the time that a right of public access accrues.

Furthermore, UP&L's analysis involves more than a simple discussion of what constitutes the record on appeal. It involves the crucial question of what substantive evidence the trial court had before it in the record when it made its decision. See the cases cited in App. Brief 13-17. Because the Utah Writings Act makes the public or private status of depositions turn on whether those depositions are "judicial records," UP&L's analysis of when depositions are placed before the court is crucial in determining whether the Act properly applies to the Carter depositions.

2. Unpublished Depositions Should Not Be Included in the Category of "Public Records."

The media also argue that depositions must pass a second test before the Writings Act can be held inapplicable. They contend that a second category -- "public records . . . of private writings" -- applies to unpublished depositions on file with a court clerk. They contend that a definition of "public records" used for the state archives and other non-judicial document storage facilities should be applied. See Utah Code Ann. § 63-2-61(1).

These arguments should be rejected. First, the attempt to apply a second, more general test to items related to the judicial system subjects that category of items to an unwarranted double analysis, when the writing act itself states that the four categories of public records constitute separate "classes." Id. Second, the "judicial records" test is more specific than the "public records" test. Thus, in the event that the results of the two tests conflict, the "judicial records" test (which provides that unpublished depositions are not subject to the Writings Act) should control. See Millett v. Clark Clinic Corp., 609 P.2d 934, 936 (Utah 1980) ("[W]here the operation of two statutory provisions is in conflict, that provision which is more specific in its application will govern over that which is more general."); Perry v. Pioneer Wholesale Supply Co., 681 P.2d 214, 216 (Utah 1984. Third, if a double analysis were warranted, it should not use a definition which on its face is inapplicable to judicial records. The "public records" test of Section 63-2-61(1) is on its face designed to apply to archives and other non-judicial depositories of records -- being specifically designated as an archives statute and contemplating the storage of "books, papers, letters, documents, maps, plans, photographs, sound recording, management information systems," etc. Both times that this court has applied this archives-based definition, it has been for records stored in a non-judicial facility. See KUTV, Inc. v. Utah State Board of Education, 689 P.2d 1357 (Utah 1984) (State Board

of Education); Redding v. Brady, 606 P.2d 1193 (Utah 1980) (Weber State College).

Mechanistically applying this archives-based definition of public records makes little sense in a judicial setting. The common law has already developed a specific test to determine when records related to judicial proceedings become public. See part A, supra. The common law definition of when a deposition becomes a public record (through use in adjudication) is based upon widespread experience, consideration for the private nature of the discovery process, concern for facilitating discovery of the truth, and a desire to provide cost-effective dispute resolution. See part A, supra; App. Brief at 20-23.

Furthermore, in the judicial context, the common law definition of "public records" is consistent with the purpose of the Writings Act, while application of the archives-based definition is not. This Court has plainly stated that purpose of the Writings Act is to provide "public access to the actions of state government." KUTV, 689 P.2d at 1361, App. Brief at 17. The judicial "public records" definition provides for public access to documents used in public adjudication, not to documents that do not yet involve the courts. At the same time, application of the archives-based definition could extend the Writings Act to require private, non-governmental transactions to be made public -- a result not intended by the legislature. See id.

E. THE CONSTITUTIONAL RIGHT OF PUBLIC ACCESS TO JUDICIAL PROCEEDINGS DOES NOT INCLUDE A RIGHT TO OBTAIN DISCOVERY NOT USED IN ADJUDICATION.

The media also argue that depositions never used in adjudication should be subject to a First Amendment right of public access. UP&L has already argued briefly that this right is inapplicable to pretrial discovery, see App. Brief at 24-25, but two other points should be mentioned. First, the media are absolutely wrong in their assertion that the "majority view" holds that the First Amendment mandates access to pretrial discovery. No court has ever held that the First Amendment prescribes such a right of access; the media cannot cite a single case to so hold. Indeed, the case cited in support of the mistaken "majority rule" merely refers to (and mildly criticizes) a case holding "that the constitutional presumption of access does not apply to 'discovery materials never used at trial.'" See Matter of Continental Illinois Securities Litigation, 732 F.2d 1302, 1309 n.11 (7th Cir. 1984) (citing Tavoulareas v. The Washington Post Co., 724 F.2d 1010 (D.C. Cir. 1984), vacated and rehearing en banc granted (Mar. 15, 1984)). The media's only source directly calling for the extension of a First Amendment right of access to pretrial discovery is a law review note written by Ann E. Cohen, a third-year law student. See Res. Brief at 43-44; see also fn. 1, supra.

Second, the U.S. Supreme Court has developed a two-pronged analysis to determine whether a First Amendment right of access extends to court proceedings. When applied to pretrial

discovery, this analysis does not support the view that the First Amendment should be applied. The D.C. Circuit explains the analysis:

In deciding whether the public has a First Amendment right of access to judicial proceedings, the [Supreme] Court has made two inquiries: (1) whether the proceeding has historically been open . . . ; and (2) whether the right of access plays an essential role in the proper functioning of the judicial process and the government as a whole. . . . Apparently, both these questions must be answered affirmatively before a constitutional requirement of access can be imposed.

In re Reporters Comm. for Freedom of the Press, 773 F.2d at 1331-32 (cites omitted). The D.C. Circuit, after extensive historical analysis, concluded that pretrial discovery has not been traditionally open to the public. Id. at 1332-36, 1338; see also part A.1., supra. The court then determined that public access to pretrial discovery would not play "an essential role in the proper functioning of the judicial process." See id. at 1336-37. This last conclusion should be apparent because, before being used in adjudication, pretrial discovery is not involved in the judicial decisionmaking process. Relying on this analysis used by the U.S. Supreme Court, the D.C. Circuit held that the public and press have no First Amendment right to obtain discovery materials before they are used in adjudication. Id. at 1338. This Court should accept such analysis as persuasive.

F. LITIGANTS SHOULD NOT HAVE TO OBTAIN PROTECTIVE ORDERS TO KEEP DEPOSITIONS PRIVATE.

This Court should maintain the expectation that discovery is a private process. When discovery takes place in a private setting, a freer exchange of information is likely to take place. That is why litigants commonly stipulate to protective orders providing that information obtained in discovery will not be disseminated to third parties. See Marcus, Protective Order Litigation, supra, at 9. As one commentator explains, "Parties desire to keep information confidential for many legitimate reasons. Although some of these reasons might not constitute good cause under rule 26(c), they are often important to the parties." Id. If denied the opportunity to conduct discovery in private, many litigants will undoubtedly be more reluctant to divulge information.

These privacy concerns are particularly important for depositions. Not only does deposition testimony come directly from the witness, but it also may contain objectionable material. For depositions, Utah R. Civ. P. 30(c) mandates: "Evidence objected to shall be taken subject to the objections." At the same time, "[i]t is well settled that counsel should never instruct a witness not to answer a question during a deposition" unless the answer is privileged or the deposition is to be terminated to seek court protection from an oppressive examination. First Tennessee Bank v. Federal Deposit Insurance Corp., 108 F.R.D. 640, 640 (E.D. Tenn. 1985); see Ralston Purina

Co. v. McFarland, 550 F.2d 967, 973 (4th Cir. 1977) ("[T]he action of plaintiff's counsel in directing the deponent not to answer was highly improper.")

In light of these concerns, this Court should not -- through an affirmance of the trial court's opinion -- require litigants to routinely apply to the courts for protective orders to keep their discovery private. Rather, this Court should minimize litigation costs and facilitate discovery by upholding the common law rule which states that depositions are private until used in adjudication.

III. CONCLUSION

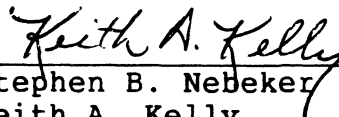
Through its construction of the Utah Writings Act, the trial court found "a public right" to inspect filed depositions, even though they were never used in adjudication. Record at 4839; Addendum "A" at 9. Thus, the basis for the decision below was an interpretation of law, not an exercise of discretion.

This Court should reject the trial court's interpretation and hold that depositions not used in adjudication do not come within the purview of the Utah Writings Act. Moreover, this Court should uphold the Utah tradition that discovery is private, and it should rule that depositions do not become public records until used to adjudicate the substantive rights of litigants. In so doing, it should reject the assertion that depositions are subject to any common law, statutory, or constitutional right of access

before they are used in court. Such an interpretation will facilitate discovery and thus help ensure fair resolution of disputes.

DATED this 4th day of March, 1988.

RAY, QUINNEY & NEBEKER



Stephen B. Nebeker
Keith A. Kelly

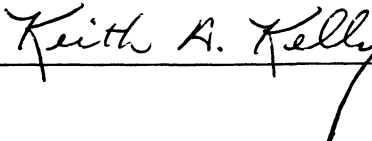
Attorneys for Appellant
Utah Power & Light Co.

CERTIFICATE OF SERVICE

I hereby certify that on the 4th day of March, 1988, four true and correct copies of APPELLANT'S REPLY BRIEF were hand-delivered to the following:

Ross C. Anderson
HANSEN & ANDERSON
50 West 300 South, #700
Salt Lake City, Utah 84101

9072K



Tab D

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IN THE SUPREME COURT OF THE STATE OF UTAH

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JANICE FAYE CARTER, et al.,	:	
Plaintiffs,	:	Case No. 870340
v.	:	Priority No. 14b
UTAH POWER & LIGHT COMPANY, et al.,	:	
Defendants-	:	ORDER GRANTING LEAVE FOR
Appellants,	:	APPELLANT UTAH POWER &
	:	LIGHT TO SUBMIT OVERLENGTH
	:	REPLY MEMORANDUM
SOCIETY OF PROFESSIONAL	:	
JOURNALISTS; KUTV INC.; KEARNS-	:	
TRIBUTE CORP.; DESERET NEWS	:	
PUBLISHING CO.; THE STANDARD	:	
CORP.; BONNEVILLE INTERNATIONAL,	:	
INC.; and UNITED TELEVISION,	:	
INC.,	:	
Intervenors-	:	
Respondents.	:	

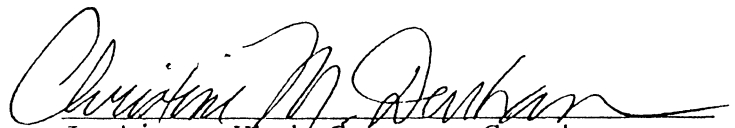
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Upon the ex parte application by Utah Power & Light
Company and for good cause showing,

IT IS HEREBY ORDERED that Appellant Utah Power & Light is
granted permission to file a 35-page reply brief in the
above-entitled case.

DATED this 3rd day of March, 1988.

BY THE COURT:


Justice, Utah Supreme Court

1001K

Tab E

Rule 13. Depositions.

(b) *Notices, Transcripts and Exhibits.* Notices of depositions shall be filed with the Clerk. Transcripts of depositions and exhibits marked for identification at depositions shall not be filed with the Clerk, unless the parties are unable to agree as to who shall retain custody of the transcripts and exhibits. If filed with the Clerk, transcripts of all pre-trial depositions in the case and any exhibits marked upon the taking of any deposition shall be withheld from public inspection by the Clerk, but shall be available to any party for any proper use in the case.

[Redesignated 5-1-85; formerly Rule 8. Subsec. (a) amended, 5-1-86].

Rule 17. Discovery.

(c) Depositions in pending cases which have been duly filed in the office of the clerk may be opened by a judge or by the clerk upon application by any attorney of record in the case. Fees for taking of depositions showing to whom paid shall be plainly endorsed on the notary's certificate or wrapper.

Rule 15. Depositions.

(b) *Opening of depositions.*

(1) If filed, unless the court directs otherwise, depositions pending action taken pursuant to Rule 26, Federal Rules of Civil Procedure, may be opened by the clerk and made available for inspection and copying on request of any party or counsel for any party to the proceeding.

(2) Depositions before action or pending appeal taken pursuant to Rule 27, Federal Rules of Civil Procedure, may be opened by the clerk and made available for inspection and copying on the request of any person served with notice pursuant to section (a)(2) of that rule, or by his counsel.

Rule 13. Depositions.

All depositions received by the Clerk of this district for filing shall remain sealed in the containers in which received, and are not to be opened prior to trial except by the Judges for this district, or by order of the Court.

4.2 Depositions

4.2.2 *Opening of Depositions*

When a deposition has been filed in any action, except in actions for which the law prescribes a different procedure, it shall be opened only by the Clerk at the direction of the Court or at the direction of any counsel of record. The fact and date of opening and the name of the person making such request shall be endorsed by the Clerk on the envelope containing the deposition, which envelope shall be preserved with the deposition.

Rule 15. Depositions.

Depositions may be taken after the commencement of an action at such time as provided by Rule 30(a), Federal Rules of Civil Procedure.

Depositions in pending cases which have been duly filed in the office of the Clerk may be opened by the Court at any time, or by the Clerk for examination upon oral or written application of any attorney of record in the case.

Fees for taking of depositions shall be plainly endorsed on the notary's certificate or wrapper, or they will not be taxed as costs in the case.

Wisconsin (W. D.)

FEDERAL LOCAL COURT RULES

Rule 19. Opening of Depositions.

Unless otherwise ordered by this court, the clerk shall, upon request of a party or his attorney, open any deposition filed in this court, first endorsing on the back thereof at the time of opening the name of the party or attorney at whose instance the deposition is opened.

FEDERAL LOCAL COURT RULES

Wyoming

Rule 215. Removal of Files from Court.

(c) *Depositions.* Unless otherwise ordered by the Court, depositions which have been filed may be opened by the Clerk for examination by counsel in the Clerk's office upon application of any attorney of record in the case. Upon the conclusion of the examination, the deposition shall be resealed. In the event an attorney wishes to examine a deposition filed in a matter in which he is not counsel of record, he must seek written permission from the Court to do so before the Clerk will allow such examination.

Tab F

Local Rule 17. Civil Discovery Materials and Exhibits.

Unless the Court directs otherwise, in all civil actions other than inmate complaints challenging the conditions of confinement:

A. Interrogatories, requests for production, requests for admissions and responses thereto, and notices of depositions shall be served in accordance with Rule 5(b), Fed R Civ P, but shall not be filed with the Clerk except upon order of the Court or for use at trial or in connection with motions. The party responsible for service of the discovery material shall retain the original and become custodian.

B. No depositions shall be filed with the Clerk unless the Court directs otherwise, or unless in support of or in opposition to a motion. Counsel who notices a deposition shall be the custodian of the deposition and shall maintain the original for filing if the Court so directs.

C. If discovery materials are germane to any motion or response, only the relevant material shall be filed with the motion or response.

D. Whenever any discovery material (request, response, notice) is served, counsel shall contemporaneously deliver to the Clerk a notice identifying the date of service and the nature of the material served or, the first and last page of the document served including the certificate of service. These notices shall be maintained by the Clerk with the civil action file but will not be docketed.

E. During the pendency of any case the custodian of any discovery material shall provide to counsel for all other parties reasonable access to the material and an opportunity to duplicate the material at the expense of the copying party, and any other person may, with leave of Court, obtain a copy of any discovery material from its custodian upon payment of the expense of the copy.

F. Any discovery material, depositions and trial exhibits filed with the Clerk will be disposed of by the Clerk sixty days following the final disposition of the action, unless earlier withdrawn.

[Amended, effective 1-1-84.]

Rule 16. Non-Filing of Civil Discovery.

Unless the Court directs otherwise, in all civil actions other than inmate complaints challenging the conditions of confinement:

A. Interrogatories, requests for production, requests for admissions and responses thereto, and notices of depositions shall be served in accordance with Rule 5(b), Fed. R. Civ. P., but shall not be filed with the Clerk except upon order of the Court or for use at trial or in connection with motions. The party responsible for service of the discovery material shall retain the original and become custodian.

✓ B. No depositions shall be filed with the Clerk unless the Court directs otherwise, or unless in support of or in opposition to a motion. Counsel who notices a deposition shall be the custodian of the deposition and shall maintain the original for filing if the Court so directs.

C. If discovery materials are germane to any motion or response, only the relevant material need be filed with the motion or response.

D. During the pendency of any case the custodian of any discovery material shall provide to counsel for all other parties reasonable access to the material and an opportunity to duplicate the material at the expense of the copying party, and any other person may, with leave of Court, obtain a copy of any discovery material from its custodian upon payment of the expense of the copy.

E. When documentation of discovery not previously in the record is needed for appeal purposes, upon an application and order of the Court, or by stipulation of counsel, the necessary discovery papers shall be filed with the Clerk.

F. Any discovery material, depositions and trial exhibits filed with the Clerk will be disposed of by the Clerk as set out by Local Rule 11.

Rule 8. Depositions and Discovery.

✓ (A) Depositions, interrogatories, requests for admission, production or inspection and any responses thereto shall not be filed with the Court. This rule shall not preclude their use as exhibits or as evidence on a motion or at trial and it shall be counsel's responsibility to so provide at that time. [Amended 8-1-83.]

(B) Depositions received as evidence shall be kept separately and not placed in the original file folder of the case. [Amended 8-1-83.]

(C) *Written Interrogatories.*

(1) Pursuant to Rule 26 of the Federal Rules of Civil Procedure, written interrogatories are limited to twenty (20) questions which shall include all subparagraphs and sub-subparagraphs. Upon completion of depositions and application to the Court, further written interrogatories may be permitted.

(2) Any party desiring to serve additional interrogatories shall submit to the Court a written memorandum setting forth the proposed additional interrogatories and the reasons for their use.

(3) Answers and objections to interrogatories (pursuant to Rule 33, Federal Rules of Civil Procedure) shall identify and quote each interrogatory in full immediately preceding the statement of any answer or objection thereto.

(D) *Responses and Objections to Requests for Admissions.* Responses and objections to requests for admissions, pursuant to Rule 36, Federal Rules of Civil Procedure, shall identify and quote each request for admission in full immediately preceding the statement of any answer or objection thereto.

(E) *Motion for Discovery.* A motion for an order compelling discovery, pursuant to Rule 37, Federal Rules of Civil Procedure, shall have attached thereto all relevant papers relating to said motion.

Rule 3. Filing or Withdrawal of Papers and Entry of Orders.

(2) *Discovery Papers.* Depositions, Interrogatories and answers thereto, Requests for Production, Inspection, or Admission, and responses thereto, shall not be filed with the Court, except that a "Notice of Service" of the foregoing pleadings on opposing counsel shall be filed with the Court. Filing the notice of taking deposition required by Rule 30(b)(1) of the Federal Rules of Civil Procedure will satisfy the requirement of filing "Notice of Service" with respect to depositions. This Rule shall not preclude their use as exhibits or as evidence on a motion or at trial, nor do the provisions of this Rule apply to motions relating to discovery. [Added, 10-5-78; amended 11-5-79, 1-27-81.]

Rule 3. Pleadings & Filings.

(a) The original of all pleadings, together with two copies thereof, shall be filed with the Clerk. All pleadings shall be typewritten, photocopied, mimeographed, or printed, in type not less than elite, in double space, *letter size* and shall be filed by the Clerk unfolded and without manuscript covers. Attorneys shall take notice of case numbers assigned to each case and shall note such numbers upon all pleadings, precedents, orders, and judgments. [Amended 10-27-86.]

(b) Pleadings are to be filed as follows:

(1) In the Eastern District, the Clerk maintains offices at Little Rock, Pine Bluff, and Jonesboro. In the Western District, the Clerk maintains offices at Fort Smith, Fayetteville, El Dorado, Texarkana, and Hot Springs. In civil matters, pleadings should be filed in the office of the Clerk designated in Local Rule 1 for the Division in which the case is pending, but when a Clerk is unavailable they may be filed in any office of the Clerk in the appropriate district.

(2) Criminal matters in the Eastern District. All pleadings in all criminal matters are to be filed in Little Rock.

(3) Criminal matters in the Western District. All pleadings in criminal matters in the Fort Smith and Harrison Divisions shall be filed in Fort Smith. Otherwise, all pleadings in criminal matters for a particular division are to be filed in that division.

(c) (1) *Parties represented by Counsel.* Every pleading filed in behalf of a party represented by counsel shall be signed by at least one attorney of record in his or her individual name, and the attorney's address, zip code and telephone number shall be stated. It is the duty of each attorney to promptly notify the Clerk and the other parties to the proceedings of any change in his or her address.

(2) *Parties appearing pro se.* It is the duty of any party not represented by counsel to promptly notify the Clerk and the other parties to the proceedings of any change in his or her address, to monitor the progress of the case and to prosecute or defend the action diligently. A party appearing for himself/herself shall sign his/her pleadings and state his/her address, zip code and telephone number. If any communication from the Court to a pro se plaintiff is not responded to within thirty (30) days, the case may be dismissed without prejudice. Any party proceeding pro se shall be expected to be familiar with and follow the Federal Rules of Civil Procedure.

[Amended 3-14-84.]

(d) At the time of filing a civil action, the plaintiff shall complete and submit a cover sheet statement on Federal Form No. JS44.

(e) When a pleading is amended, the entire pleading shall be retyped. If matter is to be deleted from a pleading, it shall be clearly described in the motion to amend the pleading; Provided, however, that this requirement shall not be applied to pro se plaintiffs. If, however, an attorney is subsequently appointed to represent such a pro se plaintiff, or if the pro se plaintiff otherwise subsequently obtains the services of an attorney, said attorney shall observe this requirement in all subsequently filed pleadings. [Amended 7-16-80.]

✓ (f) Discovery depositions, interrogatories, requests for production or inspection, proposed findings of fact, proposed conclusions of law, trial briefs, proposed jury instructions, and responses thereto, shall not be considered pleadings within the meaning of this Rule. Unless otherwise ordered by the Court, such documents shall NOT be filed with the Clerk, except as noted in paragraphs (g) and (h) below. [Added 6-26-81.]

(g) When the discovery documents listed in paragraph (f) above, or portions thereof, are needed in support of a motion, those portions of the discovery which are relevant to the motion shall be submitted with the motion and attached thereto as exhibits. [Added 6-26-81.]

(h) Any discovery documents to be used at any trial or hearing shall be filed and/or introduced in open court pursuant to the Federal Rules of Civil Procedure, the Federal Rules of Criminal Procedure, and the Federal Rules of Evidence. [Added 6-26-81.]

(i) Proposed findings of fact and conclusions of law, trial briefs, and proposed jury instructions shall be submitted to the judge to whom the case is assigned, with copies served upon all other parties. [Added 6-26-81.]

(j) Nothing in this rule is intended to modify or change the filing requirements specified in Rules 20 and 21 of these Local Rules. [Added 6-26-81.]

Rule 250. Discovery Documents.

The following discovery documents and proofs of service thereof shall not be filed with the Clerk until there is a proceeding in which the document or proof of service is in issue:

- (a) Transcripts of depositions upon oral examination;
- (b) Transcripts of depositions upon written questions;
- (c) Interrogatories;
- (d) Answers or objections to interrogatories;
- (e) Requests for the production of documents or to inspect tangible things;
- (f) Responses or objections to requests for the production of documents or to inspect tangible things;
- (g) Requests for admission; and
- (h) Responses or objections to requests for admission.

When required in a proceeding, the original transcripts of depositions shall be filed. As to other discovery materials, only that part of the document which is in issue shall be filed.

[Amended, effective 1-1-87; amended 5-19-87.]

8.3 *Discovery documents—Proof of service—Filing.* The following discovery documents and proofs of service thereof shall not be filed with the Clerk until there is a proceeding in which the document or proof of service is in issue:

- (a) Transcripts of depositions upon oral examination;
- (b) Transcripts of depositions upon written questions;
- (c) Interrogatories;
- (d) Answers or objections to interrogatories;
- (e) Requests for the production of documents or to inspect tangible things;
- (f) Responses or objections to requests for the production of documents or to inspect tangible things;
- (g) Requests for admission; and
- (h) Responses or objections to requests for admission.
- (i) Notice of taking deposition, except when the notice is filed with proof of service for purposes of obtaining a subpoena duces tecum pursuant to FRCP Rule 45(d)(1).

[Amended 10-1-87.]

When required in a proceeding, only that part of the document which is in issue shall be filed. All such discovery documents shall be held by the attorney pending use pursuant to Local Rule 8 for the period specified in Local Rule 29.2 for the retention of exhibits, unless otherwise ordered by the Court.

Rule 229. Discovery Non-Filing, Service, and Filing Practice.

1. Non-Filing.

✓ In accordance with Rule 5(d) of the Federal Rules of Civil Procedure, depositions and interrogatories, requests for documents, requests for admissions, and answers and responses thereto shall not be filed with the Clerk unless ordered by a judge of this Court.

Rule 13. Depositions.

(a) *Attendance.* Depositions on oral examination or on written interrogatories are deemed to constitute private proceedings which the public is not entitled to attend. Any person other than the witness being deposed, the parties to the action, the parent of a minor deponent or counsel for the witness or any party shall, at the request of counsel for any party, or the witness, be excluded from the hearing room while the deposition of any person is being taken. Application for an exception to this rule may be made to the presiding Judge.

✓ (b) *Notices, Transcripts and Exhibits.* Notices of depositions shall be filed with the Clerk. Transcripts of depositions and exhibits marked for identification at depositions shall not be filed with the Clerk, unless the parties are unable to agree as to who shall retain custody of the transcripts and exhibits. If filed with the Clerk, transcripts of all pre-trial depositions in the case and any exhibits marked upon the taking of any deposition shall be withheld from public inspection by the Clerk, but shall be available to any party for any proper use in the case.

[Redesignated 5-1-85; formerly Rule 8. Subsec. (a) amended, 5-1-86].

reference to magistrate. Every civil action not exempted from the requirements of Fed R Civ P 16(b) by LR 2.3 may be referred by the Judge to whom the case is assigned to the United States Magistrate who shall promptly:

- (1) Consult with the attorneys for the parties and any unrepresented parties by telephone, mail or other means;
- (2) Enter a scheduling order pursuant to Fed R Civ P 16(b); and
- (3) Determine whether the frequency or extent of use of discovery methods should be limited, and enter an appropriate order.

Orders issued pursuant to this rule shall not be modified except by leave of the Court or Magistrate upon a showing of good cause.

B. Interrogatories and Requests for Admissions.

(1) Unless the Court otherwise orders, no party shall direct more than 50 written interrogatories and 25 requests for admissions, including each subpart as a separate interrogatory or request, until such time as a conference is held pursuant to Rule 16 of the Federal Rules of Civil Procedure.

(2) The party answering interrogatories and requests for admissions shall retype the questions or requests with the answers, objections or explanations following immediately thereafter.

(3) Objections to interrogatories shall be set forth in the answers to interrogatories with a brief statement of the grounds therefor and a citation of the main authorities, if any, relied upon.

[Amended, effective 3-1-85.]

C. Requests for Production. (1) A party who produces documents for inspection in response to a request for production pursuant to Fed R Civ P 34 or who, in response to an interrogatory, relies upon the option permitted by Fed R Civ P 33(c) and produces business records and related compilations, abstracts or summaries based thereon in lieu of answering the interrogatory, shall produce the documents as they are kept in the usual course of business. The producing party shall, at its option, either (a) make available to the discovering party any business files indexes, subject matter descriptions and auxiliary information maintained by that party in the usual course of business which may permit the discovering party to locate and inspect pertinent documents; or (b) shall utilize such indexes, descriptions or auxiliary information to locate such documents for the applying party; or (c) if there are no such indexes, descriptions or auxiliary information, shall so advise the other party.

(2) The parties responding to a Request for Production shall retype each request with the response or objections following immediately thereafter. [Added, effective 3-1-83.]

D. Who May Attend Depositions.

Unless otherwise ordered by the Court, or agreed to by all parties, a deposition may be attended only by (1) the deponent, (2) counsel for any party and members and employees of their firms, (3) a party who is a natural person, (4) an officer or employee of a party which is not a natural person designated as its representative by its counsel, (5) counsel for the deponent, and (6) any consultant or expert designated by counsel for any party. If a confidentiality order has been entered, any person who is not authorized under the order to have access to documents or information designated confidential may be excluded while a deponent is being examined about any confidential document or information. [Amended, 6-4-87, corrected 9-8-87.]

E. Discovery Materials Not Filed Unless Ordered or Needed.

(1) All requests for discovery under Fed. R. Civ. P. 31 and 33 through 36, and answers and responses shall be served upon other counsel or parties but shall not be filed with the Court. In lieu thereof, the party requesting discovery and the party serving responses thereto shall file with the Court a "Notice of Service" containing the following information:

- (a) a certification that a particular form of discovery or response was served on other counsel or opposing parties, and
- (b) the date and manner of service.

Filing the notice of taking of oral depositions required by Rule 30(b)(1), Federal Rules of Civil Procedure, will satisfy the requirement of filing a "Notice of Service."

(2) The party responsible for service of the request for discovery and the party responsible for the response shall retain the originals and become the custodian of them. The party taking an oral deposition shall be custodian of the original; no copy shall be filed except pursuant to subparagraph 3. In cases involving out-of-state counsel, local counsel shall be the custodian.

(3) If depositions, interrogatories, requests for documents, requests for admissions, answers or responses are to be used at trial or are necessary to a pretrial or post trial motion, the verbatim portions thereof considered pertinent by the parties shall be filed with the Court when relied upon.

(4) When discovery not previously filed with the Court is needed for appeal purposes, the Court, on its own motion, on motion by any party or by stipulation of counsel, shall order the necessary material delivered by the custodian to the Court.

(5) The Court on its own motion, on motion by any party or on application by a non-party, may order the custodian to file the original of any discovery document.

- ✓
1. *Service and Filing of Discovery Material.*
 - a. Depositions upon written questions,
 - b. Responses or objections to depositions upon written questions,
 - c. Written interrogatories,
 - d. Answers or objections to written interrogatories,
 - e. Requests for production of documents or to inspect any tangible thing,
 - f. Objections to requests for the production of documents or to inspect any tangible thing,
 - g. Written requests for admission,
 - h. Answers or objections to written requests for admission

shall be served upon other counsel and parties but shall not be filed with the Court or the Clerk, nor proof of service thereof, unless on order of the Court or for use in the proceeding. The party responsible for service of the discovery material shall retain the original and become the custodian. *The original of all depositions upon oral examination shall be retained by the party taking such deposition.*

2. If relief is sought under any of the Federal Rules of Civil Procedure, copies of the discovery matters in dispute shall be filed with the Court contemporaneously with any motion filed under these rules by the party seeking to invoke the Court's relief.

3. If depositions, interrogatories, requests for documents, requests for admission, answers or responses are to be used at trial or are necessary to a pretrial or post trial motion, the portions to be used shall be filed with the Clerk at the outset of the trial or at the filing of the motion insofar as their use can be reasonably anticipated by the parties having custody thereof.

4. When documentation of discovery not previously in the record is needed for appeal purposes, upon an application and order of the Court, or by stipulation of counsel, the necessary discovery papers shall be filed with the Clerk.

5. *Interrogatories.* Unless otherwise permitted by the Court for cause shown, no party may serve upon any other party more than one set of forty (40) interrogatories pursuant to Rule 33, Fed R Civ P, including all parts and subparts.

Interrogatories shall be so arranged that following each question there shall be provided a sufficient blank space for inserting a typed response. If the space allotted is insufficient, the responding party shall retype the pages repeating each question in full followed by the answer or objection thereto.

6. *Motions to Compel.* Except for motions grounded upon complete failure to respond to the discovery sought to be compelled or upon assertion of general or blanket objections to discovery, motions to compel discovery in accordance with Rules 33, 34, 36 and 37 Fed R Civ P, shall quote verbatim each interrogatory, request or admission or request for production and the response to which objection is taken followed by (a) the specific objections, (b) the grounds assigned for the objection (if not apparent from the objection), and (c) the reasons assigned as supporting the motion, all of which shall be written in immediate succession to one another. Such objections and grounds shall be addressed to the specific interrogatory or request and may not be made generally. [Amended 3-25-85.]

7. *Certificate of counsel.* Prior to filing a motion to compel supra, or a motion for protective order pursuant to Rule 26(c), Fed R Civ P, counsel for the moving party shall confer with counsel for the opposing party and file with the Clerk at the time of filing the motion, a statement certifying that he has conferred with counsel for the opposing party in a good faith effort to resolve by agreement the issues raised and that counsel have been unable to do so. If certain of the issues have been resolved by agreement, the statement shall specify the issues so resolved and the issues remaining unresolved.

8. *Reasonable Notice for Taking Depositions.* Unless otherwise stipulated by all interested parties pursuant to Rule 29, FR Civ P and excepting the circumstances governed by Rule 30(a), FR Civ P, a party desiring to take the deposition within this State of any person upon oral examination shall give at least five (5) working days' notice in writing to every other party to the action and to the deponent (if the deposition is not a party), and a party desiring to take the deposition in another State of any person upon oral examination shall give at least ten (10) working days' notice in writing to every other party to the action. [Amended 3-25-85.]

Failure by the party taking the oral deposition to comply with this rule ob

Rule 3.03. Written Interrogatories, Number and Form; Filing of Discovery Materials.

(a) Unless otherwise permitted by the Court for cause shown, no party shall serve upon any other party, at one time or cumulatively, more than fifty written interrogatories pursuant to Rule 33, FR Civ P, including all parts and sub-parts.

(b) Written interrogatories shall be so prepared and arranged that a blank space shall be provided after each separately numbered interrogatory. The space shall be reasonably calculated to enable the answering party to insert the answer within the space.

(c) The original of the written interrogatories and a copy shall be served on the party to whom the interrogatories are directed, and a copy on all other parties. No copy of the written interrogatories shall be filed with the Court by the party propounding them. The answering party shall use the original of the written interrogatories for his answers and objections, if any; and the original shall be served upon all other parties. The interrogatories as answered or objected to shall not be filed with the Court as a matter of course, but may later be filed by any party in whole or in part if necessary to presentation and consideration of a motion to compel, a motion for summary judgment, a motion for injunctive relief, or other similar proceedings.

✓ (d) Notices of the taking of oral depositions shall not be filed with the Court as a matter of course (except as necessary to presentation and consideration of motions to compel); and transcripts of oral depositions shall not be filed unless and until requested by a party or ordered by the Court.

(e) Requests for the production of documents and other things, and requests for admission, and answers and responses thereto, shall not be filed with the Court as a matter of course but may later be filed in whole or in part if necessary to presentation and consideration of a motion to compel, a motion for summary judgment, a motion for injunctive relief, or other similar proceedings.

225-3. *Service and Filing of Discovery Material.*

✓ (a) *Filing Not Generally Required.* Interrogatories, requests for documents, requests for admission, and answers and responses thereto shall be served upon other counsel or parties, but they shall not be routinely filed with the Court. The party responsible for service of the discovery material shall, however, file a certificate with the clerk indicating the date of service. He shall also retain the original discovery material and become its custodian. The original of all depositions upon oral examination shall be retained by the party taking the deposition.

(b) *Selective Filing Required for Motions, Trial, and Appeal.*

(1) The custodial party shall file with the clerk at the time of use at trial or with the filing of a motion those portions of depositions, interrogatories, requests for documents, requests for admission and answers or responses thereto which are used at trial or which are necessary to the motion.

(2) Where discovery materials not previously in the record are needed for appeal purposes, the Court, upon application, may order or counsel may stipulate in writing that the necessary materials be filed with the clerk.

(c) *Depositions Under Seal.* At the request of any attorney of record in the case, the clerk may open the original copy of any deposition which has been filed with the clerk in accordance with this rule. The clerk shall note on the deposition the date and time at which the deposition was opened. The deposition shall not be removed from the clerk's office.

7.4 Interrogatories in Civil Cases. The interrogatories served upon either party shall not exceed twenty-five (25) in number. Each interrogatory shall consist of a single question. Additional interrogatories will be allowed only after initial interrogatories are answered and with the written permission of the Court of application.

a. Interrogatories under Rule 33, Federal Rules of Civil Procedure, and the answer thereto, requests for production or inspection under Rule 34, Federal Rules of Civil Procedure, and requests for admissions under Rule 36, Federal Rules of Civil Procedure, and responses thereto shall be served upon other counsel or parties, but shall not be filed with the court. If relief is sought under Rule 26(c) or Rule 37, Federal Rules of Civil Procedure, concerning any interrogatories, requests for production or inspection, requests for admissions, copies of the portions of the interrogatories, requests, answers or responses in dispute shall be filed with the court contemporaneously with any motion filed under Rule 26(c) or Rule 37, Federal Rules of Civil Procedure.

b. If interrogatories, requests, answers or responses are to be used at trial, the portions to be used shall be filed with the clerk at the outset of the trial insofar as their use reasonably can be anticipated.

c. Motions under Rule 26(c) or 37(a), Federal Rules of Civil Procedure, directed at interrogatories or requests under Rule 33 or 34, Federal Rules of Civil Procedure, or at the responses thereto, shall set forth the interrogatory, request or response constituting the subject matter of the motion.

d. Unless otherwise ordered, the court will not entertain any motion under Rule 37, Federal Rules of Civil Procedure, unless counsel for the moving party has conferred or has made reasonable effort to confer with opposing counsel concerning the matter in dispute prior to the filing of the motion. Counsel for the moving party shall file a certificate of compliance with this rule with any motion filed under Rule 37(a), Federal Rules of Civil Procedure.

e. Depositions under Rule 30 and 31, Federal Rules of Civil Procedure shall be served upon other counsel or parties, but *shall not be filed with the clerk*. The party responsible for the service of the discovery material shall retain the original and become the custodian.

f. If a party determines that it shall be necessary to use a deposition at trial, the deposition to be used shall be filed with the clerk prior to the trial insofar as its use reasonably can be anticipated.

g. Any objection by any party to any deposition or portion thereof must be filed with the court in writing, stating the page and line number objected to, and the reason for the objection. The objections must be filed in sufficient time to allow the court time to study and enter its written ruling before the proposed use of same.

h. The number of interrogatories which are permitted to be served by either party in civil cases pursuant to this rule shall not be diminished or otherwise affected by the number of mandatory standard interrogatories which are propounded to the parties by Local Rule 8.6.

7.5 Depositions under Rules 30 and 31, Federal Rules of Civil Procedure shall be served upon other Counsel or parties, but *shall not be filed with the clerk*. The party responsible for the service of the discovery material shall retain the original and become the custodian. If a party determines that it shall be necessary to use a deposition at trial, the deposition to be used shall be filed with the clerk prior to the trial insofar as its use reasonably can be anticipated. [Amended 10-1-84.]

Rule 230. Discovery Proceedings.**230-1. *Limitation on Number of Interrogatories.***

(a) *Limited Interrogatories During Twenty-Day Period.* No more than one set of interrogatories shall be served upon a defendant along with a complaint or third-party complaint, or within twenty days after service of such complaint, without prior leave of court. Those interrogatories shall not exceed thirty in number, counting any subparts or subquestions as individual questions.

230-2. *Nonfiling of Discovery Material.*

(a) Interrogatories, requests for document production or inspection, and answers and responses thereto, shall not be filed with the Court. Deposition transcripts shall not be filed with the Court, but notices of depositions shall be filed. This rule shall not preclude their use as exhibits or as evidence on a motion or at trial. [Amended, effective 10-1-85.]

(b) During the pendency of any civil proceeding, any person may, with leave of court, after notice served on all parties to the action, obtain a copy of any deposition or discovery document not on file with the court upon payment of the expense of the copy.

[Added, effective 9-15-83.]

Rule 7-104. Non-filing of Discovery.

Interrogatories, requests for documents, requests for admission, and answers and responses thereto shall be served upon other counsel and parties but shall not be filed with the Court unless on order of the Court or for use in the proceeding. The party responsible for service of the discovery material shall retain the original and become the custodian. The original of all depositions upon oral examination shall be retained by the party taking such deposition.

If relief is sought under any of the Federal Rules of Civil Procedure, pertinent portions of discovery matters in dispute shall be lodged with the Court contemporaneously with any motion filed under these rules by the party seeking to invoke the Court's relief.

If depositions, interrogatories, requests for documents, requests for admissions, answers or responses are to be used at trial or are necessary to a pretrial or post trial motion, those portions to be used shall be lodged with the Clerk at the outset of the trial or at the filing of the motion insofar as their use can be reasonably anticipated by the parties having custody thereof.

When documentation of discovery not previously in the record is needed for appeal purposes, upon an application and order of the Court, or by stipulation of counsel, the necessary discovery papers shall be lodged with the Clerk.

Discovery lodged with the Court shall be returned to appropriate counsel after final disposition of the case. Discovery lodged with the Court will be treated as exhibits and returned pursuant to Local Rule 1-108.

[Amended effective 10-1-83.]

Rule 13. Filing of Discovery Materials.

- ✓ (A) Interrogatories under F. R. Civ. P. 33 and 26(b)(4), and the answers or objections thereto, requests for production or inspection under F. R. Civ. P. 34, and responses or objections thereto, requests for admissions under F. R. Civ. P. 36, and responses and objections thereto, and depositions under F. R. Civ. P. 30 and 31, shall be served upon opposing counsel or parties but *shall not be filed* with the Court except by special order of the Court.
- (B) The party responsible for the service of discovery materials shall retain the originals as custodian.
- ✓ (C) Any motion filed under F. R. Civ. P. 26(c) or 37 shall be accompanied by the relevant portions of discovery material relied upon or in dispute.
- ✓ (D) That portion of discovery material necessary to the consideration of a pretrial motion or for a final order on any issue shall be filed contemporaneously with the motion or response to the motion and attached as an exhibit thereto.

Rule 16. Filing of Discovery Materials.

Due to the considerable cost to the parties of furnishing discovery materials, and the serious problems encountered with storage, this Court adopts the following procedure with regard to the filing of discovery materials with the Court:

✓ { (a) Interrogatories under Rule 33, Federal Rules of Civil Procedure, and the answers thereto, Requests for Production or Inspection under Rule 34, Federal Rules of Civil Procedure, Requests for Admissions under Rule 36, Federal Rules of Civil Procedure, and responses thereto, and depositions under Rules 30 and 31, Federal Rules of Civil Procedure, shall be served upon other counsel or parties, but shall not be filed with the Court. The party responsible for service of the discovery material shall retain the original and become the custodian.

(b) If relief is sought under Rules 26(c) or 37, Federal Rules of Civil Procedure, concerning any interrogatories, requests for production or inspection, requests for admissions, answers to interrogatories or responses to requests for admissions, copies of the portions of the interrogatories, requests, answers or responses in dispute shall be filed with the Court contemporaneously with any motion filed under said Rules.

✓ { (c) If interrogatories, requests, answers, responses or depositions are to be used at trial or are necessary to a pre-trial motion which might result in a final order on any issue the portions to be used shall be filed with the Clerk at the outset of the trial or at the filing of the motion insofar as their use can be reasonably anticipated.

(d) When documentation of discovery not previously in the record is needed for appeal purposes, upon an application and order of the Court, or by stipulation of counsel the necessary discovery papers shall be filed with the Clerk.

Rule 15. Filing of Discovery Materials.

Due to the considerable cost to the parties of furnishing discovery materials, and the serious problems encountered with storage, this court adopts the following procedure with regard to the filing of discovery materials with the court:

✓ (a) Except as provided in subsection (e) of this rule, interrogatories under Rule 33, Federal Rules of Civil Procedure, requests for production or inspection under Rule 34, Federal Rules of Civil Procedure, and responses thereto, requests for admission under Rule 36, Federal Rules of Civil Procedure and depositions under Rules 30 and 31, Federal Rules of Civil Procedure, shall be served upon other counsel or parties, but shall not be filed with the court. Upon the serving of the above-mentioned discovery, the party responsible for service of the discovery material shall file with the court a document reflecting the party serving the discovery request, the name of the party served, and the type of discovery material requested, including the number of interrogatories or requests for admissions made. The document should not contain any description of the subject matter of the discovery request. The party responsible for service of the discovery material shall retain the original and become the custodian.

(b) If relief is sought under Rules 26(c) or 37, Federal Rules of Civil Procedure, concerning any interrogatories, requests for production or inspection, requests for admissions, or responses to requests for production or inspection, copies of the portions of the interrogatories, requests, or responses in dispute shall be attached to any motion filed under said Rules.

✓ (c) If interrogatories and answers thereto, admissions or depositions are to be used at trial, the portions to be used shall be filed with the clerk at the outset of the trial insofar as their use can reasonably be anticipated. If interrogatories and answers thereto, admissions or depositions are necessary for the proper determination of a pretrial motion, said items or relevant portions thereof shall be attached to the motion.

(d) When documentation of discovery not previously in the record is needed for appeal purposes, upon an application and order of the court, or by stipulation of counsel, the necessary discovery papers shall be filed with the clerk.

(e) In all cases in which any party is not represented by an attorney, including, but not limited to, all cases filed by persons in custody pursuant to 42 U.S.C. § 1983, interrogatories under Rule 33, Federal Rules of Civil Procedure, requests for production or inspection under Rule 34, Federal Rules of Civil Procedure, and responses thereto, requests for admissions under Rule 36, Federal Rules of Civil Procedure and depositions under Rules 30 and 31, Federal Rules of Civil Procedure, shall be filed with the court.

FEDERAL LOCAL COURT RULES

Indiana (S. D.)

Rule 15. Filing of Discovery Materials.

Due to the considerable cost to the parties of furnishing discovery materials, and the serious problems encountered with storage, this court adopts the following procedure with regard to the filing of discovery materials with the court:

✓ (a) Interrogatories under Rule 33, Federal Rules of Civil Procedure, and the answers thereto, requests for production or inspection under Rule 34, Federal Rules of Civil Procedure, and responses thereto, and depositions under Rules 30 and 31, Federal Rules of Civil Procedure, shall be served upon other counsel or parties, but shall not be filed with the court. The party responsible for service of the discovery material shall retain the original and become the custodian.

(b) If relief is sought under Rules 26(c) or 37, Federal Rules of Civil Procedure, concerning any interrogatories, requests for production or inspection, answers to interrogatories or responses to requests for production or inspection, copies of the portions of the interrogatories, requests, answers or responses in dispute shall be filed with the Court contemporaneously with any motion filed under said rules. [Amended 11-26-84.]

✓ (c) If interrogatories, requests, answers, responses or depositions are to be used at trial or are necessary to a pretrial motion which might result in a final order on any issue, the portions to be used shall be filed with the clerk at the outset of the trial or at the filing of the motion in so far as their use can be reasonably anticipated.

(d) When documentation of discovery not previously in the record is needed for appeal purposes, upon an application and order of the court, or by stipulation of counsel, the necessary discovery papers shall be filed with the clerk.

Rule 23. Discovery Materials.

✓ .1 *Discovery Materials Not Filed.* Unless otherwise ordered by the Court, no depositions, notice of deposition, interrogatories, notice of service of interrogatories, request for production of documents, request for admission, and answers or responses thereto shall be filed by the Clerk. Any motion under Rule 37 of the Federal Rules of Civil Procedure attacking the sufficiency of a response to a discovery request must have a copy of the response attached.

✓ .2 *Filing and Opening Depositions.* When ordered by the court, the Clerk shall file discovery materials and they shall be withdrawn and disposed of in the manner provided in Local Rule 2.6.6.

.3 *Certificate as to Fee.* As part of his/her certificate thereto the officer taking deposition shall plainly show the amount of the fee therefor.

.4 *Interrogatories.*

.41 Parties answering interrogatories under FRCP 33 or requests for admissions under FRCP 36 shall repeat the interrogatories or requests being answered immediately preceding the answers. To facilitate this rule, a party propounding interrogatories or requests for admissions must leave reasonable space immediately following each interrogatory so that the answer may be inserted therein. The Clerk is directed to refuse filing of any interrogatories, requests or answers thereto which fail to comply with this rule.

.42 No party may serve more than a total of thirty (30) interrogatories upon any other party unless permitted to do so by the Court upon motion, notice and showing of good cause. Such motions shall be in writing setting forth the proposed additional interrogatories and the reasons establishing good cause for their use. In computing the total number of interrogatories, each subdivision of separate questions shall be counted as an interrogatory.

[Amended 9-6-84.]

Kansas

FEDERAL LOCAL COURT RULES

Rule 17. Discovery.

(g) Depositions shall not be filed unless on special order of the court or unless they are needed for use in a trial or hearing.

The originals of all stenographically reported depositions shall be delivered to the party taking the deposition,

(1) Upon signature by the deponent, or

(2) Upon completion if signature is waived on the record by the deponent and all interested parties, or

(3) Upon certification by the shorthand reporter that following reasonable notice to the deponent and deponent's attorney (if any) of the availability of the transcript for signature the deponent has failed or refused to sign it.

The original of a deposition shall be retained by the party to whom it is delivered to be available for appropriate use by any party in a hearing or trial of the case. [Amended, effective 6-8-83.]

Rule 7. Discovery Materials.

7.4 If interrogatories, requests, answers, responses or depositions are to be used at trial or are necessary to a pre-trial motion which might result in a final order on any issue, the portions to be used shall be filed with the Clerk at the outset of the trial or at the filing of the motion insofar as their use can be reasonably anticipated.

Rule 10.1. Discovery.

✓ { (c) *Non-Filing of Discovery Materials.* Due to the considerable cost to the parties of furnishing discovery materials, and the serious problems encountered with storage, this Court adopts the following procedure with regard to the non-filing of discovery materials with the Court: }

(1) Interrogatories under Rule 33, Federal Rules of Civil Procedure, and the answers thereto, Requests for Production or Inspection under Rule 34, Federal Rules of Civil Procedure, Requests for Admissions under Rule 36, Federal Rules of Civil Procedure, and responses thereto, and depositions under Rules 30 and 31, Federal Rules of Civil Procedure, shall be served upon other counsel or parties, but shall not be filed with the Court. The party responsible for service of the discovery material shall retain the original and become the custodian.

(2) If relief is sought under Rule 26(c) or 37, Federal Rules of Civil Procedure, concerning any interrogatories, requests for production or inspection, requests for admissions, answers to interrogatories or responses to requests for admissions, copies of the portions of the interrogatories, requests, answers or responses in dispute shall be filed with the Court contemporaneously with any motion filed under said Rules.

(3) If interrogatories, requests, answers, responses or depositions are to be used at trial or are necessary to a pre-trial motion which might result in a final order on any issue, the portions to be used shall be considered an exhibit and filed with the Clerk at the outset of the trial or at the filing of the motion insofar as their use can be reasonably anticipated.

(4) When documentation of discovery not previously in the record is needed for appeal purposes, upon an application and order of the Court, or by stipulation of counsel, the necessary discovery papers shall be filed with the Clerk.

[Amended 2-17-81, 1-1-83.]

Rule 16. Discovery.

(d) *Filing of Discovery.* Unless otherwise ordered by the Court, notices, written questions and transcripts of depositions, interrogatories, requests pursuant to FR Civ P 34 and 36, and answers, objections and responses thereto shall be served upon other parties but shall not be filed with the Court. The party that has served notice of a deposition or has served original discovery papers shall be responsible for preserving and for ensuring the integrity of original transcripts and discovery papers for use by the Court. [Amended 3-1-85.]

Rule 6A. Discovery Materials.

Depositions Upon Oral Examination. Notices of depositions shall be filed with the Court accompanied by a certificate of service. Unless otherwise ordered by the Court, depositions taken pursuant to Rules 27, 28, 29 and/or 30, FR Civ P, shall not be filed with the Court, except when used to support or oppose motions, briefs or memoranda, in which event they shall be filed with same. The party noticing a deposition shall retain, as custodian, the original of the deposition. Depositions to be used at hearings or trials shall be timely filed prior thereto. [Added, effective 4-1-83.]

Depositions, interrogatories, requests for production, inspection, or admission and answers, responses and objections thereto shall not be filed with the Court, except that a "Notice of Service" of the serving of the foregoing papers on opposing counsel (or on a party not represented by counsel) shall be filed with the Court by the party preparing the paper. Such "Notice of Service" shall contain a certificate of service stating the type of discovery or response served, the date and type of service, and the attorney (or party not represented by counsel) served. Filing the notice of taking depositions required by Rule 30 (b) (1), FR Civ P, will satisfy the requirement of filing a "Notice of Service" with respect to depositions. This Rule shall not preclude the use of any of these materials to support or oppose motions, briefs or memoranda in which event they should be filed together with same, or the relevant portions thereof should be set forth verbatim in the moving or responding papers; nor shall it preclude their use as exhibits or evidence in support of or in opposition to a motion or at trial. The party serving the discovery materials or taking the deposition shall retain the original as custodian, and make it available for inspection by any other party. The Court may, on its own motion, or on the motion of a party, order that any such materials be filed. The parties may provide for any such filing by stipulation, subject to approval by the Court. When approved by the Court, discovery materials relied upon at hearings or trial shall be timely filed prior thereto. [Paragraph added, effective 3-1-84.]

g. *Filing of Depositions.* Storage problems necessitate that the filing of depositions be limited as follows:

1. No deposition upon oral examination shall be filed except a) when the deposition provides factual support for a motion, in which case it shall be filed when the motion is filed; b) when a deposition is to be read or otherwise used during a trial or other miscellaneous proceeding, in which case it shall be filed at the start of the trial or proceeding; or c) on order of the court.

2. The party taking a deposition shall maintain custody of the deposition until it is filed with the court or until the court directs otherwise.

3. The party taking a deposition shall file a notice of the completion of the deposition to insure that the docket accurately reflects the existence of the deposition. The notice shall include the name of the person deposed, the date the deposition was taken and the name of the custodian of the deposition.

[Amended 1-13-83, and 11-4-85].

Rule 6. Discovery.

(e) *Non-filing of Depositions.*

(1) Pursuant to the provisions of Rule 5(d), FRCP, depositions in civil cases shall no longer be initially filed with the Clerk of the Court. The court reporter shall hereafter forward the original of a deposition to the party responsible for the taking of the deposition, and such party shall retain the original and become the custodian thereof. Upon receipt of the original deposition, the party serving as custodian shall forthwith file with the Clerk a copy of the cover sheet of the deposition and a notice that all parties of record have been notified of the receipt of the deposition by the custodian. (Official Form No. 1)

(2) If a deposition is used at trial or is necessary to a pretrial motion, the portions to be used shall be considered as an exhibit and filed with the Clerk.

(3) When a deposition not previously in the record is needed for appeal purposes, upon an application and order of the Court, or by stipulation of counsel, the necessary deposition shall be filed with the Clerk.

(4) The Court, on its own motion or for good cause shown, may direct that any deposition be filed with the Clerk.

Rule 3. Files and Filing.

B. *Non-filing of Discovery Documents.* The following discovery documents:

1. Depositions under Rule 30 and 31, Federal Rules of Civil Procedure;
2. Interrogatories, and answers thereto, under Rule 33, Federal Rules of Civil Procedure;
3. Requests for production or inspection, and responses thereto, under Rule 34 Federal Rules of Civil Procedure;
4. Requests for admissions, and responses thereto, under Rule 36, Federal Rules of Civil Procedure shall be served upon opposing counsel and parties, but shall not be filed with the Court, except upon order of the Court. However, a certification of service shall be filed and in respect to depositions, the court reporter, when the transcript is completed, shall file a certificate showing the name of the deponent, the date of taking, the name and address of the person having custody of the original transcript, and the charge made for the original.

If relief is sought under any of the Federal Rules of Civil Procedure, copies of only the discovery matters in dispute shall be filed with the Court contemporaneously with any motion filed under said rules.

200-3. *Documents of Discovery.*

(a) Depositions upon oral examinations and interrogatories, requests for documents, requests for admissions, and answers and responses shall not be routinely filed (see FR Civ P 5(d)), however, when any motion is filed relating to discovery, the parties filing the motion shall at the same time attach to the motion all of the documents relevant to the motion if the documents have not been previously filed.

Rule 9. Filings and Discovery.

B. *Discovery Pleadings*: Depositions, interrogatories, answers and objections to interrogatories, requests for admissions, answers and objections to requests for admissions, requests to produce or inspect, and responses to requests to produce or inspect shall not be filed until they are needed for trial or resolution of a motion or on order of the court.

With respect to depositions, a certificate of the court reporter shall be filed when the transcript of a deposition is completed, showing the name of the deponent, the date of the taking, the name and address of the person having custody of the original of the deposition, and the charges made for the original.

The demanding party's counsel, upon serving interrogatories or a request for admissions or to produce or inspect, shall file a certificate of service. The responding party's counsel shall also file a certificate of service upon serving a response.

When a motion for an order compelling discovery is filed, the movant shall file with the motion the interrogatories and responses thereto or the request for admissions or to produce or inspect and the responses thereto or the depositions which are the subject of the motion to compel discovery.

Any party who relies on any discovery pleading to support or resist any motion, including a motion for summary judgment, shall file the discovery pleading.

In making answer or objection to interrogatories or requests for admissions or requests to produce or inspect, the responding party shall first state verbatim the propounded interrogatory or request and immediately thereafter the answer or objection to it. [Amended 9-15-83.]

Rule 190. Pretrial Procedure—Civil Cases.

190-1. *Scheduling, Case Management and Discovery.*

(g) Filing Discovery Papers.

Unless filing is ordered by the court on motion of a party or upon its own motion, depositions, interrogatories, requests for production or inspection, requests for documents, requests for admissions, answers and responses thereto, and proof of service thereof shall not be filed with the court. Originals of responses to requests for admissions or production and answers to interrogatories shall be served upon the party who made the request or propounded the interrogatories and that party shall make such originals available at the time of any pretrial hearing or at trial for use by any party. Likewise, the deposing party shall make the original transcript of a deposition available at the time of any pretrial hearing or at trial for use by any party or filing with the court if so ordered.

Rule 14. Depositions, Interrogatories, Requests for Documents, Requests for Admissions.

(a) *Filing.* Pursuant to the provision of Rule 5(d) of the Federal Rules of Civil Procedure, depositions, interrogatories, requests for documents, requests for admissions, and answers and responses thereto shall not be filed with the Clerk's Office except by order of the court. If said discovery material is ordered to be filed, counsel should so specify in a cover letter to the court. [Amended 1/1/85.]

(1) *Form of Interrogatories.* The interrogatories shall be so arranged that after each separate question shall appear a blank space reasonably calculated to enable the answering party to have his answer typed in. [Added, effective 9-1-71.]

Rule 15. Discovery.

D. *Discovery Materials Not Filed Unless Ordered or Needed.* 1. Depositions upon oral examination and interrogatories, requests for documents, requests for admission and answers and responses thereto are not to be filed except where needed in a particular pretrial proceeding or upon order of the Court. However, all such papers must be served on other counsel or parties entitled thereto under Rule 5 of the Civil Rules.

2. In those instances when such discovery materials are properly filed, the Clerk shall place them in the open case file unless otherwise ordered.

3. The party obtaining any material through discovery is responsible for its preservation and delivery to the Court if needed or so ordered. It shall be the duty of the party taking a deposition to make certain that the officer before whom it was taken has delivered it to that party for preservation and to the Court as required by Rule 30(f)(1) of the Civil Rules if needed or so ordered.

Rule 8. Depositions.

a. *Reasonable Notice.* Notice of depositions under FR Civ P Rule 30(b) shall be served not less than ten days prior to the date scheduled for the deposition. Upon application and for good cause, the time may be shortened. If a motion for protective order is served at least three days before the scheduled deposition, then the failure of a deponent or managing agent of a party to appear at the time and place designated shall not be considered willful failure to appear within the meaning of FR Civ P 37(d), or contemptible conduct under FR Civ P 45(f), unless the Court finds that the motion is frivolous or for dilatory purposes. Notice of non-appearance must be given to the party seeking the deposition. [Amended 6-13-83.]

✓ b. *Filing Not Required, Certificate of Taking.* Unless otherwise ordered by the Court, depositions and the responses thereto shall not be routinely filed with the Court. Counsel, however, shall file a certificate with the Court indicating the date the deposition was taken.

c. *Examination of Depositions.* Unless otherwise ordered by the Court, or done by the Court, depositions filed in pending cases may be opened by the Clerk for examination upon application of any attorney of record in the case, and thereafter may be inspected by any person.

d. *Listing of Fees.* Fees for taking the depositions shall be plainly endorsed on the notary's certificate or wrapper.

e. *Final Disposition of Depositions.* After a judgment in a civil action becomes final, or the case is otherwise finally closed, the Clerk may deliver or mail all depositions lodged or filed in the case to the party on whose behalf the same were taken, or to his attorney. If such depositions are refused by the party entitled thereto, the same may be destroyed.

[Amended, effective 8-4-80; par. (b) deleted, remaining paragraphs redesignated, 11-24-86.]

Rule 18. Filing of Discovery Materials.

(a) Pursuant to Rule 5(d) of the Federal Rules of Civil Procedure, depositions, interrogatories, requests for documents, requests for admissions, and answers and responses shall not be filed with the clerk's office except by order of the court.

(b) A party seeking relief under Rule 26(c), or seeking to determine sufficiency under Rule 36, or seeking to compel under Rule 37(a)(2) of the Federal Rules of Civil Procedure shall file only that portion of the deposition, interrogatory, requests for documents, or requests for admissions that are objected to.

(c) When discovery material not on file is needed for an appeal, upon an application and order of the court or by stipulation of counsel, the necessary portion of discovery material shall be filed with the clerk.

3.08 *Discovery Materials Not to Be Filed Unless Ordered or Needed.* Depositions upon oral examination and interrogatories, requests for documents, requests for admission, and answers and responses thereto are not to be filed unless by order of the Court or for use in the proceeding. All such papers must be served on other counsel or parties entitled to service of papers filed with the Clerk. The party taking a deposition or obtaining any material through discovery is responsible for its preservation and delivery to the Court if needed or so ordered.

Rule 205. Discovery.**(a) *Discovery Procedures and Materials.***

(2) Depositions, interrogatories, requests for documents, requests for admission, and answers and responses thereto shall not be filed unless the court so orders or unless the court will need such documents in a pretrial proceeding. All discovery papers must be served on other counsel or parties. The party taking a deposition or obtaining any material through discovery is responsible for its preservation and delivery to the court when needed or ordered. Any party seeking to compel discovery or other pretrial relief based upon discovery material which has not been filed with the clerk must identify the specific portion of the material which is directly relevant and ensure that it is filed as an attachment to the application for relief.

(b) *Limitation on Use of Interrogatories.* A party may direct no more than 50 interrogatories to any other party, except upon leave granted by the court for good cause shown. Interrogatory parts and subparts shall be counted as separate interrogatories for purposes of this rule.

(c) *Conference of Attorneys With Respect to Motions and Objections Relating to Discovery.* The court will not consider motions and objections relating to discovery unless moving counsel shall first advise the court in writing that after personal consultation and diligent attempts to resolve differences the parties are unable to reach an accord. The statement shall set forth the date of the conference, the names of the participating attorneys and the specific results achieved. It shall be the responsibility of counsel for the movant to arrange for the conference and, in the absence of an agreement to the contrary, the conference shall be held in the office of the attorney nearest the court location where the initial pretrial conference was convened or, in the absence thereof, nearest to Greensboro. Alternatively, at any party's request, the conference may be held by telephone.

(d) *Completion of Discovery.* The requirement that discovery be completed within a specified time means that adequate provisions must be made for interrogatories and requests for admission to be answered and for documents to be produced within the discovery period.

(e) *Extension of Time for Discovery.* Motions or stipulations seeking an extension of the discovery period must be made or presented prior to the expiration of the time within which discovery is required to be completed. They must set forth good cause justifying the additional time and will be granted or approved only upon a showing that the parties have diligently pursued discovery.

(f) *Trial Preparation After the Close of Discovery.* For good cause appearing therefore, the physical or mental examination of a party may be ordered at any time prior to trial. Ordinarily, the deposition of a material witness not subject to subpoena should be taken during discovery. However, the deposition of a material witness who agrees to appear at trial, but who later becomes unable or refuses to attend, may be ordered at any time prior to trial.

Rule 120—4. Depositions, Interrogatories, Requests for Discovery.

(a) Depositions, Interrogatories, Requests for Production or Inspection, Requests for Documents, Requests for Admission, and answers and responses thereto shall not be filed with the court. This rule shall not preclude their use as exhibits or as evidence on a motion or at trial.

(b) During the pendency of any civil proceeding, any person may, with leave of court obtained after notice served on all parties to the action, obtain a copy of any deposition or discovery documents not on file with the court upon payment of the expense of the copy.

Rule 24. Discovery.

(a) Interrogatories, requests for production and inspection and requests for admission under Rules 33, 34, and 36, Federal Rules of Civil Procedure, answers, responses, and objections to interrogatories and to Rule 34 and 36 requests, notice of deposition and depositions under Rules 30 and 31, Federal Rules of Civil Procedure, shall not be filed with the court. The party serving the discovery material or taking the deposition shall retain the original and be the custodian of it.

(b) Every motion pursuant to the Federal Rules of Civil Procedure governing discovery shall identify and set forth, verbatim, the relevant parts of the interrogatory, request, answer, response, objection, notice, subpoena, or depositions. Any party responding to the motion shall set forth, verbatim, in that party's memorandum any other part that the party believes necessary to the court's consideration of the motion.

✓ (c) If material in interrogatories, requests, answers, responses, or depositions is used as evidence in connection with any motion, the relevant parts shall be set forth, verbatim, in the moving papers or in responding memoranda. If it is used as evidence at trial, the party offering it shall read it into the record or, if directed to do so by the court, offer it as an exhibit.

(d) The court shall resolve any dispute that may arise about the accuracy of any quotations of discovery material used as provided in (b) and (c) and may require production of the original paper or transcript.

(e) The court, on its own motion, on motion by any party or on application by a non-party, may require the filing of the original of any discovery paper or deposition transcript. The parties may provide for such filing by stipulation.

(f) No motion or other application pursuant to the Federal Rules of Civil Procedure governing discovery or pursuant to this rule shall be made unless it contains a certification of counsel that the parties, after reasonable effort, are unable to resolve the dispute.

[Amended effective 7-1-83.]

(g) A routine motion to compel answers to interrogatories or to compel compliance with a request for production under Federal Rule of Civil Procedure 34, wherein it is averred that no response or objection has been timely served, need have no accompanying brief, and need have no copy of the interrogatories or Rule 34 request attached. The court may summarily grant or deny such motion without waiting for a response. [Added effective 1-1-85.]

402.2 Service and Filing of Discovery Material.

✓ (a) Interrogatories, requests for documents, requests for admission, and answers and responses thereto shall be served upon other counsel and parties but shall not be filed with the Court unless on order of the Court or for use in the proceeding. The party responsible for service of the discovery material shall retain the original and become the custodian. The original of all depositions upon oral examination shall be retained by the party taking such deposition.

(b) If relief is sought under any of the Federal Rules of Civil Procedure, copies of the discovery matters in dispute shall be filed with the Court contemporaneously with any motion filed under these rules by the party seeking to invoke the Court's relief.

(c) If depositions, interrogatories, requests for documents, requests for admissions, answers or responses are to be used at trial or are necessary to a pre-trial or post-trial motion, the portions to be used shall be filed with the Clerk at the outset of the trial or at the filing of the motion insofar as their use can be reasonably anticipated by the parties having custody thereof.

(d) When documentation of discovery not previously in the record is needed for appeal purposes, upon an application and order of the Court or by stipulation of counsel, the necessary discovery papers shall be filed with the clerk.
[Amended 11-8-83.]

Rule 14. Depositions.

(a) *Stipulations regarding objections.* The court will not give any effect to a stipulation attempting to preserve for trial those objections which by Fed R Civ P 32(d)(3) are waived (unless reasonable objection is made at the taking of the deposition).

✓ (b) *Filing and opening.* Pursuant to Rules 5(d) and 30(f)(1) of the Federal Rules of Civil Procedure, transcripts of depositions upon oral examination shall not be filed with the Clerk of Court unless otherwise ordered by the Court. Original depositions not filed with the Court shall be retained by the party taking said deposition, and upon the request of any party to the action to use said deposition, it shall be the duty of the party in possession of said deposition to file the original deposition with the Clerk of Court. Depositions filed shall be open and available for inspection unless otherwise ordered by the Court. [Amended, effective 2-11-82.]

(c) Depositions may be taken by video tape with the permission of and upon such terms and conditions as set by the court.

(d) Within 30 days after the final determination of an action by this or any appellate court, or after any other final disposition, depositions filed but not offered into evidence (see Local Rule 19) shall be withdrawn by counsel for the party who offered them. Upon counsel's failure to do so, the Clerk may dispose of them as is seen fit. [Added 12-14-78.]

Rule 10.00. Depositions.

10.01: *Excerpts From Depositions To Be Offered At Trial.* At least five (5) days prior to trial, counsel shall furnish to the trial judge and all opposing counsel the excerpts from depositions (by page and line number) which he expects to introduce at trial. Four (4) days thereafter, counsel for the adverse party shall furnish to the trial judge and all opposing counsel additional excerpts from the depositions (by page and line number) which he expects to be read pursuant to F.R.Civ.P. 32(a)(4), as well as any objections (by page and line number) to opposing counsel's depositions. With reasonable notice to the trial judge and all counsel, other excerpts may be read.

Rule 11.00. Filing of Discovery.

Interrogatories under Rule 33, F.R.Civ.P., and the answers thereto, requests for production or inspection under Rule 34, F.R.Civ.P., requests for admissions under Rule 36, F.R.Civ.P., and responses thereto, and depositions under Rules 30 and 31, F.R.Civ.P., shall be served upon other counsel or parties, but shall not be filed with the Court. The party responsible for service of the discovery material shall retain the original and become the custodian.

If relief is sought under Rules 26(c) or 37, F.R.Civ.P., concerning any interrogatories, requests for production or inspection, requests for admissions, answers to interrogatories or responses to requests for admissions, copies of the portions of the interrogatories, requests, answers or responses in dispute shall be filed with the Court contemporaneously with any motion filed under Rules 26(c) or 37, F.R.Civ.P.

If interrogatories, requests, answers, responses or depositions are to be used at trial or are necessary to a pretrial motion which might result in a final order on any issue, the portions to be used shall be filed with the Clerk at the outset of the trial or at the filing of the motion insofar as their use can be reasonably anticipated.

When documentation of discovery not previously in the record is needed for appeal purposes, upon an application and order of the Court the necessary discovery papers shall be filed with the Clerk.

Rule 11. Discovery.

✓ 11.1 *Filing of Documents of Discovery.* Pursuant to the provision of Rule 5(d) of the Federal Rules of Civil Procedure, depositions, interrogatories, requests for documents, and requests for admissions shall not be filed with the Clerk's Office except by order of the Court. However, relevant portions of discovery documents may be filed in support of motions.

11.2 *Responses to Discovery.* All responses to discovery must be filed with the Court. When responding in any manner, by answer, objection, or otherwise, to interrogatories, requests for admissions, or requests for production, the responding party shall set out each interrogatory or request immediately before giving his or her response.

11.3 *Interrogatories.* No set interrogatories shall exceed thirty (30) questions without prior leave of the Court. Any interrogatory that contains subparts shall be counted as one interrogatory as long as each subpart is closely related to the original question. Should it appear to the Court, whether by motion or otherwise, that a party has used subparts as a means to circumvent the limitation on number, the party, along with the filing attorney, may be subjected to sanctions. Answers to interrogatories must be supplemented as may be required by the facts and circumstances of the case, or by the Federal Rules of Civil Procedure.

11.4 *Discovery Disputes and Controversies.* All motions concerning discovery or requests for admissions pursuant to Rules 26 through 37 of the Federal Rules of Civil Procedure shall be accompanied by a certificate of counsel affirming that, after consultation between the parties to the controversy, they are unable to reach an accord. The certificate must contain the names of counsel participating and the manner of consultation. The burden will be on counsel filing the motion to initiate a conference attempting to resolve discovery disputes. Failure to file an accompanying certificate of consultation may be deemed good grounds for denying any motion concerning discovery or requests for admissions. If relief is sought under Rule 26(c) or Rule 37 of the Federal Rules of Civil Procedure concerning any request for discovery, copies of the portions of the interrogatories, requests, answers, or responses in dispute shall be filed with the motion. The filing or serving of unnecessary discovery motions, applications, requests, or objections will subject the offender to appropriate remedies, including the imposition of costs and counsel fees.

11.5 *Multiparty or Complex Litigation.* In multiparty or complex litigation, the parties may apply to the Court for an order permitting service of interrogatories and requests for production of documents by letter or by some other informal means. In making such an application, the parties shall provide a proposed order setting forth the means of conducting discovery upon an informal basis, including the proposed procedures for service, response, and verification of the discovery contemplated.

11.6 *Inspections Made Pursuant to Court Order.* When any party to any action before the Court is permitted, pursuant to an order of the Court, to inspect the records of any person not a party to the action, the party inspecting such records shall, within a reasonable time period, provide all other parties to the action with an opportunity to copy any document obtained or copied as a result of such inspection.

Rule 9. Discovery Procedures in Civil Cases.

(a) *Form of Responses.* When responding in any manner, by answer, objection or otherwise, to interrogatories, requests for admissions or requests for production the responding party shall set out the interrogatory or request to which he is responding immediately before his response.

(b) Interrogatories under Rule 33, Fed R Civ P, and the answers thereto, Requests for Production or Inspection under Rule 34, Fed R Civ P and Requests for Admissions under Rule 36, Fed R Civ P and the responses thereto shall be served upon other counsel or parties, but shall not be filed with the Court except as provided hereafter. If relief is sought under Rule 26(c), Fed R Civ P or Rule 37, Fed R Civ P concerning any interrogatories, requests for production or inspection, requests for admissions, copies of the portions of the interrogatories, requests, answers or responses in dispute shall be filed with the Court contemporaneously with any motion filed under Rule 26(c), Fed R Civ P or Rule 37, Fed R Civ P. Any previously unfiled discovery requests, answers or responses which the Judge or United States Magistrate considers helpful in resolving a discovery dispute may be ordered filed with the Clerk of Court. If interrogatories, requests, answers or responses are to be used at trial, insofar as their use reasonably can be anticipated, the portions to be used shall be filed with the Clerk of Court prior to trial.

✓ (c) No party shall serve on any other party more than thirty (30) interrogatories without leave of court. For purposes of this rule a sub-part of an interrogatory shall count as an additional interrogatory. Any motion seeking permission to serve more than thirty interrogatories shall comply with Rule 8 and also set out the additional interrogatories the party wishes to serve. The Rule 8 memorandum shall give reasons establishing good cause for the service of additional interrogatories. If a party is served with more than thirty interrogatories without an order of the court he shall respond only to the first thirty in the manner provided by the Federal Rules of Civil Procedure.

(d) *Prohibition on Filing of Unnecessary Discovery Motions or Objections.* The filing or serving of unnecessary discovery motions, applications, requests or objections will subject the offender to appropriate remedies, including the imposition of cost and counsel fees.

(e) *Memoranda and Responses.* The provisions of Rule 8(a), (b), (c) shall apply to all motions concerning discovery and requests for admissions.

(f) *Consultation by Counsel.* All motions concerning discovery or requests for admissions pursuant to Rules 26 through 37 of the Federal Rules of Civil Procedure shall be accompanied by a certificate of counsel (with one copy) affirming that, after consultation between the parties to the controversy, they are unable to reach an accord as to all issues. Failure to file an accompanying certificate of consultation may be deemed good grounds for denying the motion.

The certificate must contain the names of counsel participating and the date and manner of consultation. If counsel are residents of the same county, the consultation must be by a face-to-face conference. If counsel are residents of different counties, the consultation may be by telephone. The burden will be on counsel filing the motion to initiate the conference. If opposing counsel refuses to cooperate in having such a conference, counsel should file a certificate to that effect setting out his efforts to comply with this rule, and the court will afford appropriate relief.

[Amended 10-22-82.]

VI. DISCOVERY

Rule 6.1. Discovery Materials.

(a) *Generally.* All discovery material filed with the Clerk (see Rule 2.2), must meet the requirements of Rule 2.1; and, all discovery motions must comply with Rule 5.1.

(b) *Filing of Deposition Transcripts.* Depositions shall not be filed with the Clerk. The original of any transcript of an oral deposition and the attached exhibits:

(1) shall be delivered to the party taking the deposition upon signature by the deponent; or upon completion, if signature is waived on the record by the deponent and all interested parties; or upon certification by the reporter that, following reasonable notice to the deponent and deponent's attorney (if any) of the availability of the transcript for signature, the deponent has failed or refused to sign it;

(2) shall be retained by the party to whom it is delivered to be available for appropriate use by any party in a hearing or trial of the case; and

(3) shall be filed with the Clerk at least 3 days before commencement of trial, or as otherwise ordered by the Presiding Judge, if any portion of the deposition is reasonably expected to be used at trial.

(c) *Form of Interrogatories and Requests for Admissions.* All interrogatories and requests for admissions must be tailored for the particular suit in which they are filed and for the party to whom they are directed. Interrogatories and requests for admission shall be served in duplicate and, after each interrogatory and request for admission, there shall be a sufficient space for the response. If required, additional sheets may be attached for the completion of the response.

(d) *Answers to Interrogatories and Requests for Admissions.* If the duplicate copy of the interrogatories or requests for admissions is not used, then answering counsel shall restate each interrogatory or request immediately before the appropriate answer or response.

(Amended May, 1983 by Misc. Order No. 29.)

Rule 10. Filing Requirements.

A. Preparation of Civil Cover Sheet—Form JS-44c. The Clerk of the Court shall not file any complaint in any civil action until the Attorney in Charge has completed and tendered to the Clerk a Civil Cover Sheet. This Rule shall not apply to pro se plaintiffs.

B. Summons. Rule 4, Fed R Civ P, amended January 12, 1983, effective February 26, 1983 (Public Law 97-462) will be strictly followed, except that the Clerk will not be required to issue summons upon the filing of a complaint under Rule 4(a), Fed R Civ P, in any civil action until the Attorney in Charge (or any plaintiff if acting pro se, unless such plaintiff is a prisoner) has submitted to the Clerk properly completed summons forms or Third Party summons forms, together with sufficient copies for service.

The Clerk will make process forms available to counsel upon request.

C. Naturalization Petitions. Every petition for naturalization proffered for filing must bear the signature of a Designated Examiner of the Immigration and Naturalization Service signifying that the said service has conducted a preliminary investigation and a preliminary examination of the applicant. [Added, effective 7-1-83.]

D. General Requirements. Whenever any paper is offered for filing, the original shall be tendered to the Clerk, and not the individual Judge. A pleading in a statutory three-judge case shall so state, and an original and two (2) copies shall be tendered. Additionally, each paper offered for filing in any case:

(1) Shall bear on its face the caption required by Rule 10(a), Fed R Civ P (including the name and party designation of the person filing it and a statement of its character, such as "Defendant John Doe's Motion for Partial Summary Judgment");

(2) Shall be typewritten or printed legibly without abbreviation or obtrusive interlineation, except where such abbreviation may be for the purpose of reference;

(3) Shall bear at its end a certificate reflecting how and when service thereof has been made or why service is not required; and

(4) Shall be bound at the top only, and shall not be enclosed in a manuscript cover (commonly called a "blueback" or "file back") or other cover.

E. Requirements for Certain Papers.

(1) **Jury Demand.** Every pleading in which a jury is demanded shall bear at the top, immediately below the case number, a statement that a jury is demanded.

(2) **Removal Petitions.** Every petition for removal shall be accompanied by copies of all pleadings and other documents filed with the Court from which the petition seeks removal and shall state, immediately below the case number, whether or not a jury was demanded prior to removal. [Amended, effective 7-1-83.]

(3) **Discovery.** Every answer, objection, or other response to any interrogatory or request for admission or to produce shall be preceded by the question or request to which the response pertains.

(4) **Interrogatories.** No party shall serve more than thirty (30) interrogatories, including subparts, without leave of the Judge first obtained.

✓ **F. Documents Not to be Filed.** Pursuant to Rule 5(d), Fed R Civ P, depositions, interrogatories, answers to interrogatories, requests for production or inspection, responses to those requests and other discovery material shall not be filed with the Clerk. When any such document is needed in connection with a pretrial procedure, those portions which are relevant shall be submitted to the Court as an exhibit to a motion or answer thereto. Any of this material needed at trial or hearing shall be introduced in open court as provided by the Federal Rules. [Amended, effective 7-1-83.]

G. Sanctions. Any paper offered for filing which is not easily legible or which otherwise does not conform to the requirements of this Rule may, for that cause or for other good cause, be ordered stricken from the file by the Judge on motion or sua sponte.

Rule 300-1. Pleadings and Filing Papers.

All pleadings in civil and criminal cases shall be furnished to the clerk in duplicate by the parties to said cause, the "Original" of which shall be marked and filed, and the remaining copy shall be sent to the judge on whose docket the case is placed provided, however, that depositions, interrogatories (See Local Rule 300-6), requests for documents, requests for admissions, and answers and responses thereto shall not be filed unless on order of the court or unless they are needed for use in a trial or hearing.

Papers presented for filing shall contain an acknowledgement of service by the person served or proof of service in the form of a statement of the date and manner of service and of the names of the persons served certified by the person who made service. Proof of service may appear on or be affixed to the papers filed. The clerk may permit papers to be filed without acknowledgement of proof of service but shall require such to be filed promptly thereafter. [Added 6-1-84.]

The originals of all stenographically reported depositions shall be delivered to the party taking the depositions,

(1) Upon signature by the deponent, or

(2) Upon completion if signature is waived on the record by the deponent and all interested parties, or,

(3) Upon certification by the shorthand reporter that following reasonable notice to the deponent and deponent's attorney (if any) of the availability of the transcript for signature, the deponent has failed or refused to sign it.

The original of a deposition shall be retained by the party to whom it is delivered to be available for appropriate use by any party in a hearing or a trial of the case.

All pleadings, motions, orders and papers shall, when offered for filing be plainly written or printed without erasures or interlineations materially defacing them, and shall be endorsed with the style of the case and the character of the paper. Orders and judgments shall be completely separate from all other papers. If documents not conforming to this rule are offered, the clerk, before receiving them, shall require the consent of a judge.

The clerk is authorized and instructed to require a complete and executed AO Form JS 44(a), Civil Cover Sheet, which shall accompany each civil case to be filed. The clerk is instructed to reject for filing any civil case which is not accompanied by a complete and executed Civil Cover Sheet. Persons filing civil cases, who are at the time of such filing in the custody of Civil, State or Federal institutions, and persons filing civil cases pro se, are exempted from the foregoing requirements.

Papers presented for filing shall contain an acknowledgement of service by the person served or proof of service in the form of and the names of the persons served certified by the person who made service. Proof of service may appear on or be affixed to the papers filed. The clerk may permit papers to be filed without acknowledgement of proof of service but shall require such to be filed promptly thereafter. [Paragraph added 5-22-84.]

CR 5. Service and Filing of Pleadings and Other Papers.

(a) *Service of Copies.* On or before the date required by these rules or by order of the Court for the filing of briefs, memoranda of authorities, forms of pretrial orders (or memoranda pertaining thereto), suggested questions for voir dire examination of the jury, proposed findings of fact and conclusions of law, and motions (including affidavits and exhibits in support of motions), the original and a duplicate copy of all such papers shall be delivered to the clerk of this court. The originals and copies of all such papers must indicate in the upper right-hand corner the name of the judge or magistrate to whom the copies are to be delivered. No original of these papers shall be accepted for filing by the clerk unless a copy for the Court has also been provided.

The original and three copies of requested instructions to the jury shall be delivered to the clerk. See Local Rule CR 51.

[Amended 7-20-84.]

(b) *Manner of Service.* Service of all papers requiring service under these rules may be made in the manner specified in Rule 5(b) of the Federal Rules of Civil Procedure. If any paper is served by delivery of a copy, the delivery may be performed by any person of suitable age and discretion, unless otherwise expressly provided in the Federal Rules of Civil Procedure.

(c) Reserved.

(d) *Filing of Depositions, Interrogatories, Requests for Production and Requests for Admissions.* Depositions, interrogatories, requests for production or inspection, requests for admissions and the responses thereto shall not be filed with the court or clerk of court. This rule shall not preclude their use as exhibits or as evidence on a motion or at a trial. [Added, effective 6-1-83.]

(e) *Place of Filing and Trial.*

(1) All civil cases in which all defendants reside, or in which the claim arose, in the counties of Clark, Cowlitz, Grays Harbor, Lewis, Mason, Pacific, Pierce, Skamania, Thurston and Wahkiakum, shall be filed at Tacoma. The same criteria as set out above shall be used to determine the place of filing of cases removed from state courts. [Amended 12-22-81.]

(2) Once a case has been filed in a particular city, the permanent cases records will be maintained there. When a case is assigned for all purposes to a Judge residing in a city other than the place of filing, the files will be maintained at the city in this district where that Judge has his office, during the pendency of the action. For convenience, all papers related to a case should be presented for filing in the city where the case file is being maintained.

(f) *Proof of Service.* Proof of service of all papers required or permitted to be served, other than those for which a method of proof is prescribed in the Federal Rules of Civil Procedure, shall be filed in the Clerk's office promptly and in any event before action is to be taken thereon by the Court or the parties. The proof shall show the day and manner of service and may be by written acknowledgment of service, by certificate of a member of the bar of this Court, by affidavit of the person who served the papers, or by any other proof satisfactory to the Court.

Failure to make the proof of service required by this subdivision does not affect the validity of the service and the Court may at any time allow the proof of service to be

Rule 2.08. Discovery.

(a) *Motion for Discovery Conference.* A motion for a discovery conference under Federal Rule of Civil Procedure 26(f), shall be filed no later than thirty (30) days prior to the expiration date for discovery under Rule 2.12.

(b) *Service and Filing of Discovery Material.*

(1) Interrogatories, requests for documents, requests for admissions, and answers and responses thereto shall be served upon other counsel and parties but shall not be filed with the Court unless on order of the Court or for use in the proceeding. The party responsible for service of the discovery material shall retain the original and become the custodian. The original of all depositions upon oral examination shall be retained by the party taking such deposition.

(2) If relief is sought under any of the Federal Rules of Civil Procedure, copies of the discovery matters in dispute shall be filed with the Court contemporaneously with any motion filed under these rules by the party seeking to invoke the Court's relief.

(3) If depositions, interrogatories, requests for documents, requests for admissions, answers or responses are to be used at trial or are necessary to a pretrial or post-trial motion, the portions to be used shall be filed with the Clerk at the outset of the trial or at the filing of the motion insofar as their use can be reasonably anticipated by the parties having custody thereof.

(4) When documentation of discovery not previously in the record is needed for appeal purposes, upon an application and order of the Court or by stipulation of counsel, the necessary discovery papers shall be filed with the Clerk.

(c) *Service; Form of Interrogatories and Answers or Objections.* When interrogatories are served upon another party pursuant to Federal Rules of Civil Procedure 33, the original and two (2) copies thereof shall be served upon the party who is to answer such interrogatories. Interrogatories shall be prepared in such fashion that sufficient space is provided immediately after each interrogatory or subsection thereof for insertion of the answer or objection and supporting reasons for the objection. If there is insufficient space to answer or object to an interrogatory, the remainder of the answer or objection shall follow on a supplemental sheet. The answers shall be under oath.

In lieu of the foregoing procedure, the answering party may retype the questions, with the answers following immediately thereafter.

(d) *Form of Objections to Requests for Admissions.* Objections to requests for admissions pursuant to Federal Rules of Civil Procedure 36, shall identify and quote verbatim each request for admission to which objection is made and the supporting reasons for the objection.

(e) *Supplemental Answers to Interrogatories.* Upon discovery by any party of information which renders that party's prior answers to interrogatories substantially inaccurate, incomplete or untrue, such party shall serve appropriate supplemental answers with reasonable promptness on all counsel or parties.

(f) *Statement of Conference to Resolve Objections.* Counsel for movant in all discovery motions shall file with the Court within ten (10) days after filing of the respondent's brief a statement certifying that he has conferred with counsel for the opposing party in an effort in good faith to resolve by agreement the issues raised by the motion without the intervention of the Court, together

Rule 2.04. Discovery.

(a) *Scheduling.* Once issues are joined, the Court will establish a binding discovery schedule by issuing a time frame order (Appendix of Forms, Form 1) under which all discovery will be completed. "Completed" means that all discovery, objections, motions to compel and all other motions and replies relating to discovery in this action must be filed and/or noticed in time for the party objecting or responding to have opportunity under the Rules of Civil Procedure to make responses. Counsel will have twenty-one days to move for modifications of the discovery schedule established by the time frame order.

✓ (b) *Filing of Discovery.* Depositions, interrogatories, requests for production of documents and reports, requests for admissions and answers and responses thereto are not to be filed with the Clerk unless on order of the Court, but certificates of service are to be filed with the Clerk. (Appendix of Forms, Form 3). The party obtaining any such material through discovery is responsible for its custody, preservation and delivery to the Court if needed or so ordered, and such responsibility shall not terminate upon dismissal of any party while the action is still pending. The custodial responsibility of the dismissed party may be discharged by agreement to transfer the custody of relevant discovery to one or more of the remaining parties with certificate filed with the Clerk evidencing the transaction.

Material obtained through discovery which is to be used in support of, or in resistance to, a summary judgment motion, or for evidentiary purposes at trial, shall be filed with the Clerk with the summary judgment papers, or upon entry of the final pretrial order, respectively.

(c) *Interrogatories: Limitations and Forms.* Unless otherwise permitted by the Court for good cause shown, no party shall serve upon any other party, at one time or cumulatively, more than 40 written interrogatories, including all parts and subparts, pursuant to Rule 33, F.R.Civ.P. Interrogatories shall be prepared in such a fashion so that sufficient space for insertion of the answer is provided after each interrogatory. The answering party shall insert answers on that copy served upon him and serve one copy on the issuing party. If insufficient space exists on the original for insertion of answers, the answering party shall retype each interrogatory and insert the entire answer immediately thereafter.

(d) *Objections, Motions to Compel and Waiver.* An objection to any interrogatory, notice of deposition, request or application under Rules 26 through 37, F.R.Civ.P., shall be filed within 30 days after service of the interrogatory, notice of deposition, request or application unless otherwise ordered by the Court. Any such objection not filed within 30 days shall be waived. Any such objection shall not extend the time within which the objecting party must otherwise appear for or respond to any discovery matter to which no objection was filed.

Objections to interrogatories shall state the grounds therefor and cite the pertinent authorities relied upon.

After a discovery request is objected to, not complied with, ignored or not responded to within time, the party initiating the discovery shall bring the matter before the Judge or Magistrate by proper motion pursuant to Rule 37, F.R.Civ.P., to compel an answer, production, designation, deposition or inspection. Any such motion shall be accompanied by a statement which shall set forth verbatim each discovery request and any response thereto to which exception is taken. In addition, the movant shall include a statement of the grounds and pertinent authorities relied upon. If the discovery request is ignored, the movant need only file a motion to compel without setting forth in verbatim form the requested discovery and without filing a memorandum of authorities.

Motions to compel or other motions in aid of discovery not filed within 30 days after the response to discovery was due are waived and, in no event, provide an excuse, good cause or reason to delay trial or modify the time frame order. Prior to filing a motion to compel or other motion in aid of discovery, counsel shall confer and proceed in good faith to resolve each dispute arising out of any discovery request. The motion shall contain a statement that counsel have conferred and failed to resolve all disputes.

(e) *Signature of Attorney on Discovery Requests, Responses and Objections.* The sanctions available under Rule 26(g), F.R.Civ.P., will be strictly enforced.

(f) *Extension of Time* Private agreements to extend discovery beyond the cutoff date as set in the time frame order will be respected by the Court if the extension does not affect the trial date or other interim scheduled dates. A discovery dispute which arises from an event of private agreement to extend discovery will not be resolved by the Court.

(g) *Depositions de bene esse.* Depositions de bene esse are not governed by the Local Rules applicable to discovery.

Rule 5. Files and Filing.

Section 5.01. *Form.* All legal papers in an action, except transcripts, shall be filed in the form of an original and one copy. The judge or magistrate to whom the case is assigned may waive this requirement. Every legal paper filed shall contain the typed name, address, and telephone number of the attorney or person submitting it, the name of a person and the firm to whom inquiries may be directed, and the name of the party on whose behalf it is filed. All legal papers filed shall be on 8½ x 11 inch paper and shall be fastened at the top without backing or special binding.

Section 5.02. *Place of Filing.* All legal papers shall be filed in the office of the clerk of court and not in the chambers of the judge or magistrate. The clerk shall retain the original of the paper filed, except the original of an order submitted for signature, and shall transmit the copy to the judge or magistrate. If a legal paper is filed less than forty-eight (48) hours before the court has stated it is due in the chambers of the court, the attorney or the person making the filing shall be responsible for transmitting a copy to the chambers of that judge or magistrate.

Section 5.03. *Responsive Pleadings.* Responsive pleadings shall be made in numbered paragraphs corresponding to the paragraphs of the pleading to which it refers.

Section 5.04. *Discovery Materials.*

✓ (a) Notices of depositions, depositions upon oral examination, interrogatories, requests for production of documents, requests for admissions, and answers thereto, shall not be filed with the clerk of court, except when ordered by the court or when relevant to a pending motion. When the document is relevant to a pending motion, the party submitting it shall clearly designate on the face of the document or on an accompanying paper the motion in relation to which the document is submitted. In select cases, the court may designate that discovery materials be filed.

(b) In actions in which any of the parties are proceeding pro se, the provisions of Local Rule 5.04(a) shall not apply and the documents enumerated in said rule shall be filed with the clerk of the court at the time they are served on the adverse party.

Tab G

Rule 231. Depositions.

231-5. Opening and Resealing by Clerk.

Upon receipt of a deposition, the clerk, unless otherwise ordered by the court, shall open, file and reseal it.

231-6. Filing.

Unless filing is ordered by the court on motion of a party or upon its own motion, depositions upon oral examination need not be filed unless and until they are used in the proceedings.

[Amended 8-1-84.]

Rule 315. Discovery.

Unless expressly required by the Federal Rules of Civil Procedure, papers relating to any discovery proceeding need not be filed with the Court. However, every time a discovery document is served upon an opposing counsel, proof of service must be filed with the Court. The pertinent parts of discovery documents, as to which rulings are sought, must be included in the motion papers.

Rule No. 4. Discovery.

E. *Discovery Papers in Civil Actions.*

I. Pursuant to Rule 5(d) of the Federal Rules of Civil Procedure, all depositions upon oral examination and interrogatories, requests for documents, requests for admission, and answers and responses thereto need not be filed with the court unless required in support of interlocutory motions or for use at the time of trial.

Tab H

Rule 9. Depositions.

(B) Unless otherwise ordered by the Court, in civil cases, the original of a deposition shall not be filed until the day of trial, at which time the party who caused the deposition to be taken shall file the original of the deposition with the Court. If depositions are needed to support motions, affidavits, etc., copies of the appropriate receipts of the depositions shall be attached to the pleading or motion.

[Added 10-16-85.]

Tab I

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IN THE SUPREME COURT OF THE STATE OF UTAH

-----oo0oo-----

JANICE FAYE CARTER, et al.,	:	
Plaintiffs,	:	Case No. 870340
v.	:	Priority No. 14b
UTAH POWER & LIGHT COMPANY, et al.,	:	
Defendants- Appellants,	:	AFFIDAVIT OF DWAYNE CASE
SOCIETY OF PROFESSIONAL JOURNALISTS; KUTV INC.; KEARNS- TRIBUTE CORP.; DESERET NEWS PUBLISHING CO.; THE STANDARD CORP.; BONNEVILLE INTERNATIONAL, INC.; and UNITED TELEVISION, INC.,	:	
Intervenors- Respondents.	:	

-----oo0oo-----

Dwayne Case, having been duly sworn, states the following based upon his personal knowledge:

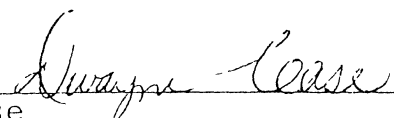
1. He is the chief deputy clerk for the Utah County clerk's office of the Fourth Judicial District of Utah. His duties in this position include assisting Mr. William F. Huish, Utah County clerk for the Fourth Judicial District, and supervising control of documents filed with the Utah County Court clerk. He has served as the chief deputy clerk in Utah County continuously since 1975.

2. He consulted with Mr. Huish regarding the statement and Mr. Huish indicated to him his approval for giving of this statement.

3. It is the policy of the Utah County Court clerk that depositions filed with the clerk are not considered part of the public record until they are ordered published by the court. Thus, unpublished depositions are not available to the public.

4. To his knowledge the press were denied access to the depositions taken in Carter et al v. Utah Power & Light, et al, Civil No. 68596, based upon the long-standing policy of the Utah County clerk that unpublished depositions are not subject to a right of public access.

DATED this 3RD day of March, 1988.



Dwayne Case


STATE OF UTAH)
 : ss.
COUNTY OF SALT LAKE)

On the 3 day of March, 1988, personally appeared
before me Dwayne Case, known by me to be the signer of the
foregoing document, who duly acknowledged to me that he executed
the same.

My Commission Expires:

June 25, 1989

1003K



Notary Public
Residing at Provo Utah

Tab J

10-11
4.
Exhibit 2

Minutes of the Advisory Committee on the
Rules of Civil Procedure

Held in the State Capitol Building

May 8, 1985

The meeting convened at 4:12 p.m., May 8, 1985, in Room No. 428 of the State Capitol Building. Present were:

Robert S. Campbell,
Jr., Chairman
Geoffrey J. Butler
Robert A. Echard
C. Douglas Floyd
Hon. J. Thomas Greene

Darwin C. Hansen
Hon. Timothy R. Hanson
John K. Morris
Stephen B. Nebeker
Arthur H. Nielsen
Gordon L. Roberts

Committee Resignations and Vacancies

Chairman Campbell noted that following this meeting Professor Floyd will resign to return to private practice in California. Chairman Campbell suggested that any member of the Committee should submit any names to the Chairman for transmittal to the Chief Justice of those who might fill the vacancies created by the resignation of Professor Floyd and E. Earl Greenwood.

Approval of Minutes

The Committee unanimously approved the minutes of the March 13, 1985, and April 10, 1985, meetings.

Rule 4

Judge Hanson reviewed with the Committee the final draft of proposed Rule 4, which his subcommittee prepared. (That draft is dated May 1, 1985.) The Committee then discussed the following provisions of that draft.

Rule 4(e)(4).--There was some disagreement among Committee members whether to retain the phrase "within the state" from the clause "[i]f no such officer or agent can be found within the state." Professor Morris and Judge Hanson were in favor of deleting the phrase. They were concerned that if all that were required of an attorney was to search for an officer or agent within the state, he might serve someone who does not know anything about the controversy, such as a cashier at a 7-Eleven Store in the case of serving Southland Corporation. Professor Morris stressed that the

concern is fair notice, not just obtaining jurisdiction, and fair notice requires service upon responsible people.

Mr. Echard was in favor of keeping the phrase in because it limits the scope of an attorney's search. Otherwise, an attorney may have to search throughout the United States before he could serve someone within the state.

Mr. Nielsen observed that the current rule works well and requires only that a search be made "within the county." He was concerned about the amount of diligence that may be required if the rule does not set a limit such as "within the county" or "within the state." Judge Hanson replied that he did not believe that a rule without a limit would require an attorney to look in every "nook and cranny" of the United States for an officer or an agent.

Chairman Campbell called for a vote on the issue, and the majority voted to leave the phrase "within the state" in the proposed rule. Subcommittee members Judge Hanson and Professor Morris, however, voted against it.

Rule 4(g).--Judge Hanson reported that the subcommittee added the last phrase, "to the extent reasonably possible or practicable," to Rule 4(g) to satisfy Professor Floyd's concerns that the rule requires that attorneys must only act within the limits of practicability as discussed in Mullane v. Central Hanover Bank & Trust Co., 339 U.S. 306 (1950). Professor Floyd said that this last addition satisfies his concerns.

Rule 4(b).--The Committee then considered Mr. Nielsen's suggestion that Rule 4(b) be revised to solve the ambiguity created by the phrase "the action shall be deemed dismissed." Judge Hanson drafted a proposed rule, which Judge Hanson read to the Committee. This proposed rule would require a party to make a motion to dismiss the case. Mr. Nielsen said that his concerns would be satisfied by Judge Hanson's proposed rule. Chairman Campbell suggested some grammatical changes to Judge Hanson's draft, to which the Committee agreed. A motion was then made and seconded to approve the proposed rule. This motion was unanimously carried.

Rule 4(1).--The Committee discussed whether to alert the Bar that subpart (1) of the current rule, "Service of Process by Telegraph or Telephone," had been deleted by (a) either reserving the subpart designation and replacing the text with a committee note explaining why it was deleted or (b) not reserving the subpart designation and designating another provision as subpart (1) and explaining the Committee's action in a footnote. The Committee preferred to adopt a footnote instead of reserving the designation.

The Committee then voted on a motion to approve Rule 4 as contained in Judge Hanson's May 1, 1985, draft, with the inclusion of his proposed draft of Rule 4(b). The Committee unanimously approved that motion. As approved by the Committee, Rule 4 is set out in Attachment No. 1 hereto.¹

Rule 5(d)

Chairman Campbell invited the Committee to discuss proposed Rule 5(d) as drafted by Judge Hanson. Chairman Campbell noted that Judge Hanson's draft parallels federal Rule 5(d). Mr. Echard was concerned about the proposal. He wanted a rule that is uniform throughout the state. Professor Morris was concerned about adopting a stringent uniform rule and was in favor of Judge Hanson's proposal because it allows each judge to accommodate individual cases or the case load of a particular district. Judge Hanson said that multi-judge districts, such as the one he is in, generally draft local rules that all judges in the district follow. He said that each district has its own problems and this rule would allow the districts to accommodate their individual problems.

Mr. Echard said he was in favor of a uniform rule because, to a degree, this Committee should promote uniformity. Otherwise, the Committee invites mistakes.

Mr. Hansen suggested that the Committee draft a rule that is consistent with the Third District's present local rule, but then allow an exception allowing for flexibility among the smaller districts. This would assure that the major districts would be uniform, but still allow the smaller districts to have flexibility.

Chairman Campbell said that he favored Judge Hanson's proposed Rule 5(d) because it allows for flexibility depending on the size of the district and that any problems in lack of uniformity can be remedied by attorneys requesting copies of the local rules. But Mr. Echard said that he was concerned about the smaller practitioner whose clients cannot afford the time required to research the local rules.

Mr. Nielsen suggested that if an attorney were afraid of making a mistake, he could always offer to file the material. This way he would be assured to comply with the rule.

1. The Committee Chairman and recording secretary have suggested certain housekeeping corrections of grammar and punctuation, which are underlined in the attached Rule 4.

Mr. Nebeker observed that there are some serious problems with inconsistency of districts. For example, he said, the clerk of the Fourth District Court requires that papers be signed in black ink, and he recently had some papers sent back to him because he did not sign them in black ink. He said that this puts an unusual burden on attorneys to be aware of the local rules and that there are some serious problems because, even if an attorney errs on the safe side, the clerk may not accept the filing.

The Committee then entertained a motion to approve the draft of Rule 5(d). A vote was taken, and all were in favor of that motion except Mr. Echard. As approved by the Committee, Rule 5(d) reads as set out in Attachment No. 2.

After approval of the rule, Mr. Echard asked if the rule will be applied on a case-by-case basis. Chairman Campbell said that a committee note should be drafted that encourages the court to adopt a local rule which will apply in most cases. ✓

Rules 19, 22, and 24

The Committee then turned its attention to Rules 19, 22, and 24. Professor Floyd reported that Rules 19 and 24 parallel federal Rules 19 and 24 before their recent modification. Rule 22, however, parallels current federal Rule 22. He proposed that the Committee adopt the current federal Rules 19 and 24, with some modifications to conform to Utah's statutes and rules.

Rule 19

Rule 19(a).--Professor Floyd reviewed with the Committee Utah's current Rule 19(a). He pointed out that Rule 19(a) does not explain or identify what persons have a "joint interest" or who are "indispensable parties." The new federal rule, however, explains these phrases. The federal rule includes a standard of practical prejudice that identifies parties who have a "joint interest" or who are "indispensable parties."

Mr. Roberts said that the rule's provision on venue may not be necessary, and he suggested that the Committee strike the last sentence of federal Rule 19(b) because in Utah an attorney can bring people in on a statewide basis. Chairman Campbell, however, was concerned about venue in real property cases. Mr. Nielsen suggested that the Committee study the venue problem before a final determination is made on whether to strike the last sentence. The Committee agreed.

Rule 19(b).--Professor Floyd said that he did not see any reason why the new federal Rule 19(b) should not be adopted. He observed that federal Rule 19(b) is complicated, but it is a logical improvement over the current rule. It works well in the federal courts, and there are treatises and good case law construing that rule. Professor Morris agreed. He said that the prior federal Rule 19 had undergone a lot of criticism and this new Rule 19 is a dramatic improvement.

Rule 19(c).--Professor Floyd reported that federal Rule 19(c) contains the cross-references like the current Utah Rule 19(a).

A motion was then made to approve adoption of federal Rule 19 and reserve the issue of venue for further discussion at a later date. This motion passed unanimously. As approved by the Committee, Rule 19 reads as set forth in Attachment No. 3.

Rule 24

Rule 24(a).--Professor Floyd reviewed the difference between the current federal Rule 24(a) and the current Utah Rule 24(a). He observed that the current federal rule is considerably broader in allowing intervention by right than the current Utah rule.

Rule 24(b).--Professor Floyd said that there was significant difference between the current federal rule on permissive intervention and the current Utah provision found in Rule 24(b).

Rule 24(c).--Professor Floyd reported that the current federal rule adds language about statutes of intervention. Chairman Campbell questioned whether that should belong in the Utah rule. Professor Floyd responded that those references to the statutes of intervention are there, as far as he can tell, merely to jog the memory.

Professor Floyd then recommended that the Committee adopt the current federal Rule 24 because it is broader and better focused on the prejudice considerations necessary for intervention.

Professor Morris proposed that the Committee only approve federal Rule 24(a) and that subpart (b) be left as it now appears in the Utah rules. The Committee considered a motion to merely adopt Rule 24(a) of the federal rules, and this motion passed unanimously. As approved by the Committee, Rule 24 reads as set out in Attachment No. 4.

Rule 22

Professor Floyd reported that the current Utah Rule 22 is the same as the current federal rule except for the federal statutory language. Professor Floyd was in favor of not altering Rule 22. A motion was made to approve current Utah Rule 22, and that motion was unanimously carried. As approved by the Committee, Rule 22 remains unchanged.

Rule 26

The Committee began its consideration of the discovery rules by discussing Rule 26.

Subcommittee member Mr. Nielsen reported on the proposed alterations to Rule 26. He observed that in general the subcommittee has adopted the federal rule. One difference from the current Utah rule is language that makes attorneys responsible for discovery abuse. Chairman Campbell said that this provision addresses the Supreme Court and the Judicial Conference's concern about the cost and abuse of discovery.

Mr. Roberts said that the Committee should discuss the general philosophy behind the discovery rules and determine whether there is a difference between state and federal practice that requires different discovery rules. Professor Morris agreed and said that because Rule 26 is the fundamental rule behind discovery, the Committee ought to examine Rule 26 closely.

Mr. Nielsen then discussed the subcommittee's recommendation that the Committee approve a provision for a discovery conference as found in federal Rule 26(f). Judge Hanson said that such a provision is needed because Rule 16 requires that discovery conferences be scheduled. Judge Hanson observed that there is a problem with discovery conferences because these conferences have the potential of consuming an inordinate amount of the court's time. Consequently, trial judges do not want to leave the impression that a discovery conference ought to be held in every case. Mr. Nielsen responded that the proposed rule may avoid this problem rather than aggravate it because the current rule does not outline how to involve the court in discovery problems, such as how to deal with an uncooperative party.

Mr. Nielsen then reviewed proposed Rule 26(g), which is entitled "Signing of Discovery Request, Response, and Objections." Mr. Echard observed that this contains the same certification concept as that found in Rule 11.

Chairman Campbell then invited a discussion on the general philosophy behind Rule 26.

Mr. Roberts said that there is a hue and cry about the cost and abuse of discovery. He said that an attorney usually discovers ninety percent of the facts after five percent of the discovery effort. He reported that there are proponents who want to do away with interrogatories or to limit interrogatories. For example, Wyoming has a limit of thirty interrogatories. Mr. Roberts suggested that this Committee should approve rules that restrict written interrogatories and restrict the scope of Rule 34 (production of documents). He observed that depositions are less abused and probably most effective in discovery. He admitted that this was a revolutionary idea, which would require the Committee to balance the quality of justice with the cost of discovery.

Judge Greene suggested that discovery conferences could be used to set limits. Chairman Campbell agreed and added that he has concluded from his experience that most judges will cooperate in stopping discovery abuse.

Mr. Echard felt that abuses will still go on even with the availability of the discovery conference because attorneys will still propound an abusive number of interrogatories, but the opposing attorney will not want to bother the court in order to stop the abuse.

Judge Greene suggested that the Committee members read current law review articles discussing the philosophy behind discovery rules, and these articles could act as a foundation for discussion at the next meeting. Chairman Campbell agreed and said that he would arrange to find and distribute those articles.

Conclusion

Chairman Campbell concluded the meeting by reminding the Committee that the next meeting will be held the second Wednesday in June.

(These minutes were submitted by Stuart W. Hinckley, recording secretary to the Committee.)

Attachment No. 1

Rule 4. Process

(a) Signing of Summons. The summons shall be signed by the plaintiff or the plaintiff's attorney at any time after the complaint commencing the action is filed. Separate summonses may be signed and served.

(b) Time of Service. The summons and complaint shall be served within 180 days after the filing of the complaint or the action, on application of any party or upon the court's own initiative, shall be dismissed without prejudice, provided that in any action brought against two or more defendants on which service has been obtained upon one of them within the 180 days, the other or others may be served or appear at any time prior to trial.

(c) Contents of Summons. The summons shall contain the name of the court, the names of the parties to the action, the county in which it is brought, be directed to the defendant, state the name and address of the plaintiff's attorney, if any, otherwise the plaintiff's address, state the time within which the defendant is required to answer the complaint in writing, and shall notify him that in case of his failure to do so, judgment by default will be rendered against him. If service is made by publication, the summons as published shall briefly state the nature of the action, a description of the res, and the relief demanded.

(d) By Whom Served. The summons and a copy of the complaint may be served in this state or any other state or territory of the United States, by the sheriff of the county where the service is made or his deputy, by a United States Marshall or his deputy, or by any other person 18 years of age or older at the time of service, and not a party to the action or his attorney.

(e) Person to be Served--Personal Service. The summons and complaint shall be served together. The plaintiff shall furnish the person making service with such copies as are necessary. Service shall be made as follows:

(1) Upon an individual, other than an infant or incompetent person, by delivering a copy of the summons and of the complaint to him

personally, or by leaving copies thereof at his dwelling house or usual place of abode with some person of suitable age and discretion there residing, or by delivering a copy of the summons and of the complaint to an agent authorized by appointment or by law to receive service of process.

(2) Upon an infant, by delivering a copy thereof to such person, and also to his father, mother, or guardian; or, if none can be found, then to any person having the care and control of such infant, or with whom he resides, or in whose service he is employed.

(3) Upon an incompetent person, by delivering a copy thereof to such person and to his legal representative if one has been appointed; and in the absence of such a representative, on the person, if any, who has care, custody or control of the incompetent person.

(4) Upon any corporation, not herein otherwise provided for, upon a partnership or other unincorporated association which is subject to suit under a common name, by delivering a copy of the summons and of the complaint to an officer, a managing or general agent, or other agent authorized by appointment or by law to receive service of process and, if the agent is one authorized by statute to receive service and the statute so requires, by also mailing a copy to the defendant. If no such officer or agent can be found within the state, and the defendant has, or advertises or holds itself out as having an office or place of business within the state or otherwise, or does business within this state or elsewhere, then upon the person doing such business or in charge of such office or place of business.

(5) Upon an incorporated city, by delivering a copy thereof to the mayor or recorder; upon an incorporated town, by delivering a copy thereof to the president or clerk of the board of trustees.

(6) Upon a county, by delivering a copy thereof to a county commissioner or the county clerk of such county.

(7) Upon a school district or board of education, by delivering a copy thereof to the president or clerk of the board.

(8) Upon an irrigation or drainage district, by delivering a copy to the president or secretary of its board.

(9) Upon the state of Utah, in such cases as by law are authorized to be brought against the state, by delivering a copy thereof to the attorney general, and any other persons or agencies required by statute to be served.

(10) Upon a department or agency of the state of Utah, or upon any public board, commission, or body, subject to suit, by delivering a copy thereof to any member of its governing board, or to its executive employee or secretary.

(f) Provisions for Service in a Foreign Country. The summons and complaint may be served in a foreign country in any of the following fashions:

(1) In the manner prescribed by the law of the foreign country for service in that country in an action in any of its courts of general jurisdiction;

(2) Upon an individual, by delivery to him personally; and upon a corporation, a partnership, or an association, by delivering to an officer or a managing or general agent; or in either instance by any form of mail, requiring a signed receipt, to be addressed and dispatched by the clerk of the court to the party to be served as ordered by the court;

(3) Service under subpart (2) may be made by any person who is not a party to the action or his attorney, and is not less than 18 years of age, or who is designated by order of the court, or by the foreign court;

(4) Return. Proof of service may be made as prescribed in these Rules for service within this state, or by the law of the foreign country, or by order of the court. When service is made pursuant to subpart (2) of this subdivision, proof of service shall include a receipt signed by the addressee, or other evidence of delivery to the addressee satisfactory to the court.

(g) Other Service. Where the identity or whereabouts of the person to be served are unknown and cannot be ascertained through reasonable diligence, or service upon all of the individual parties is impracticable under the circumstances, the party seeking service of process may file a verified motion requesting an order allowing service by publication, by mail, or by some other means. The verified motion shall set forth the efforts made to identify or locate the party to be served, or the circumstances which make it impracticable to serve all of the individual parties. If the motion is granted, the court shall order service by publication, by mail, by other means, or by some combination of the above, provided that the means of notice employed shall be reasonably calculated, under all the circumstances, to apprise the interested parties of the pendency of the action, to the extent reasonably possible or practicable.

(h) Manner of Proof. The person serving the process shall make proof of service thereof to the court promptly, and in any event within the time during which the person served must respond to the process. Failure to make proof of service does not affect the validity of the service. The return shall be as follows:

(1) If served by a sheriff or United States Marshall, or the deputy of either, by his certificate with a statement as to the date, place, and manner of service.

(2) If by any other person, by his affidavit thereof, with the same statement, together with the affiant's age at the time of service.

(3) If by publication, by the affidavit of the publisher or printer, or his designated agent, showing the same, and specifying the date of the first and last publication; and an affidavit by the clerk of the court of a deposit of a copy of the summons and complaint in the United States mail, if such mailing shall be required under this rule or by court order.

(4) If by United States mail, by the affidavit of the clerk of the court showing a deposit of a copy of the summons and complaint in the United States mail, as may be ordered by the court, together with any proof of receipt.

(5) By the written admission or waiver of service by the person to be served, duly acknowledged, or otherwise proved.

(i) Amendment. At any time in its discretion, and upon such terms as it deems just, the court may allow any process or proof of service thereof to be amended, unless it appears that material prejudice would result to the substantial rights of the party against whom the process issued.

(j) Refusal of Copy. If the person to be served refuses to accept a copy of the process, service shall be sufficient if the person serving the same shall state the name of the process, and offer to deliver a copy thereof.

(k) Time of Service to be Endorsed on Copy. At the time of the service, the person making such service shall endorse upon the copy of the summons left for the person being served, the date upon which the same was served, and shall sign his name thereto, and if an officer, add his official title.

(l) Designation of Newspaper for Publication of Notice. In any proceeding where summons or other notice is required to be published, the court shall designate the newspaper and authorize and direct that such publication shall be made therein; provided, that the newspaper selected shall be a newspaper of general circulation in the county where such publication is required to be made, and shall be published in the English language.

(m) Service by Constable. All writs and process, including executions upon judgments, issued out of a district circuit, or justice court in a civil action or proceeding, may be served by any constable of the county.

Attachment No. 2

Rule 5. Service and Filing of Pleadings and Other Papers

(a)

(b)

(c)

and

(d) Filing. All papers after the complaint required to be served upon a party shall be filed with the court either before service or within a reasonable time thereafter, but the court may upon motion of a party ~~or~~ on its own initiative order that depositions, interrogatories, requests for documents, requests for admission, and answers and responses thereto not be filed unless on order of the court or for use in the proceeding. *OK*

Attachment No. 3

Rule 19. Joinder of Persons Needed for Just Adjudication

(a) Persons to be Joined if Feasible. A person who is subject to service of process and whose joinder will not deprive the court of jurisdiction over the subject matter of action shall be joined as a party in the action if (1) in his absence complete relief cannot be accorded among those already parties, or (2) he claims an interest relating to the subject of the action and is so situated that the disposition of the action in his absence may (i) as a practical matter impair or impede his ability to protect that interest or (ii) leave any of the persons already parties subject to a substantial risk of incurring double, multiple, or otherwise inconsistent obligations by reason of his claimed interest. If he has not been so joined, the court shall order that he be made a party. If he should join as a plaintiff but refuses to do so, he may be made a defendant, or, in a proper case, an involuntary plaintiff. If the joined party objects to venue and his joinder would render the venue of the action improper, he shall be dismissed from the action.

(b) Determination by Court Whenever Joinder Not Feasible. If a person as described in subdivision (a)(1)-(2) hereof cannot be made a party, the court shall determine whether in equity and good conscience the action should proceed among the parties before it, or should be dismissed, the absent person being thus regarded as indispensable. The factors to be considered by the court include: first, to what extent a judgment rendered in the person's absence might be prejudicial to him or those already parties; second, the extent to which, by protective provisions in the judgment, by the shaping of relief, or other measure, the prejudice can be lessened or avoided; third, whether a judgment rendered in the person's absence will be adequate; fourth, whether the plaintiff will have an adequate remedy if the action is dismissed for nonjoinder.

(c) Pleading Reasons for Nonjoinder. A pleading asserting a claim for relief shall state the names, if known to the pleader, of any persons as described in subdivision (a)(1)-(2) hereof who are not joined, and the reasons why they are not joined.

(d) Exception of Class Actions. This rule is
subject to the provisions of Rule 23.

Attachment No. 4

Rule 24. Intervention

(a) Intervention of Right. Upon timely application anyone shall be permitted to intervene in an action: (1) when a statute confers an unconditional right to intervene; or (2) when the applicant claims an interest relating to the property or transaction which is the subject of the action and he is so situated that the disposition of the action may as a practical matter impair or impede his ability to protect that interest, unless the applicant's interest is adequately represented by existing parties.

(b) Permissive Intervention. Upon timely application anyone may be permitted to intervene in an action: (1) when a statute confers a conditional right to intervene; or (2) when an applicant's claim or defense and the main action have a question of law or fact in common. When a party to an action relies for ground of claim or defense upon any statute or executive order administered by a governmental officer or agency or upon any regulation, order, requirement, or agreement issued or made pursuant to the statute or executive order, the officer or agency upon timely application may be permitted to intervene in the action. In exercising its discretion the court shall consider whether the intervention will unduly delay or prejudice the adjudication of the rights of the original parties.

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