Utah Court Rules on Exhibits

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1. Foundations

Utah Evidence Rule 104(a) makes clear that foundational matters are not subject to the rules of evidence, such as hearsay, leading, etc.

> *Rule 104. Preliminary Questions. (a) In General. The court must decide any preliminary question about whether a witness is qualified, a privilege exists, or evidence is admissible.* ***In so deciding, the court is not bound by evidence rules, except those on privilege.*** (My emphasis.)

2. Early Designation of Exhibits Now Required in State Court

For state cases filed on or after 1 November 2011, new Rule 26 requires a party to provide a copy of potential exhibits *with its Initial Disclosures:*

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

This is to be done by the plaintiff within 14 days after service of the first answer to the complaint and by the defendant within 28 days after the plaintiff's Initial Disclosures or after the defendant's appearance, whichever is later.

3. Pretrial Designation and Waiver of Objections

• **For state cases filed before 1 November 2011**:

> Rule 26 (a)(4). *Pretrial disclosures*. *A party shall provide to other parties the following information regarding the evidence that it may present at trial other than solely for impeachment:*
>
> . . .

(a)(4)(C) an appropriate identification of each document or other exhibit, including summaries of other evidence, separately identifying those which the party expects to offer and those which the party may offer if the need arises.

Unless otherwise stipulated by the parties or ordered by the court, the disclosures required by subdivision (a)(4) shall be made at least 30 days before trial. Within 14 days thereafter, unless a different time is specified by the court, a party may serve and file a list disclosing (i) any objections to the use under Rule 32(a) of a deposition designated by another party under subparagraph (B) and (ii) any objection, together with the grounds therefor, that may be made to the admissibility of materials identified under subparagraph (C). Objections not so disclosed, other than objections under Rules 402 and 403 of the Utah Rules of Evidence, shall be deemed waived unless excused by the court for good cause shown.

• **For state cases filed on or after 1 November 2011**:

U.R.Civ.P. Rule 26 (a)(5) *Pretrial disclosures. A party shall, without waiting for a discovery request, provide to other parties*:

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

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

• **Federal cases**:

Federal Rule 26(1)(A) has no similar requirement to the new Utah Rule of Civil Procedure 26 requiring disclosure of potential exhibits in the Initial Disclosures. As with Utah cases filed before November 1, 2011, all that is required under the federal rule is disclosure of:

[A] copy—or a description by category and location—of all documents, electronically stored information, and tangible things that the disclosing party has in its possession, custody, or control and may use to support its claims or defenses, unless the use would be solely for impeachment.

Pretrial disclosures of exhibits under the federal rules are very similar to those for state court:

(3) Pretrial Disclosures.

(A) In General. In addition to the disclosures required by Rule 26(a)(1) and (2), a party must provide to the other parties and promptly file the following information about the evidence that it may present at trial other than solely for impeachment:

. . .

(iii) an identification of each document or other exhibit, including summaries of other evidence—separately identifying those items the party expects to offer and those it may offer if the need arises.

4. **Penalties for Failure to Disclose Intended Exhibits**

The presumed penalty for non-disclosure, absent good cause, is that the exhibit may not be used at trial.

Rule 26(d) Requirements for disclosure or response; disclosure or response by an organization; failure to disclose; initial and supplemental disclosures and responses.

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

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

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

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

(d)(5) If a party learns that a disclosure or response is incomplete or incorrect in some

> *important way, the party must timely provide the additional or correct information if it has not been made known to the other parties. The supplemental disclosure or response must state why the additional or correct information was not previously provided.* (Emphasis added.)

It is too early to tell how aggressively the courts will be enforcing this early-and-often disclosure requirement. State trial judges have been repeatedly advised that the disclosure requirements of the new rules must be enforced if the "new system" is to have any effectiveness. However, the Advisory Committee itself recognizes that some flexibility is necessary:

> Not all information will be known at the outset of a case. If discovery is serving its proper purpose, additional witnesses, documents, and other information will be identified. The scope and the level of detail required in the initial Rule 26(a)(1) disclosures should be viewed in light of this reality. . . Likewise, the documents that should be provided as part of the Rule 26(a)(1) disclosures are those that a party reasonably believes it may use at trial, understanding that not all documents will be available at the outset of a case. In this regard, it is important to remember that the duty to provide documents and witness information is a continuing one, and disclosures must be promptly supplemented as new evidence and witnesses become known as the case progresses.

Utah Civ. Pro. Advisory Committee note to Rule 26.

In addition, Utah Rule of Civil Procedure 37(h) now provides (for cases filed after November 1, 2011) that:

> *(h) Failure to disclose. If a party fails to disclose a witness, document or other material, or to amend a prior response to discovery as required by Rule 26(d), that party shall not be permitted to use the witness, document or other material at any hearing unless the failure to disclose is harmless or the party shows good cause for the failure to disclose. In addition to or in lieu of this sanction, the court on motion may take any action authorized by paragraph (e)(2).*

For cases filed before the new rules, the penalty is the same under the old Rule 37(f):

> Failure to disclose. *If a party fails to disclose a witness, document or other material as required by Rule 26(a) or Rule 26(e)(1), or to amend a prior response to discovery as required by Rule 26(e)(2), that party shall not be permitted to use the witness, document or other material at any hearing unless the failure to disclose is harmless or the party shows good cause for the failure to disclose. In addition to or in lieu of this sanction, the court on motion may take any action authorized by Subdivision (b)(2).*

Federal Rule of Civil Procedure 37(c) has similar penalties for non-disclosure:

Failure to Disclose, to Supplement an Earlier Response, or to Admit.

(1) Failure to Disclose or Supplement. If a party fails to provide information or identify a witness as required by Rule 26(a) or (e), the party is not allowed to use that information or witness to supply evidence on a motion, at a hearing, or at a trial, unless the failure was substantially justified or is harmless. In addition to or instead of this sanction, the court, on motion and after giving an opportunity to be heard:

(A) may order payment of the reasonable expenses, including attorney's fees, caused by the failure;

(B) may inform the jury of the party's failure; and

(C) may impose other appropriate sanctions, including any of the orders listed in Rule 37(b)(2)(A)(i)–(vi).

A practical problem arises when counsel dispute whether an exhibit was disclosed. This often comes up when there's successor counsel who either isn't familiar with the file, or didn't get a complete file. Proving a document was disclosed is made more difficult when counsel cut corners by not Bates-stamping the documents. It leaves the court in an untenable position, having to decide what to do with a document that one side insists was produced and the other side insists it wasn't. Careful practice, therefore, dictates the liberal use of the Bates stamp.

5. **Marking Systems**

There are rules pertaining to marking systems for exhibits in both state and federal court. However, these are widely ignored, and it is always best to speak before trial with the court clerk or judicial assistant about how your trial judge likes to handle this, or review the judge's online "Bench Book."[1]

[1] http://litigation.utahbar.org/benchbooks.html

• **State Court**

Utah Code of Judicial Administration, Rule 4-206(1). Exhibits.

(1) Marking exhibits.

(1)(A) All exhibits offered as evidence shall be marked with a label or tag, which shall contain, at a minimum, the exhibit number or alpha identification, the case number, the date received, and the initials of the clerk who received the exhibit.

(1)(B) The clerk shall designate the source of the exhibit by the letter "P" if it is received from plaintiff and "D" if it is received from defendant. In cases with multiple parties, the label shall further identify the parties, e.g. 1st D is the first named defendant in the pleadings, 3rd D is the third party defendant.

(1)(C) The clerk shall secure the label on the item and shall affix more than one identical label when necessary.

(1)(D) The court may order exhibits to be marked in advance of the date and time of trial or other hearing.

• **Federal Court**

Dist. Ut. Civ. R. 83-5 Custody and Disposition of Trial Exhibits

(a) Prior to Trial.

(1) Marking Exhibits. Prior to trial, each party must mark all the exhibits it intends to introduce during trial by utilizing exhibit labels (stickers) obtained from the clerk of court. Plaintiffs must use consecutive numbers; defendants must use consecutive letters.

(2) Preparation for Trial. After completion of discovery and prior to the final pretrial conference, counsel for each party must (i) prepare and serve on opposing counsel a list that identifies and briefly describes all marked exhibits to be offered at trial; and (ii) afford opposing counsel opportunity to examine the listed exhibits. Said exhibits also must be listed in the final pretrial order.

6. **Other Trial Rules on Exhibits**

Utah Rule of Civil Procedure 47(n) provides:

(*n) Exhibits taken by jury; notes. Upon retiring for deliberation the jury may take with them the instructions of the court and all exhibits which have been received as evidence in the cause, except exhibits that should not, in the opinion of the court, be in the*

possession of the jury, such as exhibits of unusual size, weapons or contraband. The court shall permit the jury to view exhibits upon request. Jurors are entitled to take notes during the trial and to have those notes with them during deliberations. As necessary, the court shall provide jurors with writing materials and instruct the jury on taking and using notes.

I know of no equivalent provision in the federal rules, although federal Local Rule 83-5 provides:

(b) During Trial.

(1) Custody of the Clerk. Unless the court orders otherwise, all exhibits that are admitted into evidence during trial and that are suitable for filing and transmission to the court of appeals as a part of the record on appeal, must be placed in the custody of the clerk of court.

(2) Custody of the Parties. Unless the court otherwise orders, all other exhibits admitted into evidence during trial will be retained in the custody of the party offering them. Such exhibits will include, but not be limited to, the following types of bulky or sensitive exhibits or evidence: controlled substances, firearms, ammunition, explosive devices, pornographic materials, jewelry, poisonous or dangerous chemicals, intoxicating liquors, money or articles of high monetary value, counterfeit money, and documents or physical exhibits of unusual bulk or weight. With approval of the court, photographs may be substituted for said exhibits once they have been introduced into evidence.

Dist. Ut. Civ. R. 83-5.

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